The new Egyptian constitution: an initial assessment of its merits and flaws

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Zaid Al-Ali [1] 26 December 2012

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Egypt cannot be described as a religious state, given that political power remains firmly in the hands of civilians, but religion will now play a real role in inspiring how the state is to function. And military trials of civilians have been elevated to a constitutional principle.

Following the results of the referendum, in which 63.8% of voters appear to have approved the text, the new Egyptian constitution is now the law of the land. The turnout was far lower than anyone expected, with just over 32.9% of the population making their way to the polls, which means that the constitution has been approved by a mere 21% of eligible voters, clearly not a resounding victory for its proponents.

The poor showing will have a number of consequences, including the prospect that the new constitution's popular legitimacy may be challenged for some time to come, which in turn will detract from the effort to resolve many of the more pressing problems that Egypt is facing today.

The debate surrounding the new constitution has been acrimonious to say the least. Many of the constitution's most ardent critics have been scouring the text for evidence that the country's Islamist movements are preparing to create a morality police or that the legal age of marriage is about to be lowered to 9. Many of these accusations are either baseless or merely leftover provisions from the 1971 constitution and were never applied in any meaningful sense, which will likely to continue being the case under the new constitution. The reality is that, when measured against Egyptian constitutional tradition, the new text brings a number of improvements to the protection of certain rights and to the system of government and is not the catastrophe that many have been so determined to identify.

However, if the measure is changed, there are perfectly valid reasons to be opposed to the new constitution. For example, considering recent developments internationally in the field of constitutional law, particularly in many African and Latin American countries, or considering even the aspirations that were expressed through the Egyptian revolution, the text leaves the reader disappointed.

Apart from the fact that much of the drafting is vague, a number of important rights are also lacking,

which has driven many activists to ardently oppose the text. It also does not present a convincing vision in many areas, including decentralization, the role of independent agencies and civil/military relations.

The purpose of this contribution is to discuss some of the new constitution's most salient features, including the system of government, the role of religion, the protection that the text affords to certain rights, civil/military relations and decentralization. Firstly however, the drafting process itself is deserving of some discussion considering the impact that it has had on the manner in which the text is being perceived in the country.

A flawed process

One of the more remarkable aspects of Egypt's constitution-drafting process is that it is the country's first by an elected body. Like so many other Arab countries, Egypt's past constitutions have been the exclusive product of secret drafting sessions by unrepresentative and unelected political elites (to date, the only other obvious exceptions are the ongoing Tunisian and Libyan processes, and the Iraqi constitution, although the latter was drafted under military occupation). In that sense, the Egyptian process was in itself an accomplishment. After the election of a new parliament early in 2012, the lower house nominated a 100-member constituent assembly to draft the constitution. There was significant controversy in how those 100 individuals were selected: the Muslim Brotherhood-affiliated Freedom and Justice Party (FJP) considered it justified on translating its electoral success to domination of the assembly, whereas the opposition stressed that because parliamentary majorities were transitory, the assembly's makeup should reflect all aspects of Egyptian society. In the end, the FJP had its way, which is what guaranteed the fact that, regardless of any disagreements within the assembly, it would in any event be able to complete its work.

Fatally, the assembly opted to use the 1971 constitution and existing traditions as a starting point for its deliberations. The effect is that while the new constitution claims to be a product of the people's will, it is heavily influenced by the preceding decades of autocratic rule. So much so that many articles have simply been reproduced verbatim in the final text. Thus, although the new constitution solves some of the country's more important problems (including the absence of presidential term limits and a parliament without effective power), its insistence on seeking inspiration from the 1971 constitution means that the same lapses recur, and the same arms-length relationship between the state and the people is maintained (the strongest evidence of this is the deeply flawed chapter on decentralization; see below).

All this is in stark contrast to the Tunisian constituent assembly, which took a decision early on to set aside the miscarried 1959 constitution and to start with a blank page. The Tunisian assembly published its first complete draft just a few weeks ago, and it marks a clear departure from the past: the assembly is making a genuine effort to respond to the past's failures as opposed to repeating them.

Perhaps one of President Morsi's biggest mistakes was the decision to maintain the drafting process that had been established by the Supreme Council of the Armed Forces (SCAF) in March 2011. The SCAF, clearly not expert in democratic transition, imposed a 6 month timeframe for the entire constitutional drafting process, precisely because it did not understand the challenges that Egypt was faced with or because it preferred not to see those challenges met. Constitutional drafting is difficult in any context, but is particularly complex when it involves multiparty negotiations. In a revolutionary context, there is little prospect of drafting a modern constitution in 6 months precisely because so much needs to be changed and because parties have to consult internally and with each other on every issue. The 6 month deadline was always going to be extremely problematic, which is why President Morsi should have revisited the March 2011 interim constitution as soon as he assumed his powers in June 2012.

There were many alternatives for him to choose from, including the Tunisian model which is currently proceeding with significantly more success than that of Egypt. In the end, meeting the deadline became one of the process' essential goals, regardless of what it meant for the prospects for national unity. In the process, the negotiations reached a state of hysteria before eventually

collapsing altogether: after a series of acrimonious accusations on all sides, practically every non-Islamist member of the constituent assembly withdrew, which has laid the basis for the constitution's legitimacy to be questioned far into the future.

An all powerful president?

One of the claims that have been repeated indefatigably over the past few weeks is that the new constitution is designed to allow for a Muslim Brotherhood president to dominate the political process and impose an Islamist agenda regardless of how other institutions are made up. However, an honest reading of the text does not support that accusation. If the constitution's system of government is applied literally, the days of outright domination by a strong executive are essentially over. The parliament is given significant authority in the government formation and dismissal process; it is protected from arbitrary dissolution and has important oversight powers; and the president's authority to declare a state of emergency has been limited. At the same time however, the president still has the authority to involve himself in areas that he should not be involved in.

One of the constituent assembly's stated objectives from the start was to limit the presidency's powers in order to avoid the emergence of a new 'pharaoh' who could come to dominate the country for the coming few decades. In that sense, the new constitution can be said to have achieved its objective. It clearly imposes term limits (article 133). The president must now also collaborate very closely with the parliament during the government formation process, and any government must present its programme to the parliament to be approved (article 139). The parliament itself is also empowered to dismiss the government, the prime minister or any individual minister by a simple majority of its members (article 126). Under the 1971 constitution, the parliament could only dismiss the government after obtaining the president's approval or if the vote of no confidence obtained a two-thirds majority (article 127). Strong mechanisms are also afforded to parliamentary minorities by giving individual members the right to request information or to demand a statement from the government or even to interrogate the prime minister in relation to urgent matters of public importance (articles 123-125). Finally, the constitution imposes strong restrictions on the president's power to call a state of emergency, and on the powers that the president can exercise during that period (article 148).

Some habits die hard however and the president still has more power, particularly in relation to the nuts and bolts of government, than is appropriate in the circumstances. By way of example, the president still has the power to appoint 1/10 members of the upper chamber of parliament (article 128), which gives the president an unjust and undeserved amount of leverage over the legislative process.

A related issue is that the president is responsible for appointing the heads of all just about every independent agency in the country, including its audit institution and the central bank. Although the appointment has to be approved by the upper house, given the president's power to appoint a large portion of its members, the process is skewed in his favour in ways that are difficult to justify. The impact is to limit the independence of each of these institutions at a time when the executive's accountability needs to be assessed and measured by institutions that are as independent as possible. This is a major flaw that should have been rectified during the drafting process.

Finally, the judiciary will also continue to check executive and legislative abuses of authority. Judicial independence is protected (articles 168 and 170), and a clear mechanism is provided for the appointment of the public prosecutor in a way that also safeguards independence (article 173). The supreme constitutional court is still exclusively competent to review the constitutionality of laws (article 175).

Regrettably, many of the 1971 constitution's flaws reemerge in the new text. Amongst other things, there is no detail on how judges are to be appointed or dismissed, nor is any information provided on how their salaries are to be determined (all essential cornerstones of judicial independence). Awkwardly also, although the supreme judicial council (the body that is responsible for overseeing the functioning of the entire judicial sector) is mentioned in passing in three different provisions in the constitution, it is never actually defined anywhere. Obviously, there is existing legislation in

Egypt that govern these areas but the point is that there are some principles (such as that a judge can only be dismissed in exceptional cases of misconduct, etc.) that should be immutable and that should have been spelled out clearly in the constitution.

An Islamic state?

After decades of corruption, mismanagement, brutality and deception, Egypt is in need of a new set of standards that can guide the state to better serve its people. Some hoped the revolution could fill the void, but the elections brought an Islamic majority to parliament and a president who is affiliated to the Muslim Brotherhood, which considers that religion is the answer. Their beliefs were translated into specific constitutional provisions which some in the opposition camp have alleged establish a religious state in violation of a commitment to maintain the existence of a “civil state” (see below). A close reading of the new constitution does not support that allegation, although there is some worrying wording that is in need of more clarity. In summary however, the constitution builds on the notion that Egypt is a religiously inspired state, but does not actually establish a religious state per se.

As an introductory point, Egypt prior to the revolution was not strictly speaking a secular state in the western sense of the word, nor was it a religious state. Religion has long played an important role in all Arab countries; amongst other things, family law has always been determined by religious rules, thereby prohibiting anything resembling a civil marriage. At the same time, clerics did not occupy official positions of power within the state, which meant that Egypt could not be properly described as a religious state either. In that context, Egypt has newly been designated as a “civil state”, a generally undefined term but which is generally understood to mean that the country should be administered and led by civilians as opposed to military personnel and religious figures. One of the principal aims of revolutionary, secular and liberal groups since the start of the uprising in 2011 was that Egypt should remain a ‘civil state’, particularly with a view to ensuring that the Muslim Brotherhood’s senior clerical leadership would not be given official roles within the state.

The debate on this issue initially focused on article 2, which was included in the 1971 constitution to mollify Islamists while at the same time creating enough space for legal interpretation to minimize the provision’s impact. The provision, which was eventually maintained word for word in the new constitution, states that “the principles of Islamic Sharia are the principle source of legislation”. At the time when article 2 was initially included, the trick was to specify that it was the “principles” of Islamic Sharia that would inspire legislation, a term that was both an innovation and that was left undefined. Finally, in order to ensure that the provision would be emptied of any effective meaning, interpretation was left to the courts, which were not particularly sympathetic to the idea of a religiously inspired state. In the end, article 2 was interpreted as referring to a very limited number of principles, which have barely left their mark on Egyptian state and society.

In June 2012, as the constitutional drafting process commenced, a commitment was made early on to leave article 2 unchanged. That agreement was designed to reassure liberals and others that Egypt was not headed on the path of increased Islamisation. However, it was always certain that the Islamist-dominated constituent assembly would seek to correct the way in which the courts have limited the application of article 2. Thus, instead of amending article 2, an additional two provisions were included in the final text that would determine what the term “principles” of Islamic Sharia means and who was responsible for interpreting that term. Thus, although these two provisions do not literally amend article 2, they change the manner in which it is to be understood and applied in ways that many liberal members of the assembly did not originally anticipate.

The two new provisions include article 219, which widens the scope of article 2 considerably beyond what the courts had previously decided. “Principles of Islamic Sharia” now includes all the rules of jurisprudence and credible sources that are accepted in Sunni doctrines, amongst other things. What this means is that the entire body of Islamic jurisprudence (a complex body of law that goes back centuries) is now a source of inspiration for legislation. The constitution’s detractors immediately complained that this would force legislators to contemplate sources of law that are now centuries out of date; many also expressed the concern that the criminal code would be brought in line with some of the more stringent forms of Sharia, which include corporal punishment. Although

the jury is still out on how article 219 will impact on existing and future legislation, there is agreement that the entire body of Islamic jurisprudence is sufficiently broad to include various opinions (some moderate and others more severe) about most issues, which means that legislators and courts will still have sufficient room to maneuver as they carry out their work.

Given that Islamic Sharia is such a broad area and that opinions vary within that body of law, the question as to who is responsible for interpreting Sharia becomes crucial. The constituent assembly resolved that matter through article 4, which states that the opinion of Al-Azhar (one of the Islamic world's most venerable institutions) must be obtained on all matters relating to Sharia. From the provision's wording, there is little doubt that such consultation is mandatory and that it must be sought by all bodies (including the courts and parliament). The courts therefore remain responsible for applying and interpreting the law, as well as for ensuring that legislation is in conformity with the constitution (and by extension to Sharia), but must now consult al-Azhar. What remains unclear is the weight that will be attributed to al-Azhar's individual opinions. Article 4 itself clearly indicates that its opinions will not be binding but some commentators have expressed the concern that a court will be hard pressed to contradict an opinion that is provided by al-Azhar; at the same time, the constitution clearly does provide the courts with the scope to disagree with an opinion by al-Azhar, for whatever reason (including for example if it disagrees with the opinion's logic or if it considers that al-Azhar did not consider all the relevant sources), and does not prohibit the courts from seeking other opinions in relation to the same matter.

What is more certain however is that these provisions have reinvigorated the struggle to control al-Azhar and its Council of Senior Scholars. Decades of autocratic rule are reputed to have left the institution without teeth. Despite the fact that its independence is nominally protected by the constitution, Islamists of all stripes will seek to influence its makeup over the coming year given the role that it has been attributed. One possible means to achieve that is the legislation that the constitution calls for to organise al-Azhar's internal affairs. This will clearly be one of the first issues that will be addressed after the new parliament is elected in the coming months, and will draw some of the more important battle lines between the country's various camps.

Finally, it is worth dismissing some of the more extravagant theories that have been expressed about some of the provisions. In particular, it has been said that article 10 which provides that the "state and society oversee the commitment to the genuine character of the Egyptian family" was deliberately included in the constitution by the constituent assembly's more hardline islamists to allow for the establishment of morality police that would roam neighborhoods to enforce a traditional and hardline vision of society. The reality however is somewhat less ominous: article 10 is copied almost verbatim from article 9 of the 1971 constitution, a provision that essentially had no practical impact for decades. Thus, rather than being a perverse attempt to establish a Saudi-style religious state by stealth, article 10 is actually the product of offhand copying and pasting by a constituent assembly that was determined to meet a short deadline for completion. Some critics have nevertheless expressed the concern that under an Islamist administration, article 10 takes on a different meaning; that may be so, but it is just as likely that it will in fact remain little more than symbolic wording with no practical application.

In summary, Egypt's Islamist rulers have given their spiritual counsellors a role in inspiring the direction that the state should head in, without actually giving them any hard political power (the Muslim Brotherhood's representatives in government are all professionals, many of whom hold PhDs in science-related subjects, and who have little desire to hand over power to clerics). Egypt cannot therefore be described as a religious state given that political power remains firmly in the hands of civilians, but religion will now play a real role in inspiring how the state is to function. Whether that leads to better governance, less corruption, more hardline punishment or moderation remains to be seen.

The protection of rights

The protection of fundamental rights under the constitution has been particularly controversial from the start. The final text imposes a socially conservative vision of society on the country, is economically progressive but restricts the exercise of certain rights in way that are not in keeping

with best practice or with democratic ideals. The controversy has centered mainly on the status of women and on other rights including freedom of expression. The text itself is a mixed bag: it is certainly not as progressive as many western constitutions on social issues (and was never intended to be), but sets out a number of aspirations on economic rights that will be hard to beat and almost impossible to implement, at least in the short term. Some of the rights are also disorganized and vague, making them sometimes difficult to understand.

The starting point on **women's rights** has to be an honest appreciation of Egyptian constitutional tradition on this same issue. Egyptian society, like many others in the region, is deeply conservative and that has been reflected in its constitutional history. The 1971 text (which many commentators today mistakenly consider to have been a liberal text) included awkward language imposing on women the obligation to work and to care for their families without imposing any equivalent duties on men. The text also did not explicitly prohibit discrimination on the basis of sex. In 2012, many liberal members of the constituent assembly sought to resolve this issue firstly by specifically prohibiting sexual discrimination and by removing any reference to women's obligations towards their families. After a number of iterations and rewordings, liberals appear not to have obtained any concessions. Although a provision from an earlier draft that was particularly reviled by civil rights groups was eventually deleted, most of its provisions reappeared elsewhere. Some of these provisions (including article 10) reproduce verbatim the wording the 1971 constitution had used on this issue, and once again forces upon women obligations towards family and society without imposing any such role on men.

Thus, although the new constitution probably accurately reflects the values of a large segment of society on this issue, there is reason for disappointment for several reasons. Firstly, although many Egyptians are socially conservative, every woman (and man) should be free to decide whether to marry or have children without the state's necessarily being involved. Explicitly calling for the promotion of a conservative vision of society encroaches on the personal freedom of citizens to make their own individual choices.

Secondly, constitutions in many post-revolutionary societies are often used to promote and defend values that are not always necessarily in line with the majority's values. Strong constitutional protections can often spearhead a positive change in society, or at the very least can defend the rights of the individual against an overbearing majority. A case in point is the abolition of the death penalty in South Africa despite the fact that it was and remains very popular in many circles. The constitutions of Spain, Ecuador, Bolivia, Kenya, etc. all call for strong protections against gender discrimination, even though societal values do not necessarily agree. Progress in Latin America (a famously conservative region) has now reached the point where several women have been elected head of state in countries where such a thing was considered impossible just a few decades ago.

Thirdly, stronger protections against gender discrimination in Egypt were always achievable; other countries with similarly conservative populations have offered strong safeguards, including the current Tunisian constituent assembly which finally accepted, after significant pressure from civil society, that gender discrimination should be explicitly forbidden. Egypt's new constitution will therefore come as a disappointment to those members of civil society who might have been able to influence the outcome with the right type of access to the drafting body.

Freedom of expression under the new constitution presents a more complex problem. Well written constitutions tend to consolidate all matters relating to a single issue within a single provision, to the extent possible. That approach is not only useful for interpretation purposes, but is also helpful for any member of the general public when consulting the text. The Egyptian constitution does not follow that approach. Article 45 grants freedom of thought and opinion in absolute terms; no limitations are provided, which by itself would be ideal to any advocate of free speech. The reality however is that there are many other limitations to free speech that are peppered throughout the text, some of which are not easy to find. An obvious limitation is article 44, which prohibits any speech that would defame religious messengers and prophets. Another is provided for in article 31 according to which insulting and showing contempt to any human being is prohibited. There are less obvious candidates; for example, article 198 provides that civilians can be tried before military courts for "crimes that harm the armed forces", which if interpreted broadly can include accusations of corruption or mismanagement within the military.

Together, these provisions illustrate a number of problems with Egypt's constitution. The first relates to the quality of the drafting. Today, constitutions are no longer perceived as being solely within the purview of legal scholars. In keeping with modern democratic practice, they are supposed to be readable and accessible by any member of the general public, particularly in developing countries where the free exercise of rights has been restricted in part because of a lack of access to information. Egypt's constitution does not adopt that approach, as illustrated by the provisions on freedom of expression. The fact that one has to review the entire text and decipher opaque provisions to understand where the limitations lie essentially means that an Egyptian layman has little hope of understanding where her rights lie on her own. In fact, even constitutional scholars who have little else to do with their time will likely have trouble understanding how the right should be exercised under the constitution.

Another major problem is the nature and wording of some of the limitations themselves. Despite concerns that have been expressed by the opposition camp, some of the limitations are legitimate and are in fact quite common in progressive countries (even the European Convention on Human Rights allows for speech to be restricted to protect the reputation of others). Also, although the prohibition against defaming prophets is clearly not in keeping with modern comparative practice, Egypt as a nation has the prerogative to decide whether the matter is sufficiently important for its people to justify a limitation on speech, in the same way that the desire to protect the reputation of others can justify such a limitation. The difficulty lies in the wording of the limitations themselves which is so vague that it will most probably lead to severe restrictions on speech. For example, the current wording of article 44 could easily be used to prevent theological debates between different religious denominations given that, for example, denying that a particular individual was a prophet without necessarily attributing any negative qualities to him could constitute defamation in the minds of many. Also, article 31 could easily prevent any type of accusation from being made against a senior official of mismanagement or even corruption in various circumstances, given that no distinction is made between senior officials and the remainder of the population.

One final surprise in the new constitution is the **limitations clause** that makes an appearance in article 81. It has been common in modern history (particularly in the Arab region) for constitutions to indicate that fundamental rights are to be regulated by legislation, and for that same legislation to so restrict the exercise of that right that it may as well not have been granted in the first place. Today, many constitutions in Africa and Latin America seek to resist that trend by including what is referred to as limitations clauses, which provide that legislation cannot detract from the right's very nature. Article 81 was first suggested as a means to achieve that same objective, but a third paragraph was incorporated which some commentators have argued may have the opposite effect. It ensures that all of the rights that are provided for in the constitution must be exercised in accordance with the constitution's second chapter, which is the chapter that establishes social justice as a priority and family as the cornerstone of society. The concern is therefore that the rights will have to be applied and interpreted in accordance with a conservative vision of society. Once again, the difficulty with this provision is not that it leads Egypt down a dark path, but that its effect is at this stage almost impossible to predict. There are other provisions however whose applications are clearly negative and that have caused many to reject the constitution altogether.

The darker side

Those provisions include the section on decentralization and civil/military relations. These two areas have come as a surprise to many analysts because they so clearly fail to meet the democratic aspirations of the people and because they aim to protect entrenched interests at the expense of the nation.

The trend towards greater **decentralization** is a world-wide phenomenon because it aims to bring democracy closer to the people. In the Arab region, the trend has been resisted based on a number of falsehoods that have been spread by despotic regimes. The argument that they have used is that decentralization is one step away from federalism, which is itself the precursor to a country breaking apart along sectarian lines. The truth in fact is that non-democratic regimes have used highly centralized forms of government to maintain an iron-grip on power and control their populations to

the fullest extent possible. As a result, Arab countries to this day maintain amongst the most centralized forms of government in the world, where local officials are typically appointed and dismissed at will by central ministries and where local elections (if they take place at all) are completely meaningless.

Consequently, service delivery outside the capital is almost invariably a disaster throughout the Arab region. Egypt has not escaped that trend (indeed it was one of the pioneers in establishing it in the first place) and the new constitution is no exception in that regard. It calls for local councils to be elected (article 188) but allows for any of their decisions to be overturned by the central government in order to prevent "damage to the public interest" (article 190). Worse still, the constitution does not indicate how governors will be chosen (whether elected or selected) and makes no attempt to define their powers (article 187), leaving all of these crucial matters to be decided by subsequent legislation, as has been the case for the past few decades. Finally, earlier drafts called for a financial redistribution mechanism between provinces to remedy the gross disparities that exist in the country. That provision has now been deleted from the final version. There is therefore nothing stopping the former highly centralized system from continuing to operate in the future.

Worse still are the provisions on **civil/military relations**. Early on in the drafting process, a large number of assembly members identified the need to end military trials of civilians as a priority. This has been a key revolutionary demand from the start of the uprising in January 2011, and grew over time just as the military's influence on the state grew throughout 2011 and 2012. Several provisions were therefore included in various parts of the draft that called for the practice to end. The final draft however overturned whatever progress might have been made by explicitly stating that civilians can be tried by military courts for crimes that "harm the armed forces" (article 198). The term is left to be defined by subsequent legislation. In the past, the practice was the product of legislation that could be overturned by new legislation. Today, military trials of civilians have been elevated to a constitutional principle, making it much harder to overturn. It would have been far better if the constitution had remained silent on this issue.

Also surprising is the establishment of a national defense council and the powers that have been granted to it. In 2011, the SCAF sought to preempt the constitutional drafting process by drafting what was referred to at the time as the "supra-constitutional principles document". That document was so biased in favor of maintaining the military's autonomy that it led to massive protests in the country, which eventually resulted in dozens of deaths and thousands of wounded. One of the offending principles was the notion that the military's budget should remain secret and outside the scope of civilian oversight. Although the SCAF's initiative was dropped as a result of popular opposition, that particular provision made a comeback during the constitutional drafting process. An early draft also maintained that the military's budget should appear as a single figure in the annual state budget law without a breakdown. That has now been watered down somewhat in the final draft, which provides that the national defense council (which has 8 military members and 7 civilians) is now responsible for discussing the military's budget (article 197). The reference to a "single figure" has been removed and there is no indication that the council is exclusively competent to discuss the matter, which leaves open the possibility that the parliament may be able to review the military's budget as well. The fact remains however that the military has been granted a prerogative that its counterparts in other countries do not enjoy. Once again, it would have been far better had the constitution remained silent on this point.

A final word

Altogether, in comparison with Egypt's constitutional traditions, the new text is not the disaster that its detractors claim it is, nor is it the incredible leap forward that its proponents have been boasting of. It is also clear that Egypt's constitutional reform is far from over. The coming parliamentary elections will determine not only how the text will be applied, but also its prospects for surviving the coming period.

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Topics: Civil society
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