



**The Egyptian Constitutional Declaration  
Dated 17 June 2012**

**- A Commentary -**

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**Executive Summary**

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The Constitutional Declaration dated 17 June 2012 raises significant problems in four areas: the powers of the armed forces, the schedule of parliamentary elections, the horizontal distribution of powers and the constitutional drafting process. Firstly, in relation to the powers of the armed forces, the declaration resuscitates a number of the core aims contained in the 'Fundamental Principles' document that was circulated in November 2011 but not pursued, following trenchant criticism and popular protest. These provisions expand the SCAF's control over military affairs and national security, leaving little room for civilian oversight. Secondly, the Declaration is vague on how and when fresh elections will take place, potentially leading to conflict among state actors. Thirdly, the provisions relating to the horizontal distribution of powers suffer from ambiguous language that may result in conflict and confusion, reducing the capacity for effective and coherent governance during the transition period. These provisions also vest significant legislative and executive powers in the SCAF at the expense of the presidency, raising significant concerns about the democratic legitimacy of the law-making process and the president's ability to lead the government effectively. Finally, the provisions relating to the constitutional drafting process employ unprecedented and vague criteria, potentially leading to wasteful litigation that may stall the process and delay Egypt's transition to a democratic constitutional order.

**Summary of Recommendations**

1. Civilian control over the armed forces should be established by vesting commander-in-chief powers in the president, and allowing for presidential appointment of a civilian minister of defence (page 12);
2. Once a new People's Assembly has been elected, the president should be granted the war power and should retain the power to appoint and dismiss high level officers, both subject to legislative approval (page 12);
3. The military budget should be subject to the control of the government and of the People's Assembly, and the oversight of the state's supreme audit institution (page 12);

4. The conditions under which the armed forces may be used internally should be defined as narrowly and as precisely as possible (page 12);
5. Rules on how the relevant drafting and legislative bodies will engage the public in the law-making process both during and after the transition period should be established (pages 16-17);
6. Rules allowing elected parliamentary representatives to participate in the drafting of legislation should be established (page 17);
7. The process by which the president promulgates or objects to laws should be specified (page 18);
8. The president's ability to establish the state's general policy in collaboration with the cabinet should be restored, and the People's Assembly and the supreme audit institution should be given the power to oversee the implementation of that policy (page 21);
9. The National Defense Council's relationship with the SCAF, the military and other relevant state actors should be explained, and the legal effect of its evaluations should be clarified (page 24); and
10. The conditions that trigger (i) the dissolution and replacement of the Constitutional Assembly, and (ii) the reconsideration of provisions of the draft constitution, should be reviewed for inconsistencies and specified in greater detail (pages 25-27).

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## **The Egyptian Constitutional Declaration Dated 17 June 2012**

**- A Commentary -**

### **Introduction**

The popular uprising that commenced in Egypt in January 2011 has given rise to a number of unpredictable events that have affected Egypt's transition to democracy. The Supreme Council of the Armed Forces (the "SCAF") has asserted a guiding role for itself from the beginning, starting with suspension of the 1971 Constitution following the removal of Mubarak.<sup>4</sup> This was followed by the SCAF's appointment of a committee of experts to draft amendments to that constitution; but while those amendments were approved in a referendum in March 2011, rather than re-instituting the 1971 Constitution with those changes, the SCAF chose instead to issue a constitutional declaration on March 2011 (the "March 2011 Declaration"), which aimed to set out Egypt's transition to democracy. The legitimacy of that document has been a matter of significant controversy,<sup>5</sup> although in the period since the rules it established have generally been followed by the various forces within Egypt.

During the summer of 2011, an effort was launched by the deputy prime minister's office to draft what was informally known as the "supra constitutional principles" document, which was presented as a list of fundamental principles that the coming constituent assembly would have to respect and abide by during the constitutional drafting process. A draft of that document was published in November 2011 (the "November 2011 Draft") and revealed an intent to grant unprecedented powers to the Egyptian military.<sup>6</sup> The public reacted negatively and a violent confrontation ensued between protesters and security forces that led to the deaths of at least thirty-five civilians and hundreds of casualties. As a result, the November 2011 Draft was never finalized.

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<sup>4</sup> While the SCAF has risen to prominence following its role in the removal of Mubarak and the political order since, it was originally constituted by statute as a body with the president at its head.

<sup>5</sup> While the establishment of an interim constitutional framework is a part of many democratic transitions, such interim orders are more legitimate where produced by compromise between popular forces in the country, as with the South African Interim Constitution, for example.

<sup>6</sup> For a commentary of the November 2011 Draft, see International IDEA, Declaration of the Fundamental Principles for the New Egyptian State, Draft dated 1 November 2011, A Commentary, 23 November 2011, at [www.constitutionnet.org/files/2011.11\\_-\\_commentary\\_on\\_fundamental\\_principles\\_english\\_final.pdf](http://www.constitutionnet.org/files/2011.11_-_commentary_on_fundamental_principles_english_final.pdf).

Following those events, parliamentary and presidential elections were organized in the country. The new People's Assembly appointed a constituent assembly, which was dissolved by the High Administrative Court on 10 April 2012 on the basis that the assembly was partially made up of members of parliament, which was prohibited under Egyptian law. A second constituent assembly was appointed by the People's Assembly on 7 June 2012. However, following a complaint relating to the electoral law that brought the parliament into existence, the Supreme Constitutional Court (SCC) issued a decision on 14 June 2012 declaring the elections to have been unconstitutional. The parliament was promptly dissolved the following day, raising doubts on the second constituent assembly's legitimacy (legal proceedings on that question are currently underway). Following the dissolution, the SCAF issued a new constitutional declaration on 17 June 2012 (the "June 2012 Declaration"). That Declaration is the subject of this commentary.

The June 2012 Declaration amends the March 2011 Declaration with several objectives in mind. Firstly, it seeks to amend the transition process in order to take into account the fact that the People's Assembly has been dissolved. It allocates the legislative power to the SCAF itself until a new Assembly is elected, and allocates some of the President's powers to the SCAF as well. It also sets out some rules on how the constitutional drafting process should be organized (most of which were originally included in the November 2011 Draft). As far as the remaining timeline of transition, the June 2012 Declaration calls for completion of a new constitution and its submission to popular referendum, to be followed by new legislative elections. However, a number of the relevant provisions are vague, which could lead to conflicting interpretations and court involvement, such that despite language suggesting that the process be completed in a matter of months, the transitional phase may last longer.

Public reaction to the June 2012 Declaration appears to have been mostly negative, with most analysts and officials commenting that it removes significant power from the presidency, despite the fact that the current president is perhaps the first ever to have been democratically elected.

This Commentary does not take a position on the June 2012 Declaration's legality. It has as its sole purpose to provide a detailed legal analysis of the Declaration's provisions and to provide advice on the types of improvements that can be made. A number of the Declaration's provisions are flawed, and where this is the case, this Commentary recommends changes. This Commentary recognizes that while some of the Declaration's provisions are problematic, they may be necessary given the unusual current state of Egypt's transition, where there is a president but not a legislature, requiring that some other authority assume legislative powers. In these cases, this Commentary recommends that the articles be changed in the new constitution.

This Commentary addresses four areas covered by the Declaration: the powers of the military, the parliament, the horizontal distribution of powers, and the constitution drafting process. Where pertinent, recommendations have been included at the end of each section.

## The powers of the military

### *Control over the military*

The June 2012 Declaration establishes that the military is a self-governing authority that is free to operate without any form of external oversight, including by the state's civilian and elected authorities. This is not in keeping with the 1971 Egyptian constitution, and is in sharp contrast with established principles of democratic governance.

Under Egypt's previous constitutions, the military was formally subject to civilian authority and to the authority of the president. Historically however, from 1956 to 2011 each of Egypt's three presidents assumed their positions based on the fact that they had risen through the ranks of the military. One consequence has been that the division between military and civilian authorities was distorted from the 1950s until 2011, leading many commentators to complain that the military effectively operated free from civilian oversight throughout that period. Since the start of the Egyptian revolution in January 2011, and in particular since the summer of 2011, the Supreme Council of the Armed Forces has sought to formalize the military's independence from the state's civilian institutions, possibly motivated by the prospect that Egyptians could elect their first president who had not risen through the military's ranks. That concern gave rise to the 'Supra-Constitutional Principles', which was drafted between June and November 2011 but that was never finalized as a result of the violence that followed the publication of a draft in November 2011. Had they been approved, the 'Supra-Constitutional Principles' would have formalized the existence of two parallel but unequal states within Egypt's territory: the military state would have been permitted to operate free from any type of civilian interference or oversight, but would have been able to influence the civilian state's constitutional framework.

The issue of the military's status remained essentially dormant from November 2011 until the June 2012 Declaration was published. Article 53(bis) revisits this area; it departs from the 1971 Constitution's formal provisions and borrows heavily from the never-completed November 2011 Draft. The following comparison table illustrates how this issue has evolved over time:

1971 Constitution	November 2011 Draft Declaration	June 2012 Declaration
Article 150: The President of Republic shall be the Supreme Commander of the Armed Forces.	Article First (9), second paragraph: The Supreme Council of the Armed Forces is <b>solely</b> responsible for all of the armed forces' internal affairs, and for discussing its <b>budget</b> , which should be incorporated as a <b>single figure</b> in the annual state budget. The Supreme Council of the Armed Forces is also exclusively competent to <b>approve all bills</b> relating to the armed forces before they come into effect.  The President of the Republic is the highest authority of the armed forces and the minister of	Article 53(bis): The Supreme Council of the Armed Forces, as it was composed on the day on which this Constitutional Declaration entered into force, is responsible for deciding on <b>all issues related to the armed forces</b> , for appointing its leaders, for extending their terms of office. The head of the Supreme Council of the Armed Forces will exercise all the powers that are granted by the laws and regulations to the commander-in-chief of the armed forces and to the minister of defense until a new constitution enters into

defense is the general authority of the armed forces... force.

The table shows: (a) the extent to which the June 2012 Declaration departs from Egyptian and democratic tradition; (b) the extent to which the Declaration borrows from and builds upon the November 2011 Draft; and (c) the differences between the two texts. Each of these particularities will be discussed in turn below.

#### Departures from democratic tradition

Most importantly, reproducing the core content of the November 2011 Draft, the June 2012 Declaration successfully imposes a full separation between the state's civilian authorities and the military. Its provisions effectively prevent any form of civilian oversight over the military, and also prevent the civilian authorities (including the newly elected president) from intervening in forming the military's policy.

This development is clearly contrary to the main tenets of democratic governance. Civilian control over the military is key both to a democratic system of government, and to ensuring the military is able to focus on carrying out the role that is attributed to it by the constitution. This requires vesting several powers in civilian authorities:

- (i) The power of the commander-in-chief should be vested in the country's highest civilian executive authority;
- (ii) A Minister of Defence, under the authority of the highest civilian executive authority, should be established to exercise authority on an ongoing basis;
- (iii) Power of appointment and dismissal is granted to the executive, potentially subject to the approval of the legislature;
- (iv) The military's budget should be determined by the government, subject to the legislature's approval, and under the oversight of the state's supreme audit institution, to ensure equitable distribution of resources between sectors, adherence to best practice in relation to procurement, and that all public monies are invested as efficiently as possible.

Virtually every modern and democratic constitution incorporates these principles and practices, either by establishing general principles and leaving the detail to be filled by subsequent legislation, or by setting out detailed provisions directly. The following table provides some examples of modern constitutions which explicitly provide for civilian authority over the military:



Iraq	Kenya	South Africa
Article 9(1)(a): [The Iraqi armed forces] shall be subject to the control of the civilian authority.	Article 239(5): The national security organs are subordinate to civilian authority.	Article 199(8): To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

The following table provides some examples of mechanisms that are used by modern constitutions to ensure democratic oversight over the armed forces:

Germany	Iraq	South Africa
<p>Article 45b: A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the Armed Forces. Details shall be regulated by a federal law.</p> <p>Article 60: (1) The Federal President shall appoint and dismiss... commissioned and noncommissioned officers of the Armed Forces, except as may otherwise be provided by a law.</p> <p>Article 65a: (1) Command of the Armed Forces shall be vested in the Federal Minister of Defence.</p>	<p>Article 60: The Council of Representatives shall be competent in the following:... (5) Approving the appointment of the following:... (C) The Iraqi Army Chief of Staff, his assistants, those of the rank of division commander or above, and the director of the intelligence service, based on a proposal from the Council of Ministers...</p> <p>Article 78: The Prime Minister is the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces...</p>	<p>Article 198(d): National security is subject to the authority of Parliament and the national executive.</p> <p>Article 201(1): A member of the Cabinet must be responsible for defence.</p> <p>Article 202(1): The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.</p> <p>(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.</p>

Contrary to both Egyptian and international best practice, Article 53(bis) of the June 2012 Declaration vests most if not all of these powers in the SCAF itself. The only matter that seems to remain outside of the SCAF's mandate is the power to appoint and dismiss military officers outside the SCAF itself. This is ambiguous, however, given conflicting language in the 2012 Declaration:

- (i) Article 53(bis) specifically provides that the SCAF is responsible for appointing its own leaders, which clearly prohibits the possibility that the elected president of the republic could intervene in that process;

- (ii) Article 53(bis) is silent on whether the SCAF will retain authority to appoint and dismiss military officers. Although Article 53(bis) does provide that the SCAF is “responsible for deciding on all issues related to the armed forces”, this is a general provision that is subject to interpretation. As discussed above, this specific wording is broad enough to include all matters that are even tangentially related to the military;
- (iii) However, there is specific language elsewhere in Egypt’s constitutional framework that provides authority to the civilian president to appoint and dismiss military officers. Article 25 of the March 2011 Declaration provides that the president is to assume all the powers set out in Article 56, apart from those powers that are set out in subparagraphs (1) and (2). The result is that, according to the March 2011 Declaration (which is still in effect), the president assumes all powers that are set out in subparagraphs (3) to (10) of Article 56;
- (iv) Article 56(8) of the March 2011 Declaration provides that the president will be responsible for appointing and dismissing military officers;
- (v) Based on all of the above, there is a contradiction between Article 56(bis) of the June 2012 Declaration and Article 56(8) from March 2011. In trying to resolve that contradiction, two legal rules are particularly helpful. Firstly, under Egyptian law, where amendments are made to a law or to a constitution, unless specific provisions are annulled, they are considered to remain in force. Secondly, where there is a conflict between a law or constitutional provision that is specific and one that is general, the legal principle of *lex specialis* requires that the specific provision prevail.
- (vi) The implication here is therefore that Article 56(8) remains in force and thus the president has authority to appoint and dismiss military officers.

Given the apparent intent of the June 2012 Declaration as a whole, which is to consolidate the SCAF’s control over the military and prevent any form of civilian oversight of its activities, the fact that the constitutional framework grants the president the power of appointment and dismissal of military officers appears anomalous, and may have been the result of poor and rushed drafting. This power is one of the few elements of democratic civilian control included following the June 2012 Declaration, however, and should be preserved in the new constitution, subject to legislative approval.

#### Further consolidation of the military’s independence

The June 2012 Declaration and the November 2011 Draft are both motivated by the same concern, and therefore share much in common. At the same time, the drafters of the June 2012 Declaration appear to have learned from many of the criticisms that were made of the November 2011 Draft and have tightened the wording of the June 2012 Declaration. Many of these differences with the November 2011 Draft have the effect of increasing the SCAF’s control and reducing transparency of the military’s affairs.

A primary example is the wording that is used to describe the SCAF's mandate. The November 2011 Draft sought to render the SCAF "solely" responsible for all of the military's "internal affairs". At the time, that wording was heavily criticized as being far too general and vague, firstly for seeking to remove military affairs from civilian oversight and secondly for failing to define what qualifies as "internal affairs". That failing was particularly acute given that the Egyptian military engages in a significant amount of economic activity that does not qualify as military activity. It was therefore unclear whether the November 2011 Draft's wording would have covered those activities or not. The second of those two criticisms appears to have been picked up by the drafters of the June 2012 Declaration, which now indicates that the SCAF is responsible for all issues that are "related" to the armed forces. This new wording is far wider in scope than the November 2011 Draft and strongly suggests that the SCAF's intent is to have all of the military's economic affairs under its decision-making authority.

Another criticism that was made of the November 2011 Draft was that the document did not show adequately how the Council would be composed and regulated. That failing left open the possibility that disagreements could emerge as to how the SCAF's membership should be determined, which in turn could lead to an institutional breakdown. Article 53(bis) of the June 2012 Declaration resolves that problem by granting the listed powers to the SCAF "as it was composed on the day on which this Constitutional Declaration entered into force". This makes clear that within the SCAF itself, the executive is understood to have no appointment or dismissal powers. The provision does not make clear what would occur should for any reason a member leave the SCAF. A literal reading would suggest that the SCAF loses the powers it has appropriated for itself here, although this is doubtless not what was intended. It is likely this clause was introduced to prevent the elected president from assuming the lead position within the SCAF, as dictated by the statute that originally constituted the SCAF, which predates the revolution and the SCAF's rise to prominence.

#### Differences with the November 2011 Draft

Although the June 2012 Declaration draws heavily on the November 2011 Draft Declaration, there are some important differences, the first of which is mainly terminological. While the November 2011 Draft provided that the SCAF was "solely" responsible for military affairs,<sup>7</sup> the June 2012 Declaration avoids the use of any wording that would suggest any form of exclusivity. Although the fact that that wording was dropped can be cited as evidence that the June 2012 Declaration does not provide the SCAF with exclusive authority over military affairs, it is unlikely to have any impact on the manner in which the June 2012 Declaration will be applied in practice.

The second difference relates to the manner in which the military's budget is to be elaborated. Although the November 2011 Draft sought to restrict any oversight over the military's budget by reducing the matter into a single figure in the annual state budget law, the June 2012 Declaration does not make any reference to the budget. It also abandons the wording according to which all bills relating to the armed forces had to be approved by the SCAF. These two provisions were among the most glaringly anti-democratic in the November 2011 Draft

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<sup>7</sup> The original Arabic text provided that the SCAF was responsible for military affairs "دون غيره", which literally translates as "without any other".

Declaration, and so the fact that they have been abandoned is welcome. At the same time, there is some question as to whether the military will nevertheless maintain exclusive control over its budget and will be in a position to veto legislative bills relating to military affairs based on the June 2012 Declaration’s wording. In particular, Article 53(bis) of the June 2012 Declaration provides that the SCAF is responsible for deciding on “all issues related to the armed forces”, which, if interpreted widely enough, would certainly leave the SCAF with enough scope to control its budget and to refuse to apply any legislation or regulations that interfere with its administration of the military.<sup>8</sup> In addition, the SCAF in any event will maintain legislative authority throughout the coming period (see below), which will effectively prevent the passing of any legislation without its direct approval.

*War/defence powers*

The June 2012 Declaration provides that the SCAF must consent to any declaration of war by the president of the republic. The following comparison table shows how heavily the June 2012 Declaration relies on the November 2011 Draft and the extent to which it departs from the 1971 Constitution:

1971 Constitution	November 2011 Draft Declaration	June 2012 Declaration
Article 150: ... [The President of the Republic] shall be the authority who declares war, after the approval of the People’s Assembly	Article 9: ... The President of the Republic declares war after the approval of the Supreme Council of the Armed Forces and of the People’s Assembly has been obtained...	Article 53(bis)(1): The President declares war pursuant to the approval of the Supreme Council of the Armed Forces.

The June 2012 declaration also runs counter to international best practice, which almost always grants the power to declare war or defence to the president, potentially with legislative oversight. Some examples are listed below:

South Africa	Iraq	Kenya
Article 203(1): The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly...  Article 203(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.	Article 61: The Council of Representatives shall be competent... (9)(A) To consent to the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister.	Article 95(6): The National Assembly approves declarations of war and extensions of states of emergency.  Article 132(4): The President may... (e) with the approval of Parliament, declare war...

<sup>8</sup> Although note that Article 57(5) of the March 2011 Declaration gives the Cabinet the exclusive power to “prepare a draft public budget for the state”.

In modern democracies, ultimate authority over all major policy decisions, including the decision to engage in a state of war or of defence, should belong to officials who are elected by the people. For policy decisions that are of secondary importance, authority should belong either to elected officials or to their appointees. At this particular juncture of its transition process, Egypt is in a unique position. Although a president has been elected to office, the parliament has been dissolved and, in the absence of a sitting parliament, the SCAF has granted itself legislative power. In that sense, an argument can be made that the June 2012 Declaration has merely checked the president's war power by subjecting it to an institution which is currently serving as the country's legislature. The difficulty however is that the institution in question is unelected, self-appointed, and self-regulating, which renders the entire process subject to question and inherently undemocratic.

Requiring consultation with the armed forces before such a declaration is reasonable, but a veto power oversteps the bounds of military authority. In order to ensure democratic civilian control, this power should be exercised by the legislature, rather than the armed forces themselves. Although some justification can be made for this clause in the interim period, given that the parliament is not in session, it should be removed at the earliest possible opportunity.

*Intervention in domestic affairs*

The June 2012 Declaration introduces an article envisioning the potential deployment of the armed forces within the country. Although the provision is clearly more detailed than its predecessors, its wording remains vague and will lead to confusion in circumstances where certainty and clarity will be needed. The relevant articles are reproduced below.

March 2011 Declaration	November 2011 Draft Declaration	June 2012 Declaration
<p>Article 53: The State alone shall establish Armed Forces which owe their allegiance to the people.</p> <p>Their duty shall be to protect the country and <b>safeguard its territory and security...</b></p>	<p>Article 9: The state alone shall establish armed forces, which are the property of the people, and which have as their mission to protect the country, the integrity, security and unity of its land, and to <b>defend constitutional legitimacy...</b></p>	<p>Article 53(bis)(2): In the event of <b>unrest</b> within the country that <b>requires the intervention of the armed forces</b>, the president may, with the Supreme Council of the Armed Forces' <b>approval</b>, issue a decision to <b>join the armed forces in the mission to maintain security and defend vital state institutions.</b></p> <p>Egyptian law sets out the armed forces' powers, its mission, the situations in which force may be used and in which detentions and arrests may be made, its judicial mandate, and the situations in which it enjoys immunity.</p>

Egyptian constitutional tradition on this point is generally weak. The March 2011 Declaration's provisions on the military's role, which reproduce the 1971 Constitution's provisions on this issue, are vague and open to interpretation. This is particularly true for the requirement that the armed forces should be responsible for the country's "security". Although that term could be interpreted as requiring the armed forces to protect Egypt's security from external threats, that interpretation would lead to a redundancy, given that earlier in the same sentence the armed forces are also required to "protect the country", which can only be interpreted as being in reference to external threats. The 1971 Constitution and the March 2011 Declaration therefore lack clarity, opening the door to an interpretation that may encourage the military's intervention in domestic affairs in a manner that is left unspecified. The November 2011 Draft sought to move significantly further in that direction by replacing the previous wording with an article that explicitly recognized the military's duty to intervene in domestic affairs with a view to defending "constitutional legitimacy". The use of that term was immediately criticised at the time as being excessively vague and as inviting the military to intervene at any time of its choosing merely to defend its own vision of how the state should operate; the draft provision was also heavily criticised for not indicating what measures the military would be entitled to take were it to act in defence of "constitutional legitimacy".

The June 2012 Declaration adopts a different approach. Although it maintains Article 53 of the March 2011 Declaration (which means that many of the criticisms set out above are still applicable), it supplements it with Article 53(bis)(2). Article 53(bis)(2) provides some indication as to when the armed forces can intervene internally, and what its mission would be in those circumstances. The wording nevertheless raises a number of concerns:

- (i) In relation to **the circumstances in which the military can intervene internally**, the June 2012 Declaration provides that there should be "unrest" that "requires the intervention of the armed forces". The use of both these terms indicates that "unrest" alone would not be sufficient; the unrest needs to be of the type that actually requires the armed forces to intervene, which serves to limit the scope of this provision's application. On the other hand, no indication is given as to which situations of unrest would rise to the level of 'requiring' intervention. Does the unrest in question have to be particularly dangerous or violent, or should it be targeted towards particular state institutions? For example, would violence following a sports event that involved dozens of deaths qualify as unrest requiring the military's intervention? On the other side of the spectrum, would a small demonstration targeting the ministry of the interior qualify? The June 2012 Declaration leaves these questions unanswered, and therefore allows for too much discretion in the potential use of the armed forces internally.
- (ii) The June 2012 Declaration also provides for a **specific procedure** that must be followed for the military to intervene internally. The Declaration provides that a request must be made by the President and that the SCAF must provide its prior "approval" of the intervention. This raises a number of issues. Firstly, it suggests that it is not the case (as discussed above) that the unrest in question must by its very nature actually require military intervention. It in fact suggests that the matter will be more the result of a political evaluation and agreement by various actors.

Secondly, the procedure in question will probably result in less military intervention within Egypt's borders than has recently been the case. According to the June 2012 Declaration, the president must assess the unrest and decide whether or not a request for intervention should be made (without a request by the president therefore, there can be no intervention); upon receipt of the president's request, the SCAF will carry out its own assessment and decide whether or not it is willing to intervene. This procedure introduces a political element to military intervention within Egypt's borders, but also depoliticises the process by virtue of the fact that two separate institutions must provide their approval. The result is that it is less likely that the military will be able to intervene internally in the manner that it has over since the SCAF assumed presidentially powers in February 2011. This is particularly the case given that President Morsi and the SCAF are not political bedfellows and will likely be motivated by different concerns at various points over the coming period.

Thirdly, the procedure in question once again subjects the authority of the country's elected representatives to the SCAF, which is anti-democratic by its very nature. The president's power to call upon the intervention of the military clearly must be balanced and restrained through some process. Under normal circumstances, one would imagine that the president's power would be subject to parliamentary approval. In the current circumstances, given the absence of a sitting parliament, there appear to have been few credible alternative mechanisms to the one that was provided for by the June 2012 Declaration, however undesirable.

- (iii) On the military's **specific role** when intervening within Egypt's borders, the June 2012 Declaration provides that the military's role will be to "maintain security and defend vital state institutions". This wording raises a number of concerns. The responsibility to defend "vital state institutions" is uncomplicated; the only variable appears to be distinguishing ordinary state institutions from those that are "vital". On the other hand, the responsibility to "maintain security" is more problematic: interpreted widely, this entails that the military could be authorized to carry out ordinary policing activities, which would inevitably involve the detention of civilians suspected of engaging in unlawful activity. Not only does this implicitly recognize the possibility that the regular police may be incapable of carrying out its work, but it also provides for the possibility that the military should engage in policing work, an activity that it is not trained for. Finally, the June 2012 Declaration does not indicate how the military will cooperate with the regular police in the event the former accepts an invitation to intervene internally. Some of the questions that are left unanswered are which of the two institutions will play a lead role, how they cooperate in relation to matters such as traffic control, whether the military should be allowed to operate in areas that are not affected by the unrest, etc. Constitutions in other countries provide answers to many of these questions, as illustrated by the comparison table below:

Germany	Kenya
<p>Article 87a: (3) During a state of defence or a state of tension the Armed Forces shall have the power to <b>protect civilian property</b> and to <b>perform traffic control functions to the extent necessary to accomplish their defence mission</b>. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorised to <b>support police measures for the protection of civilian property</b>; in this event the Armed Forces shall cooperate with the competent authorities.</p>	<p>Article 241: (3) The Defence Forces— (a) are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic; (b) shall <b>assist and cooperate with other authorities</b> in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and (c) may be deployed to <b>restore peace</b> in any part of Kenya affected by unrest or instability only with the approval of the National Assembly.</p> <p>Article 239: (3) In performing their functions and exercising their powers, the national security organs and every member of the national security organs shall not— (a) <b>act in a partisan manner</b>; (b) <b>further any interest of a political party</b> or cause; or (c) <b>prejudice a political interest</b> or political cause that is legitimate under this Constitution.</p>

Although the drafters of the June 2012 Declaration did make an effort to provide some guidance in relation to this area, they also missed an important opportunity to do so with the type of clarity that is needed. As if to illustrate that point, Article 53(bis)(2) of the June 2012 Declaration contains additional cryptic language that has been the source of much consternation amongst Egyptian scholars since the Declaration’s publication. The provision’s second paragraph provides that: “Egyptian law sets out the armed forces’ powers, its mission, the situations in which force may be used and in which detentions and arrests may be made, its judicial mandate, and the situations in which it enjoys immunity”. Egyptian legal commentators were quick to note this provision’s redundancy: it hardly seems worthwhile to note that applicable law is binding. However, the provision can be given meaning if it is interpreted as an affirmation that the June 2012 Declaration’s provision on this matter should be interpreted in a manner that is in conformity with the existing legal order. Assuming that that interpretation were correct, this would suggest that (if and when the armed forces are deployed internally) the same legal framework that has been in place for some time and that has led to significant human rights abuses and corresponding lack of accountability, will in fact remain in place regardless of how the June 2012 Declaration is interpreted.<sup>9</sup>

It is therefore recommended that:

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<sup>9</sup> Although the end of the state of emergency, and the recent Egyptian administrative court ruling suspending the justice ministry’s authorization for the armed forces to arrest civilians, suggest that challenges to the previous legal framework in this context are growing in strength.



- (i) Civilian control over the armed forces should be established by vesting commander-in-chief powers in the president, and allowing for presidential appointment of a civilian minister of defence;
- (ii) Once a new People's Assembly has been elected, the president should be granted the war power and should retain the power to appoint and dismiss high level officers, both subject to legislative approval;
- (iii) The military budget should be subject to the control of the government and of the People's Assembly, and the oversight of the state's supreme audit institution; and
- (iv) The conditions under which the armed forces may be used internally should be defined as narrowly and as precisely as possible.

### **The Parliament**

On 14 June 2012, the Egyptian High Constitutional Court found that one-third of the seats in the lower house of parliament were invalid, due to the fact that seats reserved for independents had been contested by party members. This was held to require the dissolution of the entire lower house of parliament. The court's authority on this issue was contested by many players, in particular the Muslim Brotherhood. Arguments included that in an era with no constitution, no body had the right to dissolve parliament, or that dissolution could only be accomplished based on popular referendum. Security personnel were nevertheless deployed to the parliament, preventing any parliamentarians from returning. The June 2012 Declaration cements parliament's dissolution by conferring legislative power, in the absence of a sitting parliament, to the SCAF.

The June 2012 Declaration also sets out a mechanism for the election of the next parliament. Article 60(bis) provides in relevant part that: "The procedures relating to the parliamentary elections will begin within one month after the people's approval of the new constitution is announced". Although an argument has been made that this provision binds the constituent assembly's decision making ability, Article 60(bis) is consistent with the June 2012 Declaration's general understanding that the constituent assembly is not an entirely sovereign body, and that it will not be free to oppose a number of procedural or substantive issues (see below).

Aside from that important question, Article 60(bis)'s wording is vague. It refers to 'procedures relating to the parliamentary elections,' rather than the elections themselves, hence potentially opening up the timeframe more broadly. A broader timeframe may not be a problem – in fact, additional time may be necessary to allow political parties to take the new constitution into account, to organize their platforms accordingly, and present them to the people. On the other hand, more clarity on the election's precise timing would be helpful to all parties involved.

One potential problem that may arise over the coming period is the manner in which the electoral system will be established. Three or four institutions will be competing over this single issue: (i) the presidency; (ii) the government; (iii) the SCAF, which has granted itself authority to pass legislation during the remainder of the transition process; and (iv) the constituent assembly. Each of these institutions may seek to pull the electoral system (particularly the

system that will govern the coming parliamentary elections) in a particular direction, which may not only lead to confusion but also to significant and wasteful litigation before the courts. If this does in fact occur, it will be another result of the disorganized transition process that Egypt has been experiencing since February 2011. Ultimate authority here should likely rest with the constituent assembly, which will be drafting the electoral framework in the new constitution, and who should ensure that framework is fair and impartial relative to all political actors.

### **Horizontal distribution of powers**

Egypt's horizontal distribution of powers (meaning the relationship between the presidency, government, parliament and courts) has been the source of significant debate and controversy of late. The origin of the controversy stems from the March 2011 Declaration, in which the SCAF awarded itself authority over the law-making process. That authority was transferred to the new People's Assembly that was elected at the start of 2012. However, pursuant to a court decision dated 14 June 2012 that dissolved the newly elected parliament, the SCAF decided to fill the legislative void by granting itself legislative power until a new parliament is elected.

There is very little precedent in comparative constitutional law for this type of situation, and what precedent does exist is not particularly encouraging.<sup>10</sup> Arab constitutional tradition contains many examples of constitutions that vest executive and legislative power together in an unelected body (sometimes referred to as the Revolutionary Command Council), but there do not appear to be any examples of military institutions that have held legislative power only.

Many commentators have argued that the June 2012 Declaration's impact was to strip the presidency of effective power in the SCAF's favour. The analysis below reveals that there is significant truth to that statement, particularly in so far as public policy and the constitution drafting process are concerned.

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<sup>10</sup> Chile's 1980 constitution is one of the few constitutions that granted the military exclusive power to adopt legislation. That text was enacted by national referendum under General Pinochet's military government. Constitutionnet.org, Constitutional History of Chile, online: [www.constitutionnet.org/country/constitutional-history-chile](http://www.constitutionnet.org/country/constitutional-history-chile) [*Chile's History*]. Part B of the Eighteenth Transitory Provision states that the "[g]overnment junta shall, by unanimity of its Members, be entitled to ... exercise the Legislative Power". Official English translation of Chile's 1980 constitution before 1989 and 2005 amendments: <http://confinder.richmond.edu/admin/docs/Chile.pdf>. This provision has since been repealed: the authority to enact ordinary laws now lies with an elected civilian legislative body, the National Congress, under Article 46 of the amended constitution. Official version of Chile after 2005 amendments: [www.leychile.cl/Navegar?idNorma=242302](http://www.leychile.cl/Navegar?idNorma=242302). Sergio Endress Gómez, Fernando J. Fernández-Acevedo and Radoslav Depolo, "Essential Issues of the Chilean Legal System", May 2010: [www.nyulawglobal.org/globalex/Chile1.htm](http://www.nyulawglobal.org/globalex/Chile1.htm).

## *Distribution of Legislative Powers between the SCAF, the Cabinet and the President*

### The law-making process

The combined effect of the March 2011 and the June 2012 Declarations is that the cabinet has authority over drafting bills, the SCAF over adoption of legislative bills (until a new parliament assumes its responsibilities), and the president over promulgation of laws after they have been approved by the SCAF. Setting aside the fact that the legislative branch of government is occupied by an unelected military institution, the framework that the two Declarations have established is fairly standard in comparative constitutional practice. At the same time however, it is unnecessarily rigid and does not incorporate lessons learned from other constitutional systems.

Article 57(4) of the March 2011 Declaration provides that the cabinet will undertake the responsibility to “[p]repare draft legislation, regulations and decisions”. This is generally consistent with comparative constitutional practice; governments around the world are often heavily involved in the legislative process, sometimes to the extent that they can block legislative initiatives altogether. What the March 2011 and the June 2012 Declarations do not provide however is the right for the legislature to draft legislation or even to the propose legislation. Not only is this in keeping with Egyptian constitutional tradition,<sup>11</sup> but it also may be more appropriate in the current circumstances and until an elected parliament assumes law-making power. As a result, though deficient, the framework for law-making that is set out above is probably the most appropriate solution in the current unique circumstances. However, it should not be retained after the transition process.

In the absence of a sitting parliament, it is worth considering whether the democratic legitimacy of the legislative process would be enhanced by giving the newly elected president joint authority to adopt legislation. Until a new parliament is elected, the president may be the next best alternative to represent the interests of the Egyptian people in the legislative process. This is explicitly recognized by the March 2011 Declaration, which provides that the president is responsible for asserting “the sovereignty of the people” (article 25).

As Egypt prepares to adopt a new permanent constitution however, the new text should clearly indicate if members of the People’s Assembly will have the power to initiate, draft and approve legislation without any involvement of the executive branch of government. This practice, which is in place in many countries, enables parliament to highlight and evaluate the interests of all segments of society through legislative proposals, thus strengthening its representative function. The following comparison table provides some examples of how the legislative process is organized in three countries:

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<sup>11</sup> Article 109 of the 1971 Constitution provides that: “[t]he President of the Republic and every member of the People’s Assembly shall have the right to propose laws”, but does not grant either the president or Assembly members the authority to actually draft legislation. Under the 1971 Constitution, that power was strictly reserved for the cabinet.

Germany	Iraq	South Africa
Article 76(1): <b>Bills</b> may be introduced in the Bundestag [the lower house of Germany’s legislature] <b>by the Federal Government</b> , by the <b>Bundesrat</b> [the upper house of Germany’s legislature], or from the floor of the <b>Bundestag</b> .	Article 60(1): <b>Draft laws</b> shall be presented by the President of the Republic and the Council of Ministers. (2) <b>Proposed laws</b> shall be presented by ten members of the Council of Representatives or by one of its specialized committees.	Article 73(2): Only a <b>Cabinet member</b> or a <b>Deputy Minister</b> , or a member or committee of the National Assembly [the lower house of South Africa’s legislature], <b>may introduce a Bill in the Assembly...</b>

Iraq’s constitution is clearly the most restrictive of the three, given that it does not allow members of parliament the right to actually draft legislation. That system was motivated by a desire to control parliamentary activity based on an expectation that the parliament was to be populated by dozens of small political parties that would be difficult if not impossible to organise. Thus, any “proposal” that is put forward by an Iraqi parliamentarian must necessarily make its way through the council of ministers before a vote can be held in the parliament itself. That system has been heavily criticized as stifling the legislative process and for concentrating too much power in the hands of the government. Egypt’s constitutional drafters would benefit from carefully reviewing the various options and their implications for the law-making process in the future.

The current constitutional framework is deficient in another important respect: there is no indication whatsoever as to how bills should be debated or voted on. The 1971 Constitution contained detailed provisions on this issue. The March 2011 Declaration, which replaced the 1971 Constitution, did not reproduce those provisions, nor did it replace them with anything else. In any event, even if the March Declaration had included specific rules on this issue, now that the People’s Assembly has been dissolved and the SCAF has assumed the power to pass legislation, a different set of rules for voting on draft legislation presumably applies. The difficulty is that the June 2012 Declaration also does not provide any indication on how the SCAF should debate, vote on and adopt legislation prepared by the cabinet.

In the current context, given the SCAF’s secretive method of proceeding, it is unlikely that a transparent set of rules will be instituted to govern its law-making power during the transition process. At the same time however, the drafters of Egypt’s new constitution should take note of the fact that the current constitutional framework is silent on how the law-making process should be organized and should seek to fill that void with detailed and modern parliamentary procedures.

Egypt’s legislative process would also benefit by creating a system that would allow civil society the right to participate in the drafting process. Many constitutions indicate that civil society should be allowed to participate in the drafting of legislation, as illustrated by the following comparison table:

Switzerland	South Africa
Article 174: "The cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation".	Section 59(1)(a): The National Assembly is under an obligation to "facilitate public involvement in the legislative and other processes of the ...Assembly and its Committees".

In South Africa, this has been interpreted to mean that civil society should be given a meaningful opportunity to participate in the law-making process (for example, through notice and comment procedures and public hearings). The state is also under an obligation to take measures to ensure that people have the ability to take advantage of the opportunities provided (for example, providing adequate access to information about the legislative process and substantive legislation). The duty to consult thus facilitates the flow of information from different segments of society to legislative drafters and vice-versa.

It is therefore recommended that:

- (i) The system that is currently in place that provides that the cabinet is exclusively competent to draft legislation be maintained for as long as the SCAF occupies the legislative branch of government;
- (ii) During the transition phase, the government, the presidency and the SCAF should establish rules as to how they will engage the public in the law-making process. This is particularly crucial for as long as there is no properly constituted parliament to represent the interests of Egyptian society;
- (iii) As soon as an elected parliament resumes its functions as the only legislative body in Egypt, the law-making process should be relaxed to allow members of parliament to draft legislation without the need for executive involvement;
- (iv) As Egypt drafts its new permanent constitution, it should consider how it will engage the public in the law making process on a more permanent basis. The constitution's drafters should seek inspiration from Egyptian practice and from lessons learned in other countries, including South Africa and Switzerland.

#### Role of the president in the legislative process

Article 56(5) of the March 2011 Declaration confers "[t]he right to promulgate laws or to object to them" on the SCAF.<sup>12</sup> Article 25 of the same document states that, after he is elected, the president "shall undertake upon assuming his/her position responsibilities referred to in Article 56 ... except for what is stipulated in provisions 1 and 2 of the Article". This means that the right to promulgate and object to laws has reverted to the president.

Neither the March 2011 nor the June 2012 Declarations contain any rules, procedures and limitations that govern the exercise of this power. The lack of clarity on this issue creates the potential for confusion during the remainder of the transition process, and therefore of yet

<sup>12</sup> Article 56(5) is lifted verbatim from Article 112 of the 1971 Constitution.

more litigation before the constitutional court. This is an issue that should be resolved as Egypt moves to finalise its new permanent constitution.

Many modern constitutions contain specific provisions that limit the scope of the president's role in the legislative process. The following comparison table provides some examples:

Turkey	South Africa
<p>Article 89(1): The President of the Republic shall promulgate the laws adopted by the Turkish Grand National Assembly within <b>fifteen days</b>.</p> <p>(2) He shall, within the same period, refer to the Turkish Grand National Assembly for further consideration, laws which he deems <b>wholly or in part or unsuitable</b> for promulgation, together with a <b>statement of his reasons</b>. In the event of being deemed unsuitable by the President, the Turkish Grand National Assembly <b>may only discuss those articles deemed to be unsuitable</b>. Budget laws shall not be subjected to this provision.</p>	<p>Article 79(1): The President must either assent to and sign a Bill ... or, if the President has <b>reservations about the constitutionality</b> of the Bill, <b>refer it back to the National Assembly</b> for reconsideration.</p> <p>[...]</p> <p>(4) If, after reconsideration, a Bill <b>fully accommodates the President's reservations</b>, the President <b>must assent to and sign the Bill</b>; if not, the President must either-</p> <p>(a) assent to and sign the Bill; or</p> <p>(b) <b>refer it to the Constitutional Court</b> for a decision on its constitutionality.</p> <p>(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.</p>

These examples demonstrate the range of decisions that must be made regarding the scope and exercise of the president's right to promulgate and object to laws. They also illustrate the gaps that exist in the current constitutional framework, and by extension those that existed under the 1971 constitution. The March 2011 Declaration should therefore be amended (and the new constitution should be drafted) to address the following issues:

- Whether the right to promulgate or object to laws must be exercised within a certain timeframe;
- Whether there are any limitations on the type of objections that the president may raise when refusing to sign a particular bill that has been approved by the parliament;
- Whether the president must refer his or her objections to the SCAF (or to the People's Assembly once it assumes its responsibilities) for reconsideration; and
- How any disagreement between the relevant legislative body and the president relating to the unsuitability of the adopted law will be resolved.

*Distribution of Executive Powers between the President, Cabinet and SCAF*

Powers relating to cabinet

Under the March 2011 Declaration and the June 2012 Declaration, the powers that the president is accorded are generally consistent with comparative practice. However, the

president’s powers are more limited than those traditionally accorded to heads of the executive branch. Although the president has sole discretion to appoint and dismiss the cabinet, he has no power to oversee and co-ordinate the functions and activities of the respective ministries and government departments. The president also has no role whatsoever in developing, adopting and implementing public policy and the budget: these responsibilities are instead shared between the cabinet and SCAF.

Aside from the ceremonial powers that are set out in Article 56(6), (8) and (9) of the March 2011 Declaration, Article 56(7) empowers the president with sole discretion to “[a]ppoint the head of the cabinet and his/her deputies and ministers and their deputies, as well as relieve them of their duties.” This power is traditionally vested in heads of states that are also heads of the executive. For example, Article 17(2) of the Indonesian constitution states that “[m]inisters of State shall be appointed and dismissed by the President.” Similarly, Article 94 of the South Korean constitution states that “[t]he Heads of Executive Ministries are appointed by the President from among members of the State Council on the recommendation of the Prime Minister.”

However, neither the March 2011 Declaration nor the June 2012 Declaration gives the president the power to co-ordinate the functions of the respective ministries and departments of the executive branch. Instead, the incoming cabinet appears to be self-regulating: Article 57(2) of the March 2011 Declaration gives the cabinet the power to “[d]irect, coordinate and follow the work of ministries and their related fronts, in addition to public institutions and bodies”. This is inconsistent with Egyptian and comparative practice, as demonstrated by the following comparison table:

<b>Egypt 1971 Constitution</b>	<b>Kenya</b>	<b>South Korea</b>
Article 142: The President of the Republic shall have the right to call a meeting of the Council of Ministers and to attend its meeting. He shall also preside over the meetings he attends. He shall be entitled to demand reports from the Ministers.	Article 132(3)(b) provides that the president has the power to “direct and co-ordinate the functions of ministries and government departments”	Article 89(13): “Formulation and coordination of important policies of each Executive Ministry” is referred to the State Council for “deliberation” - a council chaired by the president (Article 88(3)) and composing of the prime minister and 16 other cabinet-level ministers (Article 88(2)).

As the directly elected head of Egypt’s executive, the current president’s powers are limited. He has no control whatsoever over how ministries will interact and how responsibilities will be divided between different government departments. The absence of such control raises a number of concerns, including how conflicts or disagreements between government departments will be resolved regarding the scope of their respective roles. Obviously, these matters can be referred to the courts, but there is a strong interest to avoid additional litigation at the current juncture. The March 2011 Declaration should therefore be amended to clarify the role of the president in coordinating the functions of the “ministries and their related fronts”.

## Powers relating to public policy

Under the March 2011 Declaration, the president does not have a role in determining, issuing and implementing public policy. Instead, powers relating to public policy devolve to SCAF and the cabinet before parliament is elected, and to the People’s Assembly and the cabinet after parliament is elected. The March 2011 Declaration, combined with the People’s Assembly dissolution and the June 2012 Declaration, has established a confusing system of governance that is not in keeping with Egyptian constitutional tradition:

	<b>President’s role in relating to policy</b>	<b>Cabinet’s role in relation to policy</b>	<b>Legislature’s (or SCAF’s) role in relation to policy</b>
<b>1971 Constitution</b>	Article 138: The President of the Republic in coordination with the Government shall lay down the general policy of the State and supervise its implementation in the manner prescribed in the Constitution.	Article 156(1): [The cabinet shall] establish the State’s general policy, and oversee its implementation <b>in collaboration with the President of the Republic</b> and in accordance with the presidential laws and decrees.	Article 86: The People’s Assembly shall exercise legislative power and approve the general policy of the State, the general plan of economic and social development and the general budget of the State
<b>March 2011 Declaration</b>	None <sup>13</sup>	Article 57(1): Cabinet must, <b>“in collaboration with the SCAF</b> , establish the State’s general policy and oversee its implementation in accordance with the laws and resolutions of the republic”.	Article 33: Immediately upon its election, the People’s Assembly will assume the authority to legislate and determine the public policy of the state. Article 56(2): The SCAF has the power to issue “public policy for the state” (this power reverts to the People’s Assembly “[i]mmediately upon [its] election” under Article 33 of the March 2011 Declaration)

A number of observations can be made:

- (i) Whereas Egyptian constitutional tradition previous granted the president an important role in working with government to determine and oversee the implementation of public policy, that role has been completely eliminated. This is particularly confusing considering that the March 2011 Declaration anticipated that the coming president would be directly elected by the people in what was expected to be Egypt’s first free and fair elections ever. That the president’s powers should

<sup>13</sup> Article 56(2) granted the SCAF the power to issue the state’s public policy. Article 25 provides that after his election, the president shall assume all of the SCAF’s powers except the powers that are set out in Articles 56(1) and (2).



be reduced in this way and at this time is difficult to justify. The president can of course rely on his power to appoint the cabinet to negotiate specific policies, but he will have reduced power to hold the cabinet to whatever agreement is entered into;

- (ii) Until the People's Assembly assumes its functions, the SCAF will collaborate with the cabinet to establish the state's general policy. Not only is this undesirable from a legitimacy point of view (considering that the SCAF is an unelected and unappointed body), it is also undesirable from a good governance perspective (considering that military institutions in the Arab region are notoriously poor at establishing policies that are in the general public's interests);
- (iii) After the People's Assembly resumes its functions, the SCAF will ostensibly lose any authority it had to determine the state's policy (assuming that a new constitution will not be ready by the time the People's Assembly reconvenes). This will mean that the Assembly will be jointly responsible for determining policy and for overseeing its implementation. Although that framework is a far more democratic outcome, it is also likely to cause a number of practical difficulties. In revolutionary Egypt, the People's Assembly is likely to continue to be populated by a number of parties with widely diverging views on how the state should be organized (post-2003 Iraq's legislative branch was similarly organized). Given the context, the Assembly is unlikely to be able to determine any specific policies and will likely only be able to produce a broad outline of policies. Effectively therefore, under the March 2011 Declaration, the task of determining the state's policy will be left to the cabinet, which is the only unelected institution of the three that are in discussion here.

Egypt may therefore benefit from considering South Korean practice, which confers the powers relating to public policy jointly on the head of the executive and the cabinet. Under Art 89(1) of the South Korean constitution, "[b]asic plans for state affairs, and general policies of the Executive" is referred to the State Council for "deliberation". As mentioned above, the State Council comprises the president, the prime minister and other cabinet-level ministers. Like in Egypt, the president is directly elected by the people and is the head of the executive branch.<sup>14</sup>

In conclusion, the framework relating to public policy in the March 2011 Declaration is likely to damage the state's claim to democratic legitimacy and its ability to formulate a coherent and reformist public policy, which is particularly important in this transitional period. It should not be used as a basis to draft the country's permanent constitution. It is contrary to the drive for greater democracy in the country. In particular:

- The country's new constitution should restore the president's ability to establish the state's general policy in collaboration with the cabinet.
- It should also strengthen the People's Assembly's power to exercise oversight on the president and the cabinet's implementation of policy, in particular through a strong collaboration with the country's supreme audit institution.

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<sup>14</sup> The President of South Korea is also the head of the executive branch.

Powers relating to the military

Article 54 of the March 2011 Declaration establishes a “National Defense Council” that is “tasked with *evaluating* affairs concerned with means of securing the country and its safety”. Article 54 also states that it “will be headed by the president of the republic”. A recent decision issued by SCAF states that the NDC will comprise 20 members including the president: 11 will be SCAF officials, and the 8 remaining will be ministers. The membership of the NDC is dominated by the military. This departs from international best practice: the comparative table below illustrates that the constitutions in Kenya, Turkey and Brazil limit the participation of the military in similar councils to the ministers in charge of the military and/or the commanders of the various forces:

Kenya	Turkey	Brazil
<p>Art 240(2): (2) The [National Security] Council consists of—</p> <p>(a) the President;</p> <p>(b) the Deputy President;</p> <p>(c) the Cabinet Secretary responsible for defence;</p> <p>(d) the Cabinet Secretary responsible for foreign affairs; (e) the Cabinet Secretary responsible for internal security;</p> <p>(f) the Attorney-General;</p> <p>(g) the Chief of Kenya Defence Forces;</p> <p>(h) the Director-General of the National Intelligence Service; and</p> <p>(i) the Inspector-General of the National Police Service.</p>	<p>Art 118: The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, Deputy Prime Ministers, Ministers of Justice, National Defence, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy and Air Forces and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.</p>	<p>Art 91: The Council of National Defense is the consultation body of the President of the Republic on matters related to national sovereignty and to defense of the democratic State, and the following are its original members:</p> <p>I. the Vice President of the Republic;</p> <p>II. the President of the House of Representatives;</p> <p>III. the President of the Federal Senate;</p> <p>IV. the Minister of Justice;</p> <p>V. the military Ministers;</p> <p>VI. the Minister of Foreign Affairs;</p> <p>VII. the Minister of Planning.</p>

It is arguable that the limited involvement of military-related officials ensures that these councils are capable of exercising meaningful civilian oversight of the military. At the same time, the presence of some members of the military leadership ensures that the views of the military are adequately represented during the proceedings.

Art 54 also does not clearly stipulate the functions and powers of the NDC. The word “evaluating” is vague and does not define the role of the NDC in relation to the SCAF with regards to internal and national security. Article 53(bis) of the June 2012 Declaration states that SCAF will be “responsible for deciding on all issues related to the armed forces, for appointing its leaders, for extending their terms of office.” It also states that the head of SCAF will “exercise all the powers that are granted by the laws and regulations to the commander-in-chief of the armed forces and to the minister of defence until a new constitution enters into force.” Neither the March 2011 Declaration nor the June 2012 Declaration address the nature of the NDC’s ‘evaluations’ and their effects on the SCAF’s exercise of its powers over military affairs under

Article 53(bis). The table below compares similar councils established under three modern constitutions:

Kenya	Turkey	South Korea
<p>Article 240 (3): The [National Security] Council shall exercise <b>supervisory control</b> over national security organs and perform any other functions prescribed by national legislation.</p> <p>(6) The Council shall: (a) <b>integrate</b> the domestic, foreign and military policies relating to national security in order to enable the national security organs to co-operate and function effectively; and (b) <b>assess and appraise</b> the objectives, commitments and risks to the Republic in respect of actual and potential national security capabilities.</p> <p>(8) The Council may, <b>with the approval of Parliament—</b></p> <p>(a) <b>deploy</b> national forces outside Kenya for—</p> <p>(i) regional or international peace support operations; or</p> <p>(ii) other support operations; and</p> <p>(b) <b>approve the deployment</b> of foreign forces in Kenya.</p>	<p>Article 118: The National Security Council shall submit to the Council of the Ministers its <b>views on the advisory decisions</b> that are taken and ensuring the necessary condition with regard to the formulation, establishment, and implementation of the national security policy of the state.</p> <p>The Council of Ministers <b>shall evaluate decisions of the National Security Council</b> concerning the measures that it deems necessary for the preservation of the existence and independence of the state, the integrity and indivisibility of the country and the peace and security of society.</p> <p>Article 120: ... the Council of Ministers, meeting under the chairmanship of the President ... after <b>consultation with the National Security Council</b>, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.</p> <p>Article 122: The Council of Ministers, under the chairmanship of the President ... <b>after consultation with the National Security Council</b>, may declare martial law in one or more regions or throughout the country for a period not exceeding six months</p>	<p>Article 91 (1): A National Security Council is established to <b>advise</b> the President on the formulation of foreign, military, and domestic policies related to national security prior to their deliberation by the State Council.</p> <p>(2) The meetings of the National Security Council are presided over by the President.</p> <p>(3) The organization, function, and other necessary matters pertaining to the National Security Council are determined by law.</p>

Comparative constitutional practice demonstrates the range of decisions that must be made to delineate the precise functions of the NDC. The council in Kenya supervises and co-ordinates the functions of the country’s national security organs, while the councils in South Korea and Turkey are confined to purely advisory functions. The strength of the council’s advisory powers also differs from country to country. For example, the Turkish constitution imposes an obligation on

the cabinet to evaluate the decisions of the council, and also requires the cabinet to consult the council before it can declare a state of emergency or martial law. On the other hand, the South Korean constitution merely gives the council the power to advise the president. Neither the president nor the State Council (the South Korean cabinet) owes a duty to consult the council before making any national security decisions.

The March 2011 Declaration should be amended (or legislation should be passed) to address the nature of the NDC's 'evaluations' and their effect(s) on the SCAF's exercise of its powers under Article 53(bis). Among the issues that should be considered are:

- Whether the NDC exercises supervisory or advisory functions, or a combination thereof;
- Whether SCAF, the cabinet or any other relevant state actor has a duty to consider or implement the NDC's evaluations, especially with regards to issues related to the Armed forces as defined under Article 53(bis); and
- Whether SCAF and/or the President have a duty to consult the NDC before issuing any declaration or decision pursuant to Article 53(bis)(1) and Article 53(bis)(2).

## The Constitutional Drafting Process

### *Dissolving and Replacing the Constituent Assembly*

Article 60(bis) and Article 60(bis)(1) of the June 2012 Declaration operate on the assumption that the Constituent Assembly was validly formed even though the People's Assembly that elected it has been dissolved for violating constitutional principles. This assumption is questionable and is currently being challenged before the courts. This is particularly important considering Article 60(bis) of the June 2012 Declaration, which provides that:

"If a **barrier** arises that prevents the Constituent Assembly from completing its work, the Supreme Council of the Armed Forces will within one week form a new constituent assembly – which is representative of all society's components – to prepare the draft new constitution..."

The use of the word "barrier" raises a number of difficulties. Firstly, it is unclear what type of circumstance would qualify as a barrier. If one member of the Assembly refuses to attend sessions, does this constitute a "barrier"? What if the SCAF is simply dissatisfied with the manner in which the Assembly's work is progressing? There are potentially no limits to the possibilities. Comparative practice counsels that a very high threshold of failure must be reached before the constitutional drafting body can be dissolved. In Nepal, Prime Minister Baburam Bhattarai dissolved the Constituent Assembly only after it failed to create a new constitution by its midnight deadline on 27 May 2012. The two-year term of the Constituent Assembly, which began in 2008, had already been extended four times. The Supreme Court had also ruled in March 2012 that the Assembly would not be granted another extension beyond the May 27 deadline.<sup>15</sup> In Iraq, the Constituent Assembly could only be dissolved and the process

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<sup>15</sup> Richard Albert, "Nepal's Constitutional Future", May 28, 2012; online: [www.comparativeconstitutions.org/2012/05/yesterday-nepali-prime-minister-baburam.html](http://www.comparativeconstitutions.org/2012/05/yesterday-nepali-prime-minister-baburam.html).

started afresh if the draft constitution was defeated in the assembly or at the referendum.<sup>16</sup>

Furthermore, Article 60(bis) does not indicate whether there are any limits on whom or what may invoke the existence of a "barrier". Among those who may potentially raise such complaints include the SCAF, the president, the prime minister and any member (or a certain proportion) of the Constituent Assembly. As a result of the fact that this issue is not debated or discussed in the Declaration itself, it is unclear which of these institutions is authorized to invoke the existence of a "barrier".

Finally, Article 60(bis) also does not indicate which body will be responsible for determining whether a "barrier" warranting dissolution exists. Possibilities include the Supreme Constitutional Court (the "SCC"), the Constituent Assembly and the SCAF (or a combination thereof). Since the SCC is "uniquely tasked with judicial oversight over the constitutionality of laws and regulations" and "the interpretation of legislative texts" under Article 49 of the March 2011 Declaration, it is perhaps best placed to interpret what constitutes a "barrier". However, as a result of the fact that the June 2012 Declaration does not provide any guidance on the issue, the SCAF will likely seek to appoint itself as the ultimate body that will be responsible for deciding this issue. Given the lack of clarity in the Declaration itself, the mere invocation of Article 60(bis) will likely lead to significant litigation.

With a view to reducing the prospect of future litigation on this issue, the June 2012 Declaration should therefore be amended to clarify the following issues:

- The principles and limits that govern a determination of what constitutes a "barrier" that warrants dissolution of the Assembly;
- Who or what may allege a "barrier"; and
- Who or what has the power to determine whether a "barrier" exists.

#### *Reconsideration of Provisions of the Draft Constitution*

Article 60(bis)(1) of the June 2012 Declaration provides that:

**If the president, the head of the Supreme Council of the Armed Forces, the prime minister, the Supreme Council of the Judiciary or a fifth of the Constituent Assembly find that the draft constitution includes one or more provisions that conflicts with the revolution's objectives and its main principles through which the higher interests of society will be realized, or that conflicts with the recurring principles in Egypt's previous constitutions, any of the aforementioned bodies may request that the constituent assembly reconsider these provisions in no more than 15 days.**

"The High Constitutional Court's decision will be binding. It will be published free of charge in the Official Gazette within three days from its date of issuance".

The mechanism that is provided for by Article 60(bis)(1) to allow a certain number of officials to

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<sup>16</sup> Yash Ghai, "The Role of Constituent Assemblies", IDEA, June 2006, online: [www.constitutionnet.org/files/the\\_role\\_of\\_constituent\\_assemblies\\_-\\_final\\_vg\\_-\\_200606.pdf](http://www.constitutionnet.org/files/the_role_of_constituent_assemblies_-_final_vg_-_200606.pdf), at p.30.

refer disagreements relating to the new constitution to the constitutional court is not altogether unusual.<sup>17</sup> Other countries that have undergone transitions of their own (notably South Africa) also involved a court in ensuring compliance with constitutional principles (see below). However, this provision is problematic for a number of other reasons. The standard by which constitutional drafting is to be measured is extremely vague, to the extent that if Article 60(bis)(1) is invoked, it will almost certainly lead to significant litigation and acrimony between those individuals and officials that are involved in the transition process. The provision also includes an important contradiction, which puts into question the entire transition process altogether.

The first difficulty revolves around the use of the term “the revolution’s objectives”. Although reference to the Egyptian “revolution” in the June 2012 Declaration is clearly appropriate in the circumstances, it also raises a number of difficulties given that no effort was made in the June 2012 Declaration (or elsewhere for that matter) to define “the revolution’s objectives”. Said “objectives” are likely to be defined differently by the various institutions and officials that are and will be involved in the drafting of the new permanent constitution.

Article 74(1) of the South African Interim Constitution (SAIC) illustrates Article 60(bis)(1)’s deficiencies. It provides that:

During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text, or part or provision thereof, would, if passed by the Constitutional Assembly, **comply with the Constitutional Principles**.

Under Article 74(1), a claim may be brought before the constitutional court if the draft constitution is considered not to comply with the “Constitutional Principles”. This is a reference to a list of thirty-four principles drafted and agreed on by political parties and other interest groups during the May 1993 Multi-Party Negotiation Process. These principles are enshrined in Schedule 4 of the SAIC, and establish, *inter alia*, the separation of powers, judicial independence, universally accepted fundamental rights and anti-discrimination principles.<sup>18</sup> Since these principles were developed through a process that was inclusive and publically promulgated, they were widely accepted as the base of the Constitution.

The draft preamble to Tunisia’s new constitution also provides an example of the type of clarity that could be introduced to the Egyptian context. The draft preamble states that the constitution is being drafted “in response to the *objectives of the revolution* that crowned the epic struggle for liberation from colonialism and tyranny until the victory of [the people’s] free will”. The preamble elaborates that the constitution’s “purpose” is to establish:

“...a [civic] state where the people are the source of all authority; in which organisational freedom, administrative neutrality, free elections leading to a peaceful transfer of power

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<sup>17</sup> Although note that there is some cause for concern that the SCAF should be entitled to invoke Article 60(bis)(1).

<sup>18</sup> The Constitutional Principles are available in full here: [www.nelsonmandela.org/omalley/index.php/site/g/03lv02039/04lv02046/05lv02047/06lv02065/07lv02084/08lv02088.htm](http://www.nelsonmandela.org/omalley/index.php/site/g/03lv02039/04lv02046/05lv02047/06lv02065/07lv02084/08lv02088.htm).

are the basis of political competition; and in which government is based on [participative] democracy, human rights, the separation of powers, the rule of law, justice and equality in the enjoyment of rights and in the satisfaction of obligations on the part of individuals”.<sup>19</sup>

These objectives echo some of the demands that the Tunisian and Egyptian people commonly made during their respective revolutions. In contrast, once again, there is no constitutional, legal or political document in Egypt that currently defines (or even sets out broadly) what may be legitimately considered the “revolution’s objectives”.

Article 60(bis)(1) also provides that that the new constitution should not depart from the “**recurring principles in Egypt's previous constitutions**”. This criterion is even more problematic mainly because the new constitution cannot hope to achieve the “revolution’s objectives” if at the same time it must be in complete conformity with Egyptian constitutional tradition. Egyptian constitutional tradition includes a number of key principles that appear to be irreconcilable with the aims of any democratic revolution, including but not limited to the following:

- (i) Article 77 of the 1971 Constitution states that the president “may be re-elected for other successive terms”, thus providing a constitutional foothold for the incumbent president to extend his presidency indefinitely;
- (ii) Article 137 of the 1971 Constitution gives the president the power to unilaterally dissolve the People’s Assembly as long as he or she deems that it is “necessary”; and
- (iii) Article 179 of the 1971 Constitution, which allows the president to “refer any terror crime to any judiciary body stipulated in the Constitution or the law”, effectively empowering him or her to “order civilians to be tried in military courts”.<sup>20</sup>

Another problem arises from the fact that there is a complete absence of clarity as to what constitutes a “recurring principle”. A clear example of the problems that are likely to arise as a result of this is the contradiction that exists between the June 2012 Declaration itself and past Egyptian constitutions. As set out above, Egypt’s constitutional tradition provides that the president should be the commander in chief of the armed forces and that he should have the authority to establish the country’s general policy. Under Egypt’s current constitutional framework, the president no longer has those powers. This raises a number of questions:

- (i) Does the fact that the Declarations break with Egyptian constitutional tradition mean that these two elements are no longer “recurring principles”?
- (ii) If the constitutional drafters maintain the powers of the president as they are currently provided for under the March 2011 and June 2012 Declarations, will the new constitution be subject to challenge under Article 60(bis)(1)?

Article 60(bis)(1) can and should be redrafted if continued uncertainty and unnecessary litigation before the courts is to be avoided. In particular, reference to the “recurring principles”

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<sup>19</sup> First Draft of the Tunisian Constitution’s Preamble (Unofficial English Translation), 14 May 2012, online: [www.constitutionnet.org/files/2012.05.15 - draft\\_preamble\\_english.pdf](http://www.constitutionnet.org/files/2012.05.15_-_draft_preamble_english.pdf).

<sup>20</sup> Nathan J. Brown, Michele Dunne, and Amr Hamzawy, "Egypt's Controversial Constitutional Amendments: A Textual Analysis", Carnegie Endowment for International Peace, March 23, 2007, online: [www.carnegieendowment.org/files/egypt\\_constitution\\_webcommentary01.pdf](http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf), page 2.

should be eliminated and replaced with a mechanism to establish what the general principles of Egypt's revolution are. If there is a concern that some political forces may abuse this process to pursue non-democratic aims, then reference can be made to international norms, the Arab Charter on Human Rights, or even a selected number of principles that can be derived from Egypt's constitutional tradition, so long as they are limited in number and fundamental in nature.

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## Appendix - Constitutional Declaration Dated 17 June 2012

### The Supreme Council of the Armed Forces

**After considering the Constitutional Declaration that was issued on 13 February 2011;  
And the Constitutional Declaration that was issued on 30 March 2011;**

**Decides:**

**(Article 1)**

**The following provisions will be added to the Constitutional Declaration dated 30 March 2011: Article 30(3), Article 53(bis), Article 53(bis)(1), Article 53(bis)(2), Article 56(bis), Article 60(bis), and Article 60(bis)(1), in accordance with the following:**

**Article 30(3):** Where parliament is dissolved, the president will take the oath of office before the High Constitutional Court's General Assembly.

**Article 53(bis):** The Supreme Council of the Armed Forces, as it was composed on the day on which this Constitutional Declaration entered into force, is responsible for deciding on all issues related to the armed forces, for appointing its leaders, for extending their terms of office. The head of the Supreme Council of the Armed Forces will exercise all the powers that are granted by the laws and regulations to the commander-in-chief of the armed forces and to the minister of defense until a new constitution enters into force.

**Article 53(bis)(1):** The president declares war pursuant to the approval of the Supreme Council of the Armed Forces.

**Article 53(bis)(2):** In the event of unrest within the country that requires the intervention of the armed forces, the president may, with the Supreme Council of the Armed Forces' approval, issue a decision to join the armed forces in the mission to maintain security and defend vital state institutions.

Egyptian law sets out the armed forces' powers, its mission, the situations in which force may be used and in which detentions and arrests may be made, its judicial mandate, and the situations in which it enjoys immunity.

**Article 56(bis):** The Supreme Council of the Armed Forces will assume the authorities set out in Article 56(1) of the Constitutional Declaration dated 30 March 2011 until a new parliament is elected and assumes its authorities.

**Article 60(bis):** If a barrier arises that prevents the Constituent Assembly from completing its work, the Supreme Council of the Armed Forces will within one week form a new constituent assembly – which is representative of all society's components – to prepare the draft new constitution within three months from the day on which the new assembly is formed. The draft constitution will be put to a referendum 15 days after it is completed, for approval by the people through a national referendum.

The procedures relating to the parliamentary elections will begin within one month after the people's approval of the new constitution is announced.

**Article 60(bis)(1):** If the president, the head of the Supreme Council of the Armed Forces, the prime minister, the Supreme Council of the Judiciary or a fifth of the Constituent Assembly find that the draft constitution includes one or more provisions that conflicts with the revolution's objectives and its main principles through which the higher interests of society will be realized, or that conflicts with the recurring principles in Egypt's previous constitutions, any of the aforementioned bodies may request that the constituent assembly reconsider these provisions in no more than 15 days. Should the Constituent Assembly maintain the provision, the aforementioned bodies may refer the matter to the High Constitutional Court. The Court will issue its decision within seven days from the day on which the matter was referred to it.

The High Constitutional Court's decision will be binding. It will be published free of charge in the Official Gazette within three days from its date of issuance.

In any event, the date on which the draft constitution is to be put to a popular referendum in accordance with Article 60 of this Constitutional Declaration will be determined according to the date on which the final version of the draft constitution is prepared in accordance with the provisions of this article.

**(Article Two)**

**Article 38** of the Constitutional Declaration dated 30 March 2011 will be replaced with the following provision: "The right to be a candidate for membership of the People's Assembly and of the Shoura Council will be determined by law in accordance with what the electoral system determines".

**(Article Three)**

This Constitutional Declaration is to be published in the Official Gazette. It will be in force from the date on which it is published.

Issued in Cairo on 27 Rajab 1433 H  
(Approved 17 June 2012 M)

**Field Marshall Hussein Tantawi**  
Head of the Supreme Council of the Armed Forces