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Can A New Legal Framework
Revive A Flawed Transition?

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EXECUTIVE SUMMARY

As the fundamental document establishing a framework for governance, the new Egyptian constitution will have a lasting effect on Egyptian law, politics, and society for years to come. However, Egypt's transition is shaping up to be a case study in how not to initiate a constitution-writing process. If Egypt is to emerge with a stable constitutional order that protects basic rights, it will be in spite of the mismanaged transition dictated by the ruling Supreme Council of the Armed Forces (SCAF).

Acting in a unilateral and opaque manner, SCAF has continually changed the rules of political transition to suit its own evolving interests. Having proposed a series of amendments to Egypt's 1971 constitution, in which the public's only input was a simple up-down vote, SCAF overrode the national referendum with its Constitutional Declaration of March 2011. It then attempted to impose guidelines for the drafting of the constitution that would preserve its interests – through the infamous “Selmi document” – before bowing to popular pressure. The framework guiding the constitution drafting process remains mired in uncertainty a full year after the fall of President Hosni Mubarak.

These shortcomings now threaten to engender substantive weaknesses in the new constitutional text itself. The Constituent Assembly should therefore work to strengthen the procedural legitimacy of the document by fostering meaningful engagement with Egypt's various political trends.

This paper – the first in the Brookings Doha Center –Stanford “Project on Arab Transitions” – identifies the most important issues to be tackled by the Constituent Assembly and offers the following recommendations for addressing them:

- **Islamic law and liberal rights:** Article two of the previous constitution, declaring Islamic jurisprudence to be the principle source of legislation, will likely remain unchanged. Given the wide range of interpretations of this clause, liberals should push for robust constitutional guarantees protecting liberal rights and equality of citizenship. Language that guarantees “special rights” for different religious communities should be avoided as such wording tends to strengthen religious institutions at the expense of women's rights in particular.
- **Institutions of governance:** Given a widespread preference for a presidential or mixed system, the focus should be on how to reduce the powers of the presidency to guard against the emergence of another unconstrained executive. These efforts should include measures to curb the President's unilateral powers of appointment.
- **Fundamental rights:** The new constitution must detail fundamental rights – many of them already present in the 1971 Constitution – while avoiding qualifying phrases such as “according to the law” and “as provided by the law.” Fundamental rights guarantees should detail the specific conditions under which those rights can be curbed.
- **The state of emergency:** The new constitution should better specify the conditions under which a state of emergency can be declared. Further, it should set a maximum term for which the state of emergency can last, and should limit its application to the parts of the country that are affected.
- **Judicial independence:** It is critical that the new constitution outline specific safeguards for preserving judicial independence. It should detail

mechanisms for judicial appointments, administration, discipline, and budgets rather than leaving them to be specified in enabling legislation. Proposals already drafted by Egyptian jurists should be examined by the Constituent Assembly and the public at large.

- **Human rights mechanisms:** A number of options concerning the enforcement of human rights should be considered for the new constitution. These include providing rights organizations direct standing with the Supreme Constitutional Court; explicitly recognizing the state's commitments to international law; and empowering an independent human rights commission.

The international community must recognize the importance of allowing Egypt's constitution to emerge organically. The most important role for the United States and the EU at this stage is to voice clear expectations, both publicly and through back channels, that SCAF must not seek to entrench a role for itself in domestic governance. With constitution drafting yet to begin in Libya and the possibility of further transitions in Syria, Yemen, and elsewhere in the region, policymakers should study the Egyptian case as a cautionary tale of how not to initiate a constitution-writing process.

INTRODUCTION

With parliamentary elections now complete, Egypt moves to the next major step in its fitful political transition – drafting a new constitution for the republic. As the fundamental document establishing the framework for governance, the new constitution will have a lasting effect on Egyptian law, politics, and society. It therefore presents a unique opportunity for Egyptians to reshape political power, enshrine fundamental rights, and restructure processes of governance.

However, the constitution writing process is likely to be as tumultuous as the road traveled thus far and the outcome remains uncertain. Confidence in the Supreme Council of the Armed Forces (SCAF) has plummeted as the result of its erratic and unilateral control of Egypt's political transition. And poor management of the transition has exacerbated tensions between liberal, leftist, and Islamist trends as various actors work to advance conflicting agendas in a rapidly changing political context.

This paper examines the most important issues and actors in Egypt's constitution drafting process, with a special focus on how procedural deficits may result in substantive shortcomings in the new constitution itself. The paper draws attention to the gulf between “best practices” in constitutional design and the political realities of the Egyptian transition. Policy recommendations are presented in light of these realities.

Procedural Imperatives in Constitution-Making

Every constitution-writing exercise is unique. Nonetheless, experts in constitutional design emphasize the importance of an inclusive and transparent process for achieving buy-in from major political actors and a sense of ownership among the general public.¹

A credible process should aim to build consensus around decision-making procedures and the sequence of steps on the way to a national referendum that brings a new constitution into force. An inclusive

process must also provide an avenue for civil society groups, political parties, religious leaders, workers' unions, and the general public to engage in meaningful deliberation. Organizing such deliberative processes, particularly at a moment of political transition, is time-consuming and difficult to say the least. But most constitution writing efforts over the past quarter century have placed as much emphasis on the process as on content for the simple fact that procedural legitimacy directly shapes perceptions of the substantive legitimacy of the final product.

Bearing these “best practices” in mind, the Egyptian transition is shaping up to be a case study in how not to initiate a constitution writing process. If Egypt is to emerge from its transition with a stable constitutional order protecting basic rights, it will be in spite of the mismanaged transition dictated by the ruling Supreme Council of the Armed Forces.

PROCEDURAL SHORTCOMINGS IN THE EGYPTIAN TRANSITION

The Demise of the 1971 Constitution

The Supreme Council of the Armed Forces suspended the 1971 Constitution two days after Mubarak's fall from power, thereby creating a legal vacuum that is yet to be filled. In the absence of any constitutional framework whatsoever, SCAF altered the timeline and process that guides Egypt's political transition several times over to suit its own evolving interests. A brief review of the major turning points and abrupt policy reversals underscores why the Supreme Council of the Armed Forces, and the transition process itself, have lost a great deal of legitimacy.

Upon assuming power, SCAF appointed a committee of legal experts to draft amendments to the 1971 Constitution. This was not an open and participatory process. SCAF excluded representation from all political parties and trends save one member from the Muslim Brotherhood, Sobhi Saleh.³ Deliberations were closed, with no transparency and no public accountability. Such a unilateral and opaque process is quite the opposite of the open and public deliberations that are typically recommended by experts in

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constitutional design for achieving as broad a national consensus as possible.

Nonetheless, the constitutional reform committee unveiled a package of nine amendments to the 1971 Constitution after 10 days of closed meetings.⁴ A national referendum was held just two weeks later. The only role for the public – indeed, even for major political actors – was to participate in a simple up or down vote on the package of amendments.

As the public took stock of the proposed amendments, two opposing views emerged. Those who supported the amendments argued that they were the best means of ensuring a quick exit for the military from political life. Many also understood the referendum as a vote over whether the existing provisions for Islamic law would be preserved, fearing that they might be at risk if a completely new constitution were to be written. The Muslim Brotherhood came to endorse the constitutional amendments, as did many Egyptians from all walks of life who were increasingly alarmed by the deterioration in public security.

But others fiercely opposed the amendments on the grounds that they did not provide a conclusive break from the past. With political institutions largely unchanged, critics worried that it would only be a matter of time before remnants of the old regime, or some other illiberal political force, would assert control. Opponents of the amendments also worried that the swift timeline would not afford nascent political groups (read: non-Islamist trends) sufficient time to organize for presidential and parliamentary elections. A wide array of political actors urged a “no” vote in the referendum, including most civil society groups, formal opposition parties, youth groups, and prominent presidential hopefuls such as Mohamed el-Baradei and Amr Mousa.⁵ These critics urged a broad and inclusive constitutional convention in advance of elections. Nonetheless, the amendments passed on March 19, 2011 with 77 percent support.

The Constitutional Declaration

Although the referendum concerned amendments to the 1971 Constitution, the Supreme Council of

the Armed Forces changed course and issued a “Provisional Constitutional Declaration” on March 30, 2011. The document, which consists of 63 articles, now serves as an interim constitution until a completely new constitution is drafted.⁶

The introduction of the constitutional declaration was a surprising development. The interim document did not match the wording of the constitutional amendments, and it displaced the 1971 Constitution entirely.⁷ SCAF had changed the rules governing Egypt’s transition only ten days after a national referendum. The Declaration reopened debate around the sequencing of elections and a new constitution, a debate that once again mapped onto political leavages, with the Muslim Brotherhood and other Islamist groups wishing to have elections first, and leftists and liberals pushing hard for a new constitution in advance of elections.

The Debate over “Supra-Constitutional Principles”

Faith in SCAF and consensus among opposition forces deteriorated further when Deputy Prime Minister Ali al-Selmi began circulating drafts of a document that sought to define “supra-constitutional principles” to guide the constitution-writing process.⁸ The “Selmi Document,” as it came to be known, addressed the concerns of liberals apprehensive about the possibility of an Islamist-led government.⁹ It advanced the principle of a “civil state” and detailed a number of liberal rights that must be preserved in the new constitution. But the document also contained other questionable proposals that sought to entrench the power of the military in domestic governance. Although the document was ostensibly the initiative of Selmi alone, it was widely understood as having SCAF’s tacit endorsement, if not full backing. The Selmi document therefore represents the most direct statement of what SCAF seeks to impose in the constitution writing process.

Under the first section entitled “Fundamental Principles,” the document suggested that the military budget should not be subject to civilian oversight. Rather, SCAF should be “solely responsible for all

matters concerning the armed forces, and for discussing its budget, which should be incorporated as a single figure in the annual state budget.” The document also declared SCAF “exclusively competent to approve all bills relating to the armed forces before they come into effect.”¹⁰ These passages clearly sought to preserve SCAF’s institutional autonomy and vast financial interests.

Other passages suggested a role for SCAF in domestic governance. Most ominously, the military was called on to “defend constitutional legitimacy.” A vaguely defined “National Defense Council” was also proposed to examine “...all matters relating to the country’s security and safety.”¹¹

The Selmi Document also provided a blueprint for the composition of the 100-member constituent assembly charged with drafting the new constitution.¹² It further suggested that SCAF review the work of the Constituent Assembly and refer questions to the Supreme Constitutional Court for binding review in the event of disagreement between SCAF and the Constituent Assembly.¹³ Finally, a mechanism was outlined for SCAF to appoint a new Constituent Assembly in the event that the draft constitution is not prepared within six months.¹⁴ Neither the constitutional amendments nor SCAF’s Constitutional Declaration imposed such constraints on the constitution writing process.

The proposal was extremely counterproductive. Most liberals and leftists, presumably the target audience, were outraged at the notion of ceding so much ground to the military.¹⁵ The Muslim Brotherhood and other Islamist groups similarly resented the attempt to impose advance guidelines on a freely elected parliament. Distrust between liberals and Islamists was also compounded. But in the end it was the legitimacy of SCAF and the transition process itself that were undermined the most.

The military had already lost considerable support due to the repeated use of excessive force against protesters, the trial of over 12,000 civilians in military tribunals, a clampdown on independent media outlets, and other heavy-handed practices that were

widely documented by local and international human rights organizations.¹⁶ These practices, coupled with anger over the Selmi Document, fueled the rage that was directed against SCAF on the streets of Cairo on November 19-24, 2011.

The government made two concessions. It backed away from the Selmi Document and moved the presidential elections forward to June 2012, enabling an earlier transfer to civilian rule. However, both concessions turned out to be tactical maneuvers rather than genuine efforts to restore legitimacy to the transition. Less than one week later, SCAF capitalized on the strong performance of Islamist parties in the first round of parliamentary elections to once again suggest that the military play a direct role in shaping the new constitution in order to prevent any one trend from dominating the process.¹⁷ To confuse matters further, SCAF retracted this statement yet again days later.¹⁸ SCAF’s rapid vacillation exacerbated the already heightened sense of uncertainty in the Egyptian transition.

SCAF’s commitment to move presidential elections forward to June 2012 was also problematic because it intersected with yet another uncertainty in Egypt’s transition – whether presidential elections would be held before or after the new constitution is written.

The Sequence of Elections and Constitution Drafting

According to the constitutional amendments from the national referendum of March 2011, a new constitution is to be drafted by a 100-member constituent assembly selected by the two houses of parliament, upon invitation of the president. This implied that parliamentary and presidential elections should occur before the drafting of the new constitution. However, article 60 of the Constitutional Declaration changed the wording of the referendum, substituting “Supreme Council of the Armed Forces” for “President.” The change in wording not only contradicted the framework approved by voters in the national referendum; it also appeared to set in motion an extremely rushed constitution drafting process. Egypt’s Minister of Parliamentary Affairs, Mohamed Attiya, confirmed that the presidential election would take place only

after the new constitution is drafted and approved in a national referendum, despite having moved the presidential election forward to June 2012.¹⁹

This scenario provided a very short window for drafting the new constitution – perhaps as little as two months – and placed SCAF in a stronger position to exert formal and informal pressure on the shape of the new constitution. The prospect of an accelerated timeline increased friction between the Muslim Brotherhood's Freedom and Justice Party and most other political forces. Seeing its golden opportunity to shape the new constitution, the Muslim Brotherhood insisted that there should be no deviation from the wording of the Constitutional Declaration, leaving liberals and leftists increasingly convinced of a backroom deal between SCAF and the FJP. More recent developments suggest that the constitution drafting process will continue concurrently with the presidential elections, providing the Constituent Assembly more time to deliberate. But lingering confusion over the timeline continues to plague the Egyptian transition even as this policy paper goes to press.

In sum, Egypt's political transition has not been well managed. While Egyptian society has experienced a vibrant political rebirth after decades of stasis, the Supreme Council for the Armed Forces appointed an unrepresentative and unaccountable committee to draw up constitutional amendments in closed sessions, for which the public was then called upon to endorse in a Nasser-style referendum. SCAF continued to change the rules of political transition several times to suit its evolving interests. Tremendous uncertainty remains, exacerbating divisions among political trends and fueling speculation about the interests and calculus of SCAF.

Major political transitions are never clean, but SCAF has done little to engender the transparent, inclusive, and participatory process that would help reduce political friction and lead the way to a stable democratic order. These procedural shortcomings now threaten to reap substantive weaknesses in the new constitutional text itself. Whatever text is produced, its legitimacy will likely suffer -- at least at the outset

-- by virtue of these procedural inadequacies.

As the party with the largest share of seats in the incoming parliament, the Muslim Brotherhood's Freedom and Justice Party now bears the greatest responsibility for ensuring that the 100-member Constituent Assembly charged with drawing up the constitution is broadly representative of Egyptian society. It should include Coptic Christians, diverse representation of Egypt's various political trends, and a roughly equal number of women and men. Although the FJP will no doubt be tempted to cash in on its electoral victory, it should consider the fact that the legitimacy of the new constitution will rest in large part on the composition of the Constituent Assembly. The Constituent Assembly itself must work to foster consensus and strengthen the legitimacy of the constitutional text through reasoned deliberation and genuine engagement with the Egyptian public, all within the narrow timeframe dictated by SCAF.

SUBSTANTIVE RECOMMENDATIONS FOR THE NEW CONSTITUTION

Given these political realities and the procedural shortcomings detailed in the first half of this paper, what are the most important substantive issues that should be addressed in the new constitution?

Islamic Law and Liberal Rights

One of the most potentially polarizing questions in the constitution writing process is the extent to which the principles of Islamic jurisprudence will be enshrined as a source of state law. Indeed, friction over this question began almost immediately upon SCAF's suspension of the 1971 Constitution. As previously noted, the constitutional amendments of March 2011 generated heated debates, in part because they were understood by many as a referendum over whether the existing provision for Islamic law would be preserved or not.

Article two of the previous constitution declared, "Islam is the religion of the state... and the principles of Islamic jurisprudence are the principal source of legislation" (*mabadi' al-shari'a al-Islamiya*

al-masdar al-r'isi li al-tashri').²⁰ This exact phrasing was carried over into the interim Constitutional Declaration. And despite the fact that Islamist parties now control over 70 percent of seats in the new People's Assembly, it is unlikely that this wording will be altered in the new constitutional text.

As the party with the strongest representation in the People's Assembly, the Muslim Brotherhood's Freedom and Justice Party will play a leading role in shaping the new constitution. But as many analysts have noted, the FJP has a strong interest in reassuring Egyptians and the international community that they do not wish to bring about a radical departure from the status quo. Article two provides an opportunity for the FJP to demonstrate this commitment in concrete terms. The FJP also understands that, to the extent they wish to push a socially conservative agenda, changes in substantive laws will have a more direct impact than vague constitutional principles.

Members of the Salafi Nour Party may insist on stronger wording, such as substituting "*ahkam*" (rules) for "*mabadi*" (principles) or making Islamic jurisprudence "the only source of legislation" rather than "the main source of legislation." The rhetoric among Islamist parties may at times become especially heated as different strands within the Islamist movement articulate competing visions for the Egyptian state and society. However, the FJP, the Wasat Party,²¹ and prominent religious institutions such as al-Azhar will work to maintain the status quo in the new constitutional text.

The vast majority of leftists and liberals are also inclined to accept the status quo regarding article two. Many of them see article two as a legitimate marker of state identity. But even those who object to the article in principle will go along with its inclusion in the new constitution, again for the pragmatic reason that challenging the place of Islamic law is sure to be a losing battle. With this in mind, liberals and leftists have already focused on other priorities, such as placing constraints on executive power and advancing economic rights for the disadvantaged. Liberals and leftists know that article two did not have a terribly profound impact on the Egyptian political system

over the past four decades.²²

This was the result of the specific legal and institutional environment where article two was operative. Interpretation fell to the Supreme Constitutional Court (SCC), which had the exclusive authority to review the constitutionality of legislation. A review of SCC jurisprudence reveals that, in most instances, the Court harmonized article two with liberal provisions in the 1971 Constitution.²³ SCC justices provided a progressive reading of Islamic law and they limited its role in the Egyptian legal system.

In the future, however, the practical effect of article two will depend almost entirely on who is appointed to this important judicial body and the political context in which the SCC exercises judicial review. A reinstated article two, declaring Islamic jurisprudence as the principal source of legislation may carry negative implications for fundamental rights in the new Egyptian legal system depending on the strength of various political forces, the specific interpretations of Islamic law that are brought into state law, and the ability and willingness of courts to harmonize Islamic law with liberal rights guarantees in the Egyptian constitution.

Given these political realities, liberals should push for constitutional guarantees on the equality of citizenship as well as other fundamental rights. Likewise, secularists should push for language that defines Egypt as a "civil state." In advancing these principles, liberals should press the Freedom and Justice Party to hold true to their own electoral platform, which stated that the FJP advocates a state "based on the principle of citizenship, where all citizens enjoy equal rights and duties guaranteed by law in accordance with the principles of equality and equal opportunities without discrimination because of religion or race."²⁴

It is equally crucial that liberals *not* consent to constitutional language that guarantees "special rights" for the Coptic minority "as defined by their own rules and laws in the fields of family and religious affairs."²⁵ As benign as this language may sound, such a provision would bolster the grip of religious institutions at

the expense of individual rights because family law would be defined by religious doctrine rather than principles of equal citizenship. Women's rights in particular would be gravely harmed by such a provision, and entrenching such language in the constitution would make it difficult to change.

Institutions of Governance

A primary function of most constitutions is to specify the basic institutions of governance and the distribution of power among them. Institutional choices include the presidential versus parliamentary systems, a unicameral versus bicameral legislature, and a unitary versus federated structure.

Although authoritarian political institutions were built around an exceedingly strong executive for over half a century, it is not likely that Egypt will move to a parliamentary system. Most political parties and trends wish to continue with a presidential system, albeit one with far fewer powers reserved for the executive. Even the Muslim Brotherhood's Freedom and Justice Party has revisited its longtime call for a pure parliamentary system, most likely for strategic reasons. By leaving a weakened presidency occupied by a non-FJP candidate, the Brotherhood can better manage public expectations of its performance. And the FJP can more easily shift blame for any perceived failures of government policy if it shares the burdens of governance.

Assuming that the office of the President of the Republic is preserved, the most obvious task of the Constituent Assembly will be to reduce its powers to guard against the emergence of another unconstrained executive. The Constituent Assembly may wish to revisit the president's exclusive power of appointment to critical offices such as the Supreme Constitutional Court and the Cabinet of Ministers, making these appointments subject to approval by the legislature or making the legislature itself responsible for certain appointments. The Constituent Assembly should also consider restricting the office of the president to a four-year term, renewable once, as it is in the interim constitution.

There appears to be little interest in a bicameral legislature but, given the frenetic speed at which the new constitution will be written, the Shura Council may persist as a matter of institutional inertia. If the Shura Council is reconstituted in the new constitution, basic changes are recommended, such as canceling the power of the president to appoint one-third of Shura Council members.

Finally, although it is hard to imagine Egypt moving away from the unitary state model, the Constituent Assembly should consider devolving select powers to sub-national units and make the position of governor an elected office, rather than one appointed by the president.

Fundamental Rights

Another primary function of most constitutional texts is the specification of fundamental rights. Certainly, it is important to detail such rights in the new Egyptian constitution, but it is important to remember that the previous constitution was already a fairly strong document in this regard. The 1971 Constitution included provisions for the protection of free speech (article 47), freedom of the press (article 48), freedom of assembly (article 54), and freedom of association (article 55) among many others. Yet repressive laws governing elections, political party activity, the media, labor unions, professional syndicates, and other areas of political and social life robbed these constitutional provisions of their meaning.²⁶

This disjuncture between rights guarantees provided in the constitution and illiberal laws on the books was a result of the stranglehold of the executive on the rubber-stamp legislature. But the problem was exacerbated by the fact that fundamental rights provisions were qualified by phrases such as "according to the law" and "as provided by the law." For example, article five of the 1971 Constitution stated, "citizens have the right to establish political parties *according to the law*." Meanwhile, the substantive legislation that governed elections, Political Parties law 44/1977, allowed the regime to tightly control the political playing field. References such as these consistently circumscribed rights and made it more

difficult for citizens to challenge the constitutionality of illiberal legislation.

While it is true that most rights are not absolute and substantive legislation is necessary to regulate certain activities such as political participation, the next Egyptian constitution should not qualify fundamental rights with reference to substantive legislation in this manner. Rather, rights guarantees listed in the constitution should detail the specific conditions under which they can be curbed. For example, after providing a detailed list of fundamental rights, the South African Constitution states that,

The rights in the Bill of Rights may be limited only... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right (b) the importance of the purpose of the limitation (c) the nature and extent of the limitation (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose...

Passages such as these cannot, by themselves, preserve fundamental rights, but articulating rights provisions in a more detailed manner is certainly more helpful than the wording of the previous constitution where rights were defined almost entirely by texts that lay outside of the constitution itself.

The State of Emergency

The state of emergency, in almost continuous effect for the past half century, also gave Egyptian authorities the ability to circumvent many of the legal protections provided in the constitution. Like clockwork, the emergency law was renewed every two years in the name of confronting terrorism, thus allowing the government to transfer cases from the regular judiciary to State Security Courts.

The new Egyptian constitution should better specify the conditions under which a state of emergency can be declared, such as during a state of war, armed insurrection, or natural disaster. The constitution

should also specify a maximum term for a state of emergency and limit its application to the parts of the country that are affected. Finally, there should be checks on the declaration of a state of emergency by the legislature, an independent judicial authority, and/or through a national referendum if a renewal is necessary. Such procedures would be in line with international standards and would satisfy the calls from Egyptian human rights groups.²⁷ Detailed constitutional provisions such as these are once again not a panacea, but they would be a marked improvement over the previous constitution.

Judicial Independence

Equally important are effective legal mechanisms for the enforcement of fundamental rights. The judiciary was one of the only spaces in the formal political system that enjoyed a measure of autonomy from executive domination over the past six decades in Egypt.²⁸ The previous constitution provided for the independence of the judiciary (articles 65 and 165) and the independence of judges (article 166), but this was again operationalized “in accordance with the law.” Given that the judiciary is charged with adjudicating the rules of the political game and safeguarding fundamental rights, it is critical that the new constitution adequately outline specific safeguards for preserving judicial independence.

Judicial independence is a notoriously difficult concept to articulate in theory and even harder to institute in practice. But the constituent assembly should detail mechanisms in the constitution for judicial appointments, administration, discipline, and budgets rather than leaving them to be specified in enabling legislation.²⁹ The new constitution should also make an explicit prohibition against exceptional courts, such as the state security courts, which were used by the previous regime to bypass the regular judiciary. Egyptian jurists have already drafted proposals for safeguarding the independence of the judiciary and advancing the rule of law.³⁰ These proposals should be carefully studied and discussed by members of the Constituent Assembly and the public at large.

Direct Standing for Human Rights Groups

The Cairo Center for Human Rights and 26 other human rights groups also seek a constitutional provision that would provide human rights organizations direct standing with the Supreme Constitutional Court. This would help rights groups to more easily contest the constitutionality of legislation.³¹ Similar legal mechanisms are guaranteed in other constitutions, and this is an option that should be taken seriously for the new Egyptian constitution.

International Law

Another way to strengthen human rights commitments is to explicitly recognize the state's commitments to international law in the new constitution. The Cairo Center for Human Rights initiative seeks to “enshrine the hierarchy of international human rights agreements above Egyptian legislation, making them invulnerable to abrogation, amendment, or suspension by any subsequent law.”³² The incorporation of such a constitutional provision is very unlikely in the current political context. But if the Constituent Assembly wishes to consider this option, there are several successful models to examine. The South African Constitution, for example, states explicitly that any court must consider international law when interpreting its bill of rights.

Human Rights Commission

Another possibility is to empower an independent human rights commission in the new constitution. While such provisions are relatively rare, the practice is becoming increasingly common. Twelve constitutions worldwide now grant independent investigatory powers to human rights commissions.³³ A few, such as the constitution of the Philippines, additionally mandate specific roles such as monitoring the conditions of prison and detention facilities, and verifying compliance with the state's international treaty commitments.

These powers would distinguish a new rights commission from the National Council for Human Rights (NCHR) established by law 94/2003 under

the Mubarak regime. Although the NCHR was comprised of human rights activists with considerable integrity, it was ineffectual due to the fact that it served in a strictly advisory capacity, had no specific mandate, and lacked an independent and credible appointment procedure.

While some may see the role of a rights commission as more appropriate for the judiciary, the protection of human rights should not be understood in zero-sum terms. Just as the Mubarak regime built redundant legal mechanisms to dominate social and political life, “redundant” legal institutions can and should be crafted to help defend and support human rights. If such a commission is empowered in the new Egyptian constitution, its mandate and appointment procedures should be clearly specified and not left to regular legislation.

Role of the Military

Perhaps the thorniest of all issues concerns provisions relating to the military. As examined in the first half of this policy paper, the Supreme Council of the Armed Forces demonstrated a clear interest in shaping aspects of the new constitution. The Selmi Document suggests that SCAF wishes to shield the military from civilian oversight of its budget and possibly carve out a constitutional role for itself in domestic governance.

Civilian oversight of the military budget is ultimately a political issue that will be bridged between SCAF and the incoming government. While it is clearly preferable for the civilian government to have full financial oversight, political transitions are often accompanied by pacts that protect select interests of the outgoing regime in order to facilitate the transition to a new political order. Indeed, it appears that this sort of bargaining is already well underway, with the Freedom and Justice Party announcing that it may provide the military with immunity from prosecution in the deaths of dozens of protesters killed since SCAF assumed power in February 2011.³⁴ But political pacts aside, the new constitution should specify that the military's sole duty is to defend the country from external aggressors. The military should be

explicitly forbidden from domestic policymaking and policing. These are non-negotiable items in a democratic order and the constitution should state this explicitly.

Other Substantive Issues

The issues presented here are not exhaustive. They are merely some of the important items that the Constituent Assembly should consider in its deliberations. Additional issues for consideration include the possibility of a minimum quota for women's representation in the legislature, removing the anachronistic designation of worker/peasant in elections, which did little more than serve as a political instrument for the former regime, and the possibility of a constitutional provision for an independent election commission. In short, there is a wide variety of items that should be considered, not only by the Constituent Assembly, but also by the Egyptian public at large.

POLICY RECOMMENDATIONS FOR THE INTERNATIONAL COMMUNITY

The Egyptian constitution writing project has been a profoundly inward-oriented affair, as it should be. Egypt has a long constitutional history to draw upon.³⁵ More to the point, the most contentious issues that need to be worked out, such as defining the place of Islam in the legal system, must emerge organically and cannot be imposed from abroad.

With Islamist parties together controlling over 70 percent of the People's Assembly, it may be tempting for the United States and EU to back SCAF in imposing a so-called "Turkish model" where majoritarian institutions such as the parliament are constrained by unelected offices. But such illiberal constitutional mechanisms would be shortsighted to say the least. Even the most committed liberals, though apprehensive about the implications of an FJP dominated government, are convinced that Egypt must work through any tensions between Islamism and liberalism in an open and democratic framework if the country is to eventually consolidate a liberal-democratic system of governance.

The most important role for the United States and the EU at this stage is therefore to voice clear expectations, both publicly and through back channels, that SCAF must not seek to entrench a role for itself in domestic governance, or to exert influence over the constitution-writing process in the ways envisioned in the now infamous Selmi Document examined earlier in this paper. The United States in particular has significant leverage that it can bring to bear, including in the form of military aid and a close working relationship with members of SCAF.

The international community, governments in the region, and domestic political actors should reflect on how the Egyptian transition has proceeded thus far in contrast to the Tunisian experience. Whereas the Egyptian transition has been marked by an increasingly tense rivalry between Islamists, liberals, and leftists, Tunisian political forces circumvented these difficulties through early coordination in the early days after the fall of Ben Ali. The "High Commission for the Fulfillment of Revolutionary Goals, Political Reform, and Democratic Transition" – a body formed in the aftermath of Ben Ali's ouster – helped Tunisian political forces achieve consensus on a framework for political transition. This consensus served Tunisia well, even in the midst of fierce competition during the elections.

By contrast, procedural consensus was missing in Egypt, and tensions were exacerbated as a result of SCAF's erratic and unilateral control. If Egypt emerges from its transition with a stable constitutional order protecting basic rights, it will be in spite of the process that has unfolded thus far. With constitution drafting yet to begin in Libya and the possibility of further transitions in Syria, Yemen, and elsewhere in the region, policymakers should study the Egyptian case as a cautionary tale of how not to initiate a constitution writing process.

NOTES

- 1 Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Reagan, *Constitution-making and Reform: Options for the Process* (Interpeace, 2011); International Institute for Democracy and Electoral Assistance (IDEA), *A Practical Guide to Constitution Building*.
- 2 This research was funded in part through a grant from the Carnegie Corporation of New York. The author would like to thank Dr. Ghada Moussa for her assistance in the preparation of this policy paper.
- 3 The committee was headed by Tariq al-Bishri, a prominent jurist and public intellectual known for his outspoken criticism of the former regime, but the rest of the committee was far less notable.
- 4 For more detail on each of the proposed amendments, see Tamir Moustafa, "It's not a Revolution yet," *Foreign Policy*, February 28, 2011.
- 5 See, for example, the detailed press release from the Cairo Institute for Human Rights Studies, "CIHRS urges the Supreme Military Council to reconsider the proposed amendments prior to referendum," March 7, 2011.
- 6 The Provisional Constitutional Declaration is available at: <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>
- 7 For more detail on the constitutional declaration, see Nathan Brown and Kristen Stilt, "A Haphazard Constitutional Compromise," Carnegie Endowment for International Peace Commentary, June 25, 2011.
- 8 This document had earlier iterations. The first iteration was drafted by Yehia al-Gamal, the Deputy Prime Minister following the fall of Mubarak.
- 9 *Wathiqat al-Selmi* is available at: <http://www.masrawy.com/news/Egypt/Politics/2011/November/2/4559080.aspx%2f4559080.aspx>
- 10 Ibid, section 1.9.
- 11 Ibid, sections 1.9 and 1.10.
- 12 Ibid, section 3.1.
- 13 Ibid, section 3.2.
- 14 Ibid, section 3.3.
- 15 For an example, see the Cairo Institute for Human Rights Studies press release (Arabic), "No to Religious Fascism, No to Military Dominance," November 4, 2011.
- 16 The details are provided in Tamir Moustafa, *The Rule of Law in Egypt: Prospects and Challenges*, The Hague Institute for the Internationalisation of Law, February 2012.
- 17 David Kirkpatrick, "Military Flexes Its Muscles as Islamists Gain in Egypt," *The New York Times*, December 7, 2011.
- 18 David Kirkpatrick, "Egypt's Military Retracts Plan to Extend Influence over Constitution," *The New York Times*, December 9, 2011.
- 19 Salma Shukrallah, "Confusion overshadows Decision to Elect Egypt's President before Constitution," *Ahram Online*, January 3, 2012.
- 20 Egypt is not alone. The 'establishment clause' is ubiquitous in Muslim majority countries, with a full 22 of 44 Muslim majority states declaring Islam the religion of the state, many of which also provide for Islamic jurisprudence as a fundamental source of law.
- 21 The Islamist-oriented Wasat party is a Muslim Brotherhood breakaway party founded in 1995. It was the sixth largest vote winner in the 2011 parliamentary elections.

- 22 Tamir Moustafa, "The Islamist Trend in Egyptian Law," *Politics and Religion*, vol. 3 (2010), 610-630.
- 23 Clark Lombardi and Nathan Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," *American University International Law Review*, v. 31 (2006) 379-435.
- 24 Freedom and Justice Party, "Election Program," p. 11.
- 25 This language is also found in the platform of the Freedom and Justice Party, underlining the tensions and contradictions that exist within the FJP itself.
- 26 There is an urgent need to review this legislation. Human Rights Watch provides a useful review of the most important laws and regulations that the new parliament needs to review in its report, "The Road Ahead: A Human Rights Agenda for Egypt's New Parliament," January 2012.
- 27 Statement by the Forum of Independent Human Rights Organizations, February 12, 2011.
- 28 Tamir Moustafa, *The Struggle of Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press, 2007)
- 29 However, courts that operate completely independent of majoritarian institutions can also pose a risk to democracy and the protection of basic rights. For an example of how independent appointment procedures resulted in an anti-democratic judiciary, see Lisa Hilbink's important book, *Judges Beyond Politics in Dictatorship and Democracy: Lessons from Chile* (Cambridge: Cambridge University Press, 2007).
- 30 Cairo Institute for Human Rights Studies (CIHRS), "Towards Establishing a Vision for the Independence and Impartiality of the Egyptian Judiciary," April 2011.
- 31 Cairo Center for Human Rights Studies, "Freedom, Dignity, and Justice: Basic Provisions in the Constitution."
- 32 CIHRS, "Freedom, Dignity, and Justice."
- 33 Constitutionmaking.org, "Human Rights Commission," February 15, 2009.
- 34 Leila Fadel, "Brotherhood floats immunity for generals in post-Mubarak Egypt," *The Washington Post*, January 12, 2012.
- 35 One example of recent efforts to explore this constitutional tradition is Muhammad Nur Farhat's *al-tarikh al-dusturi al-masri* (al-Jazeera Center for Studies).

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