

# The Constitutional Challenges in Post-Mubarak Egypt

MAHMOUD HAMAD\*

## ABSTRACT

Writing a democratic constitution is the main task in the transition from authoritarianism to democracy. There are many opposing views about many challenging questions in Egypt today. The generals believe that they should remain above civilian control while democrats argue that the army is no different than other state institutions and hence should be subject to the scrutiny of elected representatives. In regard to the role of Islam in politics, some argue for full implementation of Sharia, while others advocate a completely secular state. Many want to scrap altogether the centralized presidential system in favor of a parliamentary regime while others are afraid that a Westminster form of government might not be suitable to Egypt's current stage of political development. This paper argues that compromise and accommodation are much needed to write a constitution that garners respect of all Egyptians. This can be done despite the extremely short time available, provided the main players do not adhere to a zero-sum mindset and look at the constitution as a living document.

Egypt's new constitution will be the roadmap to a second republic that most Egyptians hope will be free from the tyranny, corruption, and nepotism, which were the trademarks of Egypt's political life since 1952. The problem, however, is the lack of agreement about the nature of the new constitution. There is a number of competing visions for Egypt's future: secular versus theocratic at one end of the scale and civic versus militaristic at the other. Islamists, liberals, and leftists will need to come to terms and find a middle ground for the new constitution to be drafted in the very short time stipulated. The generals and the politicians would need to come to agree upon the terms as well.

While many Egyptians want the new constitution to be a sharp departure from the shortcomings of its predecessor, the founding fathers of the new constitution ought to take stock of Egypt's rich con-

\* Assistant Professor of Politics and International Relations, Drake University; Assistant Professor of Political Science, Cairo University, mahmoud.hamad@drake.edu

stitutional history. Unlike most countries in the region with no or little constitutional history, Egypt has 130 years of constitutional experience. Egypt's first experiment with a modern constitution dates back to 1882. This first constitution abruptly ended with British occupation. During the 1919 Revolution, calls to return to constitutional life went hand-in-hand with demands for independence. The result was the 1923 Constitution, known in Egyptian discourse as the liberal constitution. The constitution established a division of power between the monarch and the elected parliament. While the constitution maintained many of his powers, King Fuad I grew weary of the constraints the constitution put on his authority and rescinded it in 1930 in favor of the much less-democratic 1930 Constitution. Popular pressure forced the king to reinstate the 1923 Constitution, which remained in effect until the July 23<sup>rd</sup> Revolution.

With the success of the Free Officers, Egypt entered into an era of constitutional uncertainty until the end of Nasser's reign in 1970. During this period,

**Future of Egypt will depend on the level of political maturity the different parties show during the constitutional drafting process**

Egypt had three different constitutions (1956, 1958, and 1964) and six different constitutional proclamations. It is safe to say that legality received little attention from Nasser and his legions. Egypt went through a much more stable constitutional cycle with Sadat's ascendancy to power

in 1970. He issued the 1971 (permanent) Constitution, which remained in effect until it was revoked in 2011. This constitution was amended on three different occasions: 1980, 2005, and 2007.

Since the removal of Mubarak, the air in Cairo is thick with political discussions about civil-military relations, the role of Islam in politics, and the nature of the state, including the powers of the presidency, the structure and composition of parliament, and the political role of the courts. These critical matters and many more are constantly debated in living rooms, coffee shops, and on national and international media. In the following paragraphs, I highlight the most important controversies that face the new constitution, shed light on the preferences of major political players, as well as providing some predictions on the constitutional future of Egypt. I argue that future of Egypt will depend on the level of political maturity the different parties show during the constitutional drafting process. If major forces within the state and society approach the process as a zero-sum game, this will lead to a deadlock and hinder the prospects of democratization and political stability. However, if these forces endeavor to expand common ground and reach compromise, Egypt will be able to set a shining example for the latecomers in the Arab spring.

## Civil-Military Relations

Other than the role of defending the state, subsequent Egyptian constitutions included very little detail about the military's role in politics. The 1923 Constitution, for example, had only two brief articles about the armed forces that basically delegated military issues to legislation. Article 146 stated "The law shall organize the Armed Forces" and Article 147 read "The Law shall decide conscription, the structure of the Army and the rights and responsibilities of its members."

The 1971 Constitution was a bit more elaborate about the armed forces, with four different articles. Article 180 stipulated that "The State

alone shall establish the Armed Forces which shall belong to the people. Their duty shall be to protect the country, its territorial integrity and security." Article 182 mandated that the establishment of the National Defense Council would be presided over by the president of the Republic to "undertake the examination of the matter pertaining to the methods of ensuring the safety and security of the country. The law shall prescribe its other competences." The other articles dealt with public mobilization and the military judiciary.

While the armed forces received little attention in previous constitutions, the generals' imprint on Egyptian politics has been deep and widespread. Egypt's four presidents came from the ranks of the armed forces. While the trend of direct military participation in politics has been on the decline since 1967, the army continued to be a powerful political institution and an economic powerhouse. The stature and public support of the officers grew during the eighteen tumultuous days that led to the ousting of Mubarak. Many Egyptians saw the army as a main pillar of state stability and national security, an image that the regime controlled media carefully nurtured. The Supreme Council of the Armed Forces (SCAF), Egypt's governing junta since Mubarak's departure, has tried to seize its elevated position to institutionalize military power in the impending second republic.

The generals seem to understand that overt control over the political process is unfeasible and will be met with tremendous opposition at home and abroad. Therefore, they seek to influence the writing of the constitution to guarantee three main objectives: ensure the institutional autonomy of the armed forces away from the elected officials and particularly the parliament; maintain the army's financial independence and the privileges of senior staff with minimal

The generals seem to understand that overt control over the political process is unfeasible and will be met with tremendous opposition at home and abroad

intervention from the state; and safeguard a voice in the policy making process through the establishment of a national security council with strong military membership.

To accomplish these objectives, the SCAF has been trying to influence the selection of the constituent assembly that will draft the new constitution. Article 60 of the March 30<sup>th</sup> Constitutional Proclamation, which governs the transition period, bestowed on the parliament the exclusive task of selecting the constituent assembly. According to this provision, the elected members of the first People's Assembly and Shura Council will meet in a joint session within 6 months of their election to elect a 100 member constitutional assembly. This assembly will prepare a draft constitution within 6 months.<sup>1</sup> Citizens will vote on the draft constitution in a referendum. This original timeline has been condensed to accommodate popular demands for timely transfer of power to an elected president by June 30. The new timeline gives the assembly just over a month to finish their daunting task.

The generals exhibited second thoughts about entrusting the parliament with this critical function. The generals worry that a democratic constitution might institutionalize civilian control over the military for the first time since the establishment of the republic. The SCAF has been experimenting with different ideas to achieve their objectives. One idea, which further heated Cairo's already warm summer, was to engrave "supraconstitutional principles" that will be binding on the constituent assembly. This proposal, presented by Deputy Prime Minister Yahya al-Gamal, was met by uproar from all Islamic parties and some liberal forces. They regarded such stipulations as an intrusion on the rights of the elected representatives. After massive protests, the generals yielded and the idea was put to rest. The matter surfaced again a few weeks before the due date for the elections in November 2011. Al-Gamal's successor, Ali al-Selmi, a well-known liberal academic of the *Al-Wafd* party, circulated another suite of supraconstitutional principles. These principles, officially known as the "Declaration of the Fundamental Principles of the New Egyptian State," but was popularly dubbed as the "al-Selmi Communiqué," had some intriguing provisions regarding the role and political power of the armed forces. Most experts believe that the SCAF added these principles to the document. Articles 9 and 10 of the document stipulated:

(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 defend constitutional legitimacy. It is not permissible for any body, organization or party to form military or paramilitary bodies. The Supreme Council for the Armed Forces is 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 Supreme Council for the Armed Forces is also exclusively competent to approve all bills 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 defense is the general authority of the armed forces. The President of the Republic declares war after the approval of the Supreme Council for the Armed Forces and of the People's Assembly has been obtained.

(10) A "National Defense Council" is established and is presided over by the President of the Republic. It is responsible for examining all matters relating to the country's security and safety. Its other responsibilities will be determined by law. The defense of the nation and its territory is a sacred obligation. The military draft is obligatory in accordance with the law. General mobilization is also organized in accordance with the law.<sup>2</sup>

Enacting such a document would have meant the following significant changes to Egypt's traditional constitutional practices:

- Entrusting the military to "defend constitutional legitimacy" implies a constitutional right to intervene in the political processes, as the generals deem fit to 'correct' the deviations of elected civilians.
- Giving the SCAF exclusive oversight over the defense budget and conceivably all military appointments outside the oversight of the nation's elected politicians.
- Giving SCAF a veto over legislation related to the military and declaration of war.

To achieve these objectives, the Communiqué sought to control the composition and functions of the 100-member constituent assembly. The al-Selmi Communiqué sought to strip the parliament off this vital task. According to this plan, MPs will comprise only twenty percent of the constituent assembly, with the remaining members chosen from the ranks of judges, university professors, the Coptic Church, al-Azhar, labor unions, and an array of other state-controlled institutions.

The generals and their advisors wanted such arrangements to lead to one of the following three outcomes. First, the appointed members of the constituent assembly by virtue of their sheer majority will be able to subdue the elected-members. The end result would have been a constitution that reflects the interests and aspirations of the military establishment. Second, the constituent assembly reaches a deadlock with the committee unable to agree on a draft.

If the committee fails to reach an agreement on a draft of the new constitution within six months, the Communiqué granted the SCAF the authority to name a new committee of its own choosing. The only commonsensical outcome of such a handpicked committee is a document that is highly favorable to the generals. Third, the Communiqué grants the generals what is equivalent to a veto power. The Communiqué mandated that should the proposed constitution contains articles that flout the constitutional declarations (issued by SCAF), the constituent assembly is obliged to revise them or the SCAF can refer the unsettled matters to the regime-dominated Supreme Constitutional Court, which will issue a binding judgment.

Regardless of which scenario was likely to take place, the only possible outcome was a constitution that is made in the generals' image. A Constitution that enshrines the army as a state within if not above the state and restricts the role religion plays in the polity and society. Naturally, this flagrant infringement was met with overwhelming opposition. The Freedom and Justice Party (FJP), the political wing of the Muslim Brotherhood, and other Islamist parties alongside many leftists, nationalists, and some liberal parties called for another mil-

**Generals are keen to create a constitutional system that mirrors the Turkish constitutional arrangements before the democratization reforms in recent years, initiated partly under the incentives created by the EU process**

lion-man march in Tahrir Square on Friday November 18<sup>th</sup>. Hundreds of thousands of protestors poured into the square and other Egyptian cities in show of force unmatched since the early days of the January 25<sup>th</sup> Revolution.

After the protest ended, scores of the Revolution's victims and their families and supporters decided to camp in Tahrir to draw attention to

their suffering. The generals ordered the security forces and the army to violently break the sit-in. Many were outraged by the regime's brutality and came in large numbers to defend the square. A weeklong violent clash between the protesters and the police forced the SCAF to abandon the controversial proposal and to relieve al-Selmi from his post but not before several dozen protesters were killed and hundreds were injured. These decisions helped to calm the street for the first round of the elections, which took place with great fan fare and high turnout. After the Islamist parties' strong showing in the first round of the elections, the generals established a thirty-member Advisory Council, yet another attempt to sell old wine in new bottle.

In a press brief to foreign correspondents in Cairo, SCAF member Major General Mukhtar Mulla stated again that the ruling junta would have the final

say on the constitution. He also seemed to hint that the new Advisory Council would play a role in the selection of the constituent assembly, on the pretext that this would make the assembly more representative and balance the impact of Islamists' success at the polls.<sup>3</sup> The FJP, which most analysts believe will emerge as the largest party in the new parliament, pulled its representatives out of the Advisory Council. The Generals recoiled, at least for the time being. Major General Mamdouh Shahin, the SCAF chief legal advisor, went on record to maintain that the advisory council, the government or the SCAF will have no role in selecting members of the constituent assembly and this recent controversy was put to rest.<sup>4</sup>

**It is unlikely that the generals will give up altogether their efforts to influence the process of constitutional writing**

It is quite certain that generals are keen to create a constitutional system that mirrors the Turkish constitutional arrangements before the democratization reforms in recent years, initiated partly under the incentives created by the EU process. Under such arrangements, the army command in collaboration with their allies in other state institutions like the Supreme Constitutional Court, their protégées in the media, and 'friendly' political parties can influence the electoral contestation process. Toward this, the generals have been trying to engineer the



A man walks past graffiti near Tahrir Square in Cairo on December 21, 2011. Tahrir Square and the surrounding streets were quiet throughout the night for the first time in a week. The graffiti reads "Down with the military council, the thief" and "Tear gas and bullets, thanks God".

establishment of puppet political parties and sought to coax a fractured parliament with no single party commanding anything near a majority.<sup>5</sup>

In a telling statement, General Shaheen offered a glimpse into the military's mindset, when he declared: "We want a model similar to that found in Turkey ... Egypt, as a country, needs to protect democracy from the Islamists, because we

**Egyptian constitutions prior to 1971 rarely devoted much attention to the role religion plays in the state**

know that these people do not think democratically."<sup>6</sup> Ironically, this is the same worn out justification that has been incessantly churned out by Mubarak, Ben Ali, and other Arab dictators to legitimize despotism and tyranny for decades. Incidentally,

what the army legal advisor intended by the "Turkish model" was not its latest version, but the pre-AKP model that undermined Turkish democracy for decades.<sup>7</sup>

In any case, it is unlikely that the generals will give up altogether their efforts to influence the process of constitutional writing. The generals are expected to try to sway the selection of the constituent assembly, the procedures the assembly will apply, and the final draft of the constitution to maintain their institutional power. The issue of civil-military relations is not settled. The levels of influence the generals envisage for themselves, however, seem to be larger than what most Egyptians are willing to accept. Arguably, nevertheless, complete civilian control over the armed forces similar to consolidated democracies will have to wait. What is likely to emerge is a constitution that enshrines a high degree of institutional autonomy for the armed forces but maintain some control mainly through the presidency.

**Religion and the State**

The Egyptian society is a very homogeneous society. Roughly 99.6% belong to the same ethnicity (Arab) and about 90% subscribe to the same religion (Islam). Coptic Christians comprise 9% of the population and other Christians make up the last 1%. Muslims and Christians coexisted peacefully for most of Egypt's history. Religious tensions started to surface in the late 1970s. While national unity proved exemplary during the long struggle against Mubarak with Christians protecting Muslims during Friday prayers and Muslims shielding Christians during mass, many unfortunate instances of religious strife erupted since the fall of Mubarak. These religious tensions highlighted the role religion plays in the society and brought religion to the locus of the debate about citizens' rights and liberties in the new constitution.



Egyptian constitutions prior to 1971 rarely devoted much attention to the role religion plays in the state. The first constitution of Egypt in 1882 was silent about religion altogether. Article 149 of the 1923 Constitution maintained that “Islam is the religion of the state, the Arabic language is its official language.” Surprisingly, this principle came under Part 6: General Rules, and seems to be an afterthought rather than an integral component of the constitution. The same was for the ill-fated 1930 constitution where the stipulation about Islam came in Article 138.

The July 1952 Revolution had even less emphasis on religion. The February 1953 Constitutional Proclamation omitted any reference to the religion of the state. The provision was restored in the 1956 Constitution. Article 3 stated: “Islam is the religion of the state, the Arabic language is its official language.” However, this mention was omitted in the 1958 Constitution, following unity with Syria, to be restored word for word in the 1964 Constitution. During Nasser’s era, Arab nationalism rather than religion ruled the street and captured the imagination of the masses. This changed after the Six Day War dealt a major blow to Nasser’s Arab Nationalism and religion came to the forefront.

The 1971 Constitution exhibited more emphasis on Islam as part of Sadat’s legitimization strategy.<sup>8</sup> Article 2 stated, “Islam is the religion of the state, the Arabic language is its official language, and the principles of Islamic Sharia are *a* main source of legislation.” This article was amended on May 22, 1980, which reads: “Islam is the religion of the state, the Arabic language is its official language, and the principles of Islamic Sharia are *the* main source of legislation.” Now the principles of Islamic law became the main source of law, instead of one among a number of other main sources. The March 2011 Constitutional Proclamation copied this proviso verbatim.

The role of Islam in the polity, however, has been subject to intense debate in the past few months. At one end of the spectrum, the minority Christians and secular Egyptians want a religion-neutral constitution that omits any reference to Islam. At the other end are the conservative Muslims who want Sharia to take center-stage in the polity and society. Many Egyptians, however, are somewhere in-between these two positions. They want Sharia to be part of the constitution but not overshadow it. Most likely, Article 2, in its current format or something very similar, will likely remain in Egypt’s next constitution,

The constitutional engineering of the new political system needs to tackle the pivotal questions pertaining to the nature, powers, and composition of the presidency, the legislature, and the courts

maybe with some guarantees for the Christian minority. The electoral gains of Islamic parties, however, will make the codification of such constitutional principles a lively debate at least in the foreseeable future. The constitution might also provide stronger guarantees for citizenship and equality to soothe the fear of non-Muslims and secular Egyptians.

## The Nature of the Political System

Ever since *Narmer* unified the two kingdoms in c. 3100 BC, Egypt has been largely ruled by a single leader, where the chief executive, regardless of his title pharaoh, king, prince, Khedive, or president, commanded overwhelming power. The only exception was a brief experiment with parliamentary government between 1923-1952. The constitutional engineering of the new political system needs to tackle the pivotal questions pertaining to the nature, powers, and composition of the presidency, the legislature, and the courts.

### *The Presidency*

Since 1952 the presidential system has taken root. The presidency commands a great deal of power and prestige. Consecutive constitutions endowed the presidency with vast powers, including but not limited to:

- Dissolve the two houses of parliament;
- Appoint 10 members to the Peoples' Assembly and a third of the Shura Council;
- Appoint and remove from office high ranking officials including the prime minister, ministers, civil and military officials and diplomatic representatives;
- Chair the supreme councils of the armed forces, the police and the judiciary;
- Lay down the general policy of the state and supervise its implementation;
- Issue decrees having the force of law and veto laws;
- Call for referendum on important matters bypassing the representative assemblies altogether;
- Proclaim a state of emergency and declare war;
- Grant amnesty or commute a sentence.

These imperial powers put the presidency above all other state institutions. As one scholar appraised this power, "The Egyptian Constitution gave the president of the Republic a curious mixture of powers. He practically had powers

equivalent to those of the prime minister in the British system and to those of the president of the French Fifth Republic.”<sup>9</sup> Nathan J. Brown put it nicely, when he assessed the 1971 Constitution: “The result was a document that promised a little bit to everybody -- but everything to the president.”<sup>10</sup>

Other than the widespread dislike of the old oppressive regime, there is no agreement about the political future of the country. Intellectuals, politicians, and activists have different opinions about which system of government will be most suited to achieve the dual objectives of maintaining liberty and ensuring stability. Would Egypt continue to function as a presidential system, something along the lines of the US model? Would it move into a Westminster form of government? Or would it create a semi-presidential system similar to France?

Each proposition has its merits and supporters. It appears that the generals in the Supreme Council of the Armed Forces are well disposed to some form of continuity of the presidential system of government. Statements by SCAF members repeatedly indicated, “Egypt is a presidential system.” Some argued that the generals believe they have a better chance influencing the choice for the presidency than the parliament which Islamist groups are likely to dominate. Many in Egypt suspect that the SCAF will try to sway popular sentiments toward a candidate with a military background or at least someone who is friendly to the military establishment. The SCAF also might find comfort in the division of powers between the executive and the legislative branches that a presidential system creates. Among this camp also there are a number of secular forces that hope a strong presidency could provide a counterbalance to the Islamist majority in parliament.

On the other end of the spectrum, the FJP, the largest party in the new People’s Assembly, advocates the creation of a full parliamentary constitution, where the president would have symbolic or limited powers. The main powers would be concentrated in the hands of the prime minister who commands the majority in parliament; “Our manifesto believes that the parliamentary system (in the long term) is most suited to the conditions of the country.”<sup>11</sup>

In between these two ideal types, some argue for a middle-of-the-road alternative. The semi-presidential system will empower the parliamentary majority to select a government accountable before it but will entrust the president with some real powers. One idea is to follow the division of power in

**The FJP, the largest party in the new People’s Assembly, advocates the creation of a full parliamentary constitution, where the president would have symbolic or limited powers**

France during cohabitation where the presidency controls foreign affairs and the cabinet takes charge of domestic policies.

It is my understanding that a form of semi-presidential system is likely to prevail at least in the short run. It would be rather hard to completely depart from the age-long tradition of presidential power perceived as a guarantee for

**The vice-president selection procedures would depend on the prerogatives granted to the office of the presidency and the line of succession**

stability. Nevertheless, it will also be difficult to maintain the imperial presidency with its history of despotism untouched. Even the strong advocates of parliamentary government admit that the sorry state of affairs inherited from 60 years of repressive governments mandate a delay in embarking on full-fledged Westminster type of government. The FJP manifesto, while clearly favoring such an arrangement, maintained “However, the most fitting system for Egypt during this transitory period in the parliamentary-presidential system.”<sup>12</sup> In this, there is an agreement between the FJP and its sharp critics. The Egyptian Social Democratic Party manifesto argues for:

Establishing a mixed presidential-parliamentary system as the most fitting for the current affairs of the country. The unrestrained presidential system will reconstruct the concentration of power in an authoritarian presidency, while the parliamentary system under the current conditions might lead to political instability because of the decades of the absence of party and political life.<sup>13</sup>

Establishing a mixed presidential-parliamentary system as the most fitting for the current affairs of the country. The unrestrained presidential system will reconstruct the concentration of power in an authoritarian presidency, while the parliamentary system under the current conditions might lead to political instability because of the decades of the absence of party and political life.<sup>13</sup>

Related to this is the discussion of presidential term, which carries political and symbolic significance because presidents tend to accumulate more powers with longevity in office. The 1971 Constitution originally set the term limit at two of six years each. In 1980, Sadat, who was reaching the end of his second term, amended the constitution to remove the term limits. While Sadat did not benefit from this change, Mubarak was elected to unprecedented five terms. There is a general agreement to set a term limit for future presidents. Article 29 of the March Constitutional Proclamation states “The term of the Presidency is 4 Gregorian years starting from the date of the announcement of the result of the elections.” Some have argued that 4 years seem to be too short for the president to fulfill his programs and are advocating lengthening the term to 5 years. Most likely, the incoming constitution will keep the two-term limit as precautionary measure against the emergence of another imperial president.

Another matter related to the presidency is the issue of appointing vice-president(s). Previous Egyptian Constitutions did not mandate such a position.

Article 139 of the 1971 Constitution stated: “The President *may* appoint one or more vice-presidents, define their mandates and relieve them of their posts.” Nasser and Sadat kept the tradition of appointing a vice-president to ensure continuity at the helm. Mubarak, on the other hand, never appointed a vice president during his 30-year reign. Many speculate that the deposed president’s decision was due to his fear of the emergence of an alternative threatening power and his effort to pave the way for Gamal Mubarak’s presidency. There is a convergence among Egypt’s political elite that appointing a vice president is ideal to ensure continuity and stability at the helm. This is reflected in Article 31 of the March Constitutional Declaration which maintains: “The President shall, within at most 60 days of exercising his powers, appoint one or more vice presidents, the responsibilities of whom the President shall determine. In the case that a vice-president is dismissed from office, the president shall appoint a replacement.”<sup>14</sup>

It seems reasonable to speculate that the permanent constitution will mandate the office of vice president. The main debate will center on the vice-president selection procedures and the powers assigned to him. One idea is to follow the US model of electing the president and vice-president on a single ticket. Followers of this view argue that the vice-president should assume the presidency in the case of removal, death, resignation or inability of the president to perform his duties. Hence, the public should confer popular legitimacy through the electoral process. The alternative opinion gives the elected president the authority to appoint one or more vice presidents and remove them from office at-will. Supporters of such stand argue that the president should be able to select officials who can help him perform his duties. A middle of the road solution is to allow the president to select a vice-president or more with the approval of the parliament.

It is my contention here that the vice-president selection procedures would depend on the prerogatives granted to the office of the presidency and the line of succession. If Egypt continued its tradition of strong presidential power it will be logical to devise procedures that will allow the public or their representatives an input in the selection process. On the other hand, if Egypt would move to a form of parliamentary system, a few will be deeply concerned with the appointment procedures of the vice president. Besides, if the vice-president will be first in the line of succession, this will necessitate curtailing presidential discretion in the appointment process. However, if the vice president is conceived as an assistant to the president without special claim to the highest office presidential control over the selection process might be accepted.

**Egypt’s electoral procedures  
have witnessed many twists  
and turns in recent history**

*The Parliament*

Egypt's first representative assembly established shortly before the British occupation of Egypt in 1882 was unicameral. This practice continued until the drafting of the 1923 Constitution, which moved Egypt into a bicameral legislature of a Senate and a House of Representatives. The constitution adopted the principle of equal competences for the two houses with a few exceptions. These bicameral arrangements lasted until the July 1952 Revolution. Nasser moved Egypt again into a unicameral legislature. The 1971 Constitution maintained the same practice entrusting the People's Assembly with the sole legislative authority. This lasted until 1980 when Sadat amended the constitution and enshrined the Shura Council.<sup>15</sup>

The constitutional amendments and the constitutional proclamations in 2011 continued this practice of bicameral legislature, even though many intellectuals and politicians advocated the amputation of the Shura Council. While this issue was not highly visible during the transition process it will resurface during the process of constitutional drafting. It could be argued that the FJP is in favor of a unicameral legislature to decrease the fragmentation of the political process and ensure the ability of parliamentary majority to swiftly draft and implement legislation. On the other hand, minority parties might see advantage in a bicameral legislature that restrain the majority in the lower house. While it is too early to predict, it seems reasonable to forecast that the new constitution will continue

Female representation is another issue related to the composition of the legislative assemblies

the practice of bicameral legislature, albeit with structural changes to the composition and prerogatives of the Shura council. The 1980 Constitutional Amendments and the 2011 Constitutional Proclamation gave the

president of the republic the authority to appoint a third of the members. This practice is likely to be met with opposition from many political forces in Egypt. Furthermore, if not abolished, the powers of the upper house could be expected to grow from the modest generally advisory role to the position of a junior partner in the legislative process.

The election processes for the parliament is also debatable. Egypt's electoral procedures have witnessed many twists and turns in recent history. In the 1980s, Egypt experimented with proportional representation for all or part of the seats on the People's Assembly and the Shura Council. However, successive SCC rulings rendered this unconstitutional. All elections in the 1990s and 2000s were conducted via a first-past-the-post system with a second-round run-off to secure the majority of the votes. The first post-Mubarak election is conducted through a mixed electoral system that is comprised of individual candidates in majoritarian

two-member districts (one-third of the total seats) and proportional representation of closed party lists (two third of the total seats). These complex electoral rules are likely to be revisited during the process of constitutional drafting. Any proportional representation needs to be constitutionally mandated as the established jurisprudence of the SCC ruled such provisions unconstitutional on the ground it discriminates against individual candidates.

Another bone of contention centers on the unusual stipulation of 50% occupational quota for farmers and workers. In the height of Nasser's socialist policies in the 1960s, this quota for "workers and farmers" serving in the parliament was constitutionally mandated.<sup>16</sup> The logic was to ensure enough participation from the majority of Egyptians who were manual workers. In practice, this provision was continuously distorted to favor ruling party candidates and genuine farmers and workers seldom ran or got elected.<sup>17</sup>

The SCAF preferred to postpone this predicament and kept the quota for the parliamentary elections. Many want Egypt's incoming constitution to abolish this practice altogether allowing citizens to compete on equal footing for parliamentary seats. Advocates of such an opinion argue that this quota is undemocratic and outdated.<sup>18</sup> Leftists, however, agree that the application of this quota has been lacking but seek to amend it to guarantee the genuine representation of farmers and workers in parliament. While the jury is still out about this quota, it seems that even the backers of this provision admit it needs to be modified.

Female representation is another issue related to the composition of the legislative assemblies. The women quota was implanted for the first time during the 2010 elections. The ill-fated parliament lasted only for a period of three months and was dissolved by the SCAF shortly after they took power on February 11, 2011. The constitutional proclamation and the amendments of the Political Participation Law in 2011 removed the allocated seats for females, replacing it with a provision to include at least one female in each party list.<sup>19</sup> In practice, however, almost all parties positioned female candidates on the bottom half of the lists, reducing their chances of success. This is particularly true because in all likelihood no party list would gain 50% of the votes in any district. The expected extremely small number of female MPs would likely bring this issue to the forefront during the constitutional drafting process. In a traditional society like Egypt, it is exceptionally hard for a female candidate to overcome the societal prejudices in most districts outside the large cities. While the rhetoric of all parties, liberals, Islamic, and leftists are supportive of female representation

All political parties are supportive of protecting and expanding the institutional and behavioral independence of the courts

**The process of political transition to democracy and the rule of law started and writing a constitution is an integral component of it**

in the nation’s legislative assemblies, actions have been lacking. With some coordinated pressure, however, it seems reasonable that the constituent assembly might be inclined to amend the electoral procedures to ensure some women representation. It is un-

likely that the quota system will be restored but mandating ranking female candidates high on the parties’ lists might go a long way to provide Egyptian females with a necessary voice in the nation’s democratically elected legislative bodies.

Another issue about the electoral procedures is related to Egyptian expatriates. The estimates for the number of Egyptian overseas vary considerably, but the conservative estimates put it at several millions. Historically, Egyptian constitutions and legislation were silent on this issue. Most Egyptian expatriates were also not very keen to participate in elections, as the results were predetermined. This changed dramatically after the end of the Mubarak era. The March Constitutional Proclamation remained quiet on that matter. A number of Egyptian expatriates filled a lawsuit against the SCAF and the Election Commission. The Administrative Court ruled in their favor, mandating voting rights to Egyptians overseas.<sup>20</sup> Almost certainly this issue will come up again during the drafting of the Constitution, especially regarding creating “overseas districts” to enable expats to elect their own representatives rather than voting for candidates from their original districts in Egypt.<sup>21</sup>

*The Judiciary*

The modern Egyptian legal system was established in the 1870s, and modeled on the civil law legal system of continental Europe. Egypt has three different judicial institutions: the Supreme Constitutional Court (SCC) with the exclusive power of judicial review, the Council of State that deals with administrative disputes where the government or one of its subsidiaries is a party, and lastly the Courts of General Jurisdiction which adjudicates civil, criminal, commercial, and family cases. Historically, the judiciary enjoyed a relatively high degree of institutional independence, which enabled the courts to be the most liberal element of the Egyptian state in the last few decades.<sup>22</sup>

All political parties are supportive of protecting and expanding the institutional and behavioral independence of the courts. It is safe to assume that the next constitution would further enshrine the independence of the courts and expand their power and prestige. The constitution will also tackle the issues of exceptional courts (state security, military.... etc) that infringed on ordinary courts’ jurisdiction and violated citizens’ rights and liberties. One issue is likely



to generate some intense debate: the selection of Supreme Constitutional Court justices and chief justices. Under Mubarak, the president of the republic had a freehand in appointing the chief justice while justices were appointed by the president from nominations by either the court's general assembly or the chief justice. When the SCC issued a number of liberal rulings that threatened the regime's basic interests, Mubarak used his appointment powers to implement a court-backing plan that changed the court's liberal majority with justices loyal to the regime. Of the 19 justices who currently serve on the SCC, 13 including the chief justice were appointed since late 2001. It was noticeable that one of the first decisions of SCAF was to change the legislation of the court to allow the selection of the chief justice through seniority from within justices currently serving on the court. The generals believe that this provision will function as an insurance policy against the elected governments in the future. It is not far-fetched to assume that the parliamentary majority would be interested in having a say in who sits on the high bench. The selection procedures of the SCC are likely to be debated in the constitute assembly.

## Conclusion

Anyone who would have argued a year ago that Egyptians would be immersed in these complicated matters of constitutional engineering would have been rejected out of hand as either uninformed or a wishful thinker. Nevertheless, the process of political transition to democracy and the rule of law started and writing a constitution is an integral component of it. Transition is a complicated and even turbulent political process with many setbacks. Egypt's political future hangs in the balance at this critical juncture. Egyptians need to come to terms about the nature of the political system in the second republic.

The three issues of civil-military relations, religion and the state, and the nature of political systems are critical to Egypt's political future.

As for the role of the army in politics, exempting the generals from all civilian control would undermine the democratic future of the nation. On the other hand, ensuring full civilian control over the armed forces, as the case in established Western democracies, seems difficult at least in the short term. The safer and more realistic route is creating a constitutional design that ensures a degree of political accountability but maintains the institutional independence of the armed

**If the largest Arab country is able to attain democracy and political stability, this will provide greater incentive for other young men and women yearning for liberty in the other basins of tyranny in the region**

forces. This can be achieved through a collaborative decision-making process in which a national security council that includes both officers and policy and is instrumental in matters related to national defense broadly defined.

In terms of the role of Islam in politics there is also room for compromise. Most Egyptians, while they want their religion to be part of the political process and the constitutional framework, are not supportive of an Iranian-style theocratic state. Article 2 could be maintained with an added provision that guarantees the rights of non-Muslim Egyptians to be treated equally. A number of different proposals have floated around over the past few months, and, with some fine tuning, a compromise that satisfies most Egyptians could be reached.

As for the nature of the political system it seems that there is a convergence among the main political players about a variant of a French style semi-presidential system. The structural details about the composition, powers, and terms can all be negotiated to reach a common ground. While I am not arguing that this critical matter is going to be easy, it could be done with a bit of imagination and benefiting from the experiences of similar constitutional redesigning in the recent past.

Egypt's constitutional design is not only vital for its political future and development but also for the broader Arab world. If the largest Arab country is able to attain democracy and political stability, this will provide greater incentive for other young men and women yearning for liberty in the other basins of tyranny in the region. Negotiating Egypt's democratic future is not going to be easy or swift and setbacks will happen. Nevertheless, with accommodation and political maturity, many of the discrepancies discussed here can be solved and Egypt can embrace a political future drastically different from its long past.

## Endnotes

1. SCAF Chairman Field Marshal Tantawi's announcement on November 20<sup>th</sup> that the generals will surrender power to an elected president by June 30<sup>th</sup>, 2012 would mean that the drafting process of the new constitution would have to be drastically shortened. The Peoples' Assembly will convene in the second half of January and the Shura Council will hold its first secession on March 23, 2012. This basically gives the two houses of parliament roughly a sixty-day window to select a constitute assembly and write a constitution before the presidential election in June.

2. "Draft Declaration of the Fundamental Principles for the New Egyptian State," retrieved from [http://www.constitutionnet.org/files/2011.11\\_-\\_constitutional\\_principles\\_document\\_english.pdf](http://www.constitutionnet.org/files/2011.11_-_constitutional_principles_document_english.pdf).

3. *New York Times*, August 12, 2011.

4. *Ahram*, December 12, 2011.

5. This explains the insistence of the SCAF to ensure control over the government-owned media and their intimidation of independent media. The generals first appointed a fellow officer to run the state TV and Radio Conglomerate and when this was met with strong opposition, the generals restored the infamous Ministry of Information and appointed a trusted civilian to head it. When public opinion forced the SCAF to replace the minister of information, the generals selected

a fellow high-ranking officer to replace him. The SCAF also closed down the offices of Al-Jazeera Mubasher Misr, part of the Al-Jazeera network that provides 24/7 coverage of Egypt, and the military police harassed a number of anti-SCAF TV channels. The pressure and censorship led Egypt famous talk-show host Yosri Fouda to stop his show for a couple of weeks.

6. "The role of the army in Egypt's new politics," *Aljazeera*, September 30, 2011.

7. *Ibid.*

8. Raphael Israeli, "The Pervasiveness of Islam in Contemporary Arab Political Discourse: The Cases of Sadat and Arafat," Ofer Feldman and Christ'l De Landtsheer (eds.) *Politically Speaking: A Worldwide Examination of Language Used in the Political Sphere* (Westport: Praeger, 1998), p.22

9. Noha El-Mikawy, *The Building of Consensus in Egypt's Transition Process* (Cairo: AUC, 1999), p. 101.

10. Nathan J. Brown, "Egypt's Constitutional Ghosts," *Foreign Affairs Blog*, February 15, 2011.

11. <http://www.hurryh.com>

12. *Ibid.*

13. <http://www.egysdp.com>

14. "Egyptian Constitutional Declaration 2011," retrieved from <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>.

15. The powers of the Shura Council are rather restrained and generally advisory.

16. This Constitution also mandated workers' quota in other institutions. Article 26 stated, "The workers shall have a share in the management and profits of the projects. They are committed to the development of production and the implementation of the plan in their production units, in accordance with the law. Protecting the means of production is a national duty. Workers shall be represented on the boards of directors of the public sector units by at least 50% of the number of members of these boards. The law shall guarantee for the small farmers and small craftsmen 80% of the membership on the boards of directors of the agricultural cooperatives and industrial cooperatives."

17. The existing legal provisions define a worker simply as someone who is a dues-paying member of a labor union and receives his or her income solely from "manual or intellectual labor." Nevertheless, determining who falls into this category was the sole authority of the regime dominated labor unions. In many occasions, labor classification was granted to unqualified candidates and withheld for real working class candidates. The same could be said about farmers. According to the Parliamentary Elections Law, anyone whose source of income comes from farming, resides in the countryside and owns no more than 10 feddans (roughly 11 Acres) of land can run as a farmer. Local agricultural cooperatives, under the administration of the Agriculture Ministry, have been the only entities authorized to grant candidates the classification. The result was excessive manipulation and misuse that permitted notable family chiefs to run as farmers even though they owned much more land than the 10 feddans limit and/or resided in the cities for an extended period of time.

18. The number of worker/farmer candidates is historically much smaller than the professional candidates, giving an advantage to those who qualified for this classification a clear advantage to get elected. For example the Giza Fourth District had a total of 111 candidates, only 18 of them were worker/farmer candidates. The same was true for the Giza Second District with 22 worker/farmer candidates and 120 professional candidates.

19. The March 30<sup>th</sup> Constitutional Proclamation made women quota optional but the subsequent amendments on September 25<sup>th</sup> removed any reference to such matter.

20. Ruling No. 56257 of the 65 Judicial Year, issued on October 25, 2011.

21. In the Tunisia's elections shortly preceding Egypt's, the roughly one million Tunisian expats were granted 18 seats out of the 217 seats of the Constituent Assembly.

22. See for example: Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (New York: Cambridge University Press, 2007); and Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997).