

Beyond the Ballot Box: Egypt's Constitutional Challenge

Introduction

All eyes are on the ballot box as Egypt prepares for the second round of the first post-Mubarak presidential election on June 16-17, a controversial run-off between the Freedom and Justice Party (FJP, the party founded by the Muslim Brotherhood) candidate Mohamed Morsi and Hosni Mubarak's former Prime Minister Ahmed Shafik, two of the most polarizing candidates in the race who together won only 49 percent of the votes cast in the first stage of polling on May 23-24. Egyptians are now faced with a choice between Islamists—who already hold a parliamentary majority and now stand to gain control of two out of the three branches of government—and a symbol of the former regime and military establishment.

Against the backdrop of this historic electoral battle, much more is at stake than the country's highest office. While the election certainly represents a critical milestone, or perhaps a setback, in the consolidation of Egypt's nascent democracy, the campaign season has stolen the spotlight from an equally important process unfolding under the radar: drafting a new constitution to institutionalize and protect the freedoms envisioned by protesters in Tahrir Square. Not only will the rewritten constitution have a far-reaching impact on the structure of the future political system and the rights of Egyptian citizens, but it will undoubtedly resonate with other transitioning Arab countries that have long looked to Egypt's strong judiciary and constitutional tradition as a regional model.

Rafik Hariri Center for the Middle East

The Rafik Hariri Center for the Middle East studies political transitions and economic conditions in Arab countries and recommends US and European policies to encourage constructive change.

The stakes of the constitutional process could not be higher, yet the outcome appears increasingly uncertain. Parliament has failed to form a new constituent assembly after the initial 100-member body chosen in March—dominated by Islamists—was assailed by political and religious minorities as unrepresentative and promptly dissolved by a court ruling. After months of gridlock, the SCAF issued an ultimatum on June 5 giving political forces 48 hours to agree on new criteria for selecting the members of the constituent assembly, or the military council would make good on its threat to unilaterally issue a “constitutional annex” or reinstate the 1971 constitution—a proposal condemned by the FJP as an illegal infringement on the exclusive law-making authority of Parliament. Faced with an ultimatum, the FJP reluctantly reached an agreement with other political party leaders on June 7 that would require a 50-50 ratio of Islamist to non-Islamist members. Participants in the negotiations reported that the agreement—not yet made public—would reduce the number of assembly seats reserved for sitting MPs to 39 from 50 (a concession to

Mara Revkin is the editor of the Atlantic Council's blog, EgyptSource, a project of the Rafik Hariri Center for the Middle East. A 2009 Fulbright Fellow and Critical Language Scholar in Oman, Ms. Revkin is professionally proficient in Arabic and has previously lived in Jordan and Egypt. She is a member of the class of 2015 at Yale Law School, where she plans to pursue a Ph.D. in Arab Constitutional Development.

Yussef Auf is a sitting judge in the Egyptian judiciary and a 2012 Humphrey Fellow at American University's Washington College of Law. He holds degrees in Law and Islamic Studies from Cairo University, where he is currently pursuing a PhD in Constitutional Law and Political Systems.

non-Islamists seeking to curb the Islamist-dominated Parliament's influence over the assembly), and of these 16 would go to the FJP, 8 to the Salafi Nour Party, 5 to the centrist Wafd Party, 2 to the liberal Free Egyptians Party, 2 to the liberal Egyptian Social Democratic Party; and one each for the moderate Islamist Wasat Party, the Nasserist Karama Party, the Socialist Popular Alliance; the liberal Reform and Development Party and al-Gama'a al-Islamiyya's Building and Development Party. Of the remaining 61 seats, approximately 15 would be reserved for judges and constitutional scholars, 10 for revolutionary youth; 10 for unspecified "public figures," 7 for syndicates and labor union representatives; 7 for workers and farmers; 5 for al-Azhar (Egypt's state-sanctioned Islamic institution, but counted as part of the assembly's non-Islamist bloc) 4 for the Coptic Church; and 1 each for a representative of the police, the armed forces, and the ministry of justice. In another concession to non-Islamists who demanded a greater than 50 percent voting threshold to approve draft articles for the new constitution, the agreement requires consensus, or at the minimum, a 67 percent supermajority to approve each article.

While this compromise over the selection criteria was reached in time to preempt intervention by the SCAF, the agreement is already showing signs of strain over objections by non-Islamists to the classification of al-Azhar's five representatives as part of the "civil" bloc, which could deflate the representation of liberal and secular groups on the assembly. Furthermore, Islamists and non-Islamists are already disagreeing about the meaning of the 50-50 ratio. If the ratio is interpreted as applying only to party-based MPs rather than representatives from institutions outside Parliament, Islamists could easily obtain more than 50 percent of the seats if, for example, any of the revolutionary youth, constitutional scholars, or union representatives happen to be Salafis or members of the Muslim Brotherhood.

On June 11, the People's Assembly (lower house) approved a Constituent Assembly Law based on the agreement, which gives Parliament two months to select the 100 members of the assembly from the date of the law's implementation. Although the law states that the assembly "should be representative of all segments of Egyptian society to the fullest extent possible," it does not refer to the precise quotas outlined in the compromise between Islamists and non-Islamists. The law's ambiguity leaves the

constitutional process vulnerable to the same partisan disagreements that derailed the first Constituent Assembly in March.

Controversy over the constitutional process has been exacerbated by the charged political atmosphere surrounding the presidential election, as well as the anticipation of two game-changing decisions expected from the Supreme Constitutional Court (SCC) on June 14—one that could disqualify Ahmed Shafik just two days before the run-off and another that may lead to the dissolution of Parliament. Both outcomes are possible, and either one would radically reconfigure the current electoral process and the transitional roadmap itself.

- **Shafik's Candidacy in Jeopardy:** The SCC is reviewing the constitutionality of a controversial "disenfranchisement" law passed by Parliament in April that would bar former regime officials—including Ahmed Shafik—from running for public office. If the constitutionality of the law is upheld, Shafik's candidacy and the legitimacy of the entire election would be thrown into doubt.
- **Parliament in Danger of Dissolution:** The SCC is simultaneously reviewing a constitutional challenge to the hybrid electoral system used during the recent parliamentary elections, in which a third of the 498 elected seats in the People's Assembly (lower house) were decided by a single-winner individual candidacy system and the remaining two thirds were allocated through a party-list or proportional representation system. Independent candidates claimed the electoral system violated their constitutional right to equal opportunity by giving an unfair advantage to party-affiliated candidates, and experts believe they have a strong case based on historical precedent. Parliaments were dissolved in 1987 and 1990 after the SCC invalidated electoral laws on the basis of very similar constitutional challenges.

Crisis Over the Constituent Assembly

Egypt's transition was jolted by yet another crisis in March 2012 following the formation and subsequent dissolution of an Islamist-dominated Constituent Assembly chosen by a newly elected Parliament in which the Muslim Brotherhood and conservative Salafis held a 75 percent majority. During a joint session of the People's Assembly (lower house) and

Shura Council (upper house) on March 17, members of parliament voted to endorse a plan proposed by the Freedom and Justice Party (FJP) for the makeup of the 100-member assembly, to include 50 MPs and 50 representatives drawn from civil society, labor unions, and other institutions outside Parliament. On March 24, both houses of Parliament convened for another joint session to vote on over 1,000 nominees for the constituent assembly, in accordance with the FJP-proposed selection criteria. Although FJP leaders had repeatedly stated their commitment to forming a constituent assembly mirroring the full spectrum of Egypt's social and political forces rather than the composition of Parliament, the 100-member committee announced in late March included over 65 Islamists—dealing a blow to liberals, religious minorities and women who had hoped to have their voices heard at least in the constitutional process, after their disappointing showing in the parliamentary elections. Although Islamists won nearly 75 percent of the parliamentary seats in elections judged overwhelmingly free and fair, liberals, leftists and secular parties—occupying the remaining quarter of seats—have argued, perhaps undemocratically, that the election results do not reflect the true ideological makeup of Egyptian society, due to the superior campaign organization of the FJP and Salafi Nour Party and their alleged violation of electoral laws. Non-Islamists have insisted that the constituent assembly mirror the composition of society, rather than the election results.

Women, representing 49.8 percent of the Egyptian population held just 5 percent of the assembly's seats, while Christians occupied 6 percent. Three of the appointed women were either Brotherhood members or elected MPs from the FJP. The other two women were among only six Christians appointed to the assembly (Christians account for between 6 and 9 percent of the population according to government statistics, but independent estimates suggest the proportion could be higher than 10 percent). The two-seat overlap between the female and Christian minority blocs meant that their combined weight in the assembly was deflated to just 9 percent.

Not surprisingly, non-Islamist political forces, Christians, and even Egypt's official Islamic institution al-Azhar immediately cried foul and withdrew their representatives from the Constituent Assembly. By the end of March 2012, nearly one third of the committee's members had stepped down. The embarrassing wave of resignations culminated in

a game-changing administrative court ruling on April 10 that suspended the Constituent Assembly on the grounds that Article 60 of the interim constitution prohibits parliamentarians from electing themselves to the assembly. Although the Administrative Court's decision to suspend the assembly took a procedural rather than political angle, the lawsuit was clearly targeting the broader issue of the Islamists' domination of the Constituent Assembly. The FJP initially condemned the ruling as a politically motivated bid to curb Islamist influence over the constitution, but—in an implicit admission that Islamists had overplayed their hand—Parliamentary Speaker Saad al-Katatny (a leading Brotherhood member) eventually gave in to calls for the committee's dismissal and tasked Parliament with forming a new 100-member assembly.

The ruling sent Parliament back to the drawing board to reformulate the Constituent Assembly. Negotiations over the criteria and procedures for choosing a new assembly had reached a standstill by April 5, when the SCAF gave Parliament a 48-hour ultimatum to reach consensus on a plan of action. Under intense pressure from the SCAF, political forces agreed to a formula dividing the seats equally between Islamists and non-Islamists, which provided the basis of a new Constituent Assembly Law approved by the People's Assembly on April 11. However, the law deliberately sidesteps the controversy over the ratio of Islamist to non-Islamist members and makes no mention of the political party and institutional quotas that were at the heart of negotiations on the selection criteria. The ambiguous law does little to reinforce an already tenuous agreement that was not so much the product of consensus as it was a desperate bargain of last resort to preempt unilateral intervention by the SCAF. The high level of polarization between Islamists and non-Islamists will make it extremely difficult to agree on the 100 members themselves, even if the formula for their selection is accepted as neutral. For example, political forces may have agreed to reserve seven seats for union representatives, but they are likely to disagree sharply on how many Islamist union representatives can be included in that quota.

Meanwhile, the ruling SCAF may see an opportunity to exploit the conflict over the constitution to its political advantage. The SCAF's controversial proposal to issue a supplementary constitutional declaration clarifying the powers of the next president on the eve of the election—since deferred indefinitely over accusations of illegal

intervention in the transitional roadmap—is a troubling indicator of the military’s reluctance to relinquish its interim executive authority. Although the SCAF’s legitimacy deficit will make it nearly impossible for the military to influence the trajectory of the transitional period in the few weeks remaining before the inauguration of a civilian president, the SCAF has long been determined to build an unassailable legal firewall around the military’s political and economic privileges and may seek to negotiate with the dominant forces in the Constituent Assembly to protect these interests.

Egypt’s Transitional Roadmap: A Recipe for Gridlock

The current crisis over Egypt’s Parliament-chosen Constituent Assembly has its roots in the SCAF’s March 30, 2011 Constitutional Declaration—a military decree functioning as the interim constitution—which outlined vague parameters for drafting a new charter, based on nine amendments ratified by popular referendum. The interim constitution set the stage for a dysfunctional constitutional process in two ways: 1) requiring a sequence of events—parliamentary elections before the constitution—that many constitutional experts regard as a dangerous recipe for polarization; and 2) lack of clarity around the procedures for selecting the all-important Constituent Assembly, giving the parliamentary majority free rein to define the rules of the game.

The disintegration of Egypt’s ill-fated Constituent Assembly can be traced back to the transitional roadmap drawn by the SCAF last year. Under pressure to set a timetable for early elections and expedite a return to civilian leadership, the SCAF drew up a package of nine constitutional amendments that provided for parliamentary elections before the writing of a new constitution. With the help of the Muslim Brotherhood—the most organized political force that stood to capitalize on the comparative weakness of newer and liberal parties by holding elections as quickly as possible—the amendments were approved by a 77.2 percent majority in a popular referendum on March 19, 2011. The amendments were then incorporated into an interim constitution that was unilaterally issued by the SCAF eleven days later (also known the March 30 Constitutional Declaration). The interim constitution, which combined a

slightly modified version of the nine amendments with 53 Articles from the 1971 constitution, outlined a roadmap and timeline for the remainder of the transitional period that provided for parliamentary elections before the writing of a new constitution. Article 60 required that members of Parliament choose a 100-member Constituent Assembly within six months of their election. The committee was tasked with preparing a draft constitution within six months after that, and within 15 days of the completion of the draft the president was required to call for a popular referendum.

Critics of the SCAF’s transitional roadmap, including prominent liberal activist Mohamed ElBaradei and a number of legal scholars, objected strongly to the elections-first scenario, arguing that conducting elections in the absence of a legitimate constitutional framework could jeopardize the democratic transition. ElBaradei and others called for the reverse sequence, in which a constituent assembly would be formed before elections to allow for a longer transitional period overseen by an interim presidential council. Although proponents of a “constitution first” sequence cited concern for a neutral and non-partisan constitutional process, they also had a clear political interest in delaying elections as long as possible to allow nascent liberal and revolutionary groups time to catch up with the Muslim Brotherhood’s superior organizational infrastructure. While there is no guarantee that the “constitution first” sequence would have shielded Egypt’s constitutional process from politicization, Tunisia’s decision to draft a constitution before elections is cited as one of the factors contributing to its comparatively smooth transition. Tunisia’s constitutional process—expected to take a leisurely 18 months in comparison to the six-month timeframe originally given for drafting Egypt’s constitution—has been relatively free of the partisan and ideological disputes that have brought the Egyptian process to a standstill.

When the constitutional process begins before elections, no political group can reliably predict its representation in Parliament, and therefore all groups have an incentive to compromise before any one faction wins a majority. The Tunisian model is certainly not without its drawbacks. Forming a constituent assembly in the absence of an elected legislature can make the process more vulnerable to interference from the interim executive authority, as was

the case in Afghanistan under the transitional government of Hamid Karzai. But the virtues of the constitution first sequence would probably have outweighed its pitfalls in Egypt's case, where election results have now polarized the political map along ideological fault lines, making cooperation and consensus all the more elusive.

In addition to defining a transitional sequence that many critics would like to have reversed, the interim constitution contained a second stumbling block that set the stage for a crisis over the formation of the Constituent Assembly: ambiguous procedures that left Parliament to define the rules of the game. The interim constitution did little more than outline a skeletal sequence of events culminating in a new constitution, leaving a multitude of pressing questions unanswered. Would the members of the assembly be chosen from within Parliament or outside? What criteria would govern the selection of Constituent Assembly members? And most importantly, was the assembly meant to reflect the political composition of Parliament, or the makeup of Egyptian society as a whole? The interim constitution's silence and ambiguity on these key procedural questions gave the Islamist-dominated Parliament ample room to define the rules of the game and form a constituent assembly in which liberals, religious minorities, and women were underrepresented relative to their weight in the population.

The High Stakes of Egypt's New Constitution

What is at stake in the process of writing Egypt's new constitution and why is it such a polarizing issue? Egypt has a long and proud history of drafting constitutions that include explicit protections for civil liberties, political rights, and equal citizenship under the law regardless of gender or race. Although Egypt's 1971 charter—now superseded by the SCAF's constitutional declaration—was, at least on paper, considered one of the most liberal in the region, the problem was that its contents were not respected or implemented by previous governments. Since Egypt won independence from British colonial rule in 1922, a succession of kings and authoritarian presidents starting with Sultan Fouad and ending with Hosni Mubarak have warped Egypt's constitutional framework with illiberal interpretations and amendments aimed at consolidating executive power and marginalizing political opposition.

Now, a year and a half after the popular uprising that ousted Mubarak, Egyptians face a historic opportunity to fundamentally restructure their political reality through the drafting of a new and more democratic constitution that protects their rights and constrains the exercise of state power. The stakes of this process could not be higher: Egypt's next constitution will need to address revolutionary demands for a new social contract that redefines the relationship between citizens and the state as well as between military and civilian institutions. Toward this end, the Constituent Assembly will bear responsibility for negotiating a compromise on the following points of disagreement:

- **A Reconfigured Balance of Power:** Islamists and non-Islamists agree almost universally on the need to scale back presidential powers in the new constitution, but they hold different views on the ideal distribution of authority between the executive and legislative branches. The Brotherhood has historically advocated a shift to a full parliamentary system in which the presidency would be downgraded to a largely ceremonial role and the elected legislature would have the authority to appoint and dismiss ministers. But more recently—in an apparent effort to diffuse fears of an Islamist monopoly on state institutions—the Brotherhood has expressed receptivity to a semi-presidential or hybrid system resembling the French model, in which Parliament would appoint a prime minister and the cabinet ministers overseeing domestic portfolios, while the president would control foreign policy and national security. The Freedom and Justice Party is most likely to pursue this hybrid system over the short-run, particularly if the Brotherhood's candidate, Mohamed Morsi, wins the presidency. But FJP leaders have also explicitly stated their long-term goal of transitioning to a pure parliamentary system, and will work to enhance the powers of the legislature in the new constitution. Under the 1971 constitution, Parliament was able to override a presidential veto and pass legislation on its own by a two thirds supermajority, a provision that did not carry over into the interim constitution. Islamists are keen on reinstating this provision in the new constitution, to limit the next president's ability to obstruct their legislative agenda.

Meanwhile, many liberals and leftists—wary of ceding too much power to the Islamist majority in Parliament—would prefer to retain the current presidential system and simply introduce new limits on executive power. Proponents of a pure presidential system argue that a strong executive is necessary to prevent the Parliamentary majority from infringing on the rights of minorities, and to preempt the policy making gridlock that can result when executive powers are shared between two branches of government. But with Islamists already firmly entrenched in Parliament and the possibility that the FJP candidate Mohamed Morsi will win or at the very least make a strong showing in the run-off round of the presidential election, it will be very difficult for proponents of a pure presidential system to make their case. The Constituent Assembly will need to reach a compromise that introduces some checks on presidential appointments while preventing domination by a parliamentary majority.

- **The Role of Islamic Law:** The role of religion in the constitution is a point of contention between Salafis and other conservative Islamists who favor the application of Sharia law and non-Islamists who are opposed to any expansion of the existing religious clauses. Article 2 of Egypt's current interim constitution and the 1971 charter on which it is based already identifies the Islamic Sharia jurisprudence as "the principal source of legislation," but liberal and secular political forces are concerned that the Islamist majority could amend this language to strengthen the role of religion in political life. Some Salafis have proposed inserting the word "rulings" into the existing text, which would mean that concrete legal precedents in Sharia law—not just amorphous principles—could be used to justify the Islamization of Egyptian criminal and civil law. Some non-Islamists, on the other hand, have recommended replacing the word "the" with the indefinite article "a," which would make Sharia principles only one among other possible sources of legislation. However, fears that the new constitution will be significantly Islamized are not likely to materialize, as the Muslim Brotherhood has already offered assurances that it will not seek to further enshrine Islamic legal principles into the new charter, beyond the existing formula in Article 2. Even leaders of the conservative Salafi Nour Party have acknowledged that

they will agree to preserve the current text of Article 2 if this is the only wording acceptable to all political forces.

A more realistic concern is that the Article 2 language—ambiguous enough to convey a range of different meanings—would be interpreted by an Islamist-dominated Parliament to advance more socially conservative legislation. The role of religion and Sharia in Egyptian society will be determined to a large extent by how law-makers choose to interpret religious clauses in the constitution that will most likely replicate the existing language of Article 2. However Parliament and the next president choose to interpret the constitution in proposing and implementing new legislation, the Supreme Constitutional Court's interpretation must be respected as authoritative and final, guaranteeing the judiciary's veto power over unconstitutional laws.

- **The Status of the Military:** Since the start of the transitional period, the SCAF has been lobbying for the inclusion of special provisions in the new constitution—including the controversial "supra-constitutional principles" proposed by Deputy Prime Minister Ali al-Selmi in November 2011—that would potentially shield the military's budget from parliamentary oversight, give the SCAF veto power over legislation pertaining to the armed forces, and possibly exclusive control over military appointments. Under pressure from protesters and political forces led by the FJP, which pronounced the al-Selmi document "dead in the water," the SCAF was forced to back down from the supra-constitutional principles and subsequent efforts to codify special privileges for the military in the new constitution, most recently the proposal to issue a "supplementary constitutional declaration" clarifying presidential powers before the election. But despite failing to secure written guarantees protecting the future privileges of the armed forces, the SCAF will likely lobby allies on the Constituent Assembly to look after its interests: a strong role in national security policy; the preservation of the military's business enterprises, and limits on civilian oversight of the military's budget.

There is near-universal consensus among political forces that the SCAF no longer possesses the authority

to unilaterally issue legislation in the presence of an elected Parliament, making it politically impossible and perhaps illegal under the interim constitution for the SCAF to issue a declaration without Parliament's approval. But nonetheless, many experts view the threat of a supplementary declaration in May as the SCAF's last bid to secure the military's interests in the new constitution before relinquishing power to a civilian president. Morsi represents a far greater threat to the SCAF's interests than Shafik—who is a product of the military establishment himself—but with the outcome of the election uncertain, the SCAF is hoping to negotiate a safe exit from the political arena, possibly including immunity from prosecution, while it still has the political leverage to do so.

The SCAF may have a wish list of provisions the military would like to see included in the new constitution, but every one of the SCAF's attempts to influence the constitutional process thus far has been derailed by overwhelming demands for civilian oversight of the armed forces. The Constituent Assembly will need to respond to these demands for greater accountability and transparency of the armed forces, and ensure that the military resumes its core function—protecting Egypt's borders—while steering clear of domestic politics.

Likely Next Steps

While Egypt's troubled constitutional process took a tenuous step forward on June 7 with a hastily brokered compromise on criteria for selecting the new assembly, the agreement—forged reluctantly under the threat of SCAF intervention—could disintegrate as quickly as its many failed predecessors. Despite the SCAF's vain hope of forming the Constituent Assembly before transferring power to civilian leadership, it is unlikely that the new body will be formed until after the elected president takes office at the end of June. Once election fever subsides, Parliament will redirect its attention to the constitutional process with some of the likely steps outlined below:

- **Forming a new Constituent Assembly:** Parliament cannot afford to fail in its second attempt to form the Constituent Assembly, without which the constitutional process will remain in gridlock. Islamist and non-Islamist groups might disagree on their respective
- visions for the constitution but they share a common interest in getting the drafting process back on track to replace the military's provisional legal framework with a constitutional foundation for civil democracy. With the pressured deadline of the presidential election now over and a provisional agreement on selection criteria in place, Parliament should take the time needed to choose an assembly that meets demands for political diversity and the representation of women and religious minorities. Without a foundation of minimum consensus on the 100 individuals entrusted with writing the new constitution, any document they produce is unlikely to be perceived as legitimate or durable.
- **Clarifying Presidential Powers:** One of the strongest arguments in favor of drafting the constitution prior to the election was to avoid the hazard of electing a president with only provisionally defined powers (as outlined in the interim constitution), potentially opening the door for an overreach of executive power. Shortly after the first round, the SCAF floated the idea of a "supplementary" declaration to clarify executive powers before the inauguration of a new president. While the SCAF has since dropped the controversial proposal, the issue has by no means been resolved. Rather than issue a supplementary declaration—which has been criticized as both unnecessary and possibly illegal under the interim constitution—a better solution to the problem of ambiguous presidential powers would be for political forces to reach consensus on a non-legal code of conduct or agreement defining provisional authorities for the new president, until a permanent constitution is written. This alternative, first proposed by the FJP's deputy leader, Essam al-Arian, would avoid the potential landmine of meddling in Egypt's already murky interim constitutional framework by providing a limited and short-term clarification of the new president's provisional powers that can function as a temporary solution until the drafting of a permanent constitution, which will most likely necessitate a new round of parliamentary and presidential elections.
- **A Pledge to Protect a Civil State:** Liberal and civil-oriented political forces—not willing to trust Parliament to form a representative assembly on its own—are now petitioning the two presidential candidates to commit to a twelve-point "pledge"

guaranteeing a civil state. The United Front—a coalition including at least fifteen political parties and movements as well as former presidential candidates Amr Moussa and Khaled Ali—is leading the initiative and plans to present a document to the presidential candidates demanding that the contenders publicly announce their vice presidents and the new prime minister before the run-off, as well as begin negotiations to form a new coalition government that will represent all segments of Egyptian society including women, youth, and Christians. One of the document's conditions obligates the next president to support a genuinely representative constituent assembly. It also requires the next president to safeguard the civilian nature of the state and exclude the armed forces from the political arena, as well as ending the practice of trying civilians in military courts. Although the expiration of the Emergency Law on May 31 calls into question the future of Egypt's much-feared state security courts, civilians can still be tried in military courts outside of the emergency legal framework. Despite the Brotherhood's historic opposition to exceptional courts, the FJP-led Parliament passed controversial legislation in May that prevents the next president from referring civilians to military tribunals, but preserves that power for the military itself. The law proves that Parliament cannot be relied upon to reform a sprawling military justice system that still has the power to terrorize civilians. Mubarak may have been removed, but the deep institutional infrastructure of his police state is still very much intact. Initiatives like the pledge document, if successful in extracting commitments from the presidential candidates, could support the inclusion of provisions in the new constitution that would definitively ban the trial of civilians in military courts.

How Egypt's Next President Will Influence the Constitution

Although Egypt's next president will have no official role in the constitutional process, which will be directed exclusively by Parliament and the 100-member Constituent Assembly, the president's views on the constitution and the extent of his political mandate—depending on the winning candidate's margin of victory—will undoubtedly exercise a

degree of informal influence over the drafting of the new charter. The next president's perceived strength relative to Parliament may be a factor in redefining the balance of powers between the executive branch and Parliament in the constitution. The two candidates competing in the runoff round on Jun 16-17 would be likely to advocate the following constitutional scenarios:

- **Mohamed Morsi**, the FJP candidate, shares the Brotherhood's long-term goal of implementing a full parliamentary system, but acknowledges that the current unstable political environment is not conducive to such a radical shift, and takes a gradualist and pragmatic approach to transforming the political system. Morsi has publicly advocated the amendment of Article 5 of the 1971 constitution, which deals with presidential powers, to curb the executive's authority "in preparation for a full parliamentary system sometime in the future." With Morsi as president, the FJP—always sensitive to accusations of monopolizing power—would be more likely to take a backseat in negotiations over the formation of a new Constituent Assembly to ensure that the body chosen is sufficiently diverse to pass muster with non-Islamists and minorities. Rather than invite accusations of dominating the new Constituent Assembly—the mistake it made in March—the FJP is more likely to seek consensus on the new assembly and focus instead on advancing its legislative agenda in Parliament. But while Morsi is likely too prudent to try to interfere in the constitutional process directly, if the new Constituent Assembly chosen by Parliament contains a large bloc of Islamists again, it might be able to advocate for a pure parliamentary system or a strengthening of the religious clauses with little resistance from the president.
- **Ahmed Shafik**, former head of the Air Force who briefly served as Mubarak's Prime Minister before his resignation in February 2011, is the candidate most closely associated with the former regime. His ties to the Mubarak government have been a major political liability on the campaign trail—even more so following the release of controversially lenient verdicts in the trial of the former president and Interior Ministry officials on June 2—and would continue to haunt his presidency,

should he manage to pull off an unlikely victory. As president, Shafik would be subject to intense scrutiny from detractors who view him as one of the so-called counter-revolutionary elements seeking to resurrect the former regime, meaning that any attempt to consolidate power in the executive branch could backfire explosively. But while Shafik is in a weak position to obstruct efforts to limit presidential authorities and shift the balance of power in Parliament's favor, he is nonetheless wary of transitioning to a full parliamentary system, which he views as too volatile in the absence of strong political parties (with the exception of the FJP). Shafik has publicly stated that two election cycles under the existing presidential system must pass before parties are adequately developed and the public attains a level of political consciousness sufficient to contemplate a change in the system through a popular referendum. Shafik's views are a reflection of the military establishment's interest in curbing Parliament's power in order to shield itself from civilian regulation and budgetary oversight.

Conclusion

While Egypt's constitutional process is a necessary and vital stage in consolidating the democratic transition, it is also a road fraught with obstacles that are further dividing Egypt's political landscape and damaging the prospects for an inclusive national dialogue. Egypt's future constitution can only be legitimate if its principles reflect consensus and compromise among the cornucopia of interest groups—Islamist, liberal, socialist, revolutionary and secular—that must learn to share power peacefully in a new political environment of unfettered and unpredictable pluralism. In other countries transitioning away from authoritarian or military rule (such as post-Soviet Ukraine, Thailand, Brazil, Argentina, and Mozambique, for example), constitution-drafting has functioned as a symbolic milestone marking the end of an illegitimate and corrupt regime and the birth of a new political order guaranteeing citizens' rights and imposing limits on state power.

Egypt's constitutional process has a similarly cathartic role to play in allowing Egyptians to rewrite a more democratic social contract on their own terms. But major points of disagreement—the composition of a constituent assembly that has yet to be formed, the relative powers of Parliament and the presidency in the restructured political system, and the role of religion vis-à-vis the state and society—will need to be thoroughly debated and resolved in order for the constitutional process to yield a document that is respected by all social and political forces.

In order to break free of an authoritarian political tradition in which laws have been cynically and violently manipulated to repress dissent, Egypt will need a constitution with the legitimacy and durability to survive inevitable setbacks on the long road to a fully functioning democracy. Constitution-building is a long-term process that extends far beyond the technical act of writing a legal document, and should be accompanied by an inclusive and participatory dialogue engaging every interest group to ensure that all parties view the outcome as a legitimate product of consensus and compromise.

Rather than rush the formation of a second Constituent Assembly that could implode as quickly as the first one, Egypt's political forces should take the necessary time to choose a body that is sufficiently diverse and neutral to restart the constitutional process on a clean slate. The process of forging consensus on the contours of a new legal framework will lay the foundation for a democratic system built on rule of law, accountability and justice, and in order to stand the test of time, Egypt's constitution cannot be taken lightly or be written overnight.

JUNE 2012

The Atlantic Council's Board of Directors

CHAIRMAN

*Chuck Hagel

CHAIRMAN, INTERNATIONAL ADVISORY BOARD

Brent Scowcroft

PRESIDENT AND CEO

*Frederick Kempe

VICE CHAIRS

*Robert J. Abernethy

*Richard Edelman

*C. Boyden Gray

*Brian C. McK. Henderson

*Richard L. Lawson

*Virginia A. Mulberger

*W. DeVier Pierson

TREASURERS

*Ronald M. Freeman

*John D. Macomber

SECRETARY

*Walter B. Slocombe

DIRECTORS

Odeh Aburdene

Timothy D. Adams

Carol C. Adelman

Herbert M. Allison, Jr.

Michael A. Almond

*Michael Ansari

Richard L. Armitage

Adrienne Arsht

*David D. Aufhauser

Ziad Baba

Ralph Bahna

Lisa B. Barry

*Thomas L. Blair

Julia Chang Bloch

Dan W. Burns

R. Nicholas Burns

*Richard R. Burt

Michael Calvey

James E. Cartwright

Daniel W. Christman

Wesley K. Clark

John Craddock

David W. Craig

Tom Craren

*Ralph D. Crosby, Jr.

Thomas M. Culligan

Gregory R. Dahlberg

Brian D. Dailey

*Paula Dobriansky

Markus Dohle

Lacey Neuhaus Dorn

Conrado Dornier

Patrick J. Durkin

Eric S. Edelman

Thomas J. Edelman

Thomas J. Egan, Jr.

Stuart E. Eizenstat

Dan-Åke Enstedt

Julie Finley

Lawrence P. Fisher, II

Barbara Hackman Franklin

*Chas W. Freeman

Jacques S. Gansler

*Robert Gelbard

Richard L. Gelfond

*Edmund P. Giambastiani, Jr.

*Sherri W. Goodman

John A. Gordon

*Stephen J. Hadley

Mikael Hagström

Ian Hague

Rita E. Hauser

Annette Heuser

Marten H.A. van Heuven

*Mary L. Howell

Benjamin Huberman

*Robert E. Hunter

Robert L. Hutchings

Wolfgang Ischinger

Robert Jeffrey

*James L. Jones, Jr.

George A. Joulwan

Stephen R. Kappes

Francis J. Kelly

L. Kevin Kelly

Zalmay Khalilzad

Robert M. Kimmitt

Roger Kirk

Henry A. Kissinger

Franklin D. Kramer

Philip Lader

David Levy

Henrik Liljegren

*Jan M. Lodal

George Lund

Izzat Majeed

Wendy W. Makins

William E. Mayer

Barry R. McCaffrey

Eric D.K. Melby

Rich Merski

Franklin C. Miller

*Judith A. Miller

*Alexander V. Mirtchev

Obie Moore

*George E. Moose

Georgette Mosbacher

Bruce Mosler

Sean O'Keefe

Hilda Ochoa-Brillembourg

Philip A. Odeen

Ahmet Oren

Ana Palacio

Torkel L. Patterson

*Thomas R. Pickering

*Andrew Prozes

Arnold L. Punaro

Kirk A. Radke

Joseph W. Ralston

Teresa M. Ressel

Jeffrey A. Rosen

Charles O. Rossotti

Stanley Roth

Michael L. Ryan

Harry Sachinis

Marjorie M. Scardino

William O. Schmieder

John P. Schmitz

Jill A. Schuker

Kiron K. Skinner

Anne-Marie Slaughter

Alan Spence

John M. Spratt, Jr.

Richard J.A. Steele

James B. Steinberg

Philip Stephenson

*Paula Stern

John Studzinski

William H. Taft, IV

John S. Tanner

Peter J. Tanous

*Ellen O. Tauscher

Paul Twomey

Henry G. Ulrich, III

Enzo Viscusi

Charles F. Wald

Jay Walker

Michael Walsh

Mark R. Warner

J. Robinson West

John C. Whitehead

David A. Wilson

Maciej Witucki

R. James Woolsey

Dov S. Zakheim

Anthony C. Zinni

HONORARY DIRECTORS

David C. Acheson

Madeleine K. Albright

James A. Baker, III

Harold Brown

Frank C. Carlucci, III

William J. Perry

Colin L. Powell

Condoleezza Rice

Edward L. Rowny

James R. Schlesinger

George P. Shultz

John Warner

William H. Webster

LIFETIME DIRECTORS

Lucy Wilson Benson

Daniel J. Callahan, III

Kenneth W. Dam

Stanley Ebner

Carlton W. Fulford, Jr.

Geraldine S. Kunstadter

James P. McCarthy

Jack N. Merritt

Steven Muller

William Y. Smith

Helmut Sonnenfeldt

Ronald P. Verdicchio

Carl E. Vuono

Togo D. West, Jr.

**Members of the Executive Committee
List as of April 24, 2012*

The Atlantic Council is a nonpartisan organization that promotes constructive US leadership and engagement in international affairs based on the central role of the Atlantic community in meeting today's global challenges.

© 2012 The Atlantic Council of the United States. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Atlantic Council, except in the case of brief quotations in news articles, critical articles, or reviews. Please direct inquiries to:

1101 15th Street, NW, Washington, DC 20005 (202) 463-7226
www.acus.org