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Kristen A. Stilt

Northwestern University School of Law, stilt@law.northwestern.edu

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The End of “One Hand”: The Egyptian Constitutional Declaration and the Rift between the
“People” and the Supreme Council of the Armed Forces

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Kristen Stilt¹

By some point in the fall of 2011, Egyptians in large numbers no longer viewed the Supreme Council of the Armed Forces (SCAF) as the guardian of the revolution and even considered it the revolution’s antagonist. “The army and the people are one” was a common slogan in the early days following Mubarak’s ouster on February 11, 2011, but the situation had changed dramatically by the landmark date of October 9, when the military used violence against its own citizens, killing approximately twenty-five Christians at a protest outside Maspero, the headquarters of the Egyptian state television.² Violence against protestors continued to escalate, leading to the attack by military police on female protesters in Tahrir Square in mid-December and the now-famous video of officers ripping off the garments of a young woman on the ground and then proceeding to beat her.³

¹ Associate Professor of Law and History, Northwestern University. The sources for the study of this contemporary topic are mainly online primary source materials, newspaper reports, and personal observations. The footnotes are intended to provide enough information so that the reader can easily locate the source without necessarily reproducing the full URL address. I thank Tamir Moustafa for helpful comments on this essay.

² See David Kirkpatrick, “Copts Denounce Egyptian Government over Killings,” *The New York Times*, October 10, 2011 (quoting Ayman Nour as stating that “the credit that the military received from the people in Tahrir Square just ran out yesterday.”).

³ David Kirkpatrick, “Mass March by Cairo Women in Protest Over Abuse by Soldiers,” *The New York Times*, December 20, 2011. The event sparked what has been called the “biggest women’s demonstration in modern Egyptian history.” *Ibid.*

SCAF's assertions of political power angered Egyptians in November when it issued "supra-constitutional principles" that were intended to control the drafting of a new constitution, a task clearly in the jurisdiction of the new parliament according to the March 30 constitutional declaration, a document discussed below. These proposed principles included the provision that only SCAF would have access to the details of the military's budget and that all legislation concerning the military would have to be approved by SCAF; the parliament would only control the total sum allocated to the military.⁴ The principles also gave SCAF the power to veto any provision of the new constitution that "contradicts the basic tenets of Egyptian state and society and the general rights and freedoms confirmed in successive Egyptian constitutions."⁵ This document of supra-constitutional principles, along with a series of subsequent statements by SCAF, also indicated SCAF's attempt to control the selection of the constitution's drafters, in contradiction to the constitutional declaration.⁶

While these events marked key moments in SCAF's attempts to control the political process, SCAF had laid the groundwork for such efforts much earlier in the post-revolutionary period. The crucial turning point that showed that SCAF was a self-interested participant, willing to ignore the democratic choices of the Egyptian people if necessary to advance its own interests, came in the form of the constitutional declaration issued by SCAF on March 30, following the constitutional referendum of March 19. At that time, SCAF's actions drew little attention by foreign observers and even slight response within Egypt, in part due to the fact that it required a careful reading of the lengthy constitutional declaration in order to see exactly what SCAF had accomplished. While at that time SCAF surely had not formulated a full plan for the subsequent

⁴ Yezid Sayigh, "The Specter of 'Protected Democracy' in Egypt," Carnegie Endowment for International Peace, Dec. 15, 2011.

⁵ Ibid.

⁶ Ibid; David Kirkpatrick, "Egypt's Military Retracts Plan to Extend Influence Over Constitution," *The New York Times*, December 9, 2011.

transitional period, it was clearly already anticipating that it would want to exercise far more control, and for a far greater time, than it had envisioned prior to the constitutional referendum.

This essay examines the constitutional referendum and then the constitutional declaration with the goal of answering several questions. First, what was the constitutional referendum and what were SCAF's goals in drafting it and submitting it to the public for a vote? Second, why did SCAF subsequently determine that the referendum was not adequate and how did it seek to modify and supplement the referendum to produce the declaration? Third, how did SCAF embed in the declaration the basis for its own later assertion of greater power over the political and constitutional process? While the declaration was praised for replacing the 1971 constitution, a goal of the referendum's opponents,⁷ and for providing more clarity about the transitional process, the declaration was also the first clear expression by SCAF of its long-term ambitions, even as it was not until later in 2011 that the significance of that expression became vividly clear.

The Constitutional Referendum

Soon after assuming control of the country, SCAF suspended the constitution and then announced that it had formed a committee of eight men to quickly prepare a slate of amendments. These amendments were intended to modify or remove only the most objectionable provisions so that the constitution could remain in force throughout the transition period to democratic civilian rule. The committee was headed by retired judge Tariq al-Bishri, who was known for his criticism of the former regime and for his dramatic changes in ideology,

⁷ Nathan Brown, "Why Nobody Noticed What Egypt's Opposition Has Won," The Middle East Channel at foreignpolicy.com, March 28, 2011.

from the left towards a belief in a greater role for Islam in the state. SCAF also made the surprising appointment of Sobhi Saleh to the committee, a prominent figure in the Muslim Brotherhood. No other opposition parties or even leaders of the Tahrir movement were included, nor were any women.⁸

Within a short period of time, the committee had completed its task, and the amendments were presented to the public for discussion not long before the scheduled referendum on March 19.⁹ The substance of the amendments was largely noncontroversial, and the supporters and opponents were concerned with the consequences of adopting or rejecting the amendments more than with the actual content.¹⁰ Only revised Article 75, on the eligibility requirements for presidential candidacy, raised substantive concerns, because it supplemented the existing rule that a candidate must be an Egyptian of two Egyptian parents by further specifying that the candidate's parents must not have held the citizenship of another nation. Further, the candidate may not be married to a non-Egyptian.

The other changes were intended to address the most problematic aspects of the constitution. Mubarak's notorious Article 76 on the presidential elections—which on its surface looked like a multi-candidate process but in practice ensured that only Mubarak would be

⁸ See David Kirkpatrick and Kareem Fahim, "In Egypt, a Panel of Jurists Is Given the Task of Revising the Country's Constitution," *The New York Times*, Feb. 15, 2011; Tamir Moustafa, "Amending the Egyptian Constitution," *The Huffington Post*, Feb. 25, 2011.

⁹ The Arabic text of the referendum as presented to Egyptian voters can be found on the website of the Egyptian Supreme Judicial Council at <http://referendum.eg/constitutional-amendments/2011-03-11-22-19-08.html>. An English-language analysis of the referendum along with a summary of the amendments as adopted can be found in Nathan Brown and Michele Dunn, "Egypt's Draft Constitutional Amendments Answer Some Questions and Raise Others," Carnegie Endowment for International Peace, March 1, 2011. See also Tamir Moustafa, "It's Not a Revolution Yet," *The Middle East Channel* at foreignpolicy.com, Feb. 28, 2011.

¹⁰ See Kristen Stilt, "What the Egyptian Constitutional Amendment Referendum is Really About," available at <http://www.comparativeconstitutions.org/2011/03/dispatch-from-cairo-what-egyptian.html>.

eligible to run—was finally dismantled and replaced by a much shorter rule.¹¹ A person who met the Article 75 criteria could become a presidential candidate in one of three ways: by obtaining the support of 30 members of the People’s Assembly or Consultative Assembly; by obtaining the support of 30,000 eligible voters from at least 15 governorates, with at least 1,000 supporters in each governorate; or by being nominated by a political party that won at least one seat in either the People’s Assembly or Consultative Assembly in the previous election. The composition of the Presidential Election Committee, the body responsible for overseeing presidential elections, was altered to consist entirely of judges rather than partisan executive officers. The section of Article 76 requiring that the law detailing the presidential election process be submitted to the Supreme Constitutional Court (SCC) for a pre-promulgation review, which was added by Mubarak in the constitution’s 2005 amendments, was retained.¹² Article 77 restored term limits to the presidency, allowing only one re-election. Article 139 required the president to appoint a vice-president within 60 days of taking office.

Article 88, as amended in 2007, transferred the authority of supervising parliamentary elections to an electoral commission that would in practice be controlled by Mubarak. The new amendment returned the task of supervising parliamentary elections to the judges and gave them even further supervisory powers.¹³ Amended Article 93 gave the Court of Cassation the authority to decide challenges to contested People’s Assembly races. Article 148 restrained substantially the president’s ability to announce a state of emergency by requiring that the

¹¹ For a discussion of the 2005 amendments, which included a lengthy change to Article 76, see Kristen Stilt, “Constitutional Authority and Subversion: Egypt’s New Presidential Election System,” 16 *Ind. Int’l & Comp. L. Rev.* 335 (2005-06). Article 76 was further amended in 2007.

¹² See *ibid.* The SCC did subsequently review the presidential election law as presented to it by SCAF and decided that some provisions were in conflict with the constitutional declaration. Nathan Brown and Mara Revkin, “Egypt’s Supreme Court Ruling on the Presidential Election Law,” Atlantic Council, Jan. 19, 2012. See *infra* note 24 and accompanying text.

¹³ For a discussion of the 2007 amendments, see Nathan Brown, et. al., “Egypt’s Controversial Constitutional Amendments,” Carnegie Endowment for International Peace, March 23, 2007.

president's announcement be approved by a majority of the People's Assembly within seven days. Even if approved, the state of emergency could last for only six months unless a public referendum authorized a longer duration. Controversial Article 179 on military courts and counter-terrorism measures was repealed.

Finally, Article 189, on the constitutional amendment process, was altered and new provisions were added dealing with the drafting of a new constitution. The article preserved the original method of amending the constitution, whereby either the President or the People's Assembly may propose amendments, which then must be approved by a parliamentary majority and in a popular referendum. Article 189 added a process for the creation of a new constitution that gave the People's Assembly and Consultative Assembly the power to jointly elect a drafting commission composed of 100 members. These two bodies were given six months from their first session to elect this drafting commission, and the drafting commission would have six months to complete the preparation of the constitution. The President would then hold a national referendum on the constitution within 15 days of the constitution's completion.

In the days before the referendum, lines of support and opposition became clear.¹⁴ Opponents insisted that the revolution ousted both Mubarak and the constitution that was so intimately linked to his authoritarian rule, and that SCAF had no authority to revive it in order to call for its amendment. Recognizing the constitution even for the purpose of amending it would be an impermissible return to a rejected past. Opponents also complained that the amendment drafting was secretive and opaque; it looked too much like a Mubarak-style process to be acceptable after the revolution. The SCAF-selected drafters basically made the same alterations

¹⁴ See Kristen Stilt, "What the Egyptian Constitutional Referendum is Really About," available at <http://www.comparativeconstitutions.org/2011/03/dispatch-from-cairo-what-egyptian.html>.

as Mubarak himself had offered to make in his final plea to stay in power, as if he were still in charge. Opponents of the referendum also objected to the single-slate style, also used in the Mubarak-era, whereby voters had to accept or reject the whole package.

Referendum opponents, who included liberals, intellectuals, and the youth who led and partook in the revolution, were also concerned that the process that would follow a positive vote would privilege pre-existing political groups and organizations, and the former-NDP and the Muslim Brotherhood in particular. While SCAF did not state when parliamentary and presidential elections would be held, it implied that they would be as soon as possible after the constitution was amended. The first parliamentary elections in particular would be essential because those elected officials would be the ones to oversee the process of writing a new constitution. Opponents of the referendum thought that under an expedited timetable they would simply not be able to compete with groups—and namely the Muslim Brotherhood—who were already organized and ready to enter into a vigorous election season. Their preference was to focus on the new constitution first, with a broad and representative committee taking the time to carefully draft the document that would then guide Egypt through the first fair elections, both parliamentary and presidential. Referendum opponents were willing to tolerate a longer military rule in order to prepare the constitution first.

Supporters of the referendum, which included the Muslim Brotherhood, said that it dealt with the worst provisions of the constitution, making it a document that should be acceptable to everyone for the near term, until a new president and parliament could oversee the drafting of a new document. The process that the referendum envisioned would result in the military handing over power to a civilian government sooner rather than later, which was essential for national stability, they argued. This appeal to stability was successful among a large section of society

that may have supported the revolution but did not want the economic and political uncertainty that ensued. As for giving them a substantial edge in the elections, members of the Muslim Brotherhood said that they suffered for their opposition to Mubarak during his reign and so any advantage they may have post-revolution was fairly earned. Further, the Muslim Brotherhood tried to alleviate fears that it would achieve large electoral successes (while implicitly expressing its belief that it could do so) by stating that it would only run in a limited number of parliamentary races and would not nominate a presidential candidate.

The turnout on referendum day was unprecedented: long lines were typical at some polling stations, and many Egyptians interviewed while they were waiting said that it was the first time they had voted in an election or referendum because in the Mubarak era the outcome was always pre-determined. According to the head of the judicial committee that supervised the process, 41% of Egypt's 45 million registered voters cast a ballot. Nationwide, 77% voted in favor of the amendments, with the highest concentration of votes cast in opposition located in Cairo and Alexandria.¹⁵ While there were some reports of electoral irregularities in the process, including vigorous campaigning both inside and just outside the stations, in general SCAF was credited with conducting a free and fair election.

The referendum served important functions for SCAF. First, in terms of the actual process on the day of the referendum, SCAF proved itself to be a good faith actor, clearly showing that it could and would hold elections in a manner markedly different from those of the Mubarak era. Those who had opposed the referendum quickly followed the announcement of the results with statements recognizing the legitimacy of the outcome. Second, if SCAF's goals

¹⁵ Neil MacFarquhar, "Egyptian Voters Approve Constitutional Amendments," *The New York Times*, March 20, 2011.

prior to the referendum were to transfer power to a civilian government as soon as possible, then the adoption of the amendments served its interests. A negative vote would have delayed the process substantially, and might even have resulted in a lengthy constitutional process first, followed by elections, which would have kept SCAF in control for a much longer time.¹⁶ Third, the referendum validated the role and authority of SCAF itself. Just by participating, Egyptians tacitly recognized SCAF's power and authority as the interim government. Even those who rejected the amendments validated SCAF's role not only by voting but also by accepting that if their view prevailed, it would have meant a longer tenure for SCAF.

While supporters and opponents of the referendum were engaged in last minute campaigning, SCAF made a surprising announcement: the results of the referendum, positive or negative, would be followed by a "constitutional declaration." Prior to that announcement, it had been expected that if the referendum passed, the constitution would be considered amended and returned to force. In such a case, the declaration was anticipated to be a straightforward statement of the timetable for subsequent parliamentary and presidential elections. If the referendum did not pass, SCAF would have to devise a new plan.

After the announcement of the referendum's passage, however, Egyptians waited for more than a week for the declaration. During that time, press reports suggested that the declaration would include not only the amended provisions adopted in the referendum but also other provisions from the constitution that would be needed in the interim period, along with some guidance on the political process ahead. This new bundle would act as a temporary constitution until a new constitution could be drafted and approved. Although SCAF clearly

¹⁶ *The New York Times* reported that "the ruling military council had sought the rapid timetable to ensure its own speedy exit from running the country." Neil MacFarquhar, "Egyptian Voters Approve Constitutional Amendments," *The New York Times*, March 20, 2011. If that was a correct analysis prior to the constitutional referendum, the situation changed substantially by March 30.

supported the referendum it proposed, it seemed to have become convinced late in the process by the argument that the 1971 constitution simply could not be salvaged. Unfortunately, it had just held a nation-wide referendum on the opposite premise.

Constitutional Declaration¹⁷

On March 30, 2011, SCAF harnessed the tools of the Tahrir revolutionaries and announced the constitutional declaration on its Facebook page.¹⁸ A substantial document of 63 articles, it effectively superseded the 1971 constitution. Unlike the process of drafting the amendments that were proposed in the referendum, which was done by a committee headed by Tariq al-Bishri, the drafters of this constitutional declaration were not identified. The declaration consists of articles from the 1971 constitution as amended in the referendum; articles from the 1971 constitution as amended in the referendum with additional changes made by SCAF; articles from the 1971 constitution that were not part of the referendum, some of which were included verbatim and some of which were amended by SCAF; and several new articles that specifically recognize and give powers to SCAF.

The result was procedurally and substantively confusing. According to the 1971 constitution, amendments to it required approval in a constitutional referendum; SCAF recognized and abided by this process when it held the March 19 referendum. In the days

¹⁷ This section is based on Nathan Brown and Kristen Stilt, "A Haphazard Constitutional Compromise," Carnegie Endowment for International Peace, April 11, 2011.

¹⁸ The text of the Constitutional Declaration no longer appears to be available on SCAF's Facebook page (which is still used to make announcements and issue decrees) but can be found on an official Egyptian governmental site, at <http://www.masr.gov.eg/arabic/laws/constitution/default.aspx>. An English translation was done by the Carnegie Endowment for International Peace and can be found at <http://egyptelections.carnegieendowment.org/2011/04/01/supreme-council-of-the-armed-forces-constitutional-announcement>.

following it, however, SCAF on its own initiative put together a document that better suited its changing goals and essentially abrogated the constitution whose procedures it had asserted were necessary to follow in the referendum process. In doing so, SCAF transitioned from presenting itself as a caretaker of the revolution and the constitution to taking control of the process and creating its own constitution, one that, unlike the 1971 text or its final set of amendments as adopted in the referendum, made SCAF a constitutional actor with broad powers. In the process, SCAF left most of the 1971 constitution on the drafting room floor, such that many issues are simply not provided for in the declaration, with the result that SCAF has significant power and discretion.

The results of the referendum were largely included verbatim in the declaration. Article 26 on the eligibility criteria for a presidential election candidate is the same text as Article 75 of the constitution as amended by the referendum, and Article 76 as amended by the referendum on the presidential election process and the presidential election commission appears in two parts in Articles 27 and 28. The term limits for the presidency are presented in Article 29 (formerly Article 77 of the constitution) and the requirement that the president appoint a vice-president within 60 days of taking office is presented in Article 31 (formerly Article 139 of the constitution). Article 88 of the constitution as amended in the referendum restored full judicial supervision to the People's Assembly election process and appears as Article 39 of the declaration. Amended Article 93, making the Court of Cassation the final authority for disputed parliamentary races, appears as Article 40 of the declaration, and amended Article 148, which greatly restricts the conditions under which the president may declare a state of emergency, appears as Article 59. The referendum abrogated the controversial Article 189, which allowed

civilians to be tried in military courts and aggressive surveillance measures; this text does thus not appear in the declaration.

One article as amended by the referendum was further modified by SCAF for inclusion in the declaration. SCAF apparently decided after the referendum that amended Article 189 was not sufficiently conducive to the constitutional process and altered its language to make clear that the constitutional drafting process could begin—and even conclude—before the presidential elections were held. While not explicit, the referendum anticipated that both presidential and parliamentary elections would be held before constitutional drafting commenced. The declaration, in article 60, added new language to make clear that it is SCAF, and not the president, that convenes a joint session of parliament, within six months of the elections for both houses, in order for parliament to elect the 100-member drafting commission. In doing so, SCAF confirmed that the process could begin in the absence of a president.

Further, the referendum had amended Article 189 to state that the president should present the new constitution within fifteen days of its completion to the voters in a referendum. Thus, a president should be in place at least by the time the drafting was completed. In Article 60 of the declaration, SCAF explicitly altered that language to provide merely that the constitution will be presented to the voters in a referendum within 15 days of its completion, without specifying who should do the presenting. The constitution takes effect from the day on which it is so approved. Thus, the president does not have to be elected by this time; rather, SCAF could be the entity that arranges for the referendum on the new constitution.

SCAF's revisions to Article 189 disregarded the results of the referendum, suggesting that SCAF was not committed to a democratic or even coherent constitutional process. In the

Mubarak era, constitutional amendments were forced upon the populace through referendums that were clearly fraudulent; here, SCAF altered the results of a referendum that was considered free and fair. The alteration was not merely technical. The declaration does not pressure SCAF to return the country to civilian control since the presidential election process can be delayed indefinitely without affecting the constitutional process. In a separate new article, the declaration provides that SCAF's role, as detailed in the declaration, continues until elections for both houses of parliament and for president have been completed and they have all assumed their duties.¹⁹ The delay of presidential elections translates into prolonged rule of SCAF.

This revision to Article 189 drew surprisingly little criticism at the time.²⁰ By the fall of 2011, the implications became clear: SCAF may remain in power throughout the constitutional drafting process, which not only prolongs SCAF's rule but, more importantly, gives SCAF an opportunity to exert influence on the drafters. Even if SCAF does not succeed in actually appointing members to the drafting committee, it will still have the opportunity to affect the drafting and even achieve its own substantive goals in the new constitution. And indeed, Egyptian protestors in late 2011 and early 2012, realizing SCAF's intentions to delay presidential elections, began pressuring SCAF to hold them as soon as possible.²¹ As of late January 2012, SCAF's plan does seem to be to hold presidential elections only after the constitution has been approved and to attempt to satisfy its critics by rushing the entire process rather than by putting the presidential elections before the constitution.

¹⁹ Art. 61.

²⁰ An exception is Nathan Brown and Kristen Stilt, "A Haphazard Constitutional Compromise," *supra* note 17.

²¹ Nathan Brown has called the presidential election process as expressed in the constitutional declaration one of the "landmines" in Egypt's constitutional roadmap. Nathan Brown, "Landmines in Egypt's Constitutional Roadmap," Carnegie Endowment for International Peace, Dec. 7, 2011.

The articles in the declaration dealing with fundamental rights and freedoms are taken from the 1971 constitution verbatim, guaranteeing, for example, equal protection of law and freedom of expression, although it is not clear how these protections will be enforced in practice. In the Mubarak era, legislation eroded the rights provided in the constitution, undermining substantially their plain meaning, and much of this legislation appears to remain in force.²² The SCC had been willing to strike down in the past some legislation that was backed by the regime.²³ Presumably, the SCC will continue to play this role under the constitutional declaration, but appeals to the SCC take time to make their way through the court process. As it was tasked to do under Article 28 of the referendum, the SCC has already considered the “constitutionality” of the presidential election law and identified several provisions that contradict the declaration. By doing so, the SCC has implicitly recognized the declaration as the current constitution.²⁴ Whether the SCC will consider other claims based on the declaration is not yet known.

The logic of taking other articles from the constitution and inserting them into the declaration is not obvious. SCAF maintained the requirement that half of all parliamentary deputies be either “workers” or “peasants”; this Nasser-era idea was determined by Sadat to be an essential component of the 1971 constitution although it was criticized as unnecessary by some in the course of drafting that constitution. By 2011, it seemed clearly outdated. SCAF’s reasons for including it are unclear, but it certainly assisted parties (chiefly the Muslim

²² Article 62 of the declaration states that all laws and regulations remain in force, but they may be amended or abrogated according to the procedures provided for in the declaration. Article 56 of the declaration, which is one of the new articles created by SCAF, gives SCAF authority over legislation. The People’s Assembly also has some legislative power, creating a tension between it and SCAF in this regard; Nathan Brown calls this tension one of the landmines of the constitutional process. Ibid.

²³ See generally Tamir Moustafa, *The Struggle for Constitutional Power* (2007).

²⁴ Nathan Brown and Mara Revkin, “Egypt’s Supreme Court Ruling on the Presidential Election Law,” *supra* note 12.

Brotherhood's Freedom and Justice Party) in the parliamentary elections that already had an extensive list of possible candidates to call upon who could fit into the two categories.

In another surprising move, SCAF tinkered with one of the ideological provisions of the constitution, even though it had told al-Bishri's committee that they were beyond the scope of the amendment process. Article Two of the 1971 constitution, which provides that Islam is the religion of the state and the principles of the Islamic Sharia are the main source of legislation, was included in the declaration as its Article Two, but SCAF amended Article Five, dealing with political activity and party formation, on its own initiative for inclusion as the declaration's Article Four. As amended in 2007, Article Five banned the pursuit of political activities or the formation of political parties with a religious frame of reference or on a religious basis. The "religious frame of reference" language was clearly intended to further ensure that the Muslim Brotherhood could not become a political party, since that was the language that the Brotherhood used to describe itself.²⁵ SCAF, on its own, deleted the broader "religious frame of reference" language, paving the way for the registration of Muslim Brotherhood parties such as the Freedom and Justice Party.²⁶

In a series of new articles, SCAF provided for itself in the declaration. Article 56 lists SCAF's powers, which are essentially a combination of executive and legislative functions. SCAF's range of authority includes issuing legislation; determining state policy, including the budget; appointing the appointed members of the People's Assembly; convening and adjourning the People's Assembly and Consultative Assembly; representing the state externally, including the power to enter into treaties; appointing ministers, including the prime minister; appointing

²⁵ See Nathalie Bernard-Maugiron, "The 2007 Constitutional Amendments in Egypt and their Implications on the Balance of Power," 22 *Arab Law Quarterly* 397-417; 411 (2008).

²⁶ For a thorough guide to the new political parties and coalitions in Egypt, see the online source Jadaliyya at www.jadaliyya.com.

state employees; issuing pardons or reducing the level of punishment; and other responsibilities as determined by the president. This list created a tension between SCAF and the People's Assembly, since Article 33 specified that the People's Assembly has the power to legislate and determine state policy.²⁷

SCAF also added into the declaration some further details for the subsequent political and constitutional process. Article 41 stated that procedures for elections to the People's Assembly and Consultative Assembly would begin within six months from the date of the declaration, but the term "procedures" did not suggest that the elections would be concluded within that time. And indeed they did not: the People's Assembly elections were held over three days, from November 2011 to January 2012, which allowed for judicial oversight at the polling stations, and Consultative Assembly elections are scheduled for January-February 2012.²⁸

Conclusions

The transition from the constitutional referendum to the declaration is a crucial moment for understanding the development of SCAF's position and power. While on one hand, as a document for the transition period, the declaration provided a little more practical guidance than would have been in the amended 1971 constitution per the referendum by giving a rough timetable for elections and, importantly, by specifying the powers of SCAF itself. This addition satisfied concerns of those who said that as an extra-constitutional actor all of SCAF's decisions could later be challenged as unconstitutional under the 1971 constitution. A path towards civilian

²⁷ Nathan Brown referred to this tension as one of the constitutional landmines. Brown, "Landmines in Egypt's Constitutional Roadmap," *supra* note 21.

²⁸ For a thorough guide to the Egyptian parliamentary elections, see the online source Jdaliiyya at www.jadaliyya.com.

rule was provided for in the declaration, and the fundamental rights that SCAF selected to include from the 1971 constitution are ones that belong in a constitution for a democratic society.

Yet, the process by which the declaration was produced, and the substantive alterations and additions, undercut at least some of these benefits and set the scene for the struggles that unfolded in late 2011. Insofar as voters were told that passage of the referendum would result in the continued force of the 1971 constitution, as amended, SCAF's subsequent behavior shows that Egypt is not currently on the other side of the "threshold beyond which no one can intervene to reverse outcomes of the formal democratic process," as Adam Przeworski has argued is a crucial moment in the transition to democratic rule.²⁹ The unilateral issuance of the declaration is troubling because it followed a popular referendum the outcome of which was disregarded. Once the referendum was held, SCAF lost its ability to hold another one on the declaration without provoking voters to ask whether SCAF really intended to be bound by the results the second time.

If SCAF had the power to abrogate the 1971 constitution and write a constitutional declaration for the interim period, why did it start down the path of amending the constitution? One explanation is simply SCAF's lack of experience with governance, forcing it to learn day by day. The amendments may have seemed like a good idea to SCAF in late February but a month later the shortcomings of that approach became evident, and SCAF may even have become convinced by the arguments of those who opposed the referendum that the 1971 constitution could not and should not be revived. Another important explanation for the change, as

²⁹ Adam Przeworski, "Democracy as a Contingent Outcome of Conflicts," in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* 62 (1988).

articulated in this essay, was SCAF's realization that it was not as eager to turn the country over to civilian rule as it had thought from the outset of the referendum process.

The changes SCAF made to the constitutional drafting process, as well as provisioning for itself in the declaration, show when and how it decided that it wanted to play a significant role in shaping post-revolutionary Egypt. In order to preserve its own power and future autonomy, SCAF was willing to extend its rule to ensure that result. As of early 2012, it is certainly anticipated that tense negotiations among SCAF, the elected parliamentarians, the constitutional drafters, and the populace over significant issues such as the military's significant economic privileges will dominate political life in the course of the year, and that SCAF will not hand over power to a civilian government without gaining assurances that many aspects of the military will remain outside of civilian oversight. SCAF, initially considered the guardian of the revolution, became determined to prioritize its own interests of maintaining the same status and privileges for the military enjoyed during the Mubarak regime over the interests of the public that initially welcomed it as guardian.