

WHAT ELECTORAL SYSTEM FOR EGYPT?

EXECUTIVE SUMMARY

On 14 June 2012, just three days before the second round of the presidential election, Egypt's Supreme Constitutional Court (SCC) ruled that three articles of the Law on the People's Assembly (LOPA) and one article of Decree 123/2011 were unconstitutional and consequently the election of the People's Assembly (PA), the lower house of Parliament, was invalid. The following day, the Supreme Council of the Armed Forces (SCAF) issued a decree formally dissolving the Assembly. After his election in June, President Mohamed Morsi attempted, unsuccessfully, to temporarily re-instate the PA. As things currently stand, fresh elections to the PA are due. The Shura Council (SC), the upper house of parliament, also faces the threat of dissolution. However, it is not clear when fresh parliamentary elections will be scheduled although, at the time of writing, it is almost certain that they will only be held after Egypt's new constitution is adopted. However, the timing of the constitutional adoption process is uncertain partly because the Courts have yet to rule on the validity of the incumbent Constitutional Assembly (CA). If the CA is dissolved, a new constitution drafting body will need to be formed, thereby delaying the holding of parliamentary elections. Until fresh elections are held, President Morsi enjoys legislative as well as executive power, although this arrangement is also subject to a legal challenge.

These factors mean that it remains difficult to predict with confidence how the next phases of Egypt's transition will unfold. Nevertheless, whatever the future holds for the constitutional drafting process, at some point in the not too distant future, it will be necessary to revise the Law on the People's Assembly (LOPA). Potentially this will re-open the thorny question of the electoral system; an issue which provoked heated political debate during the spring and summer of 2011. Finding a system which is both acceptable to

Egypt's main political forces and is compatible with the SCC's rulings may not be a straight forward matter. The choice of an electoral system is a crucial political question and will have a significant bearing on the composition of Egypt's next parliament and hence the country's future political direction.

The current electoral system for the PA was finalised in October 2011 only shortly before candidacy nominations opened. It is a 'mixed' system whereby 166 Assembly members are elected in 83 two-seat constituencies (TSCs) with winning candidates requiring a majority of votes (hereafter, the individual candidate system) and 332 Assembly members are elected through electoral lists, in 46 'multi-seat' districts (MSDs) under a proportional representation system. Controversially, the LOPA allowed party-backed candidates to contest the individual seats, but did not allow associations of non-party (independent) candidates to contest the PR seats. Essentially, it was this arrangement which the SCC found discriminatory and which ultimately led to the PA's dissolution.

The SCC's 14 June ruling is the fourth occasion in the last 25 years that the Court has declared sections of the LOPA unconstitutional. Following the SCC's 1987 decision, a referendum on dissolving the Assembly was held and the electoral system, based solely on PR was modified. After the Court's 1990 ruling, the President introduced a completely different system based solely on the individual candidate system. While it is possible that the SCC's 14 June ruling could also result in a modification of the electoral system introduced in 2011, this paper concludes that fundamental changes are not necessarily required because the SCC found that the LOPA was unconstitutional not because of any inherent flaw in Egypt's mixed electoral system but because non-party (independent) candidates were not given the same electoral opportunities as party-backed candidates. Therefore, in order to bring the LOPA into line with the SCC's ruling the legislator should focus attention on ensuring that all candidates, whether independent or party-backed, and whether contesting as individuals or in association with others have equal opportunities to seek election. In so doing, the legislator should avoid trying to resolve the issue by barring party-backed candidates from contesting the individual seats as this would lead to a situation where non-party and party candidates are discriminated against in equal measure. The alternative, allowing non-party candidates to associate with others and field electoral lists for the PR seats would conversely enhance opportunities for all and, importantly, would appear to equalise opportunity for non-party (independent) and party candidates in both parts of the election, as required by the SCC's ruling.

BACKGROUND: DISSOLUTION OF THE PEOPLE'S ASSEMBLY

In the immediate aftermath of the SCC's 14 June ruling¹ some confusion existed as to whether the Court's decision had resulted in the automatic dissolution of the Assembly². On 17 June the media³ reported that the then head of the Supreme Council of the Armed Forces (SCAF), Field Marshall Hussein Tantawi, had written to the General Secretary of the PA, Sami Mahran⁴, attaching a copy of Decree 350/2012⁵ which, it was reported, dissolved the PA as of 15 June. However, the Speaker of the PA, Saad El-Katatny, and many MPs of the Freedom and Justice Party (FJP) did not accept the validity of Decree 350 ostensibly because the Constitutional Declaration⁶ does not give the SCAF the power to dissolve the parliament.⁷ Citing the dissolutions of the PA in 1987 and 1990, Katatny argued that these occurred only after referenda had been held on the issue.

On 8 July, shortly after his election, President Morsi issued a presidential Decree (11/2012) annulling the SCAF's Decree 350/12 and instructed the PA to temporarily reconvene until fresh elections are held within 60 days of the adoption of the new Constitution. Immediately, the SCC issued a formal decision suspending Decree 11/2012. Whether or not the PA has been legally 'dissolved' remains a contentious issue but unless surprising politico-legal developments occur⁸, it is likely to remain a 'moribund' institution until fresh elections take place.

¹ The case was referred to the SCC by the Supreme Administrative Court (SAC) on 20 February, 2012, and the SCC issued its ruling 4 months later. On the three other occasions that the SCC had ruled on the constitutionality of the LOPA (1987, 1990, and 2000), it had taken the court years to reach a decision on the merits of the cases.

² The text of the Court's decision is somewhat ambiguous, stating: "[...] it is incumbent upon Parliament to dissolve, by force of law, as of the date indicated, without [the necessity] of adopting any further decision or procedure". The text 'it is incumbent on Parliament to dissolve' is somewhat ambiguous.

³ Al Masry Al Youm

<http://today.almasryalyoum.com/article2.aspx?ArticleID=343049>

⁴ The General Secretary is an official of the PA, not an MP.

⁵ The decree assumed the force of law when it was published in the Official Gazette on the night of 18/19 June.

⁶ Adopted by the SCAF on 30 March 2011.

⁷ The FJP appealed the legality of Decree 350 with the Court of Cassation, which referred the case to the SCC.

⁸ Court decisions on a number of petitions challenging the dissolution of parliament are still outstanding e.g. on 10 July, the PA filed a case before the Court of Cassation requesting the court to rule on the way in which the SCC ruling (on 14 June) should be executed. On 14 July, the Cassation ruled that the case is out of its jurisdiction and such request should be filed before the SCC only. (2) On 19 July, the Administrative Court ruled that the case on decree 350/2012 is out of its jurisdiction. On the same day the Administrative Court ruled that appeals against Morsi's decision to reinstate PA are also out of its jurisdiction and referred 30 appeals to the SCC. (3) On 17 September the SCC should have finished the technical report on appeals – filed by a former MP and the former candidate whose case led to dissolution ruling on 14 June – against the SCC ruling to dissolve the entire PA. They are requesting the dissolution of the contested third in the original case only (ruling on the appeal may come out on the same day or within 15 days). On 17 September also the SCC's technical commission should have submitted their report on the case filed requesting the dissolution of the Shura Council.

The fate of the SC, Egypt's upper house of parliament, is also uncertain. The Council has almost identical rules on candidacy as the PA, and while it has continued to function, the SCC will probably issue a decision on the legality of its election on 14 October.

THE TIMING OF THE PA ELECTIONS

The timing of the next PA elections is contingent on the outcome of a number of questions for which, at the time of writing, there are few clear answers. These include:

- Whether the incumbent CA will survive to complete its task or whether a new CA will be formed;⁹
- The CA's decision on the constitutional requirements for PA and SC elections;
- How much time will be required to revise the LOPA to ensure that it complies with the SCC's 14 June ruling;
- Possible additional revision of the LOPA to ensure that it is fully compatible with the new constitution.

The SCAF's 17 June 'supplementary' Constitutional Declaration (SCD) provided that the PA elections would be held only after the adoption of the new Constitution.¹⁰ However, on 11 August, President Morsi rescinded the SCD and adopted his own amendments to the Constitutional Declaration. These provide that the elections shall take place within two months of the adoption of the Constitution,¹¹ giving only a small window to adopt changes to the electoral legislation to address the SCC's 14 June ruling and changes arising as a result of the adoption of a new constitution. Indeed, the new constitutional text could be crafted to reduce the risk that future legal challenges to the constitutionality of the LOPA would be successful.

The Constituent Assembly (CA), the body charged with drafting the new constitution, was, in its current convocation,¹² formed on 12 June. According to the Constitutional Declaration, the CA has six months to finalise the constitutional text¹³ i.e. before 11 December 2012. Thereafter a referendum must be held within 15 days to approve (or reject) the proposed constitutional text.¹⁴ However, the current CA's immediate future remains uncertain and, at the time of

writing, there are numerous legal challenges¹⁵ on the CA's formation which have yet to be decided, including a case with the Administrative Court, which on 23 October is due to rule whether the current CA was composed in a legitimate manner.¹⁶ Even if the court rules that the CA's composition is legal then it is still not altogether clear when the constitutional text will be finalised and the referendum held – although under the Constitutional Declaration, it cannot be held later than 26 December. If the referendum approves the new constitution, then the path would be clear to adopting amendments to the LOPA: the text of which would need to reflect any new constitutional provisions on elections and address the SCC's ruling.¹⁷ This suggests that the PA elections will not take place much before March 2012, and possibly some months later.

If however a court rules that the CA's composition is not legitimate then it is likely the body will be dissolved – although the issue could be further complicated if the decision is appealed. In this scenario, the timing of the adoption of the constitution and subsequent elections is not altogether clear because the current CA could, theoretically, be dissolved at any time up to the expiry of its mandate (11 December).¹⁸ The President's 11 August amendments to the Constitutional Declaration provide that: "If the constituent assembly encounters an obstacle that would prevent it from completing its work, the President shall, within 15 days, form a new constituent assembly – representing all spectra of society – to draft a new constitution within three months from the day of the new assembly's formation. The newly drafted constitution shall be put forward, within 30 days of its completion,¹⁹ for approval by the people through a national referendum."²⁰ However, the President's Decree annulling the SCD is also subject to a challenge before the courts.²¹

EGYPT'S ELECTORAL SYSTEM

Under the electoral system used in Egypt from 1990 to 2010, two candidates were elected from 222 TSCs, providing that at

⁹ If the current CA does survive then it must present its draft no later than 11 December.

¹⁰ Article 60 bis of the SCAF's supplementary Constitutional Declaration (SCD) provided that the elections should be held within one month of the adoption of the constitution.

¹¹ The SCAF's SCD provided that elections would take place with 30 days of the adoption of a new Constitution – a timeframe that would be extremely difficult to respect.

¹² The CA in its first convocation was, on the basis of a ruling of the Administrative Court, found not to be in accordance with article 60 of the CD and was dissolved on 10 April 2012.

¹³ Article 60

¹⁴ Article 60

¹⁵ Al Nahar reported that there were 23 challenges: <http://www.alnaharegypt.com/nhar/art94062-cat6.html> while Shorouk reported that there were 48 challenges.

¹⁶ The Court was expected to issue a ruling on 2 October, but it postponed the case until 23 October.

¹⁷ Although the SCC's ruling could be addressed directly in the text of the constitution.

¹⁸ For example if the Administrative Court delays issuing its ruling, if the ruling is appealed or is any other legal challenge against the formation of the CA or its procedures etc, is successful.

¹⁹ If a new CA is required then the referendum to approve the text it prepares is required within 30 days. However, if the current CA finalises its work, then a referendum will be held within 15 days.

²⁰ This text is almost identical to article 60 bis of the SCAF's 17 June supplementary Constitutional Declaration, except that it is the elected President rather than the unelected SCAF which would form the CA, and that the SCD states that the SCAF shall appoint a CA within one week, while the August amendment gives President Morsi 15 days, and that CA appointed by the President shall complete its work in 30 days (15 days in the SCAF's SCD), and that elections shall take place within two months after the adoption of the new constitution (one month in the SCAF's SCD).

²¹ On 2 October, the Administrative Court postponed the case to 27 November, 2012. See <http://www.almasryalyoum.com/node/1151461>

least half of all elected candidates were 'workers or farmers'.²² Reformists had long regarded this system as one of the foundation blocks of the patron-client political system of the Mubarak-era, holding it partly responsible for the election of parliaments dominated by the former ruling party – the National Democratic Party (NDP).²³

Following the 25 January Revolution, the question of which system should be used to elect Egypt's first post-revolution parliament became one of the main political debates.²⁴ Most reformists wanted to introduce an electoral system based on proportional representation, as it was thought that this would lessen the influence of Mubarak-supporting oligarchs and was likely to benefit the parties that emerged after the restrictions on political party formation were lifted in March 2011.²⁵

When it was issued in March 2011, the text of article 38 of the Constitutional Declaration provided that "The law regulates the right to candidacy to the People's Assembly and Shura Council in accordance with a specific electoral system established by the law. It is permissible that this system includes a minimum of women's representation in both houses". The delegation of the parliamentary electoral system to primary legislation has positive and negative consequences. The main positive feature is 'flexibility' e.g. it is easier to change the electoral system without the need for a constitutional amendment. The main negative consequences are that: i) a parliamentary majority can impose its choice of an electoral system without considering the wishes of the opposition, and ii) the risk that the electoral system could be found to be unconstitutional. The specific reference to women's representation is important because it creates a constitutional basis for special measures aimed at raising women's representation without which the SCC could rule such an arrangement as unconstitutional.

A draft law setting out a revised, mixed electoral system was published in the national media in late May 2011. The text proposed a mixed electoral system with one-third of seats elected through 'closed' election lists registered in (an unspecified number) of election districts with seats allocated by proportional representation, and the other two-thirds of seats allocated under the pre-existing individual candidate system in TSCs.

²² The requirement that half of all MPs are 'workers and farmers' was required under article 87 of Egypt's 1971 Constitution and also article 32 of the 30 March Constitutional Declaration. Ten additional MPs were appointed by the President. In the 2010 elections, an additional 64 seats were reserved for women MPs.

²³ While large numbers of independent MPs were also elected, many were either affiliated to the Muslim Brotherhood or were only nominally independent MPs as in practice they supported the presidential political line.

²⁴ This debate is covered in DRI's briefing paper: 'The Road to Elections in Egypt: Electoral reforms Since February 2011' and the Comprehensive Assessment of Egypt's Electoral Framework I (DRI, July 2011).

²⁵ See the section analysing the Law on Political Party Systems (LPPS) in DRI's Comprehensive Assessment of Egypt's Electoral Framework (DRI, July 2011).

In view of the SCC's 14 June 2012 decision, it is highly significant that the text of the May 2011 draft law allowed both parties and groups of non-party (i.e. 'independent') candidates²⁶ to form election lists.²⁷ Reformists objected to the number of seats to be contested under the existing electoral system – as noted above they preferred a system based wholly or largely on proportional representation (PR). They also objected to non-party groups contesting the seats allocated by PR, fearing that this arrangement would benefit the Mubarak-era political oligarchs.

On 19 July 2011, the SCAF issued Decree Law 108/2011 amending the LOPA (Law 38/2011). Inter alia, the law contained two important changes to the May 2011 draft. Firstly, it increased the number of PR seats so that there was a 50:50 split between the number of seats allocated under the list-PR and TSC systems. The increase in the number of list-PR seats did not appease the reform-minded political groups because in their view, retaining the individual candidate system (even in part) opened the door to the election of "remnants of the former regime" whose "money and bullying will affect political life".²⁸

The second main difference between the May 2011 draft and the adopted law was the removal of the clause that specifically allowed non-party candidates to form election lists and compete for the seats allocated by PR. At that time, the situation regarding whether party candidates could contest the TSC seats was legally unclear. While Decree Law 108 did not mention any procedures for political parties to nominate individual candidates – hinting that only non-party candidates would be permitted to contest the TSCs – it did not specifically exclude the possibility either. Most reformists strongly supported permitting party nominated candidates to contest the TSC seats and at the time, the media reported that some parties were even considering boycotting the elections unless the law was amended to more closely reflect their views.

On 25 September 2011, the SCAF amended article 38 of the Constitutional Declaration such that: "The law regulates the right of candidacy to the People's Assembly and Shura Council in accordance with the electoral system that combines closed party lists and individual systems where two-thirds are allocated to the first system and the remaining third to the second system". Thus, the balance between the two component elements of the electoral system was again altered

²⁶ In Egypt, the terms 'independent' and 'individual' candidates are sometimes conflated – whereas they are in fact very different concepts. 'Independent' relates to the status of a candidate as a non-party candidate. 'Individual' relates to a specific type of electoral system in which individuals stand for election rather than in concert with others as part of an electoral list.

²⁷ Although the draft law required the number of candidates on the electoral list to be equal to the number of mandates being elected in the electoral district, which causes unnecessary complications. In the final, adopted version of the law, the number of candidates should be two-thirds of the number of seats in a district (LOPA, article 3): which is also unnecessarily proscriptive.

²⁸ 35 political parties, presidential candidates reject elections bill" (25 July, State Information Service, <http://www.sis.gov.eg/En/Story.aspx?sid=57039>).

in favour of the list-PR system. However, the reference to closed ‘party’ – as opposed to ‘electoral’ lists – could be interpreted to mean that non-party (independent) candidates are not legally permitted to compete for the list-PR seats, thereby creating unequal opportunities between party and non-party candidates.²⁹ However, the amendment to the Constitutional Declaration did not clarify the situation as to whether party candidates were permitted to compete in the individual candidate system.

On 27 September, the SCAF issued Decree Law 120/2011, which reflected the amendment to the Constitutional Declaration, but also introduced a requirement (article 5) that “Those submitting applications to contest the People’s Assembly or the Shura Council elections through the individual electoral system should not belong to any political party. Their continued membership in these bodies shall be conditional on refraining from joining any political parties. Failure to observe this condition shall result in membership loss by a two-third majority”. Political parties strongly objected to article 5. On 1 October 2011, the SCAF announced that it would repeal article 5, and issued Decree Law 123/2011 on 8 October 2011, the effect of which allowed parties to contest the individual candidate seats. In the subsequent PA elections, which took place between November 2011 and January 2012, of the 166 seats available to individual candidates, political parties won 151 seats and independent candidates won 15 seats.

THE SCC’S 14 JUNE RULING

On 14 June, the SCC ruled that: article 3, paragraph 1; article 6, and article 9 bis (a) of the LOPA together with article 1 of Decree Law 123/2011 (which repealed article 5 of Decree Law 120/2011) are unconstitutional. Essentially, the court took the view that allowing parties to compete for two-thirds of the PA seats while excluding non-party candidates and simultaneously allowing parties to contest the individual seats alongside independent candidates constituted a violation of article 7 of the Constitutional Declaration which provides that: “All citizens are equal before the law. They have equal public rights and duties without discrimination on the grounds of race, ethnic origin, language, religion or creed”. According to the Court, it also violated article 3 of the Constitutional Declaration which provides that “only the people have sovereignty and are the source of all powers”.

EQUALITY IN ELECTIONS UNDER INTERNATIONAL LAW

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) clearly provides for equal suffrage in genuine elections, as follows: “Every citizen shall have the right and the

opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country”

Egypt acceded to the ICCPR in January 1982. As is the case for other signatories, Egypt is required to ensure the state authorities and the applicable laws respect the citizens’ rights which are enshrined under the ICCPR. The UN Human Rights Committee (UN HRC) has elaborated an authoritative interpretation of article 25 in its General Comment 25. This document deals with a number of the issues which lie at the core of the SCC’s 14 June (and earlier rulings), specifically:

Paragraph 15, which states: “The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. [...]” (emphasis added).

Paragraph 17, which states: “The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.”

While list-based electoral systems are certainly compatible with article 25, paragraph 17 strongly implies that in such systems there should be the opportunity for non-party affiliated candidates (independents) to form lists and compete with party lists on an equal legal basis.

POTENTIAL CONSEQUENCES OF THE SCC’S RULING

The SCC justified its 14 June ruling on similar grounds as before³⁰ that independent candidates were either not given an opportunity or an equal opportunity to stand for election in systems which were either based solely on PR (1984) or were

²⁹ Although the adoption of the revised text was actually designed to ensure that the electoral system was constitutional, and raises the question whether SCC consider the revised text of article 38 compatible with article 7 of the Constitution.

³⁰ The SCC’s 14 June ruling was the fourth time that the Court found parts of the LOPA unconstitutional. Two previous court rulings – in 1987 and 1990 – also led to the dissolution of parliament, albeit after referenda were held on the issue

mixed systems where a majority of seats were allocated through PR (1987 and 2011-12).

While, the SCC's judgments relate more to the law's failure to respect citizens' right to contest elections on the basis of equal opportunity rather than any inherent flaw in electoral systems based on electoral lists and proportional representation, in 1987 and 1990, the legislator responded to the SCC's rulings of those years not by amending the LOPA to ensure the right of non-party candidates to compete on an equal footing with party nominated candidates, but by revising the electoral system.³¹ It is possible that following the SCC's 14 June decision, the legislator will have the same reflex as in 1987 and 1990, although this far reaching action may not be necessary. It ought to be sufficient to simply take action to equalise opportunities for party and non-party candidates.³² In so doing, the legislator should avoid discriminating against the rights of party-nominees to contest all seats e.g. by reinstating article 5 of Law 120/2011, as this would simply extend discrimination against both non-party and party candidates in equal measure. While some might argue that this would create 'a balance' between party and non-party candidates, in fact it would discriminate against both categories by preventing them from contesting against each other on an equal basis i.e. as individuals and as associations. Indeed, the principle of equal suffrage means that all citizens are granted an equal opportunity to stand for all seats, whether the electoral system provides for competition by affiliated or associated groups or by individuals, or a combination of both, i.e. a mixed system.

In considering the electoral system, the legislator has four main options:

- i. Revert to the two-seat constituency (TSC) system
- ii. Revise the mixed electoral system used in the 2011-12 elections to ensure its constitutionality
- iii. Adopt a system based solely on electoral lists with all seats allocated by proportional representation
- iv. Adopt an entirely new electoral system

³¹ Although the 14 June ruling does not give a clear indication of the Court's view on the compatibility of article 38 of the Constitutional Declaration with articles 3 and 7 of the same document and does not specifically require any alteration to article 38. While the SCAF's supplementary Constitutional Declaration changed the text of this article to read: "Elections of the People's Assembly and the Shura Council shall be conducted in accordance to the law by any electoral system decided by the law", this document was rescinded. President Morsi's amendments to the Constitutional Declaration do not alter the text of article 38.

³² Until the election of a new PA, the legislator is, according to the 11 August amendments, the President. Under the SCAF's supplementary Constitutional Declaration, the military council would have retained this important function.

Option 1: Reverting fully to the two-seat constituency (TSC) system:

The PA elections of 1990, 1995, 2000, 2005 and 2010 used an unusual system whereby two PA members were elected from a large number of TSCs with winners elected according to the majoritarian principle, which often required two rounds of voting to establish the winners.³³

From a political perspective, this option is unlikely to sit well with the more reform oriented political groups because of their long-standing wish to employ an electoral system either entirely or largely based on PR. They also display considerable antipathy to the TSC system because of its association with parliaments elected under the Mubarak regime. This system is also likely to lead to the largest party (or coalition) gaining a strong parliamentary majority, even if it does not receive a majority of votes.

Reverting to this system has other problems too. There are obvious 'inequalities' in the size of the electorates of the TSCs (see Annex A). It is internationally recognised that elections must be held on the basis of equal suffrage, requiring that the vote of one elector should be equal to the vote of another.³⁴ The SCC's rulings on the unconstitutionality of the LOPA were founded on the fact that the LOPA established 'unequal suffrage' which was deemed discriminatory. Simply reverting to the TSC system – unless it is accompanied by an equalisation of the number of voters in the constituencies – could simply open up the election to further constitutional challenge.

Option 2: Revise the mixed electoral system used in 2011-12:

As already noted, the SCC's ruling does not necessarily mean that an electoral system based on PR is unconstitutional per se. Indeed, many countries use mixed PR-majoritarian systems without any constitutional issues arising.³⁵ However, the legislator must ensure that the rights of those seeking election are equal, whether they stand for election as non-party (independent) candidates or as party-backed candidates.

³³ The two member constituency system was selected as a method to ensure that at least 50% of the elected MPs were 'workers or farmers', as required by article 78 of Egypt's 1971 constitution and article 32 of the Constitutional Declaration.

³⁴ Paragraph 21 of UN HCR's General Comment 25 states: "Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely" (emphasis added).

³⁵ Although established democracies have their fair share of electoral system cases that are ultimately decided by the country's Constitutional Court e.g. recently in Germany, where on 25 July 2012, the Constitutional Court issued its decision concerning the unconstitutionality of the election law <http://www.reuters.com/article/2012/07/25/us-germany-election-court-idUSBRE86O0W820120725>

Under the system used in 2011-12, this could be achieved in various ways:

i) Preventing party candidates from contesting the seats reserved for individuals with the additional option of equalising the number of seats available for election to party and independent candidates.

This approach would probably violate citizen's rights under the ICCPR as it could easily be argued that introducing what are in effect quotas for party and independent candidates runs counter to the right of citizens to freely choose their representatives and amounts to an unreasonable restriction on the right to compete for political office for both party and independent candidates. It would also raise the obvious question as to why independent candidates should be allocated a specific proportion of seats as any limitation on independent candidates or party candidates to 50% of seats would appear to be arbitrary. In political terms, it could lead to the election of an Assembly which would struggle to form a stable majority as a significant number of its members would, at least formally, not be politically aligned. This would also mean that individual independent MPs may be able to yield more parliamentary power than their share of the vote would otherwise give. This would be particularly problematic if the new constitution enhances parliament's powers by giving it the authority to appoint or approve the Cabinet. Indeed, such an outcome would benefit only those that wish to marginalise the role of the parliament.

ii) Allow independent candidates to seek election under the PR component with the additional option of equalising the number of seats available for election to party and independent candidates.

This might be the best solution both politically and legally. However, the legislator would have to give serious consideration to the minimum number of candidates that a list should contain,³⁶ and whether non-party candidates should be required to contest these seats in association with others. There is a tendency in Egypt to conflate 'non-party (independent)' candidates and 'individual' candidates although these are two distinct concepts. If both parties and independents are required to submit lists then it becomes clearer that the PR system is designed for 'associations' of politically like-minded persons and there is no inequality of discrimination. Similarly, the individual seats would be contested by individuals, regardless of whether they are party-

³⁶ According to article 3 the LOPA currently in force for the multi-member districts, party lists must present a number of candidates equalling at least two-thirds the number of seats assigned to the district. While theoretically it may be possible to allow a single candidate to submit a list (whether a party-backed candidate or an independent), this approach would complicate polling e.g. by causing a ballot with a large number of election subjects, a high number of 'wasted' votes, and complications to the system of allocating seats to the election lists. However, it is not immediately apparent how this system could comply with the anachronistic constitutional provision requiring that at least 50% of elected MPs are workers or farmers (see analysis of this issue below).

backed or non-party (independent).³⁷ Equalising the number of individual and list-PR seats would better ensure 'equal opportunity' for all candidates whether independent or party-backed. An additional benefit of this option is that it requires only a few changes to the LOPA,³⁸ and if handled correctly the legislator should be able to ensure that the rights of independent candidates, party candidates, individuals and associations are all treated equally, thereby lessening the risk that the arrangements will be deemed unconstitutional. It should also be possible to ensure greater representation of women – by requiring all electoral lists with two or more candidates to nominate a specific number of women candidates on the list and in specific positions on the list: ideally among the first two candidates.

However, as discussed above in either of these two options, the legislator will need to ensure that the vote of one elector is equal to the vote of another i.e. to ensure a broadly equal number of registered electors in the constituencies and electoral districts.

Option 3: Introduce an electoral system based solely on electoral lists

Some Egyptian political leaders advocate re-introducing an electoral system based solely on proportional representation e.g. the system that was employed for Egypt's 1984 elections, whereby party lists competed for all seats in 48 multi-member election districts.³⁹ In 1987, the SCC ruled that the system was unconstitutional on the grounds that it did not create equal opportunity for all citizens to contest the election.⁴⁰ However, as the Al Ahrām Centre noted, "The Court did not, however, explore possible means of reforming the electoral system [existing at the time] in order to make it more compatible with the constitution."⁴¹ As already noted, one way of making a list-PR electoral system more compatible with the constitution would be to ensure that non-party candidates (independents) have the same opportunity to seek election as party candidates.

³⁷ If independent candidates are required to form an association with other candidates to compete in the PR seats (i.e. submit an electoral list), it may be prudent to equalise the number of PA seats allocated under the PR and individual-candidate systems to lessen the risk that the SCC would find this approach unconstitutional – but this may not be strictly necessary, providing that non-party and party candidates have equal opportunity to seek election.

³⁸ Some changes would be required, e.g. altering the terms 'party list' to 'electoral list' and the introduction of provisions detailing the procedures for the formation of an electoral list by a group of independent candidates.

³⁹ Party lists required at least 8% of the vote in order to be eligible to receive a seat.

⁴⁰ According to the Al Ahrām Centre for Political and Strategic Studies "the Court ruled on the 16th of May 1987, against the constitutionality of electing members of parliament according to the party list proportional representation system. The Court maintained that this system contradicts articles 62, 40 and 8 of the constitution which guarantee equal opportunity. The Court did not, however, explore possible means of reforming the existing electoral system in order to make it more compatible with the constitution."

See: <http://acpss.ahram.org.eg/eng/ahram/2004/7/5/ARAB34.HTM>

⁴¹ Al Ahrām Centre, *ibid*

The simplest way of achieving this objective would be to allow non-party candidates to submit lists alongside party candidates. However, this approach may not solve the problem entirely because the SCC's position on whether citizens have the right to contest an election as an individual is not clear i.e. if the Court considers that the right to seek election is an 'individual' right, it could conceivably rule that candidates should not be forced into contesting an election in association with other individuals i.e. as part of a list containing multiple candidate names. In this situation, for a list-PR electoral system to be considered constitutional, the legislator may have to allow individual candidates to contest the election alongside lists of candidates. The simplest way of achieving this would be to allow lists to be submitted without requiring that they contain a minimum number of candidates, i.e. lists could contain a single candidate's name.

This 'solution' would however create a number of problems not least regarding the size of the ballot paper, devising a simple and fair seat allocation formula, and – if it is retained – complying with the 50% quota for workers and farmers. It is conceivable that such a system might work whereby the country is divided into multi-member election districts, but it is unlikely to be workable in a system which treats the country as a single constituency because the ballot paper would end up being enormous if it had to contain the names of potentially thousands of candidates. It would also be difficult to apply a 'representation threshold' i.e. that 'lists' (or candidates) require a certain percentage of the vote in order to be allocated seats.⁴²

Option 4: Introduce an entirely new electoral system

Egyptians' decision on their electoral system need not be framed as a simple choice between a PR-list system, TMCs or a combination of the two. Indeed, there are a number of other electoral systems which would appear to be compatible with the SCC's ruling, including multi-member individual candidate systems, some of which can result in a degree of proportionality e.g. such as the Block Vote (BV) system⁴³.

⁴² The lower house of the parliament of the Netherlands has an electoral system based fully on proportional representation but voters vote for candidates, not parties. In order to be represented in its 150 seat parliament, a party (or candidate) requires a number of votes equalling the electoral quotient for one seat. All votes for candidates nominated by parties are attributed to the nominating party. Seats are allocated on the basis of the number of electoral quotients with remaining seats allocated using the highest average method (D'Hondt system). However, the electoral deposit required to stand as a candidate is high compared to other countries and the ballot paper is large.

⁴³ While the block vote (BV) system is often used in countries which do not have political parties, potentially it can work well in countries which respect their citizens' right to form parties. Kuwait uses the block vote system as follows: the country has five multi-member districts with each being allocated ten seats and each elector entitled to vote for up to four candidates. One variation on the Kuwait system might be to allow a voter to cast more than one or all of his/her votes for a single candidate. The downside of the BV system is that strategic decisions by parties when fielding candidates can have a major influence on the outcome e.g. a miscalculation by a party in registering too high a number of candidates can cause the collective vote for all its candidates to become too dispersed to secure the election of a single candidate. The system is distinct from the Party Block Vote (PVB) system which can result in one political current gaining a landslide.

Single Non-Transferable Vote (SNTV) systems or cumulative voting systems could also be compatible.

The main downside of introducing a new electoral system is that voters and candidates will be unfamiliar with the principles of the system and how it functions. Moreover some systems, including preferential voting systems may be too complicated to be used in the Egyptian context as they require a high level of voter literacy.

WORKERS AND FARMERS QUOTA

The 30 March Constitutional Declaration retained a pre-existing constitutional requirement that 50% of the members of the People's Assembly and Shura Council are 'workers and farmers'. Granting a quota (and a very high one at that) to occupational classes is a legacy of Egypt's past as a Socialist Republic which seriously disadvantages other occupational groups. In contrast to the representation of women, under international law (to which Egypt is a party), there is no provision to permit positive measures to be put in place to raise the representation of specific occupational groups. Indeed, if any such provision restricted citizens' equal opportunity to be elected or restricted voters in their free choice of candidates, it would conflict with the ICCPR.

The LOPA defines workers and farmers⁴⁴ and includes provisions on the practical implementation of the requirement. DRI's previous reports⁴⁵ have highlighted a number of shortcomings in this regard, including that in implementing the requirement, the law creates provisions that:

- Ignore the electoral choices made by voters in-so far as a candidate who is not a 'worker' or 'farmer' who receives sufficient votes to be elected or to contest a second round run-off election, may be 'passed over' in favour of a worker or farmer candidate who actually received fewer votes or, in the case of party-lists, was placed at a lower point in the list than other candidates.⁴⁶ This violates a fundamental electoral principle;
- Significantly complicate the electoral system design and restrict the options available;

⁴⁴ In the past, candidates were able to easily circumvent the definitions e.g. rich businessmen were able to stand as "workers". The LOPA contains provisions requiring that in order for a farmer to stand as a candidate he must own or rent less than 10 "feddans" and also stipulates that a worker who wishes to stand for election may not hold a high academic qualification and must be a member of a trade union.

⁴⁵ See DRI's previous reports for an analysis of the provision, e.g. "Assessment of the Electoral Framework" (2007), "The Road to Elections in Egypt: Electoral Reforms Since February 2011" (July 2011), and the "Comprehensive Assessment of Egypt's Electoral Framework" - Parts I and II, (July and August 2011).

⁴⁶ See articles 15 and 15 bis of the LOPA.

- Make it far harder to devise a system which simultaneously guarantees the representation of women (e.g. through a quota, or ordered lists);
- Violate international standards e.g. because the LOPA includes restrictions on candidacy based on property and educational requirements.⁴⁷

The quota for workers and farmers has had a major effect on the choice of the electoral system. Ostensibly, the TSC system was first established as a way to implement the quota without conducting a separate election i.e. using a separate ballot paper. Retaining the quota in the Constitutional Declaration meant that in the individual candidate component there was limited scope to change the TSC system – at least not without complicating the polling arrangements.⁴⁸ This also leads to a situation where the vote of one elector in one governorate is not equal to that of another in another governorate.⁴⁹

ISSUES FOR CONSIDERATION:

1. It is generally considered best practice to avoid drafting overly detailed⁵⁰ clauses on electoral systems in a country's constitution. Given the SCC's track record declaring parts of the electoral legislation unconstitutional, it may be prudent to set out certain elements or acceptable options for the parliamentary electoral system in the new constitution. This could stipulate for instance that systems based on the individual candidates, electoral lists, or a combination of both are all acceptable providing that all candidates have equal opportunities to seek election.

2. Introduce in the new constitution a provision that the SCC is tasked with assessing the constitutionality of parliamentary and presidential electoral legislation before the commencement of the electoral process.⁵¹

3. In the absence of a functioning parliament, to ensure that the new electoral system enjoys broad-based political support, the President should consider convoking a committee composed of representatives of: the SCC, all registered political parties, and the legislator, to reach agreement on (i) the arrangements to ensure that citizens' are granted equal rights to stand for election and (ii) the electoral system.

4. Whichever electoral system is in place for future elections, to avoid a successful challenge to the constitutionality of future elections on the grounds of unequal opportunity or discrimination, the legislator should ensure that electoral districts and constituencies have a broadly equal number of electors (or citizens) and that the number of seats available for election in multi-member districts corresponds proportionally to the number of citizens that the district contains. In the longer term, consideration could be given to establishing an electoral boundary commission.

5. Non-party and party candidates should have equal opportunity to seek election as individuals or in association with others. Hence, the legislator should seriously consider extending the right of non-party candidates to seek election through electoral lists.

6. The CA should give serious consideration to repealing or revising the provision which requires 50% of the People's Assembly to be 'workers' or 'farmers'. This would remove de facto restrictions on the legislator's options for the electoral system and would enhance the constitution's respect for citizens' electoral right to freely choose their representatives.

7. The legislator should amend Egypt's electoral legislation to ensure full compatibility with rights protected by international legal instruments, most notably the ICCPR, and to utilise the guidance offered by the UN HRC's General Comments, in particular General Comment 25 on ICCPR article 25 and General Comment 34 on article 19 of the ICCPR.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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⁴⁷ Paragraph 3 of General Comment 25 on article 25 of the ICCPR states that: "No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis added). Paragraph 15 of General Comment 25 (ibid) states: "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education [...]". The provisions on whether workers can be members of a trade union and how this affects their eligibility to stand for election are confusing and arguably also discriminatory.

⁴⁸ It is possible to conduct one series of elections for "workers and farmers" and a separate one for "others" (which is also open to worker and farmer candidates because the constitutional declaration stipulates that at least half of the PA members shall be workers and farmers). But in order to give voters and candidates equal choice and opportunities the constituencies in which the elections take place would have to be identical. Thus de facto, each constituency would still elect two members, albeit in separate contests.

⁴⁹ Because a governorate must be allocated at least two individual mandates (one TMC) – whereas its population size may justify only a single seat to be allocated.

⁵⁰ The CA should avoid following the approach taken by Mubarak when re-drafting article 76 of the 1971 Constitution i.e. to draft overly long and very detailed or overly proscriptive articles.

⁵¹ Currently the SCC only reviews the Presidential Election Law.

ANNEX 1

Total no. of registered voters/no. of seats		151730						303459			
District		Registered voters (MSD)	No. of seats in each District	Registered voters/no. of seats	Deviation			Registered voters (TSC)	No. of seats in each constituency	Registered voters/no. of seats	Deviation
Assiut	1	1,226,591	8	153324	1%		1	499,649	2	249825	-18%
	2	845,288	8	105661	-30%		2	726,942	2	363471	20%
							3	526,724	2	263362	-13%
							4	318,564	2	159282	-48%
Aswan	1	850,648	4	212662	40%		1	850,648	2	425324	40%
Alexandria	1	1,664,657	6	277443	83%		1	848,384	2	424192	40%
	2	1,639,259	10	163926	8%		2	816,273	2	408137	34%
							3	872,108	2	436054	44%
							4	767,151	2	383576	26%
Ismailia	1	696,351	4	174088	15%		1	696,351	2	348176	15%
Luxor	1	666,254	4	166563.5	10%		1	666,254	2	333127	10%
Red Sea	1	221,011	4	55253	-64%		1	221,011	2	110506	-64%
Beheira	1	2,074,330	12	172861	14%		1	668,074	2	334037	10%
	2	1,124,296	8	140537	-7%		2	776,278	2	388139	28%
							3	629,978	2	314989	4%
							4	609,171	2	304586	0%
							5	515,125	2	257563	-15%
Giza	1	2,110,345	10	211035	39%		1	1,268,136	2	634068	109%
	2	2,151,927	10	215193	42%		2	842,209	2	421105	39%
							3	848,198	2	424099	40%
							4	660,686	2	330343	9%
							5	643,043	2	321522	6%
Dakhalia	1	1,396,381	8	174548	15%		1	701,487	2	350744	16%
	2	1,050,946	8	131368	-13%		2	694,894	2	347447	14%
	3	1,243,816	8	155477	2%		3	497,167	2	248584	-18%
							4	553,779	2	276890	-9%
							5	741,320	2	370660	22%
							6	502,496	2	251248	-17%
Suez	1	378,917	4	94729	-38%		1	378,917	2	189459	-38%

Sharqiya	1	1,633,927	10	163393	8%		1	706,514	2	353257	16%
	2	1,849,987	10	184999	22%		2	927,413	2	463707	53%
							3	692,449	2	346225	14%
							4	637,304	2	318652	5%
							5	520,234	2	260117	-14%
Gharbiya	1	1,371,027	10	137103	-10%		1	714,534	2	357267	18%
	2	1,547,524	10	154752	2%		2	656,493	2	328247	8%
							3	583,299	2	291650	-4%
							4	402,962	2	201481	-34%
							5	561,263	2	280632	-8%
Fayoum	1	944,995	8	118124	-22%		1	532,939	2	266470	-12%
	2	600,561	4	150140	-1%		2	412,056	2	206028	-32%
							3	600,561	2	300281	-1%
Cairo	1	1,831,768	10	183177	21%		1	1,095,693	2	547847	81%
	2	2,245,195	8	280649	85%		2	736,075	2	368038	21%
	3	679,933	8	84992	-44%		3	499,810	2	249905	-18%
	4	1,806,856	10	180686	19%		4	380,229	2	190115	-37%
							5	1,365,156	2	682578	125%
							6	255,380	2	127690	-58%
							7	424,553	2	212277	-30%
							8	728,243	2	364122	20%
							9	1,078,613	2	539307	-36%
Qaliubiya	1	826,464	4	206616	36%		1	826,464	2	413232	36%
	2	1,756,954	8	219619	45%		2	905,915	2	452958	49%
							3	851,039	2	425520	40%
Menoufiya	1	1,192,036	8	149005	-2%		1	640,225	2	320113	5%
	2	1,023,508	8	127939	-16%		2	551,811	2	275906	-9%
							3	606,946	2	303473	0%
							4	416,562	2	208281	-31%
Menia	1	1,392,026	8	174003	15%		1	697,353	2	348677	15%
	2	1,252,804	8	156601	3%		2	694,673	2	347337	14%
							3	619,832	2	309916	2%
							4	632,972	2	316486	4%
Al-wadi Elgadeed	1	140,527	4	35132	-77%		1	140,527	2	70264	-77%
Beni Suef	1	897,942	8	112,243	-26%		1	513,087	2	256544	-15%
	2	517,284	4	129321	-15%		2	384,855	2	192428	-37%
							3	517,284	2	258642	-15%
Port Said	1	437,134	4	109284	-28%		1	437,134	2	218567	-28%

South Sinai	1	60,496	4	15124	-90%		1	60,496	2	30248	-90%
Damietta	1	849,235	8	106154	-30%		1	390,950	2	195475	-36%
							2	458,285	2	229143	-24%
Sohag	1	1,393,141	12	116095	-23%		1	574,259	2	287130	-5%
	2	929,957	8	116245	-23%		2	403,042	2	201521	-34%
							3	415,840	2	207920	-31%
							4	509,363	2	254682	-16%
							5	420,594	2	210297	-31%
North Sinai	1	203,346	4	50837	-66%		1	203,346	2	101673	-66%
Qena	1	741,731	4	185433	22%		1	414,225	2	207113	-32%
	2	843,460	8	105433	-31%		2	622,882	2	311441	3%
							3	548,084	2	274042	-10%
Kafr El-Sheikh	1	1,306,220	8	163278	8%		1	743,826	2	371913	23%
	2	557,614	4	139404	-8%		2	562,394	2	281197	-7%
							3	557,614	2	278807	-8%
Matrouh	1	199,607	4	49902	-67%		1	199,607	2	99804	-67%
Total		50,374,276	332			Total		50,374,276	166		