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After the Last Judgment: The Future of the Egyptian Constitution

An article in the series on the aftermath of Egypt's February 2011 Revolution
and the possibilities for legal and constitutional reform.

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The ancient Egyptian Goddess Maat, who represented truth and justice, carried with her the Feather of Truth. In the last judgment, the feather was used to weigh the hearts of the deceased. If their hearts weighed less than the feather they would

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*pass the first test in their journey to the afterlife. If their hearts weighed more, then they had no hope of continuing on into the afterlife.*¹

I. INTRODUCTION

On February 11, 2011, Vice President of Egypt Omar Suleiman announced on state television that President Hosni Mubarak had resigned from the office of president.² After only eighteen days of mostly peaceful protests, Egyptians surprised themselves and the world by removing one of the longest-living and most brutal dictators in the Arab world.³ The pharaoh had been judged and found wanting. Few people had expected the demonstrations that started on January 25, 2011 would result in Mubarak's resignation⁴ or influence other demonstrations throughout the region.⁵

Almost immediately after Mubarak's removal, there were calls by various human rights groups and non-governmental organizations to implement large-scale reforms in Egypt that would guarantee Egyptians' liberties and freedoms. This article will focus on one subset of the reforms being advocated—amending the Egyptian Constitution. Full discussion of this complex topic would require book-length treatment. This article initiates the discussion by highlighting a few key issues. We begin by providing a brief overview of the Egyptian Constitution. We then discuss some of the main amendments that the Egyptian Constitutional Amendment Committee proposed and that were recently adopted by public referendum. Finally, we recommend a few other amendments that Egypt should consider after parliamentary elections take place.

¹ See MIRIAM LICHTHEIM, 2 ANCIENT EGYPTIAN LITERATURE: NEW KINGDOM (2006).

² Chris McGreal & Jack Shenker, *Hosni Mubarak Resigns—and Egypt Celebrates a New Dawn*, GUARDIAN.CO.UK, Feb. 11, 2011, available at <http://www.guardian.co.uk/world/2011/feb/11/hosni-mubarak-resigns-egypt-cairo>.

³ Sultan Al Qassemi, Op-Ed., *Gulf States Must Repay Egypt Favour*, AL JAZEERA, Feb. 17, 2011, <http://english.aljazeera.net/indepth/opinion/2011/02/2011214151229281695.html>.

⁴ *Id.*

⁵ See, e.g., Amran Abocar, *Analysis: Saudi Arabia, Jolted by Egypt, Now Alarmed by Bahrain*, REUTERS, Feb. 17, 2011, <http://www.reuters.com/article/2011/02/17/us-bahrain-saudi-idUSTRE71G4JJ20110217>; Ian Black, *Muammar Gaddafi Lashes Out as Power Slips Away*, GUARDIAN.CO.UK, Feb. 21, 2011, available at <http://www.guardian.co.uk/world/2011/feb/21/libya-protests-bloodiest-yet-gaddafi>; *Djiboutians Want President Out: Protests' Shockwave Hits Syria and Djibouti*, AL ARABIYA NEWS CHANNEL, Feb. 18, 2011, <http://www.alarabiya.net/articles/2011/02/18/138195.html>.

II. OVERVIEW OF EGYPTIAN CONSTITUTION

Egypt's current Constitution is divided into seven chapters outlining the powers and authorities of the government's various branches.⁶ The first chapter defines Egypt as an Arab socialist and democratic state⁷ and establishes Islam as the official religion of the government.⁸ Chapter Two lists the basic economic and social rights and duties between the state and its citizens.⁹ For example, the Constitution states that work is a right and duty that shall be ensured by the government.¹⁰ The state shall guarantee social and health benefits,¹¹ and education is a guaranteed right.¹² Workers also have the right to share in the management and profits of the businesses in which they work.¹³

Chapter Three describes the basic political and civil liberties of Egyptians.¹⁴ Article 40 states that all Egyptians are equal before the law regardless of their sex, ethnic origin, language, or religion.¹⁵ The government shall guarantee the freedom of religious beliefs and citizens' ability to practice their religion.¹⁶ All citizens enjoy the freedom of opinion and may express and disseminate their opinions verbally, visually, or in writing.¹⁷ Chapter Four guarantees that all citizens have access to justice and the right to defend themselves in court.¹⁸ All citizens are innocent until proven guilty,¹⁹ and anyone arrested shall be informed of the reasons for the arrest and the charges being brought.²⁰

Chapter Five discusses the three main branches of the government: the executive (including the president and the local administrative councils), the People's Assembly (the legislative body), and the judiciary.²¹ As will be discussed in greater detail below,

⁶ See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, March 19, 2011 [hereinafter EGYPT CONSTITUTION]. Several English translations exist of the Egyptian Constitution. All references to the Egyptian Constitution in this article were referenced and translated by the authors (Kassim) in the original Arabic.

⁷ *Id.* art. 1.

⁸ *Id.* art. 2.

⁹ See *id.* ch. 2.

¹⁰ *Id.* art. 13.

¹¹ *Id.* art. 17.

¹² *Id.* art. 18.

¹³ *Id.* art. 26.

¹⁴ See *id.* ch. 3.

¹⁵ *Id.* art. 40.

¹⁶ *Id.* art. 46.

¹⁷ *Id.* art. 47.

¹⁸ See *id.* ch. 4.

¹⁹ *Id.* art. 67.

²⁰ *Id.* art. 71.

²¹ See *id.* at ch. 5.

the executive branch, specifically the office of the president, has power to intrude on other branches of the government. The main provision in Chapter Six includes the mechanism for amending the Egyptian Constitution.²² Chapter Seven details the responsibilities of the Shura Council.²³ The Shura Council is neither a typical legislative nor executive body. It has some limited ability to recommend and draft laws to be considered by the People's Assembly.²⁴ The president has significant overreach into the affairs of the Shura Council. For example, one third of the Shura Council is appointed by the president,²⁵ which is itself a cause for grave concern and even more so because the Shura Council plays a significant role in the nomination of presidential candidates.²⁶

III. COMMITTEE PROPOSALS: LIMITING PRESIDENTIAL POWER

The military council now ruling Egypt gave the Egyptian Constitutional Amendment Committee (the Committee), headed by retired judge Tarek El-Bishry, a truncated ten-day time frame to redraft certain aspects of the Constitution.²⁷ The Committee originally limited the scope of its proposals to a few articles in the Constitution: Articles 75, 76, 77, 88, 93, 179, and 189,²⁸ just enough to allow for the next round of

²² See *id.* art. 189.

²³ See *id.* ch. 7.

²⁴ See *id.* arts. 194-95.

²⁵ *Id.* art. 196.

²⁶ See *id.* art. 76.

²⁷ Yasmine Saleh, *Rewrite Egypt Constitution from Scratch, Say Critics*, REUTERS, Feb. 16, 2011, available at <http://af.reuters.com/article/topNews/idAFJOE71F0N620110216>.

²⁸ See Christian Gomez, *Forming a New Constitution in Egypt*, THE NEW AMERICAN, Feb. 18, 2011, available at <http://www.thenewamerican.com/index.php/world-mainmenu-26/africa-mainmenu-27/6361-forming-a-new-constitution-in-egypt>; see also Yasmine Saleh, *Factbox: Proposed changes to Egypt's Constitution*, REUTERS, Feb. 26, 2011, available at <http://www.reuters.com/article/2011/02/26/us-egypt-constitution-changes-idUSTRE71P28520110226?pageNumber=1>. Article 75 concerns presidential qualifications. See EGYPT CONSTITUTION, art. 75. Article 76 concerns presidential nomination. See *id.* art. 76. Article 77 defines each presidential term as six Gregorian years but does not limit the number of terms a president may serve. See *id.* art. 77. Article 88 states that the law shall determine how members of the People's Assembly shall be elected and that People's Assembly elections must occur under the supervision of members of the judiciary. See *id.* art. 88. Under Article 93, the People's Assembly may challenge the validity of the membership of any of its members, and the Court of Cassation has the power to investigate any contestations of membership. See *id.* art. 93. Article 179 permits the infringement of human rights in the investigation or prosecution of terrorism. See *id.* art. 179. Article 189 concerns mechanisms for amending the Constitution. See *id.* art. 189. For commentary and analysis on Article 76, 77, 88, and 179 in particular, see Nathan J. Brown, *At a glance: Egypt's Constitution*, BBC, Feb. 11, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-12411954>.

elections.²⁹ The final list of proposed amendments also included two additional articles, Articles 139 and 148.³⁰ Some Egyptians argued that the proposed amendments were insufficient and demanded a complete overhaul to the entire Constitution.³¹ Some pro-democracy groups are still unsatisfied with the Committee's proposals, claiming that they unfairly favored established political parties such as the Muslim Brotherhood and the National Democratic Party.³² Others have called into question the legitimacy of this Committee, arguing that eight members inadequately represents Egyptian society and that essential groups such as intellectuals, youth, and women, were excluded.³³ Nonetheless the Committee's proposals were put up for public referendum on March 20, 2011 and Egyptians overwhelmingly supported them with seventy-seven percent of voters backing their adoption.³⁴

The very holding of a public referendum provided some check on the Committee's recommendations. However, voters had to either accept or reject the entire list of proposed amendments and could not pick and choose among them. The referendum at this early stage attempted to create a rough equivalent to the procedure for constitutional amendments in other jurisdictions, which typically require supermajority legislative votes and, in some cases, public referenda. For example, in the United States, a constitutional amendment must first pass a two-thirds majority vote in both the House and the Senate before being sent to the states, where three-fourths of the state legislatures must vote in their favor for adoption.³⁵ Similarly, the Australian Constitution requires a majority vote from the upper and lower house of Parliament as well as a majority vote in a public referendum in the majority of states and territories.³⁶ Future constitutional reforms planned for after Parliamentary elections need to involve more fully all key sectors in Egyptian society.

²⁹ See Saleh, *supra* note 27.

³⁰ Article 139 grants the president the authority to appoint a vice-president and relieve him of his post. See EGYPT CONSTITUTION, art. 139. Article 148, which grants the president the right to call for a state of emergency, requires that state of emergency decrees be submitted to the People's Assembly within fifteen days and that they be for a limited time. See *id.* art. 148.

³¹ See Saleh, *supra* note 27; Ahmed Zaki Osman, *Army-Appointed Constitutional Committee Fails to Please Everyone*, AL-MASRY AL-YOUM, Feb. 15, 2011, available at <http://www.almasryalyoum.com/en/node/320158>.

³² *Egypt Referendum Strongly Backs Constitution Changes*, BBC, Mar. 20, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-12801125>.

³³ See Nawal El Saadawi, *Shortcomings of the New Constitution Committee*, AHAM ONLINE, Feb. 21, 2011, <http://english.ahram.org.eg/NewsContentP/4/6129/Opinion/Shortcomings-of-the-new-Constitution-committee.aspx>; Richard Spencer, *Egypt: Islamist Judge to Head New Constitution Committee*, THE TELEGRAPH, Feb. 15, 2011, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8326469/Egypt-Islamist-judge-to-head-new-constitution-committee.html>.

³⁴ *Egypt Referendum Strongly Backs Constitution Changes*, *supra* note 32.

³⁵ U.S. CONST. art. V.

³⁶ AUSTRL. CONST. ch. VIII, § 128.

This article will focus on five of the adopted amendments in greater detail, namely those that relate to limiting presidential power: Articles 76, 77, 88, 139, and 148. We anticipate discussing these articles and others in greater depth in future scholarship.

Article 76 discusses how the president is nominated and elected and, along with Article 77, has received substantial media attention. Article 76 as amended is one of the most complicated provisions in Egypt's Constitution. The previous version of Article 76 required that the president be elected by general referendum.³⁷ Presidential candidates had to obtain a minimum of 250 endorsements combined from members of the People's Assembly, the Shura Council, and local administrative units. Endorsements had to include at least sixty-five members of the People's Assembly, twenty-five members of the Shura Council, and ten members each from a minimum of fourteen regional assemblies for a total of 230 endorsements.³⁸ The remaining twenty endorsements had to be obtained proportionally from the People's Assembly (28.3%), the Shura Council (10.9%), and local provincial councils (60.9%).³⁹ No individual from the People's Assembly, Shura Council, or regional assemblies could endorse more than one presidential candidate.⁴⁰ Under the prior version of Article 76, political parties could have nominated a presidential candidate if, in addition to the above requirements, they had existed for five years and during this time maintained at least 3% of the seats in both the People's Assembly and the Shura Council.⁴¹

Presidential candidacies were then referred to the public for direct general elections under the supervision of the Presidential Elections Committee.⁴² The presidential candidate that received a majority of the votes cast would have been elected president.⁴³ If no candidate received a majority, a second round of elections would have taken place at the earliest after seven days from the announcement of the results.⁴⁴ In the second round of elections, the candidate receiving the largest number of votes cast would have been elected president.⁴⁵

³⁷ See EGYPT CONSTITUTION, art. 76.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* There were other requirements as well. For example the candidate must have been a member of the party's executive committee for a period of one-year prior to their nomination.

⁴² *Id.* The Presidential Elections Committee is led by the head of the Supreme Constitutional Court of Egypt and comprises senior members of the judiciary. Its main objective is to supervise the presidential nomination and election process. Elections must take place by secret ballot. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Many have argued that the former requirements made it close to “impossible” for an opposition group to nominate a presidential candidate.⁴⁶ Article 76 in effect excluded any nominee except for the incumbent to run for office. Under the newly adopted Article 76, presidential candidates need only thirty parliamentary endorsements, 30,000 individual signatures from half of Egypt’s provinces, or the endorsement of a registered political party that has at least one seat in Egypt’s parliament. The new version also eliminates the requirement for endorsements from the Shura Council and the regional assemblies, and it reduces the number of endorsements required from the People’s Assembly by more than half.

With regards to electing the president, revised Article 76 states that the president shall be elected through public secret ballot. It is not clear whether the successful candidate must obtain a majority of votes cast or simply the largest number of votes. While the Committee’s proposal certainly makes it easier for political parties and individuals to become presidential candidates, it may allow for too many presidential candidates—a different type of frustration to the political process. It is possible, especially during the early stages of Egyptian democracy when political parties are solidifying and organizing their internal structures and constituents, for a large number of presidential candidates to be nominated. Depending how Article 76 is interpreted, it is possible for a president who does not enjoy mass public appeal to be elected because they received marginally more votes than any other candidate. Therefore, we recommend that the new Article 76 be further amended by the next parliament to ensure that any president-elect has significant appeal to and support from the Egyptian population.

Article 77 defines presidential limits and under the previous Constitution, presidents could have been elected for an unlimited number of six-year terms. This provision allowed President Mubarak to stay in power for more than thirty years. The newly adopted Article 77 limits presidents to two, four-year terms. We endorse this mechanism for limiting presidential power.

The new Article 88 reinstates the role of the judiciary in supervising presidential elections. We agree that in principal an independent body should supervise presidential elections. However, given Egypt’s recent political history, the judiciary at this point in time may not yet be truly independent. Therefore, we recommend that a mix of representatives from the judiciary and other local or international agencies should supervise any future presidential elections until the judiciary can build the necessary capacity to act independently.

The new Article 139 requires that the next Egyptian president appoint a vice-president within sixty days of being elected. The Article was originally written only to grant the president the *option* to appoint a vice president. Requiring the president to select a vice president dilutes the power of the president and creates a further check

⁴⁶ See Saleh, *supra* note 27.

on their authority. However, we believe that the revised article, which does not include checks by any other branch of government, creates the possibility for nepotism and cronyism. Egypt may be better served if, once the president nominates a vice-president, the vice president be approved by a majority vote from the People's Assembly or by public referendum for example. Alternatively, Egypt could consider requiring a party's presidential nominee to get explicit endorsement by the party of a vice presidential candidate.

Finally, Article 148 grants the president the right to declare a state of emergency provided that he submits his decree to the People's Assembly. Under the adopted Article 148, the state of emergency decree must be submitted for a majority vote in parliament within seven days and even then, the state of emergency may not last longer than six months. Any extension in the state of emergency beyond six months must first be submitted to the public for a general referendum. We believe this is a well thought out revision to the president's ability to declare a state of emergency. The revision has adequate checks on the president's and the People's Assembly's power to impose a prolonged state of emergency.

IV. FUTURE AMENDMENTS AND ANALYSIS: ENHANCING THE LEGISLATURE

We now provide a few brief recommendations that Egypt may want to adopt in the future after the first post-revolution parliamentary elections are held. These recommendations mainly concern enhancing the role of the legislature in Egypt and ensuring better representation of Egyptians in their parliament. After decades of authoritarian rule by a single individual, a true republican legislature that reflects the majority of the sentiments and views of the Egyptian people should be a top priority for any upcoming reforms in Egypt.

As stated in Article 86 of the Constitution, the legislative powers of Egypt are vested in the People's Assembly.⁴⁷ The People's Assembly shall approve the general policy of the state and its general economic and social development plan, including the state budget.⁴⁸ The People's Assembly must consist of at least 350 individuals, half of whom must be "workers" and "farmers"⁴⁹—terms that are to be specifically defined by law.⁵⁰ The president may appoint up to ten members of the People's Assembly.

⁴⁷See EGYPT CONSTITUTION, art. 86.

⁴⁸ *Id.*

⁴⁹ *Id.* art. 87.

⁵⁰ *Id.*

Under this provision, popular representation in the legislature is highly diluted. With over eighty million Egyptians,⁵¹ each People's Assembly representative represents around 230,000 Egyptians. Once elections are held and broad constitutional revisions are underway, Egyptians may want to consider increasing the number of representatives in their legislature. They may also want to consider creating a bicameral legislature with the upper house restricted to a limited number of representatives per province or major city and the lower house consisting of representatives determined by a set number of citizens. Additionally, while the president's ability to appoint members in the People's Assembly is limited to only ten (roughly 3% of all seats), new revisions may want to consider eliminating or further reducing this number to an even more nominal amount.

The Shura Council's primary responsibilities are stipulated in Article 195 of the Egyptian Constitution.⁵² The powers vested in the Shura Council are partly legislative and partly advisory. The Shura Council may propose amendments to the Constitution. It has limited capacity to draft laws that complement the Constitution and to draft general social and economic plans for development.⁵³ The Shura Council is composed of at least 132 members, two-thirds of whom are elected by the public in secret ballot elections and one-third are appointed by the president.⁵⁴ Of the elected members in the Shura Council, half must be "workers" and "farmers."⁵⁵ Although no definition of "workers" and "farmers" is provided, we can assume that it is the same definition as used in Article 87. No individual may hold office in the People's Assembly and the Shura Council at the same time.⁵⁶

The Shura Council could be turned into a type of advisory body that tackles and recommends solutions on some of the country's long-term issues, which the People's Assembly may be unable to seriously undertake given its more political nature. The Shura Council could be structured to allow for staggered appointments of its members to ensure stability of the institution and insulate it from the political arena. A fifth of its members could be nominated every presidential term by the president, subject to the majority approval of the People's Assembly. However, allowing the president to appoint a third of its members, as it stands now, creates an opportunity for excessive executive intrusion and meddling on another branch of the Egyptian government.

⁵¹ *The World Factbook: Egypt*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (last modified Mar. 9, 2011) (last visited Apr. 12, 2011).

⁵² EGYPT CONSTITUTION, arts. 194-95.

⁵³ *Id.*

⁵⁴ *Id.* art. 196.

⁵⁵ *Id.*

⁵⁶ *Id.* art. 200.

V. CONCLUSION

Egyptians have presented themselves with an unprecedented opportunity in 2011. It remains to be seen if they will be able to overcome the authoritarian legacy of the past and be a role model for the Arab world in developing a true democracy suitable for their society in the twenty-first century. Despite the daunting challenges that lie ahead, we believe that the Egyptians can succeed if they undertake carefully designed constitutional reform as one component of their transformation. We hope that they are successful so that modern Egypt's heart will be judged as lighter than a feather.