



## Law in the Egyptian Revolt

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### Abstract

Among the protest movements sweeping the region in the Arab awakening of 2011, the Egyptian revolt is the movement that is perhaps most defined by a struggle over the Constitution and the rule of law more generally. I argue that this intense focus on law and legal institutions is a legacy of the prominent role that law played in maintaining authoritarian rule in Mubarak's Egypt. Just as law and legal institutions were the principal mechanisms undergirding authoritarian rule, opposition activists know that democracy can only emerge through comprehensive legal reform. This article examines the struggle for constitutional power in three periods – before, during, and after the Egyptian revolt of 2011.

### Keywords

Egypt; constitutional law; legal reform; rule of law

Beginning on January 25, 2011, Egyptians went to the streets in the millions to claim their rights. After 18 days of popular mobilization, Husni Mubarak's three decades in power were brought to an abrupt end. What was notable about this popular revolt was not simply the fact that the Egyptian public overcame the formidable defenses of a deeply entrenched regime, but also the character of this popular mobilization—namely, the extent to which law and legal institutions were, and still remain, on the front lines of political struggle. From day one of the protests, a new Constitution was front and centre in political debates, not simply among political elites, but also among “everyday Egyptians.” A new Constitution that would protect political rights and freedoms was one of the primary demands in the early days of the revolt, and

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it remains a central objective of political activists months after Mubarak's departure.

This focus on law and legal institutions was no doubt motivated by the myriad abuses that Egyptians had suffered. Widespread corruption, police brutality, and an unaccountable government were all highlighted by the “We are all Khaled Said” Facebook page that inspired the “day of rage” on January 25, 2011. But the focus on the Constitution was also in response to the specific mechanisms of social and political control that the Mubarak regime had skillfully wielded for three decades. Mubarak's was a “rule-by-law” regime. It had maintained its power not simply through brute force, but through a complex array of laws and legal institutions that were deployed to dominate every aspect of political and social life, from labor unions, to professional syndicates, to the press, to university campuses, to religious institutions, to political parties and civil society groups. Egyptians have a sober understanding of the centrality of law and legal institutions to both dictatorship and democracy, which is why legal reform remains at the forefront of political struggle months after Mubarak's departure. Egyptians wish to transform the January 25 movement beyond a successful revolt against Mubarak and his cronies to a true revolution: one that changes not just regime personalities, but also the institutions of governance; one in which rule-by-law institutions, still largely intact, are replaced with rule-of-law institutions; and one in which political institutions channel rather than thwart popular participation. At the time of writing in late June 2011, it is still too early to know the trajectory that the Egyptian political system is likely to take with any degree of confidence. But we have enough distance at this point to take stock of the early days of political transformation, the prominent role of law in the Egyptian revolt, and the legal conundrums that loom on the horizon.

### **Rule by Law in Mubarak's Egypt**

The Constitution that was in force in the Mubarak years dates back to 1971, when the previous president, Anwar Sadat, moved to create a base of political legitimacy around the principal of *sayadat al-qanun* (the rule of law). The national referendum on the 1971 Constitution supposedly received support from 99.98 percent of the Egyptian public, but the gulf between the regime's rule-of-law rhetoric and the reality of electoral manipulation was not lost on Egyptians. Still, the 1971 Constitution contained a surprising number of

liberal elements. These included protections on the freedom of speech (article 47), freedom of the press (article 48), freedom of assembly (article 54), and freedom of association (article 55), among others. The Constitution was also clear on the independence of the judiciary (articles 65 and 165), the independence of judges (article 166), and the division of powers between the executive and the legislative branches. The state was subject to the law (article 65), and citizens were guaranteed access to their rights in a court of law (article 68).

However, these liberal aspects of the 1971 Constitution were hemmed in by illiberal provisions, including article 88 (which governed the supervision of elections), article 93 (which prevented the courts from invalidating membership to the People's Assembly as a result of election irregularities), article 179 (which provided broad powers to a Socialist Public Prosecutor), and articles 112, 113, 136, 167, and 171 (which collectively weakened the People's Assembly and the judiciary vis-à-vis the Executive Authority). Additionally, an extensive web of illiberal legislation governing all aspects of political and social life effectively hollowed out the liberal provisions that were enshrined in the Constitution. Finally, the emergency law (in continuous force through Mubarak's rule), state security courts, and military courts further contained opposition. Although a variety of extralegal tactics were used from time to time, "rule by law" institutions were the principal means by which the Mubarak regime maintained its grip on power.

Given this constitutional framework, it is somewhat paradoxical that the law and legal institutions became the primary avenue through which opposition activists challenged the regime within the formal political system of the Mubarak years. Liberal aspects of the Constitution gave activists openings to challenge the executive in Egypt's semi-autonomous courts.<sup>2</sup> When all other avenues of political activism were closed, it was the courts to which human rights lawyers, opposition parties, leftists, liberals, Islamists, and everyday citizens flocked to challenge the state. Citizens frequently prevailed, at least when the stakes were low. But even in politically charged cases, activists occasionally scored major victories against the state. Throughout the 1990s and into the first decade of the new millennium, human rights organizations, opposition parties, and political activists of all stripes engaged in litigation as the most

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<sup>2</sup> For more on why the regime allowed for the emergence of semi-autonomous courts, see Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (New York: Cambridge University Press, 2007); and Tamir Moustafa, "Law versus the State: The Judicialization of Politics in Egypt," *Law and Social Inquiry* 28 (2003): 883-930.

viable avenue to challenge the executive.<sup>3</sup> Rights activists even launched cases that they knew they could *not* win as a way of drawing attention to the yawning gap between Mubarak's reformist discourse and the realities of authoritarian rule. All the while, court cases provided copious fodder for opposition newspapers to focus public attention on the ways in which the law constrained political life.

While rights activists worked to exploit openings in the formal legal system, the regime constantly spun out fresh, illiberal legislation. The regime also undermined the independence of the Supreme Constitutional Court—the most important institution through which rights groups had mobilized.<sup>4</sup> Finally, the regime pushed through controversial amendments to the Constitution in 2005 and 2007 that entrenched illiberal measures into the Constitution itself, thus placing them beyond the scope of judicial review.<sup>5</sup> An amendment to article 88 substantially weakened the role of judges in overseeing elections, a roll that they had assumed as the result of a landmark Supreme Constitutional Court ruling in 2000. Article 179 was also substantially amended in 2007, essentially building aspects of the emergency law straight into the Constitution.<sup>6</sup> An amendment to article 5 similarly entrenched the ban on parties with a religious orientation and finally, strict rules for candidacy in an amended article 76 made it virtually impossible to have meaningful presidential elections. In effect, the law was used to construct a facade of open political contestation, with little threat of any meaningful challenge to the regime.

There was, of course, resistance to executive retrenchment. Street protest had returned to Egypt beginning in 2003.<sup>7</sup> Yet, although the opposition group *kifaya!* (enough!) had played a critical role in breaking the veil of silence, street protests never gathered more than a few thousand participants.<sup>8</sup> One of the

<sup>3</sup> Moustafa, *The Struggle for Constitutional Power*, 118-277.

<sup>4</sup> These developments are covered in Moustafa, *The Struggle for Constitutional Power*, 178-218.

<sup>5</sup> For a more detailed analysis of these amendments, see Nathalie Bernard-Maugiron, "The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power," *Arab Law Quarterly* 22 (2008): 397-417.

<sup>6</sup> Article 179 explicitly states that articles 41, 44, and 45 of the Constitution, guaranteeing fundamental liberties and protecting citizens from search without warrant, "shall in no way preclude such counter-terror action." With terms such as "public security" and "counter-terror" loosely defined, article 179 provided the regime with extensive tools to punish regime opponents.

<sup>7</sup> Tamir Moustafa, "Protests Hint at New Chapter in Egyptian Politics," *Middle East Report Online*, 9 April 2004, <http://www.merip.org/mero/mero040904> accessed 30 June, 2011.

<sup>8</sup> *Kifāya!* is the moniker for *al-Haraka al-Masriyya min agl al-Taghbeer* (The Egyptian Movement for Change).

most striking cycles of protest in 2006 and 2007 focused public attention on demands for an independent judiciary, and later, opposition to the 2007 constitutional amendments. Rights consciousness was on the rise, but political activists were constrained by the heavy security presence and their inability to draw more protesters into action.

Resistance to the regime broadened significantly, however, as the result of successful labor actions from 2004 to 2010. The 22,000-strong textile worker strikes in Mahalla al-Kubra in 2006 and 2007 were among the dozens that were closely watched by the rest of the nation.<sup>9</sup> A year later, strikes in Mahalla showcased the emerging links between workers and urban-based political activists in the 6<sup>th</sup> of April Youth Movement. Rights advocates who had been working for years in small circles were finally forging organic links to mass publics. Wildcat strikes became high profile affairs, and more often than not workers gained concessions. In the process, they spurred others to assert their own rights claims.<sup>10</sup> The deteriorating economic situation for the bulk of Egyptian society coupled with the vast sums of wealth being amassed by crony capitalists fed widespread discontent.<sup>11</sup> At the same time, the November 2010 People's Assembly election underlined the regime's determination to silence opposition in advance of an anticipated effort to install Gamal Mubarak in upcoming presidential elections.<sup>12</sup> The time was ripe for political change in Egypt, but it was the breathtaking example of the 2011 Tunisian revolt that truly inspired people power.

### Claiming Rights in the Egyptian Revolt

Within days of popular mobilization beginning on January 25<sup>th</sup>, momentum had already shifted from the government to the protesters.<sup>13</sup> For the first time

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<sup>9</sup> Joel Beinin, "The Militancy of Mahalla al-Kubra," *Middle East Report Online*, 29 September 2007, <http://www.merip.org/mero/mero092907> accessed 30 June, 2011.

<sup>10</sup> The strike among 55,000 state tax collectors, for example, created a public spectacle when thousands camped outside of the People's Assembly in 2007. They won their demands with a 325 percent increase in salary.

<sup>11</sup> The rapid rise in the cost of food on the international market fueled discontent among the middle class, and among the 40 percent of Egyptians living on two dollars or less per day.

<sup>12</sup> Opposition parties and the Muslim Brotherhood held 95 seats in the outgoing People's Assembly of 2005-2010, whereas the 2010 elections delivered only 16 for opposition trends.

<sup>13</sup> For a detailed account of the first days of protest, see Mona El-Ghobashy, "The Praxis of the Egyptian Revolution," *Middle East Report* 258 (Spring 2011).

in three decades, state security forces were on the defensive, and the regime was fighting for political survival. Egyptians mobilized to claim their rights in an unprecedented manner, and a new, revolutionary political culture emerged virtually overnight. Workers went on strike across the country, including public transit employees, postal workers, state telecom employees, sanitation workers, employees of the electrical authority, textile workers, steel and other industrial workers. All called for higher wages, the immediate resignation of Mubarak, and – conspicuously – a new Constitution.

Faced with this unprecedented challenge, President Mubarak assured Egyptians that he would initiate constitutional reforms and not seek another term in office. His freshly appointed vice-president, Omar Suleiman, detailed the promised legal and constitutional changes on February 6. What was striking about the announcement was that 10 of the 14 concessions detailed by Suleiman related to the Constitution or other legal reforms. The centrality of the law to the Egyptian revolt was clear, both among protesters who called for a new Constitution, and from the regime, which deployed law reform talk in a hollow effort to appease protester demands.

Mubarak attempted to give credibility to his stated concessions when he formed a committee to amend the Constitution on February 8. The committee included independent legal personalities and outspoken reformist judges, such as Ahmed Mekki—who himself had faced disciplinary actions for his outspoken criticism of legal manipulation in the 2005 elections. The committee was charged with rolling back some of the illiberal constitutional amendments adopted in 2007. But with momentum on their side, protesters were in no mood to engage in stick-and-carrot delay tactics. Faced with relentless popular pressure, Vice-President Suleiman announced Mubarak's resignation on February 11, and the Supreme Council of the Armed Forces (SCAF) assumed political control two days later. Pledging that they would stay in power for only six months, SCAF dissolved the People's Assembly and suspended the Constitution, ushering in the first period of direct military rule in decades.

Popular mobilization continued for months after Mubarak's resignation with pressure focused on all sites of political authority: former NDP officials and regime cronies faced prosecution as a result of public pressure; students at Cairo University rallied to eject administrators who were appointed by Mubarak; labor unions and professional syndicates struggled to cast off the heavy hand of the Egyptian corporatist state; students and faculty at al-Azhar rallied for institutional independence and elections for the office of *sheikh al-Azhar*; and the state media and press similarly faced internal revolts against

Mubarak appointees. A tremendous cultural shift was underway as Egyptians felt a real sense of empowerment for the first time after decades of demobilization. What was particularly notable was not just that popular rage was finally being expressed, but that pressure was mobilized to force the legal reforms upon the illiberal institutions that had served the regime. As the most fundamental document outlining political institutions, the debate over the shape of a new Constitution immediately took centre stage.

### **Constitutional Conundrums and an Uncertain Future**

Within days of assuming power, SCAF appointed a new committee to draft amendments to the Constitution. Many in the pro-democracy movement criticized its composition, scope, and timeline. The eight-member committee was headed by Tariq al-Bishri, a towering intellectual figure and prominent jurist known for his outspoken criticism of the regime. Yet the rest of the committee was far less notable. Most significantly, the military excluded representation from the groups that organized the January 25th democracy movement—indeed from almost all political parties and trends (save one member from the Muslim Brotherhood)—and not a single woman sat on the committee. Beyond the committee's composition, pro-democracy activists were concerned that piecemeal changes in the form of constitutional amendments would be insufficient to engineer a fundamental reordering of the political system.<sup>14</sup> Finally, the work of the committee was closed, with no transparency or public accountability, and its timeline was swift. SCAF instructed the committee to prepare its recommendations within 10 days in preparation for a national referendum within two months, followed by presidential and People's Assembly elections within six months.

The constitutional reform committee unveiled its work after 10 days of deliberation.<sup>15</sup> The proposed amendments were to relax the tight restrictions for candidacy in presidential elections (article 76), restore full judicial supervision of elections (article 88), grant courts the power to decide on the validity

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<sup>14</sup> For example, see the statement by prominent Egyptian rights advocate, Bahieddin Hassan, "No to Neo-Mubarakism," *al-Abram Weekly*, 17-23 February 2011.

<sup>15</sup> For more detail on each of the proposed amendments, see Tamir Moustafa, "It's not a Revolution yet" *Foreign Policy*, 28 February 2011, [http://mideast.foreignpolicy.com/posts/2011/02/28/it\\_s\\_not\\_a\\_revolution\\_yet](http://mideast.foreignpolicy.com/posts/2011/02/28/it_s_not_a_revolution_yet) accessed 30 June, 2011.

of membership in the People's Assembly (article 93), require the president to appoint a vice-president within two months of coming to power (article 139), require a public referendum if a state of emergency is to last more than six months (article 148), and cancel article 179, which had entrenched aspects of the emergency law into the Constitution itself. Finally, the package of amendments opened an avenue for a 100-member Constituent Assembly to draft an entirely new Constitution after the presidential and People's Assembly elections. Given that other illiberal articles in the Constitution were not addressed, and the fact that a tremendous volume of illiberal enabling legislation remained on the books governing elections, party formation, the press, et cetera, the proposed constitutional amendments did not by themselves constitute a definitive break from the past. However, they did provide what were arguably the minimum steps necessary to initiate a viable program of political reform.

As the public took stock of the proposed amendments, two opposing views emerged. Those supporting the proposed amendments argued that their adoption was the best way to ensure a smooth transition to democracy, and a quick exit for the military from political life. The Muslim Brotherhood came to endorse this position, as did many Egyptians from all walks of life who were growing increasingly alarmed by the deterioration in public security. But others fiercely opposed the constitutional amendments on the ground that they did not provide a conclusive break from the past. Even with the amendments, they argued, the executive branch would wield significant powers. With political institutions largely unchanged, they worried that it would only be a matter of time before remnants of the old regime, or some other illiberal political force, would assert control. Opponents of the amendments also worried that the swift timeline would not afford nascent political groups sufficient time to organize and successfully contest presidential and parliamentary elections. A wide number of political actors urged a "no" vote in the referendum, including most civil society groups, formal opposition parties, youth groups, and prominent presidential hopefuls such as Mohamed el-Baradie and 'Amr Mousa.<sup>16</sup> Perhaps more striking was the outspoken criticism that came from Tehani al-Gebali, a sitting justice on the Supreme Constitutional Court, the body that would adjudicate future constitutional challenges. Critics of

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<sup>16</sup> See, for example, the detailed press release from the Cairo Institute for Human Rights Studies, issued March 7, 2011, "CIHRS urges the Supreme Military Council to reconsider the proposed amendments prior to referendum." <http://www.cihrs.org/English/NewsSystem/Articles/2799.aspx> accessed 30 June, 2011.

the amendments urged a full-blown constitutional convention in advance of presidential and parliamentary elections. The heated debate over the constitutional amendments subsided for a brief moment on the day of the referendum, when all Egyptians celebrated the first vote of the post-Mubarak era, which by most accounts was the cleanest day at the ballot box in over half a century. On March 19, 2011, the referendum passed with 77 percent support.

On March 30, however, the Supreme Council of the Armed Forces issued its constitutional declaration, a document with 63 articles that will serve as an interim Constitution until presidential and parliamentary elections are held, and a complete redrafting of the Constitution can begin.<sup>17</sup> The introduction of the constitutional declaration was a confusing development for all parties involved. Not only did the interim document displace the just-completed constitutional referendum, but it also reopened questions and debates about the sequencing of elections and a new Constitution. April, May, and June of 2011 was a period of increasing confusion and anxiety. Unfortunately, the renewed debate once again mapped onto political cleavages, with the Muslim Brotherhood and other Islamist groups wishing to stick with elections first, and leftists and liberals pushing hard for a new Constitution in advance of elections. As of late June, a coalition of leftist and liberal forces initiated a “Constitution First” campaign, which aims to gather 15 million signatures urging SCAF to sequence the drafting of a new Constitution in advance of People’s Assembly and presidential elections.

The increasingly bitter debate has at least three important implications for the prospects of democracy and the rule of law. The first and most obvious problem is that the sense of unity and common purpose among opposition forces has come under significant strain. There is no doubt that the revolt against Mubarak and the piecemeal concessions extracted from SCAF thus far were won only as the result of collective action across the various opposition trends. If political forces are unable to overcome their emerging differences, it is unlikely that their many common objectives will materialize. Already, SCAF has shown dubious commitment to democracy and the rule of law. Since assuming power in what was essentially a coup d’état, SCAF has shown little

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<sup>17</sup> For more detail on the constitutional declaration, see Nathan Brown and Kristen Stilt, “A Haphazard Constitutional Compromise,” Carnegie Endowment for International Peace Commentary, 25 June 2011, <http://www.carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise/3hi> accessed 30 June, 2011.

regard for civil liberties and human rights. In their first two and a half months in power, for example, 5,600 civilians were sentenced in military courts, with another 1,300 trials in process in the military courts.<sup>18</sup> Without firm and unified pressure from social forces, a successful transition to democracy and the rule of law is far from guaranteed.

A second problem with the increasing rancor over the sequencing of elections and constitution drafting is that the question of timing is intimately wrapped up in one of the most vexing questions that Egypt faces: the place of religion in the Constitution. Much of the debate over sequencing relates to the fate of article 2 of the 1971 Constitution, which declares “Islamic jurisprudence is the principal source of legislation” (*mabadi’ al-shari’a al-Islamiya al-masdar al-r’isi li al-tashri’*). This article, cynically adopted by Anwar Sadat to counter leftists, and later amended to co-opt an emergent Islamist movement, was meant to bolster the regime’s religious credentials. Decades after its adoption, popular discussion of what this article should mean in practice, its compatibility with a civil state, and the implications for individual, minority and women’s rights are at last open for debate. Islamists are suspicious that leftists and liberals want to do away with article 2. Most leftists and liberals, on the other hand, while not necessarily opposed to article 2 in the abstract, are apprehensive about its implications in practice—particularly if the Muslim Brotherhood forms a government. The question of the sequencing of elections and a new Constitution only magnifies the perceived stakes of this very polarizing issue.

A final problem with these debates is that they threaten to overshadow a much more significant issue for the bulk of Egyptians: how to generate economic growth and redress the tremendous economic disparities in contemporary Egypt. Economic issues are core for most Egyptians. They are, moreover, intimately linked to the prospects for successful transition to democracy and the rule of law. Strikes played a critical role in elevating rights consciousness and shaping the political context in Egypt well in advance of the 2011 revolt. And, as in Tunisia, labor unions played an important role in helping topple the regime once protesters took to the streets. Moving to the future, the emergence of independent trade unions is again vital not only to advance the rights

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<sup>18</sup> Human Rights Watch, “Egypt: Military Trials Usurp Justice System,” 29 April 2011, <http://www.hrw.org/en/news/2011/04/29/egypt-military-trials-usurp-justice-system> accessed 30 June, 2011; and Human Rights Watch, “Egypt: Human Rights Reform an Urgent Priority,” 7 June 2011, <http://www.hrw.org/en/news/2011/06/07/egypt-human-rights-reform-urgent-priority> accessed 30 June, 2011.

claims of Egyptian workers, but also to push further institutional reform and to resist authoritarian retrenchment. Just as law and legal institutions were used by the Mubarak regime as the principal mechanisms to maintain power, democracy and accountable government can only emerge through the reform of those rule-by-law institutions.