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## Revising Egypt's Constitution: A Contribution to the Constitutional Amendment Debate

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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Chibli Mallat\*

Maria van Wagenberg,\*\* Mostafa Abdelkarim\*\* & Julian Simcock\*\*\*

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\* The Custodian of the Two Holy Places Visiting Professor of Islamic Legal Studies, Harvard Law School; Presidential Professor of Law and Professor of Middle Eastern Law and Politics, S.J. Quinney College of Law, University of Utah; EU Jean Monnet Professor of European Law, Saint Joseph's University, Lebanon. Special acknowledgment to Dr. Adel Omar Sherif, Vice-President of the Supreme Constitutional Court of Egypt, for his unique input over the years, to Mohammad Sherine, LL.M. Harvard Law School, 2011 and to Samir Doumit and Trudi Hodges in Beirut for their contributions. Thanks also to Sarah Akhtar, Usama Al-Haddad, Laurel T. Rapp, J. Danielle Singleton, George Somi and Jacob Turner. This study is dedicated to the memory of the late President of the Supreme Constitutional Court of Egypt, Dr 'Awad al-Morr.

\*\* J.D. Candidates, Harvard Law School, 2011.

\*\*\* J.D. Candidate, Stanford Law School, M.P.P. Candidate, Harvard Kennedy School, 2013.

## I. PREFACE

Chibli Mallat

*A. The Constitutional Moment: Nonviolence in Action*

The transition under way in Egypt is constitutional. Work on the higher law bespeaks the Nile Revolution at its noblest: its nonviolent character. A constitutional transition after the ousting of the dictator is the most important task for sealing in law the future of Egypt and the region and for ensuring peaceful political change. Through the trust and interest of dear Egyptian friends, it is a rare privilege to be witness to a unique moment in Middle Eastern, indeed in world history.

The present project, initiated by the enthusiasm of students of Middle Eastern Law at Harvard Law School, is moved by the momentous nature of the Middle East revolution, recognizing its conscious nonviolent character, the centrality of Egypt and its legal tradition in the region, and the crucial importance of the constitutional reform underway. In the spirit of generating broad discourse in support of the Nile Revolution, this modest study seeks to identify key revisions to Egypt's Constitution, and in doing so, to contribute an additional legal voice to the public deliberation on the future of the country, that is led by the Constitutional Amendments Committee.

The saraband of constitutional interpretation is not unusual in times of distress, and various groups will cite this or that method of interpretation to further their views and interests on how reform should go. While constitutional interpretation may be widely divergent even in times of normalcy, it is especially flexible in countries emerging from authoritarian rule that have little to rely on by way of constitutional precedent or practice. With a wide range of readings available for clauses that were never applied and are suddenly revived from their constitutional slumber, the best way to promote "orderly transition"—that is constitutional, nonviolent revolutionary change—is to embrace a reading with a constructive spirit, a spirit which allows freedoms to grow and change and to be as open and as free from violence as possible.

This constructive democratic spirit animates the present effort. The project seeks to honor the Egyptian people's legitimate expectations which all parties acknowledged throughout the Nile Revolution, including the former regime leaders, the armed forces, and the international community. Without serious constitutional amendments, however, language about people's legitimate grievances and expectations will remain empty words. All Egyptians in good faith, and those who support them on the bumpy and difficult road to democracy, are seeking to build institutional change into the neglected and distorted democratic promise of the Constitution.

Competition for political leadership is natural and healthy. Every citizen aspires to be part of the democratic change—in the street, in the deliberations over traditional and current media outlets, in closed committee within the armed forces, all the way to the

Constitutional Amendment Committee. Key to enhancing the chances for success is the absolute rejection of violence as a means to further political ends, and the invocation of as transparent a process of deliberation as possible. The nonviolent, constructive democratic spirit has now reached its constitutional moment.

*B. The Egyptian Constitution at a Crossroad*

Today, where does Egypt stand constitutionally?

The constitutional scene is naturally traversed by many currents. As a consequence, some key indicia of legitimacy have been muddled or lost. This is first a legacy of the long absence of the rule of law, constitutional and otherwise. It is typical for dictatorships to use constitutions opportunistically. Democratic constitutional articles are kept dormant by the dictator until some popular earthquake recalls them to his attention, at which time he will use them even more opportunistically to remain in power. After three decades, the former Egyptian president suddenly remembered the existence of Article 139, which requires him “to appoint one or more Vice Presidents,”<sup>1</sup> and designated General Omar Suleiman to the position on January 29, 2011.<sup>2</sup> He did so in all likelihood to forestall a move by the Speaker of the People’s Assembly, who had announced earlier that day that he was about to issue an important statement. The Speaker was expected to announce the demotion of the Egyptian President under Article 84, which states that “in case of the vacancy of the Presidential office or the permanent disability of the President of the Republic, the Speaker of the People’s Assembly shall temporarily assume the Presidency in Egypt.”<sup>3</sup> The Speaker seemed ready to declare the President unfit to rule the country any further, and to take over during the transitional period. He was preempted by Hosni Mubarak’s nomination of a Vice-President, which forestalled the Speaker’s bid to take over power.

In turn the rapid developments overtook the reform process: on February 11, Vice-President Suleiman announced that “President Hosni Mubarak has decided to step down from the office of president of the republic.”<sup>4</sup> Two days later, the Supreme Council of the Armed Forces (hereinafter SCAF, *al-majlis al-a’la lil-qumvat al-musallaha*) issued a Constitutional Proclamation announcing squarely that it was suspending the Constitution and “temporarily administer[ing] the affairs of the country for a period of 6 months or until People’s Assembly, Shura Council and Presidential elections are

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<sup>1</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, Mar 25, 2005, March 26, 2007 (official English translation) [hereinafter EGYPT CONSTITUTION], art. 139.

<sup>2</sup> See Reuters, *Mubarak Names Deputy, Protesters Defy Curfew*, (Jan. 29, 2011), available at <http://www.reuters.com/article/2011/01/29/us-egypt-idUSTRE70O3UW20110129>.

<sup>3</sup> EGYPT CONSTITUTION, art. 84.

<sup>4</sup> *Egypt Crisis: President Hosni Mubarak Resigns as Leader*, BBC.COM, Feb. 12, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-12433045>.

held.”<sup>5</sup> By doing so, the SCAF denied the legitimacy of the Vice-President stepping into the shoes of the President. It is unclear whether the SCAF acts collectively or is entrusting its decisionmaking to its Chairman, Field Marshal Mohammed Hussein Tantawi. If the SCAF has devised internal rules for the period of its “administer[ing] the affairs of the country,” such a text has not been made public.

In strictly formal legal terms, the SCAF has mounted a military coup d'état which is unconstitutional. It should be noted that the Constitution does not mention the SCAF, and so the SCAF has no constitutional authority. Instead, Article 182 mentions a National Defence Council under the President's authority, which is clearly not meant to exercise the large powers the SCAF has granted itself.<sup>6</sup>

The upshot of this weak legitimacy means that whatever power the SCAF has is relative, and that at all times, the SCAF ought to adhere to the principles of nonviolence and transparency, and to basic political principles. In terms of nonviolence, the army's continued rejection of the use of force against unarmed demonstrators is central to dispelling the cloud surrounding its political leadership and the shadow of its authoritarian past. Nonviolent demonstrations and strikes are a basic right vindicated by the Nile Revolution, and the repeated calls of the SCAF to end strikes and clear the streets are neither constitutional nor realistic. No one is entitled to deal with street demonstrations by force, so long as they are peaceful.

In terms of transparency, should the SCAF retain and enhance its appeal, it can only do so by keeping away from military communiqués that have been issued in a stereotyped format since the so-called Free Officers' movement's first such communiqué on July 23, 1952<sup>7</sup>: the calque reads as a telegraphic, poorly drafted message announcing the military is in charge and issuing a number of diktats. Communiqués must be discontinued as soon as the constitutional amendments transitional measures are announced by the Constitutional Amendments Committee.

In terms of basic political principles, the army is secondary to civilian rule in a democratic country, even in times of stress. In the absence of an elected civilian leadership, the army must disentangle itself from any political role and stay in the background of those in charge of the transition. The SCAF announced in its Communiqué Number 4 on February 12, 2011 that it “aspires to guarantee a peaceful transition of authority within a free and democratic system that allows for the assumption of authority by a civilian and elected authority to govern the country and

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<sup>5</sup> Supreme Council of the Armed Forces (“SCAF”), Council Statement (Constitutional Proclamation), 13 Feb. 2011 (Egypt), available at <http://www.sis.gov.eg/En/Story.aspx?sid=53709>.

<sup>6</sup> EGYPT CONSTITUTION, art. 182.

<sup>7</sup> *Army Dictates Terms in Egypt*, THE GUARDIAN, July 24, 1952, available at <http://www.guardian.co.uk/theguardian/2009/jul/24/egypt-coup-from-the-archive>.

the build[ing] of a democratic and free state.”<sup>8</sup> It must be held to this commitment.

### C. *On Transition and the Role of the Judiciary*

Because the country has been subjected to thirty years of continuous emergency powers exercised by the executive, political parties have not fully developed, with the exception of those that were useful for the perpetuation of the ruling party. The structure of parties like the Muslim Brotherhood was tailored by Hosni Mubarak to serve as a perpetual scarecrow to the West without growing large enough to become a real threat to the system. Even if the election of a new president were to be held in September 2011, the lack of natural institutional growth means that only the Muslim Brotherhood would have the resources and organization to achieve meaningful gains.

Other leaders and organizations were stifled more brutally, including the three best known names of dissidence in Egypt in the last decade: Dr. Saadeddin Ibrahim, the prominent professor who dared question the omnipotence of Mubarak and his family’s corruption, was imprisoned in 2000 for over two years and members of his very active Ibn Khaldun Center hounded, arrested and ruined.<sup>9</sup> In March 2005, Mubarak was forced to amend Article 76 of the Egyptian Constitution in response to the Cedar Revolution of Lebanon, which demonstrated the people’s power against dictatorship and led to growing demonstrations in Cairo.<sup>10</sup> The amendment allowed other contenders to run, and Ayman Nour did. He was jailed for over three years for daring to run against Mubarak, and his Ghad party was destroyed.<sup>11</sup> And after a courageous effort by Mohamed ElBarade’i two years ago to offer an alternative to absolutism, increasing pressure by Mubarak forced ElBarade’i into taking the road of self-imposed exile.<sup>12</sup>

So there is a question of a democratic level playing field needed during the transition, including the leeway allowed by the Mubarak regime to some, like the Muslim Brotherhood, as against other, more secular leaderships, of which one of the most

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<sup>8</sup> SCAF, Communiqué No. 4, 12 Feb. 2011 (Egypt), *available at* <http://www.sis.gov.eg/En/Story.aspx?sid=53695>.

<sup>9</sup> *See Egypt Activist Verdict Criticised*, BBC.COM, Aug. 8, 2008, *available at* [http://news.bbc.co.uk/2/hi/middle\\_east/7540986.stm](http://news.bbc.co.uk/2/hi/middle_east/7540986.stm); *Injustice in Egypt*, Opinion, N.Y. TIMES, May 26, 2001, *available at* <http://www.nytimes.com/2001/05/26/opinion/injustice-in-egypt.html?src=pm>.

<sup>10</sup> Neil MacFarquhar, *Mubarak Pushes Egypt to Allow Freer Elections*, N.Y. TIMES, Feb. 27, 2005, *available at* <http://www.nytimes.com/2005/02/27/international/middleeast/27egypt.html>. *See also* CHIBLI MALLAT, MARCH 2221. LEBANON’S CEDAR REVOLUTION: AN ESSAY ON JUSTICE AND NON-VIOLENCE (2007), at 77–78.

<sup>11</sup> *Egypt’s Nour Released from Jail*, BBC.COM, Feb. 18, 2009, *available at* <http://news.bbc.co.uk/2/hi/7897703.stm>; Maram Mazen, *Future of the El-Ghad Party in Question*, DAILY NEWS EGYPT, July 8, 2006, *available at* <http://www.dailystaregypt.com/article.aspx?ArticleID=2186>.

<sup>12</sup> Michael Hughes, *Egypt’s Freedom Riots: Democracy Leader Returns from Exile*, THE EXAMINER, *available at* <http://www.examiner.com/geopolitics-in-national/egypt-s-freedom-riots-democracy-leader-returns-from-exile#ixzz1EdiRsGfN>.

promising was the Kefaya movement. Balance is needed to level the field. Even in an ideal situation, presidential elections in September may be too soon for a fair, open, and peaceful transition.

The dilemma is clear. A delay further postpones the free choice of a leader by the people of Egypt. Too quick a process might unbalance the country, and unduly favor one faction over the others. The transition is therefore critical for ensuring the process leading to the elections is free, fair and peaceful. It means that an independent body should be present to monitor, encourage democratic behavior, deter intimidation, and punish violence. Only the judiciary and the people of the law generally have the expertise and detachment needed to staff this necessary agency for democracy at the most crucial time of the early post-Mubarak stages

The Egyptian army has been increasingly drawn into a political limelight for which it is not prepared, and in which the military should not be allowed to dabble in the first place. The long tragedy of Egypt started in 1952 with the so-called Free Officers' putsch, and was perpetuated constitutionally by the infamous Revolutionary Command Council that still marks the authoritarianism of Arab regimes in a dozen countries in the region. To allow the army to run the political show would hardly offer a meaningful change. Mubarak himself, like Sadat and Naser, came from the army. It was unconscionable for Mubarak to name to the Vice-Presidency the head of the security services who is associated with twenty years of widespread torture,<sup>13</sup> or to keep similarly tainted officials in key positions of the government.

The army in Egypt is hardly neutral, but it has kept the respect of the Revolution by not shooting at the crowds. Its image needs to be protected during the transition by preventing any high officer from seeking constitutional power.

So who can lead the transition? The best way is to entrust a respected group of people, with a natural constitutional mandate, to oversee the transitional period, and to ensure that the democratic level playing field is balanced, so that the autocratic practices of some Islamic groups, including the Muslim Brotherhood, and vindictive remainders of the regime, are seriously checked. When a transition from sixty years of dictatorship is envisaged, the number of details that need to be addressed is staggering, and the need for a coherent body of constitutional and electoral experts to oversee the complex measures needed is obvious. The only group that meets the required democratic expertise and the detachment from executive and legislative positions is the judiciary.

The judiciary in Egypt has a strong tradition of independence, even if, as the late

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<sup>13</sup> See, e.g., HUMAN RIGHTS WATCH, "WORK ON HIM UNTIL HE CONFESSES": IMPUNITY FOR TORTURE IN EGYPT (Jan. 30, 2011), available at <http://www.hrw.org/en/reports/2011/01/30/work-him-until-he-confesses-0>.

president of the Supreme Constitutional Court (SCC), Dr ‘Awad al-Morr, expressed best his frustrations with the job: “Our main problem,” he told me repeatedly, “is the Executive.” Despite executive interference, the SCC has built an international reputation, as well as a domestic one, that carries the respected legal tradition in Egyptian society exemplified by the dean of Arab jurists in the twentieth century, ‘Abd al-Razzaq al-Sanhuri, whom Naser’s supporters brutalized inside the court he was presiding over on March 29, 1954.<sup>14</sup> Since that sadly symbolic physical attack on the judicial branch, Egyptian judges have stood up time and again to Sadat then Mubarak, forcing both to give due respect to the Supreme Constitutional Court’s independence, and keeping the executive at arm’s length of the judges. This explains the constant resort of the three successive rulers of Egypt since 1954 to special military tribunals to dispose of Egyptian dissidents.<sup>15</sup> In May 2005, some judges threatened to refuse to oversee presidential election controls because of the lack of independent guarantees.<sup>16</sup> The latest judicial revolt over executive interference in judicial affairs is less than two years old.

Where can one vest leadership by the judiciary of the orderly transition in the Constitution? In addition to the natural role of legal review and oversight that can be found in a full section on the judiciary, and a special section devoted to the SCC as the guarantor of the constitutional order, Article 84 can root the argument constitutionally: After the mention of the Speaker’s right to declare the presidency vacant, the article adds that “the President of the Supreme Constitutional Court shall take over the Presidency on condition that neither one [neither the Speaker nor the President of the SCC] shall nominate himself for the Presidency.” However, the People’s Assembly has been dissolved by SCAF and is, in effect, non-existent in law. Considering the sham parliamentary elections of last year, which Mubarak himself acknowledged by asking that these elections be revisited by the Court of Cassation, the former People’s Assembly is widely seen as illegitimate and is not in a position to lead the transition. The SCC and the High Judicial Council would instead be ideally positioned under Article 84 to “take over the Presidency” because the SCC President is barred also from “nominating himself” for the position. Either the Constitutional Amendment Committee or the SCAF should be encouraged to confirm that the transition to democracy and the holding of free and fair elections will be led by the judiciary.

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<sup>14</sup> Enid Hill, ‘*Abd al-Razzāq al-Sanhūrī*, in ENCYCLOPEDIA OF ISLAM (P. Bearman, et al. eds., 2d ed. Brill Online 2011), available at <http://www.brillonline.nl>.

<sup>15</sup> See, e.g., Human Rights Watch, Press Release, *Egypt: Military Court Convicts Opposition Leaders* (Apr. 15, 2008), available at <http://www.hrw.org/en/news/2008/04/15/egypt-military-court-convicts-opposition-leaders>.

<sup>16</sup> *Egyptian Judges Allege Vote Fraud*, BBC.COM, July 2, 2005, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4644503.stm](http://news.bbc.co.uk/2/hi/middle_east/4644503.stm).

*D. Constitutional Choices*

In working on the amendments to the Constitution, choices must be made.

The first choice is whether the Constitution needs to be replaced altogether, or whether amendments are sufficient at least for the transitional period. A second, related choice, is whether the amendments should be restricted to a limited number of articles, arguably the most important ones, or whether the whole Constitution needs to be reformed.

Writing a novel Constitution requires more time and more deliberation, and a constitutional assembly may be required to undertake the effort. In addition, the Constitution of Egypt, like many constitutions operating in dictatorships, is superficially democratic, but was applied to support authoritarianism through operation of a limited number of articles, which, through untenable interpretation, were applied in either an overbroad or exceedingly restrictive manner.

The use of the emergency powers uninterrupted since 1981 (and formally since 1967) is an example of the first case. Constitutions in working democracies offer in some exceptional circumstances enhanced power to the executive, but they are typically limited in time and in substance. The present Egyptian Constitution is not dissimilar, but the President's exercise of emergency powers has been so heavily manipulated that the system stood on its head: emergency became the rule, and constitutional life the exception.

Overbroad use of emergency is one way to distort the Constitution. Narrowing the freedom to run for high office is another typical example of distortion. This explains the length of Article 76, which piled conditions and regulations onto potential presidential candidates in order to deter all candidates to the presidency save one.

The proposed amendments that follow are meant to help prevent the state of exception revolving around one person.



## II. PROPOSED AMENDMENTS

Maria van Wagenberg, Mostafa Abdelkarim &amp; Julian Simcock

*A. Introduction to Proposed Amendments*

After assuming power from Hosni Mubarak on February 11, 2011, the Supreme Council of the Armed Forces (SCAF) of Egypt dissolved Parliament, suspended the Constitution, and appointed a Constitutional Amendment Committee tasked with reforming the 1971 Constitution. The SCAF gave the Committee ten days to amend the Constitution for the purpose of facilitating upcoming elections, which the military aims to hold within the next six months.<sup>17</sup> The Committee has been specifically instructed to consider the abolition of Article 179, as well as the amendment of Articles 76, 77, 88, 93, and 189, which primarily deal with elections; it has also been given a broad mandate to “amend all articles as it sees fit to guarantee democracy and the integrity of presidential and parliamentary elections.”<sup>18</sup> The below analysis contains our modest recommendations for constitutional reform. These suggestions are offered in the spirit of generating public dialogue and promoting the goals of the February 2011 Revolution.

The analysis is organized into two tiers of recommendations. The first tier addresses the procedures governing elections in Egypt with specific attention to the enumerated articles before the Committee. Amending these provisions will be at the top of the Committee’s agenda. The second tier addresses structural weaknesses in the Constitution regarding the allocation of powers, and suggests mechanisms to properly balance executive, legislative, and judicial authority.

Many activists and opposition members see amendment of the Constitution as inadequate, and advocate instead for wholesale replacement. They argue that the current document is thoroughly flawed and has come to symbolize an “instrument of repression.”<sup>19</sup> Furthermore, they argue, provisions of the current Constitution hinder replacement of the old regime and do not adequately prevent entrenchment of future leaders. A minority of the opposition urges the view that the Revolution of January 25, 2011 dissolved, or at least abrogated, the 1971 Constitution. This view is espoused by the Vice-President of the Supreme Constitutional Court, Adel Omar Sherif.<sup>20</sup> Under this interpretation, there is a question about whether the Constitution had legal effect at the time it was suspended by the Military Council or whether it was already eviscerated by the popular uprisings. If the revolution did in effect dissolve the

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<sup>17</sup> SCAF, Communiqué No. 4, 12 Feb. 2011 (Egypt), *available at* <http://www.sis.gov.eg/En/Story.aspx?sid=53695>.

<sup>18</sup> *Egypt Crisis: Army Sets Constitution Reform Deadline*, BBC.COM, Feb. 11, 2011, *available at* <http://www.bbc.co.uk/news/world-middle-east-12466893>.

<sup>19</sup> Mohamed ElBaradei, *The Next Step for Egypt’s Opposition*, N.Y. TIMES, Feb. 11, 2011, *available at* <http://www.nytimes.com/2011/02/11/opinion/11elbaradei.html>.

<sup>20</sup> E-mail from Adel Omar Sharif to Chibli Mallat (Feb. 21, 2011) (on file with Chibli Mallat).

Constitution, this would call into question the legitimacy of the Military Council's "suspension" of the Constitution and the establishment of the Constitutional Amendment Committee.

Other commentators believe that a majority of the Constitution can be preserved, while only a limited number of provisions need to be overhauled. These commentators point out that the actual language of the Constitution is relatively progressive and, if strictly enforced, would work to guarantee freedoms and prevent authoritarianism. According to this camp, these provisions failed to regulate the past regime due to a lack of enforcement, rather than to any inherent flaws in the text.

Still other commentators have envisioned a middle course in which the military promulgates interim Constitutional amendments to govern a first round of elections, which will be followed by a more substantial redrafting. This later redrafting could be conducted either by the new slate of electors or an independent constitutional reform body. The SCAF seems to be following this middle course, seeking to amend the Constitution for purposes of transitional elections while leaving more substantial edits for the future. How any future substantial reforms would be organized remains to be seen.

The advantage of adopting short-term Constitutional amendments is that this strategy minimizes the period of military rule and ensures the Constitution will be reinstated as quickly as possible. In the absence of a provisional Constitution, improvement of the current Constitution will avoid a prolonged period of military rule. At the same time, however, short-term amendments may fail to address many of the deeper structural issues in the Constitution and might not prevent another dictatorship from emerging. Furthermore, once the Constitution is reinstated, applicable Constitutional procedures may make amendment more difficult. To avoid lock-in of the current Constitution, the Committee could, in its first round of revision, provide for a one-time post-election procedure by which the Constitution could undergo comprehensive reform.

The current suspended Egyptian Constitution was adopted by referendum in 1971 and amended in 1980, 2005, and 2007. Many of the amendments had the effect of consolidating power in the executive branch, as well as restricting other branches of government and opposing political parties. In 2005, the Constitution was purportedly amended to promote multiparty participation<sup>21</sup>; however, in practice, the amendments severely limited the ability of political parties, other than the ruling National Democratic Party, to participate in elections. The 2007 amendments were criticized for removing human rights protections in the name of national security and for facilitating increased crackdowns on opposition groups.<sup>22</sup> Although the amendments were nominally added to enlarge the power of the People's Assembly and redefine the

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<sup>21</sup> EGYPT CONSTITUTION. amend. II, art. 76 (2005).

<sup>22</sup> EGYPT CONSTITUTION. amend. III (2007). *See, e.g.*, Nathan J. Brown, Michele Dunne, and Amr Hamzawy, *Egypt's Controversial Constitutional Amendments*, CARNEGIE INST. FOR INT'L PEACE (Mar. 23, 2007), available at [http://www.carnegieendowment.org/files/egypt\\_constitution\\_webcommentary01.pdf](http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf).

motivating purpose of the Constitution from “socialism” to “citizenship,” they did little to shift the effective balance of power away from the executive.<sup>23</sup> These amendments serve as a cautionary tale for how would-be reform provisions can be manipulated to stifle opposition and demonstrate why comprehensive reform of the Constitution is so important.

The provisions relating to elections have been frequently amended to make balloting more difficult for opposition parties and to strip the judiciary of its electoral oversight role. In order to allow for democratic voting, these amendments must not only be reversed, but must also be accompanied by substantial reforms of the election process.

It is important to note that leveling inequities in the electoral process will not address the deeper structural issues in the Constitution. Therefore, a second tier of reforms may be necessary to reset the balance of power between the branches of government. Under the suspended Constitution, the President has expansive powers to override the other branches and to act unilaterally under a state of emergency. The fair election of the President does not ensure that he or she will not take advantage of available constitutional authorities. Therefore, structural reforms may be necessary, in particular those which: (1) reduce the President’s ability to issue and promulgate laws; (2) limit the circumstances under which the President may assume unchecked unilateral power; (3) enable the People’s Assembly greater authority to challenge Presidential decisions; (4) ensure fair and transparent elections; and (5) strengthen the multiparty system.

*B. Tier 1: Immediate Reform of Provisions Related to Regulation of Elections<sup>24</sup>*

The immediate focus of the Committee is to amend the provisions relating to elections, in particular Articles 76, 77, 88, and 93. The current Articles are problematic because they vest disproportionate power in the People’s Assembly and the President to appoint candidates and to regulate elections. Enforcing direct participation of the electorate on an unfettered “one-person one-vote” principle will be critical to achieving genuine political reform and ensuring government accountability. No less critical is the removal of the constraints on candidacy to the top elected positions that have been the hallmark of authoritarianism in Egypt over the three past decades.

The recommendations below discuss methods by which the Constitution could be amended to make elections more democratic. They set forth different measures for insulating elections from political pressure, regaining trust in the political process, and leveling the playing field for potential candidates; important steps include: (1)

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<sup>23</sup> See, e.g., *Regression Analysis, The Small Gains for Democracy Are Now Being Rolled Back*, THE ECONOMIST, May 17, 2007, available at <http://www.economist.com/node/8861479>.

<sup>24</sup> Formatting keys: Strikethroughs indicate current constitutional provisions to be abolished. Capital letters indicate suggested replacement language.

promotion of direct electorate participation in the nomination of candidates either by providing for primary elections, nominations through petition, or a lowered legislative threshold for appointing a candidate; (2) elimination of the restrictions on political parties that can nominate candidates and participate in the election process; (3) removal of political oversight over the election process and a return to judicial oversight; (4) establishment of a two-step election to screen for viable candidates and select a majority-supported candidate; and (5) addition of Presidential term limits as well as a reduction of the individual term length.

Some of these proposed reforms deserve a few words of discussion.

The first suggestion relates to the nomination of candidates, which is currently controlled by the legislatures. Under the 1971 Constitution, a percentage of the People's Assembly, Shoura Council and local administrative councils, totaling 250 members is required to support a candidate before he or she could run for the Presidency. By setting a high ceiling, this system virtually guaranteed that no opposition candidates would be able to garner enough support to challenge Mubarak. By contrast, a nomination process controlled by the electorate would allow a broader range of candidates to place their names on the ballot. This could be accomplished by petitions or primaries. Petitions have the advantage of low administrative cost, but would be difficult to verify and would favor candidates with the most organizational resources. Primaries, on the other hand, would give voters a clear choice among candidates, but would be more difficult and time-consuming to administer. Whichever method of nomination is chosen should be followed by a two-step general election process which further narrows the field of candidates.

The third proposal—increasing judicial oversight of the election process—is not without its critics. Some commentators believe that the judiciary should be completely separated from politics to maintain its integrity and independence, and that election oversight is better accomplished by a non-judicial electoral commission with enforcement powers that can guarantee a fair and transparent election. Adel Omar Sharif, for example, has suggested that the judiciary be completely excluded from the electoral oversight and confined to reviewing only the acts or regulations related to the election process.<sup>25</sup>

The below analysis includes proposals for both an electorate-controlled nomination process and a two-step general election; the result could be a three-stage election in which primaries are followed by two rounds of general elections. While this system could lead to obvious delays and administrative costs, multiple elections have certain advantages. If candidates are to be nominated through petition, a large number of candidates will likely appear on any ballot, especially before political parties have an opportunity to organize. A two-step general election will winnow down a wide field of presidential candidates to a more manageable number and will ensure that voters choose among viable candidates. Furthermore, a majority requirement can prevent a

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<sup>25</sup> E-mail from Adel Omar Sharif, to author (Feb. 21, 2011) (on file with author).

significant plurality candidate from prevailing over a coalition of smaller, more numerous interests.

### 1. Key Recommendations for Article 76

- ***Direct Electorate Participation in Candidate Nomination:*** To reform the candidate nominations process, the political qualifications imposed on candidates by Article 76 should be removed and replaced with provisions allowing the electorate to control nominations. The present proposal has simplified the mechanisms to a minimum, but cleaning up the political process to ensure the universal one-person one-vote principle can be achieved through several methods, including a direct primary election or a petition requirement. In conjunction with increased electorate participation, the legislative threshold could be reduced from 250 legislative members to expand the number of political parties that field candidates. A relaxed legislative threshold could also be combined with direct electorate methods to create a joint system of parliamentary and electorate control over the nomination process. In summary, options include:
  - *(1a) Direct electorate participation through petition:* candidates must have a certain number of signatures before being placed on the ballot.
  - *(1b) Direct electorate participation through primary elections:* candidates are selected through a primary process in which primaries could be conducted through political parties or on a nationwide basis. In the nationwide system, candidates achieving a certain percentage of the primary vote could be elevated to run in a general election (which may itself occur in two stages).
  - *(2) Combination of legislative and electorate control:* some combination of one of the direct electorate controls listed above while maintaining an avenue for legislative input. For example, candidates could be selected initially through one method of direct electorate participation and then confirmed by support from a certain number of legislators.
  - *(3) Lowered legislative threshold:* the Constitution currently requires presidential candidates to receive the support of 250 legislators from the People's Assembly, the Shoura Council, and other local councils. Lowering this threshold would allow more candidates to qualify and would promote the diversity of political parties participating in an election.
- ***Political Party Regulation:*** To prevent crackdown on opposition groups, the provisions in Article 76 (and Article 5 if necessary) that impose regulations and restrictions on political parties should be removed.
- ***Judicial Oversight of Elections:*** Article 76 currently allows political appointment of members of the Presidential Elections Committee. To ensure this

body is insulated from political pressure, the Committee should be staffed by members of the judiciary.

- **Two-stage Election Process:** A multi-stage election process will have the advantages described above, including diverse political participation, viable candidates, and a majority winner. This process could have two parts: (1) a first-round would candidates must achieve a designated percentage of votes; and (2) a nationwide run-off election, or series of run-off elections, in which the remaining candidates compete until one is elected by majority. For example, in the first round election, candidates receiving more than 5% of the vote (or the candidates receiving the two highest vote percentages) would graduate to the next round of general elections. In the second round, candidates would compete until one prevailed by a clear majority, or won a run-off between the two candidates with the highest number of votes, as provided in the current Constitution.
- **Lengthened Campaign Period:** Because of the decades-long oppression of opposition groups in Egypt, few political parties are prepared to field viable candidates and conduct effective campaigns. Therefore, a longer campaign period leading up to the next round of elections may be necessary to give political parties an opportunity to form and organize. The Committee may wish to promulgate an interim set of procedures for a first round of elections that will be later replaced by a more permanent set of provisions.
- **Nationwide Primaries:** One way to ensure representation of minority groups would be to hold primaries on a nationwide basis instead of a regional basis. While geographical districting appears convenient, a nationwide primary could provide a means to protect representation of minority groups who otherwise would not secure regional representation and could actually reduce administrative costs.
- **Recommended Revisions to Article 76:**

#### **Article 76(1)**

*The President shall be elected BY THE PEOPLE by direct, public, secret ballot. ~~For an applicant to be accepted as a candidate to presidency, he shall be supported by at least 250 elected members of the People's Assembly, the Shoura Council and local popular councils on governorate level, provided that those shall include at least 65 members of the People's Assembly, 25 of the Shoura Council and ten of every local council in at least 14 governorates. The number of members of the People's Assembly, the Shoura Council and local popular councils on governorate level supporting candidature shall be raised in pro rata to any increase in the number of any of these councils. In all cases, support may not be given to more than one candidate. Procedures related to this process shall be regulated by the law. Political parties, founded at least five consecutive years before the starting date of candidature and have been operating uninterruptedly for this period, and whose members have obtained at least 3% of the elected members of both the People's Assembly and the Shoura Council in the latest elections or an equivalent percentage of such total in one of the two assemblies, may each nominate for presidency~~*

~~a member of their respective higher board, according to their own bylaws, provided he has been a member of such board for at least one consecutive year. As an exception to the provisions of the afore-mentioned paragraph, the afore-mentioned political parties whose members obtained at least one seat in any of the People's Assembly or the Shoura Council in the latest elections may nominate in any presidential elections to be held within ten years starting from May 1, 2007, any member of its higher board, according to their own bylaws, provided he has been a member of such board for at least one consecutive year.~~

### **Article 76(2)**

~~Candidature applications shall be submitted to an independent committee, named the Presidential Elections Committee~~ NATIONAL ELECTIONS COMMITTEE.

~~The committee~~ NATIONAL ELECTIONS COMMITTEE shall be composed of the head of the Supreme Constitutional Court as a chairman and the head of the Cairo Court of Appeal, the most senior deputy of the head of the Supreme Constitutional Court, the most senior deputy of the head of the Court of Cassation, the most senior deputy of the State Council and five public figures, recognized for impartiality CHOSEN BY THE ABOVE AD HOC MEMBERS BY A MAJORITY. THEY WILL SERVE ON THE NATIONAL ELECTIONS COMMITTEE FOR A NON-RENEWABLE PERIOD OF FIVE YEARS. ~~Three of the afore-mentioned public figures shall be selected by the People's Assembly and the other two by the Shoura Council upon a recommendation of the bureaus of both houses for a period of five years.~~

~~The law shall determine who will act on behalf of the chairman or any member of the committee, should there be some reason for their absence.~~ MEMBERS OF GENERAL AND FURTHER ELECTIONS COMMITTEES MAY NOT BE MEMBERS OF POLITICAL PARTIES DURING THEIR TENURE AND MAY NOT STAND FOR NATIONAL ELECTIONS WITHIN THREE YEARS FROM THE DATE THEIR TERM HAS ENDED OR THE DAY THEY HAVE RESIGNED FROM THE COMMITTEE IN WHICH THEY SERVE.

~~This committee~~ THE NATIONAL ELECTIONS COMMITTEE shall exclusively have the following competences:

- 1- To declare the initiation of candidature and supervise procedures for declaring the final list of candidates;
- 2- To generally supervise balloting and vote-counting procedures;
- 3- To announce elections results;
- 4- To decide on all appeals, challenges and all matters related to its competences, including conflict of jurisdiction;
- 5- To draw up by-laws regulating its modus operandi and method of practising its competences.

~~The committee's resolutions shall be passed with a majority of at least seven members~~ AN ABSOLUTE MAJORITY. Its resolutions shall be final, self-enforcing and incontestable by any means or before any authority whatsoever.

*Its resolutions may not be challenged through construing or stay of execution. ~~The law regulating presidential elections shall determine other competences for the committee.~~*

### **Article 76(3)**

*~~The law shall also determine regulating rules governing the nomination of a~~ A candidate who has vacated his seat for some reasons other than assignment within the period between the starting date of candidature and before the termination of voting SHOULD BE REPLACED THROUGH AN ELECTION TO BE HELD IN A REASONABLE PERIOD AFTER THE SEAT IS VACATED, UNDER THE SUPERVISION OF THE NATIONAL ELECTIONS COMMITTEE.*

*Voting shall be conducted in one single day. ~~The presidential committee~~ NATIONAL ELECTIONS COMMITTEE shall establish FURTHER committees to administer stages of the voting and ballot-counting process. ~~The committee~~ NATIONAL ELECTIONS COMMITTEE shall establish main committees to be composed of members of the judiciary to supervise the process in accordance with such rules and regulations as may be decided by the ~~committee~~ NATIONAL ELECTIONS COMMITTEE.*

*Election of the president shall be declared BY THE NATIONAL ELECTIONS COMMITTEE when candidates have obtained an absolute majority of the number of valid votes.*

*In the event that none of the candidates has obtained such majority, election shall be repeated, ~~at least after seven days, between the two candidates who have obtained the largest number of votes. Should another candidate obtain a number of valid votes equal to those of the second, he or she shall take part in the re-election. In this case, the candidate who has obtained the largest number of votes will be declared winner.~~*

[suggest replacing the two-candidate run-off procedure with another method of candidate elimination]

*~~Voting for electing the president shall be effected, even though one single candidate has applied or even if he was the only candidate remaining due to assignment of the rest of candidates or due to failure to field another candidate in lieu of the one vacating his seat. In this case, the candidate who has obtained the absolute majority of the number of valid votes shall be declared winner BY THE NATIONAL ELECTIONS COMMITTEE. The law shall regulate procedures to be followed in the event the candidate has failed to obtain this majority.~~*

*~~The President shall submit the draft law regulating the presidential elections to the Supreme Constitutional Court following endorsement by the People's Assembly and before promulgation, to determine compliance with the Constitution.~~*

*~~The Court shall return its ruling in this connection within fifteen days from date of submission thereto. Should the court decide that one or more provisions of the draft law are unconstitutional, the President shall return it to the People's Assembly to put this ruling into effect. In all cases, the court's ruling shall be binding to all parties and all state authorities. The law shall be published in the official gazette within three days from date of issuance.~~*



## 2. Key Recommendations for Article 77

- **Presidential Term Limits:** These provisions could be reformed by introducing a two-term limit and by reducing the presidential terms to four years, so that Presidents are limited to serving two four-year terms. Subjecting the President to reelection will hold him accountable for actions taken in his first term and will make him more politically sensitive.
- **Staggered Presidential and Legislative Terms:** These provisions could also provide for staggered presidential terms and legislative terms so that the legislative term ends midway through the presidential term. This would build in some degree of political accountability for the first half of the president's tenure.
- **Recommended Revisions to Article 77:** *The term of the Presidency is ~~six~~ FOUR Gregorian years starting from the date of the announcement of the result of the plebiscite. The President of the Republic may be re-elected for A SECOND ~~other successive terms~~ term.*

## 3. Key Recommendations for Article 88

- **Judicial Oversight:** The judiciary, or some other independent body, should be given full oversight over the election process. Although the current Article allows for judicial input, it does not give the judiciary exclusive oversight.
- **Free and Fair Elections Clause:** One way to ensure judicial accountability would be to add a provision that guarantees free and fair elections. This guarantee can then be used as a basis for constitutional challenges to election results.
- **Recommended Revisions to Article 88:** *ELECTIONS SHOULD BE CONDUCTED ON A FREE AND FAIR BASIS. ~~The necessary conditions stipulated in the members of the people's assembly shall be defined by law which shall set out the provisions of the election and referendum~~ Balloting shall be conducted in one day WITH OVERSIGHT OF THE NATIONAL ELECTIONS COMMITTEE. THE NATIONAL ELECTIONS COMMITTEE shall generally supervise elections in the manner regulated by the law. ~~The law shall set out the functions, method of formation and guarantees for the committee, which shall include current and former members of judicial bodies.~~ and form sub-committees to supervise elections at the level of constituencies as well as sub-committees to administer the balloting process and votes counting. The general committees shall be composed of FORMER AND CURRENT members of judicial bodies and votes counting shall be made under the supervision of the NATIONAL ELECTIONS COMMITTEE ~~general committees in accordance with the rules and procedures stipulated by the law.~~*

#### 4. Key Recommendations for Article 93

- **Judicial Review of Elections:** Authority for reviewing parliamentary elections should be delegated to the judiciary and not to the People's Assembly. Granting the People's Assembly review over the election results guarantees political distortion of the process.
- **Elimination of Political Review of Elections:** The court reviewing a contested election should not need to submit their investigation and decision to the Assembly for approval; instead these decisions should have independent force of law.
- **Recommended Revisions to Article 93:** ~~The People's Assembly~~ THE JUDICIARY shall be the only authority competent to decide upon the ~~validity of its members~~ LEGALITY OF A CONTESTED ELECTION OF A MEMBER OF THE PEOPLE'S ASSEMBLY. The contestation shall be referred to the Court of Cassation within fifteen days from the date on which the Assembly was informed of it, while the investigation shall be completed within ~~ninety~~ SIXTY days from the date on which the contestation is referred to the Court of Cassation. ~~The result of the investigation and the decision reached by the Court shall be submitted to the Assembly to decide upon the validity of the contestation within sixty days from the date of submission of the result of the investigation to the Assembly. The membership will not be deemed invalid except by a decision taken by a majority of two thirds of the Assembly members.~~ THE COURT OF CASSATION SHALL INVESTIGATE THE VALIDITY OF THE CONTESTATION AND RENDER A DECISION WITHIN SIXTY DAYS FROM THE DATE ON WHICH THE CONTESTATION WAS REFERRED TO THE COURT. THE INVESTIGATION AND THE DECISION REACHED BY THE COURT SHOULD BE SUBMITTED TO THE NATIONAL ELECTIONS COMMITTEE FOR APPROVAL WITHIN 15 DAYS. ANY DECISION APPROVED BY THE NATIONAL ELECTIONS COMMITTEE SHALL BE ENFORCED IMMEDIATELY.

#### C. Tier 2: Long-Term Reform—Structural Issues in the Constitution<sup>26</sup>

In the longer term, structural weaknesses in the current Constitution will need to be re-assessed in order to promote a more even allocation of powers. In keeping with the recommendations featured in Tier 1, many of these suggestions pertain to executive power and the mechanisms by which the office of the Presidency accumulates disproportionate authority. A substantive redrafting of the Constitution will also

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<sup>26</sup> Formatting Methodology: Amendments written in italics indicate suggested revisions to the text of the constitutional articles. Amendments written in non-italics represent general suggestions for amendments or abolition of articles, without including specific textual edits. This methodology was used for clarity to avoid extensive use of strikethrough text.

require greater assurances of civilian control over the military and greater autonomy for judicial institutions. To that end, the prevailing themes in this section pertain to: (1) reducing the President's ability to promulgate laws; (2) limiting the circumstances under which the President may assume unchecked unilateral power; (3) enabling the People's Assembly greater authority to challenge Presidential decisions; (4) removing the provision allowing the President to appoint members of the People's Assembly, and all articles related to workers and peasants' special representation; (5) ensuring fair and transparent elections; and (6) strengthening the multiparty system.

- **Article 55 Formation of Societies:** *Citizens shall have the right to form societies as defined in the law. The establishment of societies whose activities are hostile to the social system, clandestine or have a military character is prohibited.*
  - **Proposed Amendment:** *Citizens shall have the right to form associations. Associations whose activities incite violence, discrimination on the basis of race, region, religion, ethnicity or gender are prohibited.*
- **Article 87 President's Appointment of Representatives:** *The law shall determine the constituencies into which the State shall be divided and the number of elected members of the People's Assembly must be at least 350 persons, of which one half at least must be workers and farmers elected by direct secret public balloting. The definition of the worker and the farmer shall be determined by law. The President of the Republic may appoint a number of members not exceeding ten.*
  - **Proposed Amendment:** *The number of elected members of the People's Assembly must be at least 350 persons, and not more than 400. Seats are apportioned to offer a fair representation of the population.*
- **Article 108 President's Authority to Issue Laws:** *The president of the Republic shall have the right, in case of necessity or in exceptional cases and on the authorization of the People's Assembly upon the approval of a majority of two thirds of its members, to issue resolutions having the force of law. The authorization must be for a limited period of time during which the subjects of the resolutions and the grounds upon which they are based, must be determined. The resolutions must be submitted to the People's Assembly in the first meeting after the end of the authorization period. If they are not submitted or if they are submitted and not approved by the Assembly, they shall cease to have the force of law.*
  - **Proposed Amendment:** *In cases of imminent existential threat, the President of the Republic shall have the right to issue resolutions having the force of law. Following a period of sixty days, the People's Assembly must approve such resolutions by a two-thirds majority vote in order for the resolutions to be sustained.*
- **Article 134 Ministers Serving as Representatives:** *The Prime Minister, his deputies, the Ministers and their deputies may become members of the People's Assembly. Those of them who are not members may attend the sessions and committees of the Assembly.*
  - **Proposed Amendment:** *The Prime Minister, his deputies, the Ministers and their deputies may not become members of the People's Assembly. They may, however, attend the sessions and committees of the Assembly.*

- **Article 136 President's Authority to Dissolve the People's Assembly:** *The President of the Republic may not dissolve the People's Assembly unless it is necessary. Should the Assembly be dissolved over a certain matter, the new Assembly may not be dissolved for the same matter. The decision shall include a call to voters for new elections of the People's Assembly latest within sixty days from the date of issuing the decision of dissolution. The new Assembly shall convene during a period of ten days following the completion of elections.*
  - **Proposed Amendment:** *The President of the Republic may not dissolve the People's Assembly.*
- **Article 147 President's Ability to Issue Decisions with Force of Law:** *In case it becomes necessary, during the absence of the People's Assembly, to take measures which cannot suffer delay, the President of the Republic shall issue decisions in their respect, which shall have the force of law. Such decisions must be submitted to the People's Assembly within fifteen days from their date of issuance if the Assembly is standing. In case of dissolution or recess of the Assembly, they shall be submitted at its first meeting. In case they are not submitted, their force of law disappears with retroactive effect, without need for issuing a decision to this effect. If they are submitted and are not ratified, their force of law disappears with retroactive effect, unless the Assembly ratifies their validity in the previous period or settling their effects in another way.*
  - **Proposed Amendment:** *In light of the proposed revisions to Article 136, Article 147 is no longer necessary and should therefore be abolished.*
- **Article 148 State of Emergency:** *The President of the Republic shall proclaim a state of emergency in the manner prescribed by the law. Such proclamation must be submitted to the People's Assembly within the subsequent fifteen days in order that the Assembly may take a decision thereon. In case the People's Assembly is dissolved, the matter shall be submitted to the new Assembly at its first meeting. In all cases, the proclamation of the state of emergency shall be for a limited period, which may not be extended unless by approval of the Assembly.*
  - **Proposed Amendment:** *In light of the proposed revisions to Article 108 and Article 136, Article 148 is no longer necessary and should therefore be abolished.*
- **Article 149 President's Ability to Grant Amnesty:** *The President of Republic shall have the right of granting amnesty or commute a sentence. As for general amnesty, it can only be granted by virtue of a law.*
  - **Proposed Amendment:** *The President of Republic shall have the right of granting amnesty or commuting a sentence in extraordinary circumstances only. As for general amnesty, it can only be granted by virtue of a law.*
- **Article 152 President's Ability to Call a Referendum:** *The President of the Republic may call a referendum of the people on important matters affecting the supreme interests of the country.*
  - **Proposed Amendment:** *Article 152 should be abolished.*

- **Article 167 Administration of the Judiciary:** *The law shall determine the judiciary organizations and their functions, organize the way of their formation, prescribe the conditions and measures for the appointment and transfer for their members.*
  - **Proposed Amendment:** Article 167 should be amended to remove delegation of this authority to the law and to guarantee the formation of certain courts and certain procedures for judicial appointments.
- **Article 171 State Security Courts:** *The law shall regulate the organization of the State Security Courts, and prescribe their competencies and the conditions to be fulfilled by those who occupy the office judge in them.*
  - **Proposed Amendment:** State Security Courts should be abolished.
- **Article 173 Judicial Independence:** *Every judicial body shall administer its own affairs. A council, comprising chiefs of judicial bodies and chaired by the President, shall be formed to administer their common affairs. The law shall define its composition, competencies, and working rules.*
  - **Proposed Amendments:** *Every judicial body shall administer its own affairs. A council, comprising chiefs of judicial bodies, shall be formed to administer their common affairs. The law shall define its composition, competencies, and working rules.*
- **Article 179 [Counterterrorism Measures]:** *The State shall seek to safeguard public security and discipline to counter dangers of terror. The law shall, under the supervision of the Judiciary, regulate special provisions related to evidence and investigation procedures required to counter those dangers. The procedure stipulated in paragraph 1 of Articles 41 and 44 and paragraph 2 of Article 45 of the Constitution shall in no way preclude such counter-terror action. The President may refer any terror crime to any judicial body stipulated in the Constitution or the law.*
  - **Proposed Amendment:** Article 179 should be abolished.
- **Article 189 Constitutional Amendment:** *The President of the Republic, as well as the People's Assembly, may request the amendment of one or more of the Constitution articles. The articles to be revised and the reasons justifying such amendment must be mentioned in the request for amendment. In case the request emanates from the People's Assembly, it should be signed by at least one third of the Assembly members. In all cases, the Assembly shall discuss the amendment in principle, and the decision in this respect shall be taken by the majority of its members. If the request is rejected, the amendment of the same particular articles may not be requested again before the expiration of one year from the date of such rejection. If the People's Assembly approves the principle of revision, the articles requested to be amended shall be discussed after two months from the date of the said approval. If the modification is approved by two thirds of the members of the Assembly, it must be referred to the people for a plebiscite. If the amendment is approved, it shall be considered in force from the date of the announcement of the result of the plebiscite.*
  - **Proposed Amendment:** The text as it stands does not need to be amended, but transitional measures are necessary to implement the currently proposed amendments of the Constitution.

- **Part Seven: Chapter I The Shoura Council (Articles 194-205)**
  - **Proposed Amendment:** Articles 194-205 should be abolished. In the absence of a federal structure, an additional chamber with legislative powers is unnecessary. References to the Shoura Council in other parts of the Constitution, i.e. Articles 62, 74, and 76, should be amended accordingly.