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ARAB CENTER FOR RESEARCH & POLICY STUDIES



(Doha Institute)

## **Assessment Report**

### *The Popular Referendum on the Amendments to the Constitution in Egypt*

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The process of democratic transition in Egypt faced an important challenge on Saturday, March 19, 2011 when Egyptians, for the first time in decades, voted in free and fair elections in one of the first accomplishments of the January 25 revolution. The referendum was on nine constitutional articles amended by a committee of six members, and headed by former judge Tarek al-Bishry. The committee, comprising three judges of the Supreme Constitutional court—the highest constitutional body in Egypt, and three professors of constitutional law, was formed by the Military Council to oversee the amendments.

The amendments concern the conditions for nomination to the presidency of the republic, the length of the president’s term in office, guarantees of the elections process, and the rules governing future constitutional amendment. The amendments, however, do not affect the approximately 36 articles governing the powers granted to the president. If approved by the requisite majority, the constitutional amendments will form a temporary constitution governing both the transition period and the coming parliamentary and presidential elections until such time as a new constitution is prepared. If the amendments were rejected, the transition period may be prolonged, creating a difficult challenge to the Military Council, which strives to hand-over power to an elected president and assembly. It, therefore, hoped the amendments would constitute a basis to govern the transition period in post-revolution Egypt.

In an unprecedented procedural step to secure the integrity of the election process, Egyptians will vote with their national identity cards rather than their electoral cards. Moreover, the interior ministry’s role will be to ensure security of the voting process while the elections will be overseen by the judicial supervision.

Egyptians will vote on the amendments to Articles 75, 76, 77, 88, 93, 193 and 148; the annulment of Article 179; adding a final paragraph to Article 189; and the introduction of two new articles numbered 189 and 189.1. The most important of these are Articles 75, 76, and 77 which specify the conditions for presidential nomination, the nomination procedures, and the length of the presidential terms which has been reduced to four years – down from six in the old constitution – renewable for one time only. Article 88 concerns the judiciary taking complete supervisory responsibility for the elections process, while Articles 189 and 189.1 specify the procedures for the preparation of a new constitution and the parties responsible for its preparation.

The referendum comes in the context of a highly-charged political context amidst a sharp division within the Egyptian polity in which two main camps have emerged. The first is represented by a number of political forces, including the Muslim Brotherhood, in calling on Egyptians to vote “yes.” This camp sees voting on the amendments as a necessity, considering the outcome an independent constitutional document intended to govern the transition of power, rather than being part of the old – defunct – constitution. From their viewpoint, the current conditions do not allow for the preparation of a new constitution not because of any obstacles to the formulation or drafting of a new text, but because of the challenges facing a national consensus on its content, particularly as it pertains to the fate of Article 2 which states that Islamic jurisprudence is a main source of legislation, the form of the political system, and the

fifty-percent quota for peasants and workers. Those forces also contend that the new constitution should be prepared by an elected body, not one appointed by the Military Council.

The opposing camp includes a variety of members from the January 25 Revolution Youth Coalition, the April 6 Movement, the Front for Reform headed by Mohamad al-Baradei, and political parties, including the Tajammu', Nasserist and Wafd parties. This camp sees the amendments as circumventing the principles of the revolution. Their objections are not directed at the amendments themselves so much as what has not been amended, namely the scope of presidential powers. These objections have reflected legitimate apprehension concerning the reproduction of the autocratic system in that the presidential powers have not been amended; additionally, they feel that the Military Council selectivity chose certain articles for amendment, excluding those dealing with presidential powers.

A further concern for this camp is that the president of the republic elected in the next presidential election, which itself will undoubtedly be carried out before the end of the transition period, will be able to exercise direct influence on the founding committee, especially with regards to articles governing his powers and length of term. There is a further fear that the coming parliamentary elections will result in legislative seats being divided between the Muslim Brotherhood and the remnants of the National Democratic Party, while the other parties, including those of the revolution, remain without the sufficient organization to pass the test an electoral contest. Furthermore, another concern is that the referendum is being carried out while disorder, absence of the police, and chaos instigated by the former regime can still be felt throughout the country.

These forces call for a constitutional declaration that includes the basic articles required to administer the country's affairs until a new constitution is drafted while at the same time forming a leadership council composed of two civilians and one military representative to administer these affairs during a transition period of up to six months. The leadership council would have the power to issue legal directives, including one on the formation of political parties. Another committee would be formed, composed of fifty politicians, intellectuals, and professors of constitutional law, to prepare a draft constitution for the whole country within one month.

Despite the last minute calls to postpone the referendum, or cancel it and replace it with a referendum on a declaration of constitutional principles founded on the legitimacy of the revolution, it is notable that the main political parties did not call for a boycott of the referendum. Most parties have preferred to call on voters to head to the polls and exercise their right to cast a "yes" or "no" vote.

The referendum also comes at a time of heightened anxiety based on strong evidence of a counter-revolution to reverse the gains of the January 25 revolution, one that is being carried out by members of the National Democratic Party and businessmen connected to them, as well as the disbanded state security forces. Demonstrations of particular interest groups and the lack of security related to the country's instability also work to add to this anxiety. This has led the Military Council to issue a warning against carrying out protests on election-day, ensuring that anyone who tries to obstruct the referendum shall be "subject to the dictates of thug law."

This referendum comes as a first of several political outcomes expected for the transition period, and will be followed by legislative, as well as presidential, elections despite the differences of opinion on which of these elections should precede the other.

There is consensus among constitutional experts who have participated in the constitutional amendment committee that the current constitution must be completely changed and just reformed for it is, in the words of constitutional scholar Ibrahim Darwish, “a corrupt constitution” because it is an expression of the political, economic, and social climate before the January 25 revolution. These experts, however, also affirm that the preparation of a new constitution would require a founding committee, formed by an elected parliament, not the Military Council, and would require at least a year to complete its task. A new constitution, moreover, would likely open a Pandora’s Box of debate on sensitive topics such as Article 2 (Islam is the official religion and Arabic the official language of the state and Islamic jurisprudence and its principles are the main source for legislation). According to Abu Ala Madi, a founding member of the Islamically-oriented *Al-Wasat* party, talk of changing the constitution “could cause the society to implode.”

Constitutional scholars also defend Article 75, which has met resistance for its focus on “purity of citizenship” as it relates to the president, the amendment of which stipulates that presidential nominees cannot be citizens of any other country, nor be married to non-Egyptians. One participant in the constitutional committee stated that the amendment aims to “fortify the [presidential] post,” given the centrality of Egypt’s role, stressing that the amendment does not exclude women from the right to nomination for presidency. Committee chair al-Bishry, for his part, has also defended the amendment, stating that the issue of dual citizenship has been the subject of rulings by the High Administrative Court with regards to members of parliament, while the position of president of the republic is of greater consequence. He adds that the law governing the diplomatic and military circuit forbids Egyptian diplomats from marrying non-Egyptians, and this should apply with greater weight to the president.

These amendments upon which Egyptians will vote are the first stage to be followed later by another that concerns the amendment of supplementary and derivative legislation to the amended constitution, particularly the laws governing political rights, both houses of parliament, and presidential election.

As for the Muslim Brotherhood, it is clear that their position strongly advocates the scenario of a referendum result that leads to the adoption of the amendments in order to continue along the path of implementing the other outcomes of the revolution, particularly the parliamentary elections. The referendum may reveal – perhaps for the first time in decades – the true electoral weight of the Brotherhood and the extent of its reach and influence. Furthermore, in seeking to pass these reforms, the Brotherhood is driven by the desire to prevent the renewal of the military’s dominance, and to transition to a democratic system.

The Brotherhood’s advance has met with several obstacles, most important of which are the fears, expressed by several political currents including those of the January 25 revolution, that

the Brotherhood are the ones who will reap the benefits of the revolution by taking control over the legislative body or sharing it with the remnants of the National Democratic Party if parliamentary elections indeed take place according to the timetable approved by the armed forces (according to which the elections will be held in June 2011). The Brotherhood has made efforts to quell these fears by emphasizing that the Brotherhood's guiding principle will be "participation not domination" and that they have committed to nominating no more candidates than would fill one-third of the 510 parliamentary seats, and will not nominate a candidate for the presidency. Issam al-Aryan, a member of the Brotherhood's guidance office has announced his organization's readiness to enter the elections on a unified national slate together with the revolution youth and any other political parties wishing to join.

If the result of the referendum, however, is the rejection of the amendments, there are two likely scenarios: either other articles are amended (such as those dealing with the presidential powers), incorporating the arguments made by the oppositional groups, bringing the resulting amendments back for another referendum; or the Military Council responds to the oppositional groups' demands by issuing a constitutional decree that specifies the mechanisms for administering the transition period, the powers of the civilian leadership council, and the formation of a founding committee to draft a new constitution for the country while providing for full public freedoms and trade union activity.

The referendum may indeed clarify whether the democratic transition in Egypt will be governed by a constitutional amendment, or by scrapping the constitution altogether and replacing it with a new one. More importantly, the referendum will be an important indicator of the forces that will shape and affect the democratic transition by showing their strength in the ballot boxes. Whatever the case may be, it is clear that the process of democratic transition is still in its beginnings, and that the coming contests for presidential and legislative authority will be decisive in determining whether the new political system will be based on the principles of the revolution, or whether it will be a process of mere reform of the previous regime.