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IN EGYPT

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THE ROAD TO ELECTIONS IN EGYPT: ELECTORAL REFORMS SINCE FEBRUARY 2011

SUMMARY

After assuming power in February this year, Egypt's Supreme Council of the Armed Forces (SCAF) quickly established a transitional timetable consisting of parliamentary elections to be held in September. The elected members of the two houses of parliament would then select a 100-member constituent assembly, which would draft a new constitution, which would be approved by referendum.

Reform-minded groups have begun questioning the sequence of the transition, arguing that quick elections would be detrimental for new political parties. Not only would they have too little time to organise themselves, but there is a risk that a parliamentary majority could turn the constitution-writing process into a highly partisan endeavour. Whatever the transition sequence will eventually be, it is clear that the quality of these next elections will be crucial to Egypt's democratisation. Therefore the quality of the electoral framework is crucial.

The various recent amendments to the constitution and laws have addressed some long-standing reform demands, namely:

- Judges will play a crucial role in administering elections. This is highly significant because they enjoy far more trust than staff at the Ministry of the Interior
- Eligibility and nomination criteria for presidential candidates are much more reasonable than was previously the case
- The possibility of election observation is acknowledged, although currently this only refers to non-governmental organisations
- Introducing a two-term limit for the President

- Giving a court, rather than the two houses of parliament, the final say on whether members were genuinely elected
- The registration of political parties is now administered by judges, while in the past it was controlled by the ruling party

However, there are two reasons for some concern about the independence of the electoral administration. First, while election commissions (composed of judges) should be in charge of election management, some key elements of election administration, such as the appointment of lower-level election officials, has been left with the Ministry of the Interior, creating unclear lines of accountability. Second, a provision creating a special budget for the High Election Commission (HEC) has been deleted, potentially weakening its independence.

One piece of electoral legislation, the Law on the People's Assembly (LOPA; the lower house), has not yet been reformed, but the SCAF has already issued a draft version of possible changes. According to the draft, an element of proportional representation (PR) would be introduced. While this would benefit smaller parties, which cannot gain seats under a majoritarian system, its effects depend on many details; e.g., the size of electoral districts and the allocation formula. Even if part of an electoral system is technically called 'PR', it is far from certain that it will result in seat allocations proportional to vote gains. The details of the PR system laid out in the SCAF's draft would greatly favour larger parties. The SCAF draft also retained obsolete provisions favouring workers and farmers. These greatly complicate the electoral arrangements.

The overall legal framework for elections still suffers from major and minor problems and needs improvement. Beyond the law reforms, there are other significant challenges in preparing the next elections. These could

impact on the feasibility of the prospective September election date. These challenges include:

- Voter registration has been changed and is now based on the ID card system, but it is not clear how fast it can be implemented without risking widespread *de facto* disenfranchisement of voters
- Based on the electoral system determined in the LOPA, electoral districts will have to be delimited and/or decided seats attributed to districts¹
- The HEC will have to adopt a wide range of regulations and to hire and train staff
- Apart from the start date of elections, it should be borne in mind that elections may have to proceed in phases because there are not enough judges to administer country-wide elections, thus creating a range of complications related to the political dynamics of elections and counting and announcement of results

1. INTRODUCTION

This briefing paper examines progress made in reforming the political-electoral legal system in Egypt following the ouster of Hosni Mubarak on 12 February 2011. It also points to enduring weaknesses and ambiguities in the electoral framework. A full report, which explores these questions in detail and backs up the findings of this briefing paper, is available upon request from DRI.

2. POLITICAL CONTEXT

During the interim period, governmental authority rests with the Supreme Council of the Armed Forces (SCAF), and to a lesser extent with the civilian government. The SCAF moved quickly to suspend Egypt's 1971 Constitution and dissolve parliament. Its powers are similar to that of a president and it will remain in place until the People's Assembly and the Shura Council assume their responsibilities, and the president of the republic is elected and assumes his/her position. In early March, the SCAF appointed a new cabinet containing some reform-minded ministers under Prime Minister Essam Sharaf.

In February and March, the SCAF pushed ahead with a narrow revision of the constitution. On 15 February, it formed a committee to propose changes to the constitution. Before deciding this approach, the SCAF did not hold any public dialogue on the big sequencing question—namely, whether Egypt should undertake wide-ranging constitutional reform before or after electing new institutions. Most reformists had wanted a thorough revision of the constitution to take place before the elections in order to avoid electing institutions without bolstering checks and balances on their powers and debating the best model for the separation of powers. On 26 February, the committee proposed, *inter alia*, to form a constituent assembly (CA) to draft a new constitution after

the next parliament is elected. The committee's proposals were backed by 77 % of the voters in a referendum that was held on 19 March.

The 1971 constitution was a significant obstacle to holding democratic elections. Its overarching aim was to make sure that those holding power would retain it without having to face serious political competition. Although narrow in their focus, the changes adopted on 19 March significantly increase the possibility of genuine elections being held, and address many (but not all) long-standing concerns. However, some contentious issues, like the highly questionable 50 % electoral quota for workers and farmers and the right of the president to appoint a third of the members of the Shura Council (the upper house of parliament), were not addressed.

On 30 March, the SCAF promulgated a constitutional declaration, a document that gives the SCAF a legal basis and strong powers until the next parliament and president are elected. The declaration incorporates all the changes approved by the 19 March referendum (as well as introducing some subtle changes), and includes a few new positive elements. Overall, however, it must be regarded as a missed opportunity because it mostly copies articles verbatim from the unloved 1971 constitution. Given that the document includes some completely new provisions, which were not a subject of the referendum, it ought also to have been possible to address the numerous weaknesses in the articles that were copied. It appears that the declaration will serve as Egypt's mini-constitution until a new one is promulgated—possibly by late 2012.

3. TIMING OF THE ELECTIONS

Despite the referendum result and the adoption of the declaration, discussion on whether additional constitutional reform can be adopted before elections has not gone away. Since it came to power, the SCAF has consistently maintained that parliamentary elections should be held in late September 2011 and the constitutional declaration makes this a legal requirement, albeit ambiguously.² This would leave almost no time to introduce new constitutional changes. Thus, some reformists are hoping that the election date slips. This would also be good for Egypt's long-suppressed political movements because they have not had much time to organise themselves before the upcoming election poll.

If the September election date is to hold, many legal and organisational challenges must be overcome. The most significant concerns include: revising Egypt's notoriously deficient electoral laws; appointing new personnel to manage institutions with badly tarnished reputations; deciding on a new election system and possibly re-drawing the electoral boundaries; compiling a completely new national voter register; and adopting a host of procedural regulations necessary for elections. These activities must

¹ The existence of electoral districts is the crucial difference to referenda where the whole country is one district. Thus the May referendum could be organised at short notice.

² Article 41 of the declaration states that, "*The procedures for electing the People's Assembly and the Shura Council shall begin within six months of the Constitutional Declaration*" (emphasis added).

take place before the election can be called– no later than 30 days before election day.

4. SHURA COUNCIL AND OTHER ELECTIONS

While most attention has focused on the timing of the People's Assembly elections, the Shura Council elections are important because the CA cannot be formed until both parliamentary houses are elected. And with the municipal councils having been dissolved, local elections may also be on the agenda soon. The timing for the presidential election is not altogether clear. In March, the SCAF indicated that this would take place one or two months after the parliamentary elections. However, in May a SCAF member stated that the presidential election would only be held after the adoption of a new constitution. This approach fits well with the reformist agenda. But because the CA may not finalise the text of the new constitution until one year after the new parliament first sits, the SCAF will continue to serve as acting president for a much longer period than anticipated a few months ago. Indeed article 56.10 of the declaration suggests that the SCAF may continue to exist in some form even beyond the election of the president.

5. REFORM OF POLITICAL PARTY LAW

Until the election of the People's Assembly, the SCAF has the authority to legislate. In late March, it began the process of revising the legislation that regulates political parties and elections. The revision process has been relatively slow, particularly regarding the LOPA, which has yet to be adopted. This is because the SCAF and the pro-reform camp appear to have different ideas on what election system should be used.

After the February revolution, reformists wanted completely new electoral and political party legislation. Instead, the SCAF decided to amend the existing Law on Political Party Systems (LPPS). Most of the changes, adopted on 28 March, mark significant progress, including revising the composition of the notoriously biased Political Parties Affairs Committee (PPAC), permitting registration on a no-objection basis, and removing ambiguities on parties and religion.

However, because the SCAF did not consult with political groupings prior to enacting the changes, a few legal provisions have caused the parties unnecessary problems. For example, the law left unchanged some questionable provisions, such as a requirement that founding members' signatures be witnessed by a notary (article 7), a burdensome and expensive procedure, especially in view of the fact that the minimum number of founding members has been increased from 1,000 to 5,000. This has raised costs to new parties and slowed down their registration. The prohibition of parties accepting a 'contribution, privilege or benefit' offered by foreigners, including international agencies (article 11), is vague. Theoretically, this could be applied if a party receives training, for instance on campaigning or electoral monitoring, but other parties do not.

6. REFORMS OF ELECTION LAWS

Egypt's electoral arrangements are set out in five acts adopted between 1956 and 2005. These acts regulate the exercise of political rights and the elections of the People's Assembly, the Shura Council, the president, and local councils. Other acts are also relevant to holding elections, such as the emergency law, laws on public assembly, the media laws, and the penal and administrative codes.

To date, the SCAF has only adopted amendments to the Law on the Exercise of Political Rights (LEPR). Various drafts of the LOPA were circulated and discussed between May and early July. A draft of the Law on the Formation of the Shura Council (LFSC) was deposited with the cabinet on 3 July, but has not yet been publicly released. Reforming the Law Regulating the Presidential Election (LRPE) is unlikely to become a priority until a clear timeframe for the presidential election is established.

LEPR

On 19 May, the SCAF published amendments to the LEPR. The major changes cover the composition and competencies of the High Election Commission (HEC), a reduced role for the Ministry of Interior in electoral organisation, the creation of a new voter register and opening the possibility for election observation by Egyptian and international CSOs. It is not easy to draw firm conclusions about whether the changes are positive or negative because some could have both beneficial and detrimental effects. The drafters of the LEPR and LOPA focused on reformists' long-standing demands, but have left a number of problematic provisions unchanged. It may be necessary to adopt further amendments to the LEPR in order to harmonise it with the LOPA and to iron out various inconsistencies.

The reformed HEC will be composed of seven serving judges. This should improve public confidence because the judiciary is one of the few trusted public institutions. The role of the Ministry of Interior, which enjoys little public confidence, has been significantly reduced but not eliminated altogether. Positively, the LEPR establishes a permanent secretariat to support the work of the HEC. Over time, this ought to allow the HEC to develop its organisational capacity and procedures rather than rely on ad hoc support from state bodies. However, a provision creating a special budget for the HEC has been deleted. Funding problems could lessen its ability to hire its own staff and hence its independence.

The HEC has much to do before elections can be called, including: forming its secretariat; appointing the governorate, general and polling committees; overseeing the preparation of an entirely new voter registration database; and issue various regulations. It may also be called upon to delineate constituencies. If elections are to take place by 30 September, the HEC has less than two months to complete these tasks. It may have little choice but to request the support of the state administration to assist the secretariat in organising the process. However, re-assigning any key task to the Ministry of Interior is likely

to provoke a strong reaction from some political and civic groups.

Although the HEC has been granted authority to regulate some aspects of the electoral process (e.g., candidate registration, campaigning and election observation), other important aspects will be regulated by different bodies. Controversially, the LEPR's executive regulations are to be adopted by the Minister of Interior and the president (in practice, the SCAF) has the authority to regulate the work of the HEC secretariat. This potentially reduces the HEC's ability to function as an independent body.

The LEPR states that the HEC has competence to regulate the 'engagement of Egyptian and international civil society organisations in monitoring all electoral processes'. However, the law does not give any further details on what observers may or may not do. The LEPR makes no mention of election observation by international governmental organisations.

The system of voter registration has been changed. For the parliamentary elections, a new database of electors will be created by extracting data from the national ID card database. It is not known whether a feasibility study was conducted before deciding on this change, nor is it known how many citizens lack a national identity card. No changes to the database may be made after the elections have been called, which means that if elections are to be held by 30 September, an accurate database must be finalised no later than 31 August. An unknown but potentially very large number of citizens are registered on the ID card database at places other than their current residence. Thus, sufficient time should be set aside to issue these persons with new ID cards before the elections are called.

The amendments re-introduce the need for direct supervision of polling at polling station level by judges. This practice also took place in the 2000 and 2005 elections, but because there were many fewer judges than polling stations, the elections in those years took place in three different phases. Moreover, because the election system required run-off elections to be held, there were six election days.

It is possible that similar arrangements will be required for the next parliamentary elections. Holding the Shura Council elections separately will further multiply the number of election days. Holding them together will significantly complicate the voting arrangements by increasing the number of ballots that voters will be required to mark, thereby slowing down voting. Holding phased elections also creates other dilemmas, for example when the votes should be counted and when the results are announced. Immediately announcing results from one phase runs the risk of influencing voter choices in subsequent phases. Not announcing the results runs the risk of raising political tensions.

The amendments to the LEPR leave voting and counting procedures unchanged despite obvious weaknesses in the previous legislation, the most notable of which concern provisions that potentially jeopardise the secrecy of the vote. The law provides very few clues as to the vote

counting or aggregation arrangements that are applied. Transparency during the counting phase is not assured.

The aggregation of votes appears to be conducted by the HEC, rather than at district or governorate level. The HEC is required to announce final results within three days. This timeframe is very short for the HEC to compile results from some 15,000 voting centres and to be certain of the accuracy of its work. Moreover, this timeframe gives the HEC almost no time to review any complaints received.

The constitutional amendment that a superior court has jurisdiction to decide on the validity of parliamentary elections, rather than the respective parliamentary assembly, constitutes clear progress.

LOPA (DRAFT)

The SCAF has yet to adopt amendments to the LOPA. However on 30 May it publicly released a draft of the proposed changes. This draft report provides an analysis of these proposals. It is stressed that the final version of the LOPA has yet to be adopted, and will probably contain changes to the 30 May text.

The LOPA sets out the election system for elections to the People's Assembly (the lower house of parliament). In the past, the election system for the Shura Council has been almost identical to the People's Assembly and it is believed that this similarity will continue in future. As is the case with the LEPR, it is not easy to categorise the proposed changes as positive or negative because they could have both a beneficial or detrimental effect.

The most notable change is the introduction of a mixed election system. This retains the existing system of two-member constituencies elected on the majoritarian principle, but incorporates a separate component based on closed registering in multi-seat election districts with mandates allocated by a form of PR.

Workers and farmers must constitute at least 50 % of the elected MPs. This provision and the way it has been applied is at odds with international standards for democratic elections and has unduly complicated the election system. The 30 May draft makes no mention of a women's quota, which was a feature of the 2010 People's Assembly elections.

The draft does not stipulate the total number of members of the People's Assembly to be elected, nor the number of election districts and constituencies into which Egypt will be divided. But it does make reference to the governorates, implying they will constitute the election districts. The draft also stipulates that the one third of the mandates allocated to a governorate will be PR seats and the two thirds of the mandates will be for individual candidates. While many Egyptian reformers have long argued for the re-introduction of PR, most strongly disagree with the proposed split between the PR and majoritarian systems. At the time of writing, it is rumoured that the number of PR seats will be increased.

The draft does not mention any criteria to establish how a governorate's seat entitlement will be determined. It is a concern that there is no legal text establishing that

election districts and constituencies should respect the principle that ‘the vote of one elector should be equal to the vote of another’; i.e., that either electoral units are formed with broadly equal population sizes, or that where they have unequal population sizes, they are allocated a higher or lower number of mandates. The changes to the election system and inequalities in the existing constituency population sizes necessitate the redrawing of constituency boundaries. However, it is entirely unclear from the draft which body will make changes to the constituency boundaries, what the principles and criteria that will guide the redrawing exercise are, whether appeals may be filed against the decisions on new boundaries, and when the process must be completed. The process must be completed before the voter registers are closed to ensure that the extracts of the registration database correspond to the new constituencies.

The system for allocating mandates to election lists contained in the draft was very unclear. DRI understanding of the draft provisions is that mandates are allocated to election lists on the basis of their election quotient. This is calculated by dividing the number of valid votes received by each list by the total number of valid votes and multiplying this figure by the number of mandates to be allocated. However, parties will only be allocated a number of mandates corresponding to whole integers— all remainders (fractions) are summed together and allocated to the highest scoring list. This system is unusual and provides a potentially very large unearned electoral dividend to the highest scoring party, and could significantly reduce the proportionality of representation.³

The draft foresees that parties must receive a minimum percentage of the votes at national level in order to retain any PR seats they may have won in an election district. If they do not, the seats they were initially allocated will be allocated to other lists according to the method outlined above. For independent candidate lists, a district level threshold will be applied. The draft does not propose at what level the thresholds will be set. The introduction of a national threshold in a situation where elections are phased could create a situation where the results of one phase influence voting preferences in subsequent phases; e.g., in a situation where a party is just above or just below the threshold prior to the final voting phase.

The LOPA does not set out a time frame for the election campaign. Currently, many new parties are in the process of forming and it is necessary for the campaign period to be longer than it previously was in order to give sufficient time to allow voters to learn about party and candidate political programmes. Thus the SCAF should give serious consideration to calling elections much longer than 30 days prior to the election day.

Neither the LOPA nor the LEPR contain adequate provisions protecting candidates’ campaign rights or provisions to ensure a level playing field for campaigning; e.g., there are no provisions requiring public authorities to treat candidates and parties equally or to allow parties

and candidates to display campaign material and have access to public spaces for holding campaign events on an equal basis. It is possible that the HEC may be able to address some or all of these issues in the regulation on campaigning. To better ensure that fundamental freedoms are respected during the electoral period, the SCAF should end the state of emergency and repeal the emergency law before elections are called.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

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

DRI has received an 18-month grant from the European Union to support Egyptian civil society organisations during the country’s current transition. The programme aims at fostering linkages between civil society groups and supporting their capacity to respond to the transition.

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³ This point is illustrated in the full report, see introduction.