

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

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

Rule by Law in Mubarak's Egypt

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

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

While rights activists worked to exploit openings in the formal legal system, the regime constantly spun out fresh, illiberal legislation. The regime also undermined the independence of the Supreme Constitutional Court—the

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

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

Claiming Rights in the Egyptian Revolt

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

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

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

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

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

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

in three decades, state security forces were on the defensive, and the regime was fighting for political survival. Egyptians mobilized to claim their rights in an unprecedented manner, and a new, revolutionary political culture emerged virtually overnight. Workers went on strike across the country, including public transit employees, postal workers, state telecom employees, sanitation

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

Constitutional Conundrums and an Uncertain Future

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

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

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

¹⁵ For more detail on each of the proposed amendments, see Tamir Moustafa, "It's not a Revolution yet" *Foreign Policy*, 28 February 2011, http://mideast.foreignpolicy.com/posts/2011/02/28/it_s_not_a_revolution_yet accessed 30 June, 2011.

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

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

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

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

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

The increasingly bitter debate has at least three important implications for the prospects of democracy and the rule of law. The first and most obvious problem is that the sense of unity and common purpose among opposition forces has come under significant strain. There is no doubt that the revolt against Mubarak and the piecemeal concessions extracted from SCAF thus far were won only as the result of collective action across the various opposition trends. If political forces are unable to overcome their emerging differences, it is unlikely that the political forces will be able to overcome their emerging differences.

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

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

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

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

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