

## Stability or Rigidity?

### Egypt's Use of Constitutional and Executive Power

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Brief Analysis

This is the second of a three-part series on Egypt's political future. Read [part one \(http://www.washingtoninstitute.org/templateC05.php?CID=3267\)](http://www.washingtoninstitute.org/templateC05.php?CID=3267) and [part three \(http://www.washingtoninstitute.org/templateC05.php?CID=3269\)](http://www.washingtoninstitute.org/templateC05.php?CID=3269).

The Egyptian regime has used constitutional amendments to consolidate its power vis-a-vis the "loyal opposition" and to fend off independent bids for the presidency. The amendments have also closed off all legal and constitutional channels for the country's largest opposition group, the Muslim Brotherhood, to participate in the political process.

#### Taking on Islamists

First, Article 5 of Egypt's constitution -- which theoretically established a system of "party pluralism" in 1971 -- was amended in 2007 to enshrine an existing ban on religious parties and broaden it to preclude "political activity with any religious frame of reference." The clause effectively eliminates the Muslim Brotherhood's prospects of party legitimacy and circumscribes their activities in the public sphere. Second, an amendment to Article 62 establishes a system for future elections based predominantly on a party list, which effectively bars the Muslim Brotherhood from fielding candidates since, as a banned party, it has historically had to rely on "independent" candidates to make electoral gains.

The explicit banning of religious parties was marketed in Egypt and the West as a move to enhance "citizenship" -- a buzzword increasingly used by National Democratic Party (NDP) policy committee secretary-general Gamal Mubarak -- putatively emphasizing the equality of all citizens before the law. Nevertheless, the amendments left intact Article 2 of the constitution, which states that sharia is Egypt's principal source of legislation and which, according to many rights groups, contravenes the principle of religious equality in a religiously diverse country.

#### Targeting the Judiciary

These amendments helped the regime significantly undermine its opposition. At the same time, the regime targeted the role of the judiciary in the election process. In 2005, judicial monitoring and reporting uncovered significant abuse and the rigging of election processes. As a result, in 2007, Article 88, which had previously been interpreted judicially as mandating full judicial oversight of every polling station, was amended to replace this supervision with an "independent electoral commission." This amendment -- ironically, made in response to a call from the European Union and the United States to establish such a commission -- destroyed the judiciary's ability to monitor elections. Today, the executive branch has entirely eclipsed the judiciary and, through the commission, has allowed the electoral process to be safely manipulated by the Ministry of Interior, which unofficially oversees every aspect of the process.

Although the election commission is partly composed of judges, the remaining members are public figures appointed by the executive. In fact, far from calling attention to abuses, the electoral commission -- whose decisions enjoy immunity from judicial review -- defended widespread fraud, and even violence, perpetrated by the security apparatus during and after the last two Shura Council elections. Furthermore, during those elections, it refused to implement numerous court decisions allowing independent candidates who were wrongfully disqualified to reregister their candidacy. It also refused to allow many rights organizations to monitor the elections despite proper legal requests to do so, and it appears that in this election season, it is refusing to grant monitoring permits again.

The executive, by strengthening the Ministry of Interior, further eroded the judiciary's role by amending Administrative Rule 293 of 1984, which governs conditions of candidacy for elections to the People's Assembly, Egypt's parliament. The decision essentially allows the ministry to appoint its own officials to oversee local polling stations, and requires that candidates and their representatives be approved by the chief of security of a particular governorate. It also stipulates that all polling station reports must be shown to the relevant chief of security before the votes are counted and the results announced.

By upgrading the role of the Ministry of Interior and sidelining the judiciary in the election process, the regime has eliminated the final factor that could have served as a legal check on the NDP's ability to advance its candidate -- presumably Gamal Mubarak -- for the presidency.

Not content with creating a bulwark within the executive branch to bar unforeseen political challengers from entering the race, the regime undermined the legislative branch through amendments ostensibly designed to strengthen it. While the People's Assembly can now withdraw confidence from the cabinet, for instance, that power was simultaneously undermined through an amendment to Article 136 that allows the president to dissolve the assembly without a referendum, which was previously required.

#### The Constitution on Succession

Amendments extending new powers to the prime minister also highlight President Mubarak's continued unwillingness to appoint a vice president, leaving the succession scenario to play out within the new constitutionally prescribed methods. An amendment to Article 82 granted extended powers to the prime minister and allowed him, in certain circumstances, to assume the role of vice president if none was appointed. Article 82, as amended, allows the prime minister to assume power in the event that the president is temporarily incapacitated, as occurred earlier this year during Mubarak's surgery in Germany. Even then, however, the president retains full and sole discretion to appoint and fire the prime minister. Moreover, the prime minister is prohibited from requesting any constitutional amendments or dissolving the legislature while in power. This delegation of presidential responsibility to the prime minister is therefore largely symbolic, and combined with the reluctance to appoint a vice president, would appear to reflect Mubarak's fear that any subordinate figure may ultimately pose a threat to him or to his son, Gamal.

Undoubtedly, Mubarak's memory of his own accession to the presidency and President Anwar Sadat's before him shapes that view. When Sadat was assassinated, the constitution stipulated, as it does now, that the speaker of the house assumes the country's leadership and holds an election within sixty days. Sufi Abu Taleb, then acting speaker, assumed the position for six days when Mubarak, acting vice president under Sadat and a man with a low political profile, was thrust into the position.

Whatever the president's motives for not appointing a vice president, the vacancy makes it much easier to envision a constitutional father-son transition should Mubarak senior suddenly pass away.

#### A Permanent State of Emergency

A final constitutional revision transcends all others in affording the next president unfettered power during the transition. Article 179, granting special powers to the executive to deal with national "security threats" and terrorism, essentially enshrines much of Egypt's twenty-nine-year-old Emergency Law in the constitution. The article allows the suspension of several provisions guaranteeing an individual's rights against warrantless arrests, searches, seizures, and surveillance. It also grants the president unlimited power to refer any "terrorist-related" crime to any judicial body he designates, thus opening the door to abuse of the terrorist charge and trials of civilians in military and exceptional courts. Article 179 essentially lays the groundwork for a comprehensive "anti-terror" legislation that the government is claiming will permanently replace the existing Emergency Law, currently subject to renewal every two years.

The Emergency Law, in existence since 1981, has been used not only to suspend individual rights -- such as the right against indefinite detention without charge -- but also to curb the activities and potential activities of existing political parties and civil society groups. The law bans the public assembly of more than four people, for example, crippling the ability of parties to reach out meaningfully to constituents through public rallies or any large public gathering.

Although the Emergency Law and the promised "anti-terrorism" law designed to replace it are said to target violent extremist groups, the real victims for nearly three decades have been Egypt's liberal voices -- its young activists, liberal party leaders, and today, its bloggers. The cases of activists and party leaders such as Saad Eddin Ibrahim and Ayman Nour are but two famous examples of the Emergency Law's politicized use to silence liberal dissent. Even the cases of minority-group bloggers, such as Bedouin rights blogger Mosad Abu Fagr and Coptic blogger Hani Nazir, demonstrate the excesses of the law. In these cases, the executive branch even refused to honor the decisions of the exceptional courts associated with the Emergency Law. Far from being terrorists, Nour, Ibrahim, and countless others were nonetheless tried under the exceptional justice system established by the Emergency Law, putatively designed to combat terrorism. The law was recently extended, so the legal framework it creates will prevail throughout the upcoming election period, granting the regime greater latitude in settling scores with dissidents and restricting opposition parties' activities. If and when the Emergency Law is eliminated, as the U.S. administration is urging, Article 179 will nonetheless retain the current law's most onerous provisions in permanent form.

By constitutionally orchestrating the regime's empowerment at the expense of the legislature, and through unchecked powers granted by the Emergency Law, the regime has guaranteed that substantially unfair processes will continue in Egypt throughout its transition.

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