

## Report

### Comprehensive Assessment of Egypt's Electoral Framework

11 July 2011

#### 1. Introduction

This report examines progress made in reforming the electoral-legal framework of Egypt since February 2011. It reviews:

- The constitutional amendments adopted by referendum on 19 March;
- The Constitutional Declaration promulgated by the Supreme Council of the Armed Forces (SCAF) on 30 March;
- The Law on Political Party Systems (LPPS) as amended on 28 March;
- The law on the Exercise of Political Rights (LEPR) as amended by the SCAF on 19 May;
- The 30 May draft of the Law on the People's Assembly (LOPA).

The report shows that some progress has been made to address long-standing flaws of Egypt's electoral framework, but also points out that there are still many issues that ought to be resolved, as well as a number of provisions that are ambiguous, requiring clarification. The authorities may be able to address some of these issues through further legal reform while the High Election Commission (HEC) may issue regulations that can remove ambiguities or fill gaps.

A separate briefing paper summarises these findings, while this report explores them in detail. The report is aimed at enhancing the understanding of the complex electoral questions which are currently under discussion in Egypt. It may also serve as a basis for future discussions on electoral reform.

#### 2. Political Background

##### 2.1 The Current Governmental Authorities

On 12 February 2011, Hosni Mubarak resigned as President of Egypt. His last act was to hand executive power to the Supreme Council of the Armed Forces (SCAF). On 13 February, the SCAF issued a Constitutional Proclamation stating that it "shall temporarily administer the affairs of the country for a period of 6 months *or until People's Assembly, Shura Council and presidential elections are held*" (emphasis added). The proclamation also dissolved both houses of the Parliament (the People's Assembly and the Shura Council) and suspended Egypt's 1971 Constitution. In early March, the SCAF appointed a new cabinet under Prime Minister Essam Sharaf.<sup>1</sup> While the cabinet contains a number of reformers, it is the SCAF which remains the most important decision making body.

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<sup>1</sup> He replaced Ahmed Shafiq, who had been appointed Prime Minister in the last days of the Mubarak regime.

## 2.2 Elections versus Constitutional Reform

The first major issue to be addressed was whether Egypt should undertake ‘deep’ constitutional reform before or after parliamentary and presidential elections. There was however little public understanding, consultation or debate on this crucial question.

The SCAF decided to push ahead with elections as soon as possible, while introducing ‘quick and narrow’ constitutional changes. On 15 February, the SCAF appointed a committee tasked with proposing amendments to the 1971 Constitution.<sup>2</sup> Its mandate was to:

- i) Establish a process, with specific mechanisms and timetables for the drafting and adoption of a new constitution;
- ii) Create a free and fair electoral mechanism for parliamentary and presidential elections;
- iii) Restrict government powers to infringe on the rights and freedoms of the people.

Despite the third clause, the committee did not consider that it had a mandate to propose fundamental constitutional reforms on the separation of powers and the exercise of governmental power.<sup>3</sup> On 26 February, the committee presented proposals to revise eleven constitutional articles.<sup>4</sup>

In addition to addressing a number of long standing grievances concerning the electoral framework, the committee proposed that Parliament be granted the power to elect a Constituent Assembly to draft a new constitution.<sup>5</sup> A referendum on the proposals was held on 19 March. Many reformist groups campaigned for a ‘no’ vote, because in their opinion unless ‘deep’ constitutional reforms were made before elections were held, newly elected bodies could, as under the Mubarak regime, abuse their political powers. However, the proposals were backed by some 77% of voters.<sup>6</sup>

Many Egyptians believed that the referendum amended the 1971 Constitution, which implies that it would cease to be suspended. As such, it cannot be ruled out that additional amendments could be introduced before elections – although any change would require the holding of another referendum.<sup>7</sup>

On 30 March, the SCAF issued a ‘Constitutional Declaration’ comprising 63 articles. The Declaration incorporates the text of the articles amended by the 19 March

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<sup>2</sup> The committee was given only 10 days to finalise its proposals for amending the Constitution.

<sup>3</sup> Although it did reduce the presidential term to four years and introduce a two-term limit, require a President to appoint a Vice President expeditiously, tightened the rules on declaring a state of emergency and repealed article 179 on counter-terror measures (which had been abused by the Mubarak/NDP regime).

<sup>4</sup> Amending articles 75 (eligibility to run for President), 76 (nomination of presidential candidates and administration of presidential elections), 77 (presidential term limits), 88 (supervision of parliamentary elections), 93 (determining the validity of parliamentary elections), 139 (appointment of a Vice President), 148 (State of emergency), and 189 (amending the Constitution); deleting article 179 (counter-terrorism), and introducing two new articles 189 (Bis) (formation of a Constituent Assembly) and 189 (Bis 1) (transitional arrangements for the Shura Council).

<sup>5</sup> The committee’s original proposals did not guarantee that a Constituent Assembly *would* be formed, only that it *may* be formed. The Constitutional Declaration (article 60) issued on 30 March clarifies the issue by requiring that the Parliament meets to elect the 100 assembly members.

<sup>6</sup> The campaign period before the referendum was only 15 days, arguably giving insufficient time for a proper debate on the pros and cons of the proposals.

<sup>7</sup> On 20 June, the State Council gave its interpretation that a change to the Constitution (or presumably the Constitutional Declaration) is possible so long as it is backed by a referendum. In its role as ‘acting President’, it would fall to the SCAF to initiate any further constitutional changes and call for the holding of a referendum.

referendum (as well as introducing some subtle changes to the text),<sup>8</sup> a large number of articles copied verbatim from the 1971 Constitution, and some entirely new provisions.<sup>9</sup> It seems that the Declaration will serve as the 'interim' Constitution of Egypt until such time as a new constitution is approved i.e. it replaces the 1971 Constitution.<sup>10</sup> However, because the Declaration is much less broad than the Constitution, certain issues are unregulated, e.g. what will be the powers of the People's Assembly elected at the next elections?<sup>11</sup>

The Constitutional Declaration introduces a legal basis for the SCAF, which hitherto had been absent. Essentially, the SCAF has the powers of a President.<sup>12</sup> Article 61 provides that "the Supreme Council of the Armed Forces will continue directly with its limited responsibilities following this Declaration, until a time at which the People's Assembly and the Shura Council assume their responsibilities and the President of the Republic is elected and assumes his/her position."

### 2.3 The Timing of Elections

The referendum did not propose any timeframe for elections. However, article 41 of the Declaration requires that "electoral procedures will begin within 6 months" i.e. by 30 September.<sup>13</sup> While this would appear to give insufficient time to introduce any further constitutional changes before the elections, reformists continue to hope that this will be possible – particularly if they can push back the election date. Nevertheless, the SCAF has steadfastly maintained that parliamentary elections will take place in September, although unless the preparatory work begins in earnest in the very near future, this timetable may soon become unrealistic.

While most attention has focussed on the elections for the People's Assembly, the Shura Council elections are important because the Constituent Assembly cannot be formed until both houses of Parliament meet in joint session to elect its members.<sup>14</sup> Any delay in holding the Shura Council elections will put back the formation of the Constituent Assembly. Because the Constitutional Declaration does not distinguish between the timing of elections to the two chambers, it is assumed that the elections will be held simultaneously.

The timing for the presidential election is less clear. In March, the SCAF indicated that it would take place one or two months after the parliamentary elections, most likely in late 2011, and the Constitutional Declaration infers that it will be held after

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<sup>8</sup> For example, according to the Declaration it is the SCAF which initiates the constitutional revision by inviting the People's Assembly and the Shura Council to meet within six months of their election to elect the Constituent Assembly. According to the referendum text (189 and 189 Bis) the People's Assembly could initiate the process without reference to the SCAF and without being bound by a time limit on forming the Constituent Assembly.

<sup>9</sup> The legal status of the Declaration's clauses which do not stem from either the 1971 Constitution or the 19 March referendum is not entirely clear.

<sup>10</sup> The status of the 1971 Constitution may only be clarified if and when the Supreme Constitutional Court is called upon to rule on the matter.

<sup>11</sup> Articles 86-136 of the 1971 Constitution set this out in detail, but the Constitution is suspended.

<sup>12</sup> Article 56 provides that the SCAF "deals with the administration of the affairs of the country" and lists its powers.

<sup>13</sup> The use of the term 'electoral procedures' causes some ambiguity over the actual election date; it could mean the formal start of election preparations, the start of 'phased' elections or the actual election day.

<sup>14</sup> Article 60 of the Constitutional Declaration.

the parliamentary elections.<sup>15</sup> However, on 19 May, the SCAF announced that the presidential election would only be held after the adoption of a new constitution.<sup>16</sup> While this approach may satisfy those who are against holding an election and then deciding on the powers of the office holders, it will leave the SCAF to continue in its role of ‘acting President’ for a much longer period than anticipated a few months ago.<sup>17</sup>

Since early June, reformists have pushed for the dissolution of the local councils – which unlike the Parliament have continued in office despite their equally dubious legitimacy. The SCAF has appeared reluctant to dissolve the councils and on 5 June, a SCAF member stated that their dissolution would require a judicial decision. However, on 28 June, the State Council’s Administrative Court ordered the dissolution of all councils across Egypt. While the Court’s decision may be appealed, it appears that the need for local elections remains a distinct possibility.

## 2.4 Formation of the Constituent Assembly

According to article 60 of the Constitutional Declaration, after the parliamentary elections are held, the Constituent Assembly will be formed as follows:

- 1) *Within six months of the elections*, the SCAF invites the elected members of the People’s Assembly and Shura Council to attend a joint session to elect<sup>18</sup> a Constituent Assembly composed of 100 members to draft a new constitution.
- 2) The Constituent Assembly must complete its work within six months of its formation.
- 3) Within 15 days of its completion, the draft Constitution will be put to a referendum.

This timeframe means that the referendum of the new Constitution could take place up to one year and fifteen days after the election of the two houses of Parliament.

## 3. Overview of the 19 March Constitutional Referendum and the Constitutional Declaration

The 1971 Constitution was a significant obstacle to holding democratic elections. Its overarching aim was to make sure that those holding power retain it without having to face serious political competition. Rules were skewed in favour of incumbents, the President was granted control over almost all the levers of state power, and his chosen successor was almost guaranteed a smooth path to power.<sup>19</sup>

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<sup>15</sup> Article 41 states: “The Shura Council will assume its duties with elected members, and upon his/her election, the President of the Republic will appoint the final third of the Council’s membership, who will serve out the remainder of the term of the Council as regulated by law.”

<sup>16</sup> See State Information Service: “Military council: Parliamentary elections to be held as scheduled in September”, <http://www.sis.gov.eg/en/Story.aspx?sid=55633>.

<sup>17</sup> See article 61 of the Constitutional Declaration.

<sup>18</sup> The text of the referendum stipulates that the Constituent Assembly members are “to be *mostly elected* by the two houses of Parliament”; whereas the Constitutional Declaration (article 60) implies that all assembly members will be elected. Neither document sets out the method of the election of the Assembly’s members.

<sup>19</sup> See DRI’s report: “Paving the Way for Presidential Succession” (7 November 2010).

### 3.1 The 19 March Constitutional Referendum

Although narrow in their focus, the constitutional changes adopted on 19 March significantly increase the possibility of genuine elections being held, and address many (but not all) longstanding concerns. 'Positive' changes to the electoral framework include:

- Establishing eligibility and nomination criteria for persons wishing to stand as a candidate in a presidential election which are much more reasonable than previously;<sup>20</sup>
- Composing the Presidential Election Commission (PEC) *only* of senior judges;<sup>21</sup>
- Introducing a two-term limit for the President;<sup>22</sup>
- Giving a court<sup>23</sup> rather than the two houses of Parliament the final say on whether members were genuinely elected.<sup>24</sup>

Other positive (non-electoral) changes include:

- Requiring the President to appoint a Vice President within 60 days of *his* (sic) election;
- Restricting the President's authority to call a state of emergency unilaterally and requiring a popular consultation (referendum) for its extension beyond six months;
- Dispensing with a provision which had granted military courts jurisdiction over civilians in cases involving terrorism.

However, neither the constitutional amendments nor the Constitutional Declaration addressed other controversial issues e.g. the provision requiring that half the members of the two parliamentary houses and local councils must be 'workers or farmers'.<sup>25</sup> Granting a quota (and a very high one at that) to occupational classes is a remnant of Egypt's past as a Socialist Republic and the necessity of retaining it in 'the new Egypt' is dubious.<sup>26</sup> Moreover, the provision significantly complicates the design of the election system.

Although the amendments alter the composition of the electoral administration, the Constitution retains a separate Commission with specific responsibility for presidential elections. Ideally, there ought to be only one principal electoral body, founded as a 'full-time' and permanent institution (as opposed to an *ad hoc* body) which has responsibility for all types of elections.

In the event that presidential elections are held after the adoption of a new constitution, then the amendments to article 76 adopted in March may end up being redundant as it will be the Constituent Assembly which will be in a position to decide these issues.

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<sup>20</sup> By revising the notorious article 76.

<sup>21</sup> Previously, the PEC was composed of judges *and* "five public figures, recognized for impartiality". As previously, it will be chaired by the head of the Supreme Constitutional Court.

<sup>22</sup> Revision of article 76.

<sup>23</sup> On 27 February, the SCAF publicly announced the proposed constitutional changes to be agreed in the referendum. This text provided that the Supreme Constitutional Court would rule of these cases. However the text actually put to referendum designated the Court of Cassation as being the competent court.

<sup>24</sup> Previously, this was the prerogative of the People's Assembly, although the Court of Cassation has a role in investigating alleged electoral violations.

<sup>25</sup> Articles 87, 162 and 196 of the 1971 Constitution and article 32 of the Constitutional Declaration.

<sup>26</sup> In April, one trade union leader informed DRI that he and many union members did not support retaining the provision and on 3 June, the electoral systems committee of the National Accord Conference called for the quota to be scrapped (See: <http://www.sis.gov.eg/En/Story.aspx?sid=55993>).

An additional amendment (to article 88) dispensed with a text introduced in 2007 which prevents judicial supervision of polling.

### 3.2 The Constitutional Declaration (30 March 2011)

While the Constitutional Declaration retains a number of negative elements of the 1971 Constitution, it does include some positive changes, as follows:

- While the prohibition on engaging in political activity on the basis of religion is retained (article 4), the text is much less broad than that which it replaced (article 5 of the 1971 Constitution, as amended in 2007);<sup>27</sup>
- Article 26 removes a slight ambiguity contained in article 75 of the 1971 Constitution regarding whether women are eligible to stand in the election for the presidency, making clear that they are;
- Article 39 provides that the High Election Commission (HEC),<sup>28</sup> formed to supervise parliamentary elections, will be composed entirely of judges, thereby raising public confidence in its work.

Nevertheless, the Constitutional Declaration contains a number of problematic provisions, many of which featured in the 1971 Constitution, including:<sup>29</sup>

- Article 7 (on equal application of the law) omits any reference to non-discrimination on the basis of gender;
- While article 12 allows the freedom of opinion and expression, it allows laws to place limits on the exercise of this right. This is problematic for an election as the legislation has yet to be reformed and contains problematic clauses e.g. the Penal Code criminalises certain forms of libel;
- While article 16 allows the right to peaceful assembly without prior notice, it provides that public meetings, processions and gatherings are permitted within the confines of the law. The current laws on assembly have however not been reformed and in practice restrict this right;
- Article 28 prohibits any form of objection or appeal against a 'decision' of the PEC, thus potentially restricting access to an effective legal remedy;
- Article 32 retains a provision allowing the President (and in the interim period, the SCAF),<sup>30</sup> to appoint 10 members of the People's Assembly. Potentially this allows a President (or the SCAF) a decisive role in creating a parliamentary majority;
- Article 35 retains the system whereby the President appoints one third of Shura Council members. This creates undue presidential influence in the working of the legislature;
- Article 44 provides that members of both parliamentary houses can lose their membership through a confidence motion adopted by two thirds of the members in the respective assembly. This provision is open to abuse by the majority party, particularly in the Shura Council with its high proportion of MPs appointed by the President;
- Article 56.4 which allows the SCAF to adjourn Parliament;

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<sup>27</sup> Article 5 prohibited a political party being formed or based on a "religious referential authority".

<sup>28</sup> A 2007 amendment to article 88 of the 1971 Constitution provided for the establishment of a HEC, but stipulated that its composition would include judges i.e. it was not guaranteed that it would be composed only of judges.

<sup>29</sup> The committee which drafted referendum proposals is as responsible as the SCAF for not revising these provisions.

<sup>30</sup> See Constitutional Declaration, article 56.3.

- Article 60 retains the provision that referenda on adopting constitutional changes shall be held within 15 days of the text being finalised. This timeframe is not sufficient, neither for campaign groups to organise, nor for citizens to form an informed opinion on complex constitutional issues.

Article 39 of the Constitutional Declaration re-introduces the requirement for judicial supervision of polling.<sup>31</sup> Most civic groups and opposition parties trust no-one but judges to control the election processes. However, having judges supervise polling in previous elections did not prevent the occurrence of electoral violations and can complicate organisational arrangements, notably in 2000 and 2005 because the number of judges was less than the number of Polling Stations, polling was held in phases (see section ‘Consequences of Judicial Supervision’).

Although the SCAF presents itself as an interim body, article 56.10 of the Constitutional Declaration stipulates that it can assume other responsibilities “as determined by the President of the Republic pursuant to laws and regulations”. This has a strong implication that the SCAF will continue to exist even after the election of the President.

#### 4. Legislation

According to article 57 the cabinet has responsibility to prepare draft legislation, regulations, and decisions (clause 4) and issue administrative and executive orders according to laws, regulations, and decisions, and see to their implementation (clause 3). However it is the SCAF which has the authority to legislate during the interim period.<sup>32</sup> All laws and regulations adopted before the Constitutional Declaration continue to have legal force but can be cancelled or amended.<sup>33</sup>

After the adoption of the constitutional changes, the SCAF began the process of revising the legislation regulating political parties and elections. This revision process has been relatively slow, partly because on some issues the SCAF and the pro-reform camp have different ideas e.g. as regards the most appropriate election system for parliamentary elections.

Egypt’s electoral arrangements are set out in various acts adopted between 1956 and 2005. Reformists have long advocated for adopting an Electoral Code to unify the texts. After the February revolution, reformists asked that completely new electoral legislation be drafted. Instead, the SCAF decided to amend the existing legislation. It has been suggested that a compromise may be to introduce ‘sunset clauses’ to the legislation such that these laws lose their legal validity after the next parliamentary elections are held.

On 22 May, the Prime Minister chaired the first session of the National Accord Conference (NAC), a formal gathering for discussion between the parties, civil society and the government. It meets regularly and committees covering various issues including electoral legislation have been formed. Nevertheless, the NAC was only established after the SCAF had adopted amendments to laws regulating political parties and the exercise of political rights. Some parties and civic groups have

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<sup>31</sup> The constitutional amendments reopen the possibility of judicial supervision, but it is the Declaration which makes this a requirement.

<sup>32</sup> Articles 33 and 56 of the Constitutional Declaration.

<sup>33</sup> Article 62 of the Constitutional Declaration.

complained that they have no idea which body is drafting the legislative amendments.

#### 4.1 Law No. 40/1977: The Law on Political Party Systems (LPPS)

The constitutional amendments left the system for political party organisation largely unchanged. However, recognising that new political forces needed to register and organise themselves before elections, the SCAF prioritised changes to the Law on Political Party Systems (LPPS) and amendments were published on 28 March 2011.<sup>34</sup> However, the SCAF did not appear to consult with the parties or political groupings prior to amending the law.

Prior to the revolution, the main obstacle facing any group wishing to establish a political party was the restrictive manner in which the LPPS was applied by the Political Parties Affairs Committee (PPAC). Most of the provisions contained in the revised LPPS can be assessed as marking significant progress, but there are a few changes which have caused the parties unnecessary problems. The main positive features of amended LPPs are as follows:

- The PPAC's composition was reformed, such that all seven current members are serving judges. This considerably lessened the scope for political bias;<sup>35</sup>
- The PPAC can no longer temporarily suspend a party;<sup>36</sup>
- The amended law facilitates party registration based on the 'no-objection' principle and contains fewer provisions dealing with procedures for rejecting applications;
- The legislation contains timeframes for deciding on party registration expeditiously;<sup>37</sup>
- Deleting a requirement that "parties shall have programmes representing an addition to political life";<sup>38</sup>
- Less ambiguity in the prohibition on founding parties based on religion, class, sect, professional group and geography;<sup>39</sup>
- The amended law reduces from 10 years to 5 years the prohibition of naturalised citizens joining a political party. However, ideally the restriction should be removed altogether.<sup>40</sup>

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<sup>34</sup> SCAF (Decree 12/2011).

<sup>35</sup> Previously, the PPAC had nine members: the President of the Shura Council, two government ministers (Interior and Justice), three "non-affiliated" persons appointed by the President and three judges. This composition gave the ruling National Democratic Party a decisive say over whether other parties would be registered.

<sup>36</sup> Article 17 of the old LPPS included vaguely worded text allowing a party's suspension based on the "exigencies of public interest", or in the case *one of its members in a leadership position* dissents with any aspect of article 4 of the law (which sets out the basis on which parties can be formed). This created a situation whereby the actions or pronouncements of a single board member could lead to the suspension of a party. Previously, the Court could defer its decision on continuing a party's suspension for an indefinite period.

<sup>37</sup> For example, a party's application to be registered is considered as having been successful unless objected to by the PPAC within 30 days of its filing (article 8). Previously, this period was 90 days. Any decision to object to a party's registration is referred to the Supreme Administrative Court for adjudication within eight days (article 8). Previously the Court could issue its ruling up to four months later.

<sup>38</sup> Former article 4, clause 3 of the LPPS. This opened the door to subjectivity in deciding on a party's 'additional value' and was on occasions used to reject applications to form new parties.

<sup>39</sup> The former article 4 of the LPPS prohibited parties from "exploiting religious feelings"; a vague terminology.

<sup>40</sup> LPPS, new article 6.

Despite the generally positive nature of the amendments, the new legal regime contains two significant problems for prospective parties. Article 7 increases the number of founding members from 1,000 to 5,000 and requires that each member's signature is witnessed by a notary. While the number of 5,000 members is not necessarily excessive, the notarisation procedure is burdensome and expensive, and slowed down the registration of new parties. Article 8 requires party founders to publish the names of all 5,000 founding members at the party's expense in two widely circulated newspapers. DRI was informed that this can cost new parties up to US\$100,000 – a considerable amount of funds, for what appears to be little benefit. Other negative aspects of the LPPS are as follows:

- The removal of a prohibition on discriminating on the basis of race, origin and creed;<sup>41</sup>
- Article 8 provides that the PPAC shall 'include' seven designated judges. This does not rule out the possibility that other, unspecified, members can be appointed in future;
- Vague text prohibiting parties from accepting any "contribution, privilege or benefit" offered by foreigners including international agencies is retained.<sup>42</sup> Theoretically this could be applied if a party receives training e.g. on campaigning or electoral monitoring, but other parties do not;
- There is no requirement to publish accounts setting out donations received, only to provide this data to the Central Audit Agency;<sup>43</sup>
- The state is no longer obliged to provide any financial support to parties;<sup>44</sup>
- The wording of article 22 which provides a penalty of imprisonment for establishing, organising, managing, financing or even joining an 'illegal party' – even if in the form of an association, body, or group, "or whatever name given to it". Due to its broad scope, this is open to arbitrary application;<sup>45</sup>
- The penalties (part 2 of the law), have not been harmonised with the amendments (all of which relate to part 1 of the law);<sup>46</sup>
- Violating any provision contained in article 4 is punishable by imprisonment without distinction. In an extreme example of the problem, theoretically a party member could be imprisoned for not publicising the party's principles, goals or methods.<sup>47</sup>

#### 4.2 Law No. 73/1956: The Law on the Exercise of Political Rights (LEPR)

The Law on the Exercise of Political Rights (LEPR) first adopted in 1956 has been amended 14 times. It regulates the administration of elections to the People's Assembly, the Shura Council and local councils, and referenda. Presidential elections are regulated in a separate act. The LEPR covers: suffrage rights, voter registration, the composition and competencies of the High Election Commission (HEC), some types of election appeals, the formation of electoral committees, voting and counting procedures, the announcement of results, and election crimes. Additional issues are regulated in other laws, notably the Law on the Election of the People's Assembly (LOPA), the Law on the Formation of the Shura Council (LFSC), and the Law on Local Government Systems (LLGS).

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<sup>41</sup> Article 4, clause 3 of the previous version of the LPPS.

<sup>42</sup> LPPS, article 11.

<sup>43</sup> LPPS, articles 11 and 12.

<sup>44</sup> Following the deletion of article 18.

<sup>45</sup> See LPPS, articles 22 and 23.

<sup>46</sup> For example, article 26 refers to penalties for violating the second clause of article 9, but in the amended law there is no second clause of article 9.

<sup>47</sup> See LPPS, article 4, clause 6, in conjunction with article 26.

On 19 May, the SCAF announced major changes to the LEPR. Unlike its approach to the LOPA, it did not hold formal consultations with parties and civic groups prior to amending the law. The major changes introduced relate to:

- The HEC's composition and competencies;
- Reducing the role of the Ministry of Interior in electoral organisation;
- Creating a new voter registration system;
- Opening the possibility for election observation by Egyptian and international CSOs.

It is not easy to categorise the changes as 'positive' and 'negative' because some changes could have both a beneficial and/or a negative effect. The drafters appear to have focussed their attention on longstanding demands, but have left many other provisions unchanged (as these were not necessarily the focus of advocacy efforts).

It may be necessary for the SCAF to amend the LEPR further so that it is harmonised with the amendments to the LOPA, which, at the time of writing, have not been adopted. This presents an opportunity to improve the LEPR. There are also a number of issues which can be addressed by the HEC adopting procedural regulations.

#### 4.2.1 Suffrage

The provisions on suffrage were left unchanged by the May 2011 amendments. Voting is considered as a duty and a modest fine can be imposed for non-participation by a registered elector (article 40). Military personnel and police officers are relieved of the duty to vote.<sup>48</sup> However, it is not clear if they can, should they so choose, participate as electors.<sup>49</sup> Prohibiting their right to vote would appear to conflict with Egypt's obligations as a signatory to the International Covenant on Civil and Political Rights (ICCPR).<sup>50</sup>

Certain restrictions placed on the right to vote by convicted criminals, discharged civil servants and persons declared bankrupt (articles 2 and 3), may be disproportionate and thus be in conflict with the United Nation's Human Rights Committee's interpretation of article 25 of the ICCPR.<sup>51</sup> According to article 4, naturalised citizens can only be registered to vote after a period of five years has elapsed from the time of his/her acquiring citizenship. The distinction between citizens by birth and naturalisation may raise questions of compatibility with the ICCPR.<sup>52</sup>

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<sup>48</sup> LEPR, article 1.

<sup>49</sup> According to the LOPA, military and police officers can stand for office if they resign from their official position.

<sup>50</sup> Article 25 of the ICCPR protects the right to vote for every citizen.

<sup>51</sup> Paragraph 14 of General Comment 25 states "If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence." Civil servants discharged for a breach of honour (article 3, clause 6), should not be deprived of the right to vote, unless convicted of a criminal offence.

<sup>52</sup> Paragraph 3 of General Comment 25 on article 25 of the ICCPR states "[...] Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25."

## 4.2.2 The Electoral Management Body

### *Composition and competencies*

Civil society groups have long advocated a strong role for the judiciary in managing electoral processes. Prior to 2005, elections were organised by the Ministry of Interior. In July 2005, the HEC was formed as an *ad hoc* body. It administered the flawed 2005 and 2010 elections. At the time it was composed of: three serving judges, three former judges, three ‘public figures’ and a representative of the Ministry of Interior.<sup>53</sup> Following the LEPR amendments, the HEC will be composed of seven serving judges and will be, ex-officio, chaired by the chair of the Cairo Court of Appeal.<sup>54</sup>

Article 3 (Bis A) implies that the six HEC members serve ‘ex-officio’ as a result of their seniority within the judiciary. However, article 3 (Bis B) stipulates that the President of the Republic (currently the SCAF) selects the members from among names proposed by the Minister of Justice. This gives the government and the SCAF (in future the President) discretionary powers, which could lessen the independence of the institution. If a selection of nominees occurs, normally the names of the appointed members would be formally announced. However, it appears that although the names of the HEC members are known, there is no formal decision on their appointment. Indeed, it is unclear whether the HEC has formally started its work preparing for the parliamentary elections.<sup>55</sup>

Inter alia, the HEC has the competency to: establish Voting Centres;<sup>56</sup> appoint polling staff; oversee preparation of the voter registration database; regulate election observation, election campaigning and the provision of free airtime for electoral campaigning in public and privately owned media; declare official election and referendum results; schedule run-off elections, and express their opinion on election bills. The LEPR no longer grants the HEC a role in suggesting the rules for determining constituencies, or requires it to engage in civic education,<sup>57</sup> but does not stipulate any other body with competence in these areas.

### *Formation and Competencies of Governorate and General Committees*

The HEC shall form an electoral committee in each governorate (hereafter Governorate Election Committees - GECs), chaired by the head of the Appeals Court, and including members from judicial bodies.<sup>58</sup> However, as the LOPA has yet to be adopted, the distribution and number of electoral districts and constituencies is not yet known. Preferably the GECs will mirror the electoral units, and hence this provision may require future modification. The LEPR also makes reference to General

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<sup>53</sup> Two of the three former judges were selected by the People’s Assembly and one was selected by the Shura Council. The three “apolitical and non-affiliated public figures” (LEPR) were selected by Parliament in the same ratio.

<sup>54</sup> The other six members are: the two most senior deputy heads of the Court of Appeal; the two most senior deputy heads of the State Council and the two most senior heads of the Courts of Appeal, below the level of the Cairo Appeal Court.

<sup>55</sup> However, an article on the SIS website reported that on 3 July, “Field Marshal Mohamed Hussein Tantawi, the Head of the Supreme Council of the Armed Forces met Sunday 3/7/2011 with the head and members of the Higher Elections Commission.”

<sup>56</sup> Previously, the Ministry of Interior designated polling places. Under the revised provisions, it will be the HEC taking this decision after consulting with the Ministry.

<sup>57</sup> These were required under LEPR, article 3 (Bis C), clauses 2 and 4 of the previous version of the law.

<sup>58</sup>LEPR, article 3 (Bis E).

Committees (GCs), which are established at the level of the electoral unit (constituencies).

### ***The Ministry of Interior***

The Ministry of Interior enjoys almost no confidence among political parties and civic groups. The amendments to the LEPR significantly reduce the Ministry's role in organising elections. However, the Minister of Interior does retain some competencies and/or rights, specifically:

- Selecting the staff seconded to the General Committee Secretariats (article 3 Bis H);
- Receiving one of the three copies of the official polling results sheets (article 37);
- Modifying time limits for preparing the database of electors (article 54);
- Adopting the Executive Regulations for implementing the LEPR (article 57).

Regarding the last point, the HEC cannot be expected to fully meet its responsibilities if it lacks the authority to adopt the Executive Regulations which will set out in detail procedural aspects. There is no clear reason for the Minister to retain the rights conferred under articles 37, 54 and 57, and these provisions should be reconsidered.

### ***Financing and Organising Elections***

Under the previous LEPR, the HEC was granted a special budget under the general state budget. This provision was deleted, raising a concern that if the HEC's finances are now discretionary, its scope to hire and pay its own staff and decide on its own operational needs could be reduced.

The LEPR makes provision for the establishment of a permanent Technical Secretariat to support the HEC's work and for General Secretariats to be established under the GCs. Over time this ought to allow the HEC to develop systems and its organisational capacity rather than to rely on *ad hoc* support from state bodies, as previously. Prior to the May 2011 amendments, the LEPR provided that the work of the HEC's Secretariat was regulated by the chair of the HEC.<sup>59</sup> The amendments stipulate that this regulation will be adopted by the President of the Republic.<sup>60</sup> In practice this will fall to the SCAF. Potentially, this change reduces the ability of the HEC to function as an independent body, and thus constitutes a backward step.

The HEC has much to do before the elections can be called, for example: establish staff and organise its Secretariat; appoint GECs, GCs, Voting Centres and Polling Station Committees;<sup>61</sup> oversee the preparation of an entirely new voter registration database; develop a system for allocating symbols to parties and candidates; issue regulations. It may also be called upon to organise the delineation of electoral districts and constituencies.

If elections are to take place by 30 September, at the time of writing, the HEC has less than two months to implement these tasks. If this timeframe holds – which

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<sup>59</sup> The HEC does retain the right to regulate the Secretariats of the General Committees (article 3, Bis H).

<sup>60</sup> LEPR, article 3 (Bis A).

<sup>61</sup> For the referendum there were 30 GECs, 350 GCs, some 15,000 Voting Centres and some 49,700 Polling Station Committees.

looks increasingly unlikely with each delay to the adoption of the LOPA and LFSC – the HEC may have no choice but to request the support of the state administration to assist the Secretariats in organising the process. However, reassigning key tasks to the Ministry of Interior is likely to provoke a strong reaction from some political and civic groups.

### ***Regulation of Procedures***

The previous version of the LEPR contained a specific provision allowing the HEC to issue statutes and decisions necessary for regulating its work<sup>62</sup> but the amended version does not. However it does require the HEC to adopt regulations or rules regarding election observers, the campaign, and the rules for distributing airtime in the media for campaigning.<sup>63</sup> The law does not specifically confer the HEC with the power to regulate voter registration or polling procedures (voting, counting and aggregation of results). It appears that these aspects will be regulated under the general Executive Regulations to be adopted by the Minister of Interior.<sup>64</sup>

### ***Transparency and Accountability***

The LEPR requires that the HEC's regulatory decisions must be published in the Official Gazette but does not establish a publication deadline. In the interests of transparency, it would be preferable for the HEC to be required to publish *all* its decisions, whether these are regulatory or otherwise.

According to article 3 (Bis D), HEC deliberations are 'secret'. This is not in the public interest. While it may be acceptable for the HEC to hold 'closed' sessions, it ought to be required to undertake its work transparently and there ought to be guarantees regarding public access to information held by the HEC.

The LEPR does not require the HEC to adopt internal rules of procedure. These are considered beneficial as they can enhance public understanding of the HEC's decision making process.<sup>65</sup>

Article 35 stipulates that during the vote count all deliberations on the validity / invalidity of ballots "shall take place behind closed doors". This lacks transparency and should be reconsidered.

The LEPR does not provide for an appeal to be filed against the legality of a HEC decision / regulation e.g. in a case where such a decision or regulation may be at variance with primary legislation. Notwithstanding that the HEC is composed of senior judges, the absence of an appeal mechanism could constitute a denial of access to an effective remedy.<sup>66</sup>

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<sup>62</sup> LEPR, previous version, article 3 (Bis B).

<sup>63</sup> The LOPA requires it to establish various procedures on candidate and list registration.

<sup>64</sup> Executive Regulations are mentioned in articles 5 and 6 (on creating a database of registered voters), 14 (on displaying voter registers), 29 (on the form of the ballot), and 55 (on free public transportation).

<sup>65</sup> Internal regulations on the functioning of election management bodies have been adopted in many countries.

<sup>66</sup> Article 3 (Bis E, clause 4) does however provide that the HEC should verify the authenticity of, and address reports and complaints in connection with the electoral process, which may be sufficient if the complaints system is formalised.

### 4.2.3 Election Observation

The HEC has competence to regulate the “engagement of Egyptian and international civil society organisations in monitoring all electoral processes”.<sup>67</sup> The law does not give any further details on election observation.

Article 27 provides that “No one but voters (and candidates) may enter the polling area”. This is a specific provision, which, left unchanged, could provide a pretext to deny observers access to the polling room. The LEPR does not mention the rights of observers during the vote counting phase.

The HEC’s regulation on observation can resolve these problems. It should ensure that observers have the right to effectively observe all stages of the process, including: constituency delimitation, voter registration, candidate registration, campaigning, adjudication of election challenges and appeals, and to have unimpeded access to monitor voting, counting, and vote aggregation. Observers should be given the right to ask for and receive information from electoral commissions.

### 4.2.4 Voter Registration

Prior to the May amendments to the LEPR, citizens were required to apply to be registered to vote (the so-called ‘active citizen model’). The registers were open for new applicants and for corrections during fixed periods of the year. For whatever reason, many millions of otherwise eligible electors were not included in the registers.<sup>68</sup> The revised LEPR provides that citizens are automatically registered in a database of voters if the citizen has been issued with a national identity card (the so-called ‘passive citizen model’).<sup>69</sup> It is not known whether a feasibility study was conducted prior to the change.

The national identity card establishes the place of domicile. This will determine where citizens are registered to vote.<sup>70</sup> However, the LEPR does not detail: exactly how the voter database will be extracted from the ID card system; what information on each elector will be stored; the procedures for verification and amendment (e.g. whether it will be updated periodically or instantly); if and when extracts of the database (voter lists) will be put on public display, and whether it will be compiled as a single national database or an amalgam of different ones (e.g. based on the governorates or election districts). These important aspects will probably be set out in the Executive Regulations.

According to article 10, no modification may be made to the database of voters after citizens are called to cast their votes. However, the LEPR does not set out a calendar for voter registration. It is not known how many citizens do not possess a national identity card or how many are registered at places other than their current residence, although it is believed that this number could run into several millions. Hence, it is extremely important that sufficient time is set aside for the issuance of ID cards and for correction of residency data, before the elections are called.

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<sup>67</sup> LEPR, article 3 (Bis E, clause 5).

<sup>68</sup> In 2005, 32 million voters were registered out of an estimated potentially eligible voting body of some 42 million.

<sup>69</sup> LEPR, article 5.

<sup>70</sup> Previously, voters could decide whether to be registered to vote at a place other than their domicile. This allowed citizens who may be located away from their legal domicile an easier means of exercising the right to vote, i.e. they did not have to return to the place of their domicile, but it raised the risk of tactically registering citizens in one district to influence the outcome of elections.

Potentially problematic provisions include:

- Permitting every registered voter to request the competent authorities to include the names of those who have been ‘unlawfully’ omitted or to correct registration data.<sup>71</sup> In effect this allows one citizen to act as a proxy for another citizen;
- Any registered voter may become a litigant concerning the entry *or deletion* of any name from the database. The appropriateness of permitting one ordinary citizen to be involved in the legality of another’s voter registration entry is debatable;
- While anyone ‘whose name is determined to be deleted’ may file an appeal, the LEPR does not require the authorities to issue formal notifications to the person concerned;<sup>72</sup>
- Imposing a fine of EGP 1,000 (EUR 120) if a voter registration appeal is rejected. This could serve as a serious disincentive even where the appeal is well-grounded.

#### 4.2.5 Timeframe for Calling Elections

The President of the Republic (for the next elections, the SCAF), sets the election date. The decree must be issued no later than 30 days before election day. Depending on the timeframe for candidate registration procedures (which will be set out in the LOPA, which has yet to be finalised), calling elections just 30 days before polling day may not give sufficient time for parties and candidates to conduct an effective election campaign.

The HEC schedules any run-off elections.<sup>73</sup> In the past, these were often held only a few days after first round elections. Most countries schedule run-off elections at least two weeks after the first round as this allows time to investigate any challenges e.g. conducting a recount as well as ensuring the efficient and transparent printing and distribution of ballots.

#### 4.2.6 Polling Procedures

##### *Consequences of Judicial Supervision of Polling*

In 2000, in a landmark ruling, the Supreme Constitutional Court (SCC) ruled that members of a judicial body must be present at every Voting Centre to supervise polling and counting. As the number of judges is much less than the number of Polling Stations the elections of 2000 and 2005 took place in three phases.<sup>74</sup> Because the election system required run-offs, polling was actually held on six election days.

A 2007 amendment to the Constitution dispensed with the legal need for judicial supervision of polling, but it has been re-introduced by the Constitutional Declaration (article 39) and the revised LEPR (article 24). Thus it is possible that polling will once again be phased. The parliamentary election systems have not yet been finalised. Retaining run-off elections will multiply by two the number of phases.<sup>75</sup>

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<sup>71</sup> LEPR, article 15.

<sup>72</sup> See LEPR, article 17.

<sup>73</sup> In the previous version of the law, this was a task of the Minister of Interior.

<sup>74</sup> In 2004, the Supreme Constitutional Court ruled that polling could be supervised by members of “judicial organs” as well as judges. Its definition included government lawyers and prosecutors, whose independence was questioned by opposition groups.

<sup>75</sup> Unless a first-past-the post-system is introduced.

Holding Shura Council elections separately from People's Assembly elections could also multiply the number of polling days by two (depending on which election system is chosen). If the parliamentary elections are held together (again depending on the election system(s) used), a situation could arise where voters are required to cast six ballots.<sup>76</sup> It is also likely that turnout will be much higher than in previous elections. Therefore, the HEC may need to consider reducing the number of registered voters per Polling Station to avoid serious organisational difficulties. This could however increase the number of election phases needed to complete the process.

Some election systems can work reasonably well under a phased election e.g. those with a strong majoritarian element, while others do not e.g. a single national list system with mandates allocated by proportional representation (PR) – especially one which uses a national representation threshold.<sup>77</sup>

### ***Voting Centres and Polling Station Committees***<sup>78</sup>

The HEC must appoint a member of a judicial body to serve as head of a Voting Centre (VC). Within a VC there may be multiple Polling Stations each with a Polling Station Committee (PSC). The PSC is composed of: a chair who must be a member of a judicial body, a secretary and an officer who is drawn from the local civil service or public sector employment. According to article 24, clause 3, the chair must be appointed from a judicial body and may supervise up to three Polling Stations providing that he/she is able to see all stations from where he/she is positioned. However, it is not clear if the head of the Voting Centre may also be a PSC chair. If not, then at least two members of a judicial body will be required for every Voting Centre. This is potentially significant because as there is a shortage of members of judicial bodies, their availability influences the number of election days.

The LEPR provides that 'candidates' may nominate a delegate to serve on a PSC.<sup>79</sup> In the event that more than six candidate delegates are nominated, a selection shall be made by the casting of lots.<sup>80</sup> The LEPR does not permit the 'unselected delegates' to remain in the polling place. In such a situation, a candidate<sup>81</sup> would have no means of scrutinising the process. *Candidates* may also designate 'agents' to represent them at the level of the Voting Centre or Polling Station.<sup>82</sup> The LEPR refers to the candidates' right to nominate delegates and agents, but it is likely that a mixed election system will be established which includes both 'candidates' and 'election

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<sup>76</sup> E.g. if a mixed PR-majoritarian system is introduced and the women's quota system used in 2010 is retained, voters would be required to complete three ballots for the People's Assembly elections and the same number for the Shura Council elections.

<sup>77</sup> There is some evidence to suggest that where a single national list PR system is used and where polling for whatever reason does not take place on a single day, the results of the elections that have already occurred influence voting behaviour in places where polling takes place subsequently e.g. see OSCE/ODIHR report on the 2001 Albanian elections: <http://www.osce.org/odihr/elections/albania/13560>.

<sup>78</sup> See LEPR, article 24.

<sup>79</sup> A delegate must be registered as a voter at the respective Polling Station.

<sup>80</sup> In the event that less than two delegates are nominated or that less than two present themselves in a timely manner, the head of the Polling Station will select two literate voters to serve on the Polling Committee.

<sup>81</sup> The provisions refer to 'candidates', but it is possible that the electoral system will be based on 'electoral lists', thus this article may require revision in the light of changes to the LOPA to enable 'parties' or 'the lists' to present delegates. Candidates are also eligible to designate 'agents' to represent them at the level of the Voting Centre or Polling Station. Agents have the right to enter a Polling Station to address the head of the Polling Committee, but may not remain in the polling place.

<sup>82</sup> Agents have the right to enter a Polling Station to address the head of the Polling Committee, but may not remain in the polling place. This right ought to be extended to the candidate lists.

lists'. Thus, article 24 may need to be amended to enable representatives of 'the election lists' to present delegates and agents and set out how the selection of delegates to serve on the PSC will be made from among the two election contestant categories.

According to the LEPR, the VC decides on any complaints received. In practice this is likely to be done by the head of the VC. However, the legislation does not establish procedures to file an appeal against the VC decision e.g. to a GC or a GEC. Such a possibility ought to be available.

### ***Voting Procedures***

The amendments did not alter voting procedures. Article 29 of the LEPR provides that voters shall mark their ballots "at a side of the voting room designated for expressing opinions". Most countries' election laws explicitly require voters to mark their ballot(s) in secret e.g. behind a voting screen. While the actual voting arrangements put in place may enable voters to vote in secret, the absence of an explicit provision in the LEPR constitutes a potentially major shortcoming. Other weaknesses which ought to have been addressed in the amendments, but could still be addressed by a HEC regulation, include:

- While article 31 stipulates that the national identity card is the sole means of identifying voters, there is no requirement for voters to prove their identity *before* they receive a ballot;
- The PSC is not required to verify if voters' fingers bear any trace of indelible ink before the voter receives a ballot;
- Voters must hand their folded marked ballots to a PSC member to deposit in the ballot box, increasing the risk that their electoral choice will be seen;
- Voters sign the voters list after casting their ballot rather than when they receive a ballot;
- One of the options<sup>83</sup> open to blind persons and other persons with a disability who are unable to record their electoral choice without assistance is to express their choice verbally to the Polling Committee.<sup>84</sup> This conflicts with international standards.<sup>85</sup>

### ***Voting in Referenda***

Voters participating in a referendum may cast their ballot at any Polling Station.<sup>86</sup> Consequently, a pre-prepared voter register has little value. Notwithstanding the use of indelible ink, the arrangements magnify the risk of multiple voting thereby reducing citizens' confidence in the integrity of the vote. Serious consideration should be given to reconsidering this provision for future referenda.

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<sup>83</sup> While the LEPR does foresee that a person with a disability can designate a person of his choice to mark the ballot, this is set out as an 'alternative', rather than 'standard practice'.

<sup>84</sup> The Polling Committee will then mark the voter's ballot accordingly and the committee head signs the ballot paper. This practice denies PWDs a secret ballot and should be replaced with alternate methods.

<sup>85</sup> Paragraph 20 of General Comment 25 states: "Assistance provided to the disabled, blind or illiterate should be independent."

<sup>86</sup> LEPR, article 32.

## **Counting**

At the end of voting, ballot boxes are handed to a 'Sorting Committee'. The LEPR does not establish any procedures for reconciling the number of ballot papers received with the number used and unused; a requirement to count the total number of ballots in the ballot box, or the procedures for separating and counting the votes for each candidate or electoral list. Nor does it specify whether each Polling Station result is counted and announced separately or whether, in the case of multiple Polling Stations being located in one VC, the results are merged.

The LEPR stipulates that 'candidates' have the right to delegate a representative to follow the vote counting process. This right ought to be extended to candidate lists if a mixed election system is introduced as well as to domestic and international observers.

A Voting Centre's election results are produced in triplicate. One copy is sent to the HEC (along with the ballot papers), one is sent to the GEC, and one is sent to the Ministry of Interior. There appears to be no justification to send a copy to the Ministry as it now has little role in the election process.

While the LEPR provides for the announcement of results at the level of the VC, it does not specify the form of the announcement. There appears to be no explicit requirement to display the results at the VC in order to inform the public at that locale. This lacks transparency and ought to be provided for. There is no requirement that electoral contestants or their representatives or observers receive a copy of the electoral results sheet. This right ought to exist in law.

## **Vote Aggregation Procedures and Announcement of Results**

Article 37 provides that the HEC shall announce the final election results within three days of the announcement of results by the heads of the Voting Centres, *or after completion of the final stage of the election in the case that it is held in several stages*. This raises two important issues.

Firstly, the law does not appear to designate any role for GECs or GCs in aggregating polling results, implying that this is the sole responsibility of the HEC. Centralising the aggregation of results whilst meeting the 3 day deadline could constitute a significant challenge. If the process is rushed, there is an increased risk of inaccuracy in the aggregation process. If however GECs or GCs do have a role in aggregating results, this should be detailed in law, and access to the aggregation process for stakeholders should be guaranteed. The HEC should only be required to announce 'provisional results' within 3 days, and given more time to verify the aggregation of results to ensure that it is completely correct, and to hear and decide upon any complaints before it is called upon to issue 'final' results.

Secondly, if the elections are held in several stages, it would be very difficult to keep the results of the elections held in the first stage(s) under wraps, and it is highly questionable whether this would be in the public interest.<sup>87</sup> Such an approach could create serious political tensions. The alternative – releasing the results of each phase separately – risks creating the situation where election results from one phase influence the electoral choices of voters in areas which have not yet held a vote.

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<sup>87</sup> Delaying the count is possibly not a solution as it raises serious concerns over the security and integrity of the uncounted ballot boxes.

To enhance public confidence, the HEC should ensure that polling results from Voting Centre level upward are publicly available on the internet within a reasonable timeframe e.g. 3 days. This data must necessarily have been gathered and tabulated by this time, as it is the deadline for the HEC to announce final results.

#### 4.2.7 Electoral Crimes

The list of various election crimes set out in the LEPR is not exhaustive e.g. there is no specific offense or penalty for not counting or not reporting election results accurately or other ‘crimes against the electorate’, and the penalties are sometimes not proportionate to the offence e.g. verbally insulting a committee member can be penalised by two years imprisonment, while vote buying or intimidating electors can be penalised by six months imprisonment and voter impersonation or multiple voting can be penalised by one month imprisonment.<sup>88</sup>

A violation of the campaign provisions can lead to de-registration of a candidate.<sup>89</sup> Removing a citizen’s right to stand for election constitutes a very strong sanction.<sup>90</sup> Hence the offenses which can result in de-registration ought to be set out only in law and the sanction applied only if it is proportionate to the offence.<sup>91</sup> The LEPR provides that the HEC shall request this to be effected by the Supreme Administrative Court (SAC), but it is unclear whether it has any role in deciding if an offence has actually been committed, and if it does not, what is the judicial procedure for deciding the case.<sup>92</sup>

#### 4.3 Law No. 39/1972: The Draft of the Law on the People’s Assembly (LOPA)

At the time of writing, amendments to the Law on the People’s Assembly (LOPA) have not yet been adopted. This section provides an overview of the draft amendments released by the SCAF on 30 May 2011. During June, the SCAF held consultations with parties and civil groups on the text and a new draft was sent to the cabinet on 3 June. This draft has not been made public, but is likely to change some of the amendments proposed on 30 May. It is expected that after consultations the final version of the amendments will be adopted in mid-July.

Since it was adopted in 1972, the Law on the People’s Assembly (LOPA) has been amended 14 times. It regulates: the composition of the People’s Assembly; the definition of ‘worker’ and ‘farmer’ for the purposes of achieving the 50% quota; the election system and the method of allocating mandates; candidate eligibility, nomination, and registration; campaigning; filling vacant seats; legal appeals, and issues to do with membership of the People’s Assembly.

The 30 May draft focuses on changing Egypt’s election system but leaves unchanged many articles, some of which contain problematic provisions. As is the case with the LEPR, it is not easy to categorise the proposed changes as ‘positive’ or ‘negative’, because most could have a beneficial and/or a negative effect.

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<sup>88</sup> See LEPR, articles 43, 48 and 40.

<sup>89</sup> LEPR, article 3 (Bis G) and LOPA, article 11.

<sup>90</sup> General Comment 25 on the ICCPR states that “Any restrictions on the right to stand for election [...] must be justifiable on objective and reasonable criteria.”

<sup>91</sup> Article 3 (Bis G) allows the sanction to be applied for violations of the HEC regulation on campaigning.

<sup>92</sup> This may however, be set out in another law, but it would be beneficial to clearly provide for due process in the LEPR.

### 4.3.1 Election System

Most previous Assembly elections in Egypt were held under a majoritarian election system. However, in 1984 and 1987, elections were held under a party-list election system or mixed system.<sup>93</sup> For the 2010 People's Assembly elections, 454 members were elected in two-member election districts, and 64 women MPs were elected in a separate ballot.

Article 3 of the 30 May draft proposes a mixed election system based on:

- i) Multi-candidate 'closed'<sup>94</sup> election lists registered in election districts with mandates allocated by proportional representation (PR);
- ii) The '*individual*' system, with Assembly members elected in election constituencies according to the 'majoritarian principle'. The two components of the election will take place at the same time, although different ballots will be used.<sup>95</sup>

The draft requires that 50% of the 'PR seats' and 50% of the majoritarian seats will be allocated to 'workers and peasants'. But for the closed list system it does not state how this is to be achieved.<sup>96</sup> A women's seat quota was introduced in 2010, but the draft does not retain this system.<sup>97</sup> One way to enhance women's representation without using a fixed quota would be to require parties to nominate a certain number of women candidates in the higher places of their election lists.

The draft does not stipulate the total number of members of the People's Assembly to be elected, or 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 number of PR seats shall be equal to 1/3 of the total number of seats allocated to a governorate, and the number of the individual candidate seats should be 2/3 of the total number of seats allocated to the governorate i.e. that there will be twice as many mandates elected under the majoritarian principle as under PR. 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 and would like more – ideally all – seats to be distributed on the basis of PR.

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<sup>93</sup> In 1984, Egypt was divided into 48 multi-member districts. Election lists required at least 8% of the total vote to participate in the allocation of seats. In 1987, the multi-member district system was retained but 48 single mandate districts were added.

<sup>94</sup> A closed list is one in which the order of candidates is fixed at the time of registration.

<sup>95</sup> Article 5 (Bis).

<sup>96</sup> There are various ways this could be achieved. The simplest would be to require that the first placed candidate on the list is a worker or farmer, although this could result in a very high number of these occupational groups being elected, thereby magnifying the discrimination against other occupational groups.

<sup>97</sup> Devising a closed list system to achieve a minimum 50% quota for workers and farmers while simultaneously requiring a minimum number of women to be elected using the same system could seriously complicate the requirements on the sequencing of the various categories on the election lists. Applying a women's seat quota might require an additional ballot.

### ***Election Districts and Constituencies***

The draft does not mention any criteria or principles for establishment of election districts and constituencies or how a governorate's 'seat entitlement' will be determined. In the situation where a country's territory is divided into electoral units, in order to respect the fundamental principle that 'the vote of one elector should be equal to the vote of another',<sup>98</sup> two main options are available. Specific electoral units can be formed with broadly equal<sup>99</sup> population sizes, or existing administrative units can be used as electoral units so long as they are allocated a variable number of mandates corresponding to their population size. However, the draft is silent on these important issues.

One problem with using the governorates as a basis for the multi-seats election districts is that their population sizes vary considerably. According to official data<sup>100</sup> South Sinai has just 157,000 inhabitants whereas Cairo has over 7,302,000 million.<sup>101</sup> This creates a problem in allocating governorates a number of mandates equal to their 'entitlement' based on their populations size i.e. a fair representation. One solution to this problem would be to merge governorates with smaller populations with more populous adjacent governorates.

Other important issues in need of clarification include:

- i) Whether 'good practice' criteria for delineating constituencies will be applied e.g. the need to establish contiguous constituencies, using the existing administrative division (insofar as this is possible while prioritising 'fair' representation), and taking into account geographical features;
- ii) When the constituencies and election districts will be formed i.e. where does it fit in the overall calendar of electoral activity;<sup>102</sup>
- iii) Which body has competence to decide on the formation of election districts and delineate constituency boundaries;
- iv) Whether appeals against constituency delineation decisions can be filed and if so, to whom.

Egypt's existing constituencies vary in size by a factor of 10.<sup>103</sup> Thus, if the equality of the vote is to be ensured, the constituencies will need to be re-drawn regardless of the final decision on the election system to be used. Redistricting, if done properly, can be a time consuming process.

### ***Election Lists***

Parties can form pre-election coalitions and non-party (i.e. independent) candidates can also form election lists. The latter provision allows groups of like-minded individuals to field candidates without the need to register as a political party. Both

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<sup>98</sup> General Comment 25 on the ICCPR states: "The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group [...]."

<sup>99</sup> Most European countries allow a deviation in the range of 10-15%.

<sup>100</sup> See <http://www.sis.gov.eg/VR/egyptinfigures/Tables/1-%20السكان/4.pdf>.

<sup>101</sup> South Sinai has such a small population that if mandates were allocated to governorates in proportion to their population size, South Sinai would only be entitled to one seat. One solution to this problem would be to merge smaller governorates with larger units to ensure that they contain a given minimum number of citizens.

<sup>102</sup> It may be better to complete constituency delineation before voter registration is finalised as the register ought to be segmented to achieve a constituency list.

<sup>103</sup> See DRI/EOHR Report, *op cit*, page 33.

of these are positive changes. However, the draft requires that the number of candidates nominated on an election list shall be equal to the number of mandates available for allocation in the election district. This causes an unnecessary complication in the event of candidate withdrawals or their death after registration but before election day (see section *Vacant Seats*, below).

***Method of Allocating Mandates to the Closed Lists***

Article 17 of the draft sets out the method of allocating mandates to the election lists. The text was badly drafted and the method it employs is not clear. This is problematic for such an important provision of an election law. The article could mean that in order to be eligible to receive one or more mandates, a list requires a number of votes at least equal to the ‘electoral average’ (electoral quotient). The quotient 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. Parties will be allocated a number of mandates corresponding to the number of whole quotients won (integers). All ‘fractional remainders’ are allocated to the highest scoring list. The following example demonstrates the system in a hypothetical electoral district with 1,600,000 registered voters of which 70% participate and eight mandates available for distribution.

	<b>List A</b>	<b>List B</b>	<b>List C</b>	<b>List D</b>	<b>List E</b>	<b>List F</b>
<b>Votes</b>	392,000	268,000	145,600	134,400	112,000	67,200
<b>% of the vote</b>	35%	24%	13%	12%	10%	6%
<b>% of available mandates</b>	2.8	1.92	1.04	0.96	0.8	0.48
<b>Actual mandates won</b>	6	1	1	0	0	0

This system thus provides a potentially very large electoral dividend to the highest scoring party, and significantly reduces the proportionality of representation. More commonly used methods include: largest remainder methods<sup>104</sup> and the highest average methods.<sup>105</sup>

As yet there is no clear indication of the number of multi-seat districts which will be established. If the governorates are used as a basis it should be possible to achieve a fair allocation of PR seats, so long as less populous governorates are merged with another governorate, and if the number of seats allocated is variable rather than fixed i.e. more populous governorates receive more seats. In districts with fewer seats available for distribution parties will require a higher share of the vote to win one seat. In the example above, parties D (12%), E (10%) and F (6%) gained no seats despite gaining a combined share of 28% of the vote.<sup>106</sup> However, in a larger constituency of 2,200,000 with the same percentage of the vote Parties D and E would both have won a seat.<sup>107</sup> The example illustrates that even if a system is called ‘a PR system’, the allocation method is a key variable in determining the actual degree of proportionality.

<sup>104</sup> For example the Hare-Niemeyer method which can apply different quotas.

<sup>105</sup> For example the D’Hondt and Sainte-Laguë methods which apply different divisors.

<sup>106</sup> But if the three parties had formed a coalition they would have won 2 seats.

<sup>107</sup> But if the three parties had formed a coalition they would have actually won 3 seats.

### ***Representation Threshold***

Article 17 of 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 instead be allocated to other lists. For independent candidate lists, a district level threshold will be applied. The draft does not propose at what level the thresholds will be set.<sup>108</sup>

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.<sup>109</sup>

### ***Individual Candidates***

Article 15 of the draft makes reference to two candidates being elected in a constituency.<sup>110</sup> Thus, the individual candidate system will retain in part the existing election system. However, the draft does not explicitly state how many candidates a voter may vote for. Article 5 implies that voters may only vote one candidate<sup>111</sup> whereas article 15 foresees a situation where two or more candidates can gain a majority (50% + 1) of votes – a mathematical impossibility unless voters can vote for more than one candidate. In the previous elections utilising the two-member district system, voters had two votes.

To be elected, candidates require an absolute majority of valid votes. Supplementary (run-off) elections are required in the event that i) no candidate gains an absolute majority of votes ii) two or more candidates secure a majority of the vote, but where neither is a worker or farmer.<sup>112</sup> The second scenario creates a situation where a candidate with fewer votes than another participates in the run-off by virtue of their occupational status. This is undemocratic because it ignores voters' preferences.<sup>113</sup>

### ***Vacant Seats***

Article 18 of the draft requires holding by-elections to fill a vacant seat which had been allocated to an election list e.g. in the case of death of an MP. This is not absolutely necessary e.g. it could be decided, as in the law which regulated the 1984 elections, to allocate a vacant seat to the highest placed unelected candidate from a party's list from the preceding election. However, in the event that a list won all the mandates in the respective constituency then a by-election would be needed.<sup>114</sup>

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<sup>108</sup> There is speculation that the national threshold will be set at 2%.

<sup>109</sup> See OSCE/ODIHR Final Report on the 2001 parliamentary elections in Albania (*op cit*).

<sup>110</sup> Article 3 of the previous version of the LOPA was explicit that two candidates are elected from each constituency.

<sup>111</sup> Article 5 of the draft states: "votes shall be considered invalid if they elect more than one candidate".

<sup>112</sup> The LOPA provides that where the first placed candidate is not a worker or farmer (i.e. is considered as being in the category of 'other') and where the second placed candidate is also from the 'other' category he/she will not be awarded the mandate. Instead a run-off election will be held between the two highest scoring 'worker' or 'farmer' candidates.

<sup>113</sup> While possible solutions to this problem exist, they would further complicate the election system. It would be more preferable for the quota for workers and farmers to be removed altogether.

<sup>114</sup> This principle could also apply to candidates who die after the 10 day withdrawal deadline and election day.

### 4.3.2 Definition of 'Workers' and 'Farmers'

The draft amendments do not change the definitions of 'workers' and 'farmers'.<sup>115</sup> In the past, candidates were able to easily circumvent the definitions e.g. rich businessmen were able to stand as 'workers'. The LOPA contains provisions requiring that in order for a farmer to stand as a candidate he must own or rent less than 10 'feddans' and also stipulates that a worker who wishes to stand for election may not hold a high academic qualification and must be a member of a trade union. Arguably these requirements conflict with the ICCPR.<sup>116</sup>

### 4.3.3 Candidate Eligibility

Article 5 sets out candidate eligibility requirements, a number of which are problematic:

- Clause 1 requires that "he shall be born of an Egyptian father". This provision is discriminatory as it does not put a candidate's mother and father on an 'equal footing';<sup>117</sup>
- Clause 3 requires that candidates must be thirty years of age. This appears to be high in comparison with other states, and should be reduced;
- Clause 4 requires that candidates be the holder at least of an elementary school certificate or equivalent. As noted, educational requirements conflict with the ICCPR.<sup>118</sup>

### 4.3.4 Candidate Registration

In order to be registered as an individual candidate, a citizen must pay a deposit of EGP 1,000 (EUR 120) and provide supporting documents establishing his/her eligibility. A positive change is that, unlike in the past, individual candidates nominate themselves by applying to a GEC rather than a Security Directorate. The procedures for registering candidate lists are not entirely clear but are likely to be set out in the regulation which the HEC is required to adopt.<sup>119</sup>

Article 8 of the draft provides for special committees to be established to review candidate nominations (hereafter 'the Review Committee' – RC). As for the LEPR, the draft LOPA reduces the role of the Ministry of Interior in the election process. However, the draft grants the Ministry the right to nominate a member to the RC.<sup>120</sup> This should be reconsidered unless there is a clear function to be fulfilled by this

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<sup>115</sup> Article 2.

<sup>116</sup> Paragraph 3 of General Comment 25 on article 25 of the ICCPR states that: "No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*" (emphasis added). Paragraph 15 of General Comment 25 (ibid) states: "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education [...]". The provisions on whether workers can be a member of a trade union and how this affects their eligibility to stand for election are confusing and arguably also discriminatory.

<sup>117</sup> This could be a consequence of the Citizenship Law.

<sup>118</sup> The clause also states that those born before 1 January 1970 do not have to have this certificate but have to be able to read and write satisfactorily. This creates a distinction between candidates based on their age. The law does not set out how the reading and writing skills are assessed thereby creating a possibility that the provision could be applied inconsistently or arbitrarily.

<sup>119</sup> The candidate registration period may not be less than 5 days. The regulation must also specify the documents required to prove eligibility to stand for election, and registration procedures.

<sup>120</sup> This also applies to the separate candidate registration 'appeals committee' which is formed to adjudicate challenges (see draft LOPA, article 9).

member that cannot be fulfilled by any other person. The article does not state any deadline for the RC to issue its decisions,<sup>121</sup> or any procedures to appeal a RC's decision to a higher body or a court.<sup>122</sup>

After the closing of the candidate nomination period, candidate lists and the names of individual candidates must be displayed for five days. During this period candidates or parties may request the inclusion of any candidate inadvertently omitted or challenge the inclusion of any candidate's name. Challenges are decided by an 'Adjudication Committee' (AC) formed by the HEC. The AC must issue its decisions within seven days from the date of the closing of the nomination period (48 hours after the end of the display period). This may be insufficient for ACs to investigate all challenges properly. Appeals against an AC decision may be filed with the Administrative Court within seven days. The Court then has seven days in which to issue its verdict. Article 9 foresees that the Supreme Administrative Court (SAC) can issue a stay against the decision of the Administrative Court. However, no timeframe is given for this appeal process meaning that the SAC's final ruling could be issued after an election has actually taken place.

The total time period for candidate nomination, review, challenges and appeals (prior to an appeal to the SAC) is 26 days. Elections must be formally called no later than 30 days prior to the election day.<sup>123</sup> Thus, a candidate whose nomination was subject to a challenge and a successful appeal would have almost no time to campaign. Article 14 permits the President (or in the current circumstances the SCAF), to shorten timeframes for candidate registration, appeals and withdrawal. It would be preferable instead to establish an election calendar with a longer period between the call for elections and election day.

Individual candidates and those registered on election lists may withdraw from the contest no later than 10 days before elections. It is not known whether the HEC will organise the printing of ballots earlier or later than 10 days before elections. Ideally, the names of withdrawn candidates should not appear on ballot papers.

The SCAF should put in place a system so that citizens who were stripped of their political rights in questionable circumstances during President Mubarak's tenure have their rights reinstated to enable these persons to participate fully in the election processes.

#### **4.3.5 Election Campaigning<sup>124</sup>**

The LOPA does not set out a time frame for the election campaign. After the revolution many new parties have formed and are either engaged in securing registration or organising themselves. It is necessary for the campaign period to be longer than previously in order to give sufficient time to allow voters to learn about parties' and candidates' political programmes.

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<sup>121</sup> This needs to be at least 24 hours after the closure of the nomination period in order to ensure that the RC has time to review nominations. If the deadlines are simultaneous, there may be no time to review an application submitted just before the closure of the nomination period.

<sup>122</sup> If the provisions of article 9 of the draft (which deals with challenges) are applicable, then article 9 ought to state that rejections of candidate nomination applications by the RC can be appealed to the Appeals Committee and stipulate deadlines.

<sup>123</sup> LEPR, article 22.

<sup>124</sup> As set out in LOPA, article 11.

Neither the LOPA nor the LEPR contain adequate provisions protecting candidates' campaign rights and to ensure a level playing field for campaigning. For example there are no provisions:

- Requiring public authorities to treat candidates and parties without discrimination and setting out the penalties for failure to treat election subjects equally;
- Commercial vendors who supply a service to a candidate or list should be required to provide the same service to other candidates or lists on equal terms;
- Establishing reasonable rules for parties and candidates to display campaign material and have access to public spaces for holding campaign events on an equal basis;
- Requiring data on campaign expenditure to be made publicly available and providing for a professional audit of the candidates'/parties' campaign expenditure;
- Consideration should be given to introducing a campaign silence period(s), taking into account that the elections may be held in different phases.

It is possible that the HEC may be able to address some or all of these issues in the regulation on campaigning. The legislator and/or the HEC should give consideration to establishing an effective mechanism to ensure that the legal rights and proscriptions on election campaigning are properly enforced.

The HEC is required to issue a regulation on the allocation of free airtime in the media. Ideally, the HEC will provide a generous amount of airtime to ensure that voters are able to inform themselves about parties' political programmes. The media ought to be required to treat election contestants in an objective manner and the HEC should put in place a mechanism to ensure the media's compliance with the regulations.

To better ensure that fundamental freedoms are respected during the electoral period, the SCAF should end the state of emergency and repeal the law on the state of emergency (Law 162/1958) before the elections are called.

#### **4.3.6 Post Election Legal Challenges**

The draft reflects the provisions of the Constitutional Declaration insofar as it stipulates that the Court of Cassation decide on the validity of the membership of the People's Assembly members. However, the LOPA does not set out the timeframe for filing appeals and the deadline for the Court of Cassation to issue its rulings, which are set out in the Constitutional Declaration (30 days and 90 days respectively). More importantly, the LOPA does not make any clear provision for repeat elections in the event that elections are annulled by the Court.

#### **4.3.7 Membership of People's Assembly**

The draft does not alter part 3 of the LOPA which deals with membership of the People's Assembly. However, it would be worthwhile considering ways in which the LOPA could be amended to avoid past pitfalls. In particular, it may be beneficial to require the Assembly to adopt new procedural rules rather than inherit those already in force.<sup>125</sup>

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<sup>125</sup> See article 36, clause 2.

Article 27 of the LOPA relieves MPs from certain occupational categories of the need to devote all their time to the work of the Assembly. This dispensation should be reconsidered, as to represent their constituents effectively MPs should be fully engaged in the work of Parliament.

Article 29 stipulates that MPs receive monthly remuneration equalling EGP 1,000 (EUR 120). Raising MPs salary could lessen the risk of their corruption and allow all MPs to dedicate themselves fully to their work, thus strengthening Parliament.

#### **4.4 Law No. 120/1980 on the Formation of the Shura Council (LFSC)**

The text of amendments to the Law on the Formation of the Shura Council was deposited with the cabinet on 3 July, but has not been published yet.

Under the previous arrangements, the Shura Council was composed of 264 members of which 176 were directly elected. In most respects the election of Shura Council members is similar to that of People's Assembly members and as such the issues outlined in section 3.3 of this report are relevant.

#### **4.5 Law No. 174/2005 Regulating the Presidential Election (LRPE)**

The most important features of the presidential elections are set out in the Constitutional Declaration. The date for the presidential elections has not yet been set. Hence the urgency of the need to amend the legislation cannot be assessed. However, it is clear that as a result of the significant changes adopted in the March constitutional referendum and subsequent enactment of the Constitutional Declaration, amendments to the LRPE will be substantial. Ideally a completely new law will be drafted with proper consultation with parties and civil society groups.<sup>126</sup>

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<sup>126</sup> The Constitutional Declaration requires that “draft legislation for presidential elections will be shown to the Supreme Constitutional Court before being issued to determine the extent of compliance with the Constitution.”

## 5. About DRI's Programme in Egypt

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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