



Volume 4
Issue 1

Volume IV, No. 1

Article 2

2015-2016

2016

Holding the Executive Accountable in Egypt, Impeachment: A Losing Case

Dr. Mohamed Abdelaal
Alexandria University School of Law

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Abdelaal, Dr. Mohamed (2016) "Holding the Executive Accountable in Egypt, Impeachment: A Losing Case," *University of Baltimore Journal of International Law*: Vol. 4 : Iss. 1 , Article 2.

Available at: <http://scholarworks.law.ubalt.edu/ubjil/vol4/iss1/2>

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HOLDING THE EXECUTIVE ACCOUNTABLE IN EGYPT

IMPEACHMENT: A LOSING CASE

Dr. Mohamed Abdelaal

ABSTRACT: This paper examines the impeachment mechanism in Egypt after the 2011 Revolution and the 2013 events and the removal of Presidents Hosni Mubarak and Mohamed Morsi. In doing so, the paper will provide a critical analysis to the impeachment clauses in both the 2012 and 2014 Constitutions, in an attempt to discover to what extent the pre 2011 impeachment differs from that of post 2011. Further, it addresses the issue of whether the recall election could make a good alternative to impeachment in Egypt. Specifically, we will briefly shed light on the history of the recall device as well as its emergence as one feature of direct democracy. Our focus will then shift to discussing the possibility of adopting the recall device in Egypt and the challenges that might face such adoption. Eventually, we will propose a recall provision that could replace impeachment in Egypt's current constitution.

AUTHOR: **Dr. Mohamed Abdelaal**, SJD, is an Assistant Professor of Law at Alexandria University School of Law in Alexandria, Egypt, and an Adjunct Professor of Law at Indiana University Robert H. McKinney School of Law, Indianapolis, IN. He is admitted to the bar in Egypt and is a member of the Egyptian American Rule of Law Association (EARLA) in Washington, D.C.

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Introduction

With a long constitutional history dating back to 1882 when it was an Ottoman province, Egypt is considered to be the oldest constitutional state in the Arab world.¹ Under the monarchy system, Egypt had two constitutions, 1923 and 1930, neither of which installed Egypt as a constitutional monarchy.² In other words, in the Egyptian Kingdom the king was not a symbolic figurehead, but rather a strong political actor who ruled the state and was heavily involved in its administration.³ However, he was immune from accountability.⁴

After the abolition of the monarchy and the declaration of the republic in 1952, Egypt underwent the drafting and application of six constitutions—1956, 1958, 1964, 1971, 2012, and 2014—in which the president and his cabinet were recognized as active participants in the day-to-day administration of the state under a semi-presidential system of governance.⁵ However, the many presidential powers envisioned in these constitutions, as well as practiced under most of them, revealed the president to be the sole executive, aided by only a symbolic involvement of the cabinet.⁶

Most of the constitutions adopted in the Egyptian Republic were guided by the themes of democracy, human dignity, and political accountability, as they were the outcome either of bitter battles against colonial powers (the 1954 and 1956 Constitutions),⁷ or the overthrow of authoritarian regimes (the 1971 and 2012 Constitutions).⁸ However, these constitutions manifest a remarkable ability to yield exceptions regarding political accountability.⁹

For the purposes of this article, I will examine the issue of political accountability from the perspective of presidential impeachment

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1. *Egyptian Constitutions*, MIDAN MASR, <http://www.midanmasr.com/en/default.aspx?PageID=15> (last visited Oct. 9, 2015).
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. Sujit Choudhry & Richard Stacey, *Chapter 5: Semi-presidential government in Tunisia and Egypt*, CONSTITUTION BUILDING: A GLOBAL R. 33 (2013), http://www.idea.int/publications/constitution-building-a-global-review/upload/cbgr_c5.pdf.
 6. *Id.*
 7. *Egyptian Constitutions*, *supra* note 1.
 8. *Id.*
 9. *Id.*

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in Egypt's Constitutions of 2012 and 2014. They were the outcome of two popular uprisings and a bitter struggle against two authoritarian regimes, those of Mubarak and of the Muslim Brotherhood. Then I will discuss the possibility of adopting the recall election as an alternative to impeachment in Egypt.

The Constitution of 2012

A. Background

Following the assassination of President Sadat, Vice President Hosni Mubarak assumed the presidency.¹⁰ Mubarak's first years of presidency teemed with serious challenges. He was required to face the escalating debt rate in Egypt, radical Islamists, and Egypt's deteriorating relations with the Arab nations after the Egypt-Israel Peace Treaty.¹¹ Indeed, Mubarak did a good job during his early years in the office of the presidency. His policy in suppressing the Islamists, fighting terrorism in Egypt, and maintaining peace with Israel earned him a close relationship with the United States and the West that helped him to reschedule the country's debt and to cure certain economic problems.¹² Further, Mubarak succeeded in restoring Egypt's relation with the Arab nations.

Under his regime Egypt was readmitted to the Arab League¹³ after having been suspended as a consequence of the peace treaty with Israel.¹⁴

10. Mohamed Hosni Mubarak was Egypt's fourth president who served from 1981 to 2011. Mubarak was appointed as Egypt's vice president in 1975 during the regime of President Anwar Al-Sadat, and thus he assumed the office of the president in 1981 following the assassination of President Sadat. Michael Slackman, *A Brittle Leader, Appearing Strong*, N.Y. TIMES (Feb. 12, 2011), http://www.nytimes.com/2011/02/12/world/middleeast/12mubarak.html?pagewanted=all&_r=0.

11. *Id.*

12. *Id.*

13. The Arab League is a regional organization of Arab countries in Africa and Asia. The Organization was formed on March 22, 1945 in Cairo, Egypt. The Organization aims "to draw closer the relations between member States and co-ordinate their political activities with the aim of realizing a close collaboration between them, to safeguard their

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Corruption in his regime also roused the Egyptians against Mubarak.²⁰ In an attempt to secure his office and prolong his presidency, Mubarak tried to take control of the institutions of the country.²¹ A significant feature of corruption in Mubarak's era was the rise to power of businessmen who endeavored desperately to serve only their own business interests.²²

Another aspect of corruption was electoral fraud, which reached its acme in the Parliamentary Election of 2010.²³ At this time, the government decided that the judiciary would not supervise the election,²⁴ and it initiated a wide arrest campaign targeting opposition figures.²⁵ As a result of these practices, the National Democratic Par-

the president to take the required precautions to restrict the freedom of meeting, movement, residence, arrest suspects or those who threat public security and public order, to inspect people and places notwithstanding the provisions of the Criminal Procedures Law. Law No. 162 of 1958, *al-Jarida al-Rismiyyah*, 28 Sept. 1958, Art.3(1) (Egypt). It also entitles the president to order surveillance on any kind of messages, monitor, confiscate and close newspapers, leaflets, publications, fees and all means of expression, propaganda and advertising before its publication. *Id.*, at Art.3(2). Further, under this law, the president determines the opening and closing times of public stores, withdraws weapons' licenses and evacuates or segregates certain regions. *Id.*, at Art.3(3),(5),(6).

20. See generally BRUCE RUTHERFORD, *EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD* (Princeton University Press, 2008).
21. *Id.*
22. A stark example of such a selfishly corrupt and powerful business figure was Ahmed Ezz, who served as the Organization Secretary of the National Democratic Party (NDP), Mubarak's ruling party. Ezz was the majority leader of the Egyptian Parliament, as well as the absolute monopolist of the steel industry in Egypt, with an estimated wealth of \$3 billion. To further his own interests, Ezz significantly enhanced monopolies rather than fighting it, backing every effort to thwart any legislative bill introduced in parliament that would criminalize monopoly. Likewise, Rashid Mohamed Rashid, former Minister of Trade and Industry, had an estimated personal wealth of \$2 billion, and Zuhair Garrana, former Minister of Tourism, was worth \$2.2 billion. Tom Ramstack, *Obama Optimistic about Egypt as Negotiators make concessions*, GANT DAILY, <http://gantdaily.com/2011/02/07/obama-optimistic-about-egypt-as-negotiators-make-concessions/> (last visited Sept. 15, 2015).
23. *Egypt Rebuffs U.S. Call for Foreign Monitors at Election*, N.Y. TIMES (Nov. 18, 2010), http://www.nytimes.com/2010/11/19/world/africa/19egypt.html?_r=0.
24. In addition, the government refused any kind of international monitoring for the electoral process, arguing that international monitoring would undermine the sovereignty of the state and allow interference in its internal affairs. *Id.*
25. Mubarak extended the state of emergency just before the election, ignoring his promise in 2005 to put an end to the state of emergency and to introduce a terrorism law to replace emergency law. In 2010, the Egyptian security forces started a wide arrest

ty (NDP), the ruling party, swept the election with virtually no representation of opposition.²⁶

Police brutality also plagued Mubarak's regime. The 2009 Human Rights Report of the U.S. Department of State reported that "the government's respect for human rights remained poor, and serious abuses continued in many areas,"²⁷ and "security forces committed arbitrary or unlawful killings during the year."²⁸ A notable incident that sparked a massive wave of anger over Egypt's police practices and significantly contributed to toppling Mubarak's regime was the death of Khaled Saeed, who was severely beaten to death by police officers after being identified as "suspicious."²⁹

campaign against anti-government political activists, including members of the Muslim Brotherhood after it announced its participation in the Election. *Elections in Egypt State of Permanent Emergency Incompatible with Free and Fair*, HUMAN RIGHTS WATCH, (Nov. 23, 2010), <http://www.hrw.org/reports/2010/11/23/elections-egypt>.

26. The NDP won 420 out of 518 seats with a success rate of 81%. Independent candidates won 68 seats, of which 53 seats were secured by NDP defectors. While, all other political parties won 15 seats, the Muslim Brotherhood won only one seat down from 88 seats in the previous election of 2005. *Official Results: 16 Opposition, 424 NDP, 65 "independents"*, AHARAM ONLINE, (Dec. 6, 2010), <http://english.ahram.org.eg/NewsContent/1/5/1321/Egypt/Egypt-Elections-/Official-results---opposition,---NDP,---independents.aspx>.
27. *2009 Human Rights Report: Egypt*, U.S. DEPARTMENT OF STATE, (Mar. 11, 2010), <http://www.state.gov/j/drl/rls/hrrpt/2009/nea/136067.htm>.
28. *Id.* Further, the report stated, "[D]omestic and international human rights groups reported that the Ministry of Interior (MOI) State Security Investigative Service (SSIS), police, and other government entities continued to employ torture to extract information or force confessions, [and that] police and the SSIS reportedly employed torture methods such as stripping and blindfolding victims; suspending victims by the wrists and ankles in contorted positions or from a ceiling or door frame with feet just touching the floor; beating victims with fists, whips, metal rods, or other objects; using electric shocks; dousing victims with cold water; sleep deprivation; and sexual abuse, including sodomy." *Id.*
29. Wael Ghonim, an Egyptian computer engineer, political activist and prominent revolutionary figure, created a memorial Facebook's page, *Kullena Khaled Saeed* (We Are All Khaled Saeed), to commemorate Saeed. The page dramatically attracted many followers nationwide in support for Saeed's case and against the brutal and oppressive practices of the Egyptian police. In short, during Mubarak's regime, the police force

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Perhaps the growing rumors that Mubarak sought for his son Gamal to inherit his rule were the last proverbial nails in his coffin. After many attempts to introduce him into Egypt's political life,³⁰ Gamal's grooming process peaked in February 2000 when the elder Mubarak appointed him a member of the NDP's General Secretariat.³¹ Gamal later became the Assistant Secretary General and the Secretary of the Policy Committee, which allowed him to play a large role in determining how the ruling party should function.³² Further, in an attempt to support his son legislatively, in 2005 Mubarak ensured that Article 76 of the 1971 Constitution was amended to allow multi-candidate presidential elections.³³ However, the amendment also imposed further restrictions regarding the eligibility to run for the office of president³⁴ in a move interpreted by many politicians and

was changed from being a tool for the people's security to a weapon in the regime's hand to threaten and suppress the people. *See* WAEL GHONIM, *REVOLUTION 2.0: THE POWER OF THE PEOPLE IS GREATER THAN THE PEOPLE IN POWER* 58-81 (2012). On March 3, 2014, Alexandria Criminal Court sentenced two police officers to ten years of aggravated imprisonment after they were found guilty of false arrest, using excessive force, and the manslaughter of Saeed. *Appeals Court upholds death sentence, long prison terms in Sidi Gaber Case*, MADA MASR, (Feb. 15, 2015), <http://www.madamasr.com/news/appeals-court-uhpolds-death-sentence-long-prison-terms-sidi-gaber-case>.

30. *See* Muhammad Abdul Aziz & Youssef Hussein, *The President, the Son, and the Military: The Question of Succession in Egypt*, 9/10 *THE ARAB STUD. J.* 73 (Fall 2001/Spring 2002). The first attempt to introduce Gamal into political life was in 1999, when rumors abounded that a new political party, *Hizb al-Mustaqbal* (The Future Party) would be established and funded by the wealthy NDP loyalists, and Gamal would be installed as the party president, *Id.* at 75. However, the government denied any attempt to establish the party, ending these speculations. *Id.* The grooming process of Gamal continued when he was installed as the Chairman of *Gama'at Giel al-Mustaqbal* (The Future Generation Organization), a non-governmental organization founded in 1998 to provide educational, housing and employment services for youth. *Id.* at 84.
31. Jason Brownlee, *The Heir Apparency of Gamal Mubarak*, 15/16 *THE ARAB STUD. J.* 36, 46 (Fall 2007/Spring 2008).
32. *Id.* at 47.
33. *Id.*
34. *See* Brownlee, *supra* note 31. The amendment required that an eligible independent candidate should secure the support of at least 250 elected representatives (sixty-five members of the People's Assembly, twenty-five of the Shura Council, ten members of each of the Municipal Councils in at least fourteen governorates and twenty more from some combination of the three). *Id.* at 47-48. Further, eligible candidates are to include only "member of the party's supreme board, provided that a candidate is a member of

activists as an attempt from Mubarak to secure the presidency for himself and his son after him.

All these circumstances contributed to the Egyptian Revolution of 2011. Egyptians flooded the streets on January 25, 2011, protesting against police brutality and the deteriorating socio-economic situations.³⁵ Political activists named January 25th *Yawm Al-ğadab* (“Day of Anger”), as thousands of people demonstrated in Cairo, occupying Tahrir Square (“Liberation Square”), the icon of the 2011 Revolution, chanting “Bread...Freedom...Social justice.”³⁶ Demonstrations and protests soon spread beyond the borders of Cairo to reach other major cities such as Alexandria, Suez, Aswan, and Ismailia. Nationwide demonstrations and protests continued through the following two days. Police forces stepped up their responses using

that board for a least one year, and that the political party completed five continuous years and hold at least 5% of seats in both legislative chambers. *Id.* at 47. In 2007, another amendment to Art. 76 was introduced, whereby political parties, which have been founded at least five consecutive years before the starting date of candidature and have been operating uninterruptedly for this period, and whose members have obtained at least 3% of the elected members of both the People’s Assembly and the Shura Council or what equals this total in one of the two assemblies, may nominate for presidency a member of their respective higher board, according to their own by laws, provided he has been a member of such board for at least one consecutive year. *See* Nathan J. Brown, Michele Dunne, & Amr Hamzawy, *Egypt’s Controversial Constitutional Amendments*, CARNEGIE INST. FOR INT’L PEACE 1, 11 (Mar. 23, 2007), http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf.

35. The 25th of January is Egypt’s National Police Day. Choosing the National Police Day to demonstrate and protest indicates the extent to which people in Egypt were frustrated and disappointed with the police brutality and violent practices. *Egypt Braces for Nationwide Protests*, FRANCE 24 (January 25, 2011), <https://web.archive.org/web/20110201013309/http://www.france24.com/en/20110125-egypt-braces-nationwide-protests>.
36. In fact, this famous revolutionary chant was a cunning selection by the protestors, as it mirrored their demands for a better social, economic and political life. First, “bread” refers to the people’s socio-economic demand for a regime that could get the country out of debt, offer them employment opportunities and satisfy their essential needs. Second, “freedom” describes the Egyptians’ search for their constitutional-fundamental rights, lost under Mubarak’s rule. Last, “social justice” was a catchall term that accommodated both the economic and political deteriorated situations. Specifically, the term reflects the Egyptians’ desire for a regime that would maintain civil rights and guarantees an equitable distribution of wealth and resources. *See* Katie Bridget Wright, *Bread, Freedom, and Social Justice: Understanding the Egyptian Revolution*, LAKE FOREST C. PUBL. (2013), http://publications.lakeforest.edu/firstyear_writing_contest/1.

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tear gas and bullets against the protesters and arresting many political activists.³⁷

After eighteen days of massive protests and demonstrations,³⁸ on February 11, 2011, Vice President Omar Suleiman announced that

37. *Egypt Protesters Clash with Police*, AL JAZEERA (January 25, 2011, 10:26 AM), <http://www.aljazeera.com/news/middleeast/2011/01/201112511362207742.html>. On January 27, Dr. Mohamed El-Baradei, former director of the International Atomic Energy Agency, returned to Egypt in order to participate in the revolution arguing that, “[T]he people have broken the barrier of fear. There is no going back.” Mohamed Elmeshad, *Back in Egypt, ElBaradei Vows to Take Part in Planned Friday Demonstrations*, EGYPT INDEP. (Jan. 27, 2011 4:06 PM), <http://www.egyptindependent.com/news/back-egypt-elbaradei-vows-take-part-planned-friday-demonstrations>.

38. *See Ghonim, supra* note 29. During these eighteen days, Mubarak made three televised statements in an attempt to appease the angry protesters, yet he remained defiant, refusing to step down. Mubarak’s first statement was on January 28, 2011, *id.* at 216, known as the Friday of Anger, *id.* at 190, which time he overthrew the government, named General Umar Suleiman, the head of intelligence, Vice President of Egypt, *id.*

Mubarak had decided to step down and had charged the Supreme Council of the Armed Forces (“SCAF”) to administer the country, a moment much awaited by the Egyptians.³⁹ Following this withdrawal, Mubarak and his family were prohibited from departing the country, and he and his two sons were prosecuted under charges of corruption and of killing peaceful protestors.⁴⁰ In fact, Mubarak’s trial

at 216, making him the first vice president in Mubarak’s regime. Michael Slackman, *Choice of Suleiman Likely to Please the Military, Not the Crowds*, N.Y. TIMES, Jan. 29, 2011, at A10. (The post had remained vacant for nearly 30 years). He also imposed curfew in Cairo, Alexandria and Suez, deployed military forces in the three cities, and promised the people to undertake a huge socio-economic reform, Ghonim, *supra* note 29 at 215. In fact, the impact of Mubarak’s was significant for the protestors, as they became sufficiently confident of Mubarak’s weakness to become more insistent upon the overthrow of the regime. *Id.* at 217. They chanted, “*Al-sha’ab Yureed Esqaat al-Nizam*” (The People Want to Topple the Regime) which shows to what extent the Egyptians’ political awareness grew; they became so determined not only to force Mubarak to step down, but also to end the whole regime. *Id.* As the protestors defied the curfew and the severity of violence between police and protestors continued to escalate, Mubarak addressed the nation again on February 1, promising to ask the parliament to amend the constitutional articles concerning the term of presidency and pledging not run in the next presidential election. However, he insisted on remaining in power until the end of his term in September 2011. *Id.* at 232, ostensibly to guarantee a peaceful transition of power. Once again, the protestors did not accept Mubarak’s speech and continued demanding that he step down. *Id.* As the demonstrations continued widely, on February 10, Mubarak made his third televised statement, amid great expectations that he would resign his office. However, in this third statement, Mubarak insisted that he would remain as the president until the next presidential election in September 2011, but also stated that he would transfer his powers to the vice president. *Id.* at 276. As a response to the stubborn Mubarak, protestors organized in massive marches chanting “Leave means go, in case you do not know!” The crowd headed towards the presidential palace with the intention to blockade Mubarak and force him to step down. Once he was informed of the people’s approach, Mubarak along with his family, fled to Sharm el-Sheikh, an Egyptian resort city.

39. David Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES (February 11, 2011), <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html>.

40. See Patrick Kingsley, *Hosni Mubarak Cleared of Conspiring to Kill Protesters in Egypt’s 2011 Uprising*, GUARDIAN (Nov. 29, 2014 2:53 PM), <http://www.theguardian.com/world/2014/nov/29/hosni-mubarak-cleared-conspiring-kill-protesters-egypt-2011-uprising>. See also, Jason Hanna, Sarah Sirgany & Holly Yan, *Egypt: Ex-ruler Hosni Mubarak, Accused in Deaths of Hundreds, Cleared of Charges*, CNN (Nov. 30, 2014 5:42 AM),

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was the first occasion in the history of the Arab world and indeed the Middle East in which an overthrown president underwent a public trial.⁴¹

Immediately after the overthrow of Mubarak, the Supreme Council of the Armed Forces (SCAF) issued a Constitutional Declaration on February 13, 2011, pledging not to remain in governance and to hand over power to an elected civilian government within six months or as soon as parliamentary and presidential elections were held. In addition, the Declaration suspended the 1971 Constitution and dissolved the two parliamentary chambers elected in 2010. Subsequently, the SCAF ordered the formation of a committee to amend certain articles of the 1971 Constitution regarding conditions to seek the presidency, as well as confirming full judicial supervision over both parliamentary and presidential elections.⁴² The amendments also included a description of the road map describing how power would be transferred to an elected civilian government by virtue of a parliamentary election followed by a presidential election.⁴³ Further, the amendments stipulated that the parliament should elect a constituent assembly to draft the country's new constitution. The amendments were put into a popular referendum and approved by 77% on March 19, 2011.⁴⁴ On March 30, 2011, the SCAF issued a constitutional declaration including the approved amendments.⁴⁵

<http://www.cnn.com/2014/11/29/world/meast/egypt-mubarak-trial/>. On June 2, 2012, a criminal court acquitted Mubarak of ordering protesters to be killed. However, the Court found him guilty of not ordering the killing to be stopped, and sentenced him to life imprisonment. Likewise, the court found Habib el-Adly, the former Minister of Interior, guilty of conspiring to kill the protestors, also sentencing him to life imprisonment. However, Mubarak appealed the verdict, and the Court of Cassation granted him the appeal and ordered a retrial, in which he was acquitted later. *Id.*

41. Ilhem Allagui & Johanne Kuebler, *The Arab Spring and the Role of ICTs: Editorial Introduction*, 5 INT'L J. COMM'N 1435, 1439 (2011).
42. James Feuille, *Reforming Egypt's Constitution: Hope for Egyptian Democracy?*, 47 TEX. INT'L L. J. 237, 247 (2011).
43. *Id.*
44. *Egypt Referendum Strongly Backs Constitution Changes*, BBC (March 20, 2011), <http://www.bbc.com/news/world-middle-east-12801125>.
45. The 2011 Declaration was amended twice. The first amendment was adopted on September 25, 2011, and stipulated that one-third of the parliamentary seats were to be filled by individual candidates, while two-thirds were to be filled by proportional lists. The second amendment took place on November 19, 2011, and required ambassadors and consuls to supervise the elections abroad, as it would be difficult for judges to

After the 2011 Revolution, Islamists in Egypt started to emerge as a major political power especially *Al-ikhwan Al-mostlumin* (the Muslim Brotherhood). Following the revolution, the Muslim Brotherhood decided to practice politics in an organized form, and so established a political party, Hezb Al-horya w Al-'adalah (The Freedom and Justice Party).⁴⁶ The Muslim Brotherhood became highly involved in political life, after having been during Mubarak's regime a banned group whose members were always prosecuted.⁴⁷ The decisive electoral victory in the 2011 parliamentary elections was the first occasion upon which the Brotherhood showed its canines.⁴⁸ Under the flag of their new party, Hezb Al-Nour (The Light Party), the Salafists⁴⁹ were fairly represented in the parliament,⁵⁰ which guaranteed to the Islamists full control over the lower house.⁵¹ On June 24, 2012, with a 51.73% of vote,⁵² Mohamed Morsi of the Muslim Brotherhood⁵³ was sworn as Egypt's first democratically elected pres-

travel abroad to ensure judicial supervision. Nathan J. Brown & Kristen Stilt, *A Haphazard Constitutional Compromise*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 11, 2011), <http://carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise>.

46. Mohamed Abdelaal, *Egypt's Constitution: What Went Wrong?*, 7 VIENNA J. ON INT'L CONST. L. 200, 203 (2013).
47. *Id.*; see also Sahar F. Aziz, *Egypt's Protracted Revolution*, 19 HUM. RTS. BRIEF 2, 3 (2012).
48. Despite its proclamation that it would not run for more than 30% of the seats, the Muslim Brotherhood ran for 70% of the seats in the People's Assembly (the lower house) and won almost 50% of the seats. Sahar F. Aziz, *Egypt's Protracted Revolution*, 19 HUM. RTS. BRIEF 2, 4 (2012).
49. According to Islamic jurisprudence, the word *salaf* refers to the earliest Muslims, i.e., Prophet Muhammad's companions and their followers. Thus, technically, Salafists are those who call for the understanding of Islam and its sources according to the approach of the earliest Muslims, simply because they consider this approach to be the true Islam and free of foreign influence and interpretation. In Egypt, Salafists are considered among the most extreme Islamists. *Id.* at 3.
50. The Salafists won 25% of the seats in the People's Assembly. Abdelaal, *supra* note 46.
51. Aziz, *supra* note 48.
52. David Kirkpatrick, *Muslim Brotherhood's Mursi declared Egypt president*, BBC (June 24, 2012), <http://www.bbc.com/news/world-18571580>.
53. Indeed, the Brotherhood initially nominated Khairat El-Shater, a prominent leader and the deputy chairman of Brotherhood, as its first presidential candidate. However, El-Shater was disqualified by the 2012 Presidential Election Commission due to the legal requirement that a released prisoner is not eligible to practice his political rights before six years has elapsed from the time of his release. Consequently, the Muslim Brotherhood introduced Mohamed Morsi as the alternate presidential candidate. *Id.*

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ident after the 2011 Revolution.⁵⁴ In the same year, the Islamist-dominated parliament elected a Constituent Assembly to draft a new constitution for the country.⁵⁵ The Assembly witnessed a boycott movement from some of Egypt's liberal figures and parties in objection to the Islamists' dominance over its formation.⁵⁶ On December 26, 2012, the constitution was put to popular referendum where it was approved by 63.8% with a population turnout of only 33%.⁵⁷ In fact, the constitution was sharply criticized by many Egyptians and political activists for restricting rights and introducing a theocratic rule.⁵⁸ However, Islamists argued that the 2012 Constitution was superior to all of Egypt's previous constitutions, and asserted that it achieves great progress in the fields of individuals' rights and freedoms, social justice, restricting presidential powers, and limiting the presidential term.⁵⁹

B. Impeachment in the 2012 Constitution

Article 152 of the 2012 Constitution established presidential impeachment by stating:

A charge of felony or treason against the President of the Republic is to be based on a motion signed by at least one-

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54. Evan Hill, *The villa and the ministry*, AL JAZEERA (June 18, 2012), <http://blogs.aljazeera.com/blog/middleeast/villa-and-ministry>.
55. The 2012 Constituent Assembly was composed of 100 members—39 seats for parliamentary members and 61 seats for independent members (6 seats for judges, 13 seats for labor unions, 21 seats for public figures, 9 seats for law experts, 5 seats for the Al-Azhar institute, 4 seats for the Coptic Orthodox Church, a seat for the armed forces, a seat for the police, and a seat for the Ministry of Justice). The Assembly was heavily dominated by the Islamists. Specifically, Islamic parties, with 16 seats for the Freedom and Justice Party (the Muslim Brotherhood's party) and 8 seats for the Light Party (the Salafists' party), comprised 24 out of the 39 parliamentary seats. Further, the Islamists desperately sought for the nine seats of the law experts to be filled by those who belong ideologically to the Islamic bloc in Egypt. Abdelaal, *supra* note 46, at 203 n.18.
56. For instance, Dr. Mohamed ElBaradei, *Hezb Al-Karama* (The Dignity Party), and the Coptic Orthodox Church announced their withdrawal from the Assembly in objection to the Islamists' dominance. *Id.*
57. *Id.* at 200 n.2.
58. For more information see Mohamed Abdelaal, *Egypt's Constitution: What Went Wrong?*, 7 VIENNA J. ON INT'L CONST. L. 200, 203 (2013).
59. Abdelaal, *supra* note 46.

third of the members of the House or Representatives.⁶⁰ A decision to impeach is to be issued only by a two-thirds majority vote of the members of the House of Representatives.⁶¹ As soon as an impeachment decision is reached, the president ceases all work. This should be treated a temporary impediment that prevents the President of the Republic from assuming his responsibilities.⁶²

At the outset, Article 152 listed high treason and felony as two offenses that merit impeachment if committed by the president.⁶³ Unlike Article 85 of the 1971 Constitution, which extended the scope of impeachable offenses to include high treason or any criminal crime, Article 152 limits the scope to include only high treason or felony.⁶⁴ Regarding the first offense, given that Article 152 failed to define the crime of high treason and that Law No. 247/1956 lacks a definition,⁶⁵ the definition of a high treason crime should be determined according to the penal code as well as Law No. 79/1958, regarding the prosecu-

60. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 152.

61. *Id.*

62. According to Article 153, “if a temporary impediment prevents the President from exercising his duties, the Prime Minister takes over his responsibilities.” *Id.* at art. 153. Thus, since Article 152 treats presidential impeachment as a “temporary impediment,” the prime minister should assume the presidency until a verdict is reached in the impeachment case. *Id.* at art. 152.

63. *Id.*

64. *Id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, as amended, May 22, 1980, May 25, 2005, Mar. 26, 2007.

65. Law No. 247/1956 served under the Constitution of 1956 and regulated the trial of the president and the ministers. It impeached the president for the commission of treason or disloyalty to the republic regime, and listed acts of disloyalty to the republic regime to be: (a) seeking to overthrow the republic regime in favor of a monarchy; (b) or suspending all or part of the country’s constitution or amending its provisions without following the terms and rules prescribed in the constitution. However, it did not define what is meant by the crime of treason as an impeachable offense. According to the explanatory memorandum of the law, acts that constitute the crime of treason are to be determined according to provisions of the penal code. Law No. 247 of 1956, *Al-Jarida al-Rismiyyah*, 14 June 1956 (Egypt).

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tion of ministers in both the Egyptian and Syrian territories, after Egypt had entered a political union with Syria in 1958.⁶⁶

On the other hand, Article 152 listed felony as the second category of impeachable offense. As mentioned above, the Egyptian penal code classifies crimes as felonies, misdemeanors, or violations, and it defines felonies as crimes that are punished with death, life imprisonment, aggravated imprisonment, and imprisonment.⁶⁷ Consequently, according to Article 152, impeachment procedures should be invoked against the president if he commits a crime that is punishable by death, life imprisonment, aggravated imprisonment, or imprisonment.

Regarding the question of how to impeach, the 2012 Constitution followed that of 1971 by Article 152's requirement that at least one-third of the members of the House of Representatives support the impeachment resolution against the president to be considered, and that an impeachment decision against him requires a two-thirds majority vote to pass.⁶⁸ As mentioned earlier, the requirement of special majorities is likely to hinder any attempt to render the executive accountable for his misconduct, since such majorities are required just to submit an impeachment resolution and to indict.⁶⁹ Indeed, the role of the investigation committee found in Article 10 of Law No. 247/1956, to investigate the impeachment resolution and ensure its seriousness, is likely to help prevent malicious resolutions without requiring a special majority to submit such resolutions in the legisla-

66. Law No. 79/1958 was issued by a presidential decree with the force of law on June 22, 1958, and replaced the provisions of Law No. 247/1956 regarding the prosecution of ministers. The law did not address the possibility to impeach the president; however, it only called for impeaching ministers if they committed certain crimes such as, "(1) high treason; (2) violation of the basic provisions in the constitution; (3) any act or behavior that causes an increase or decrease in prices of commodities, real estate, governmental securities, or securities of the stock markets to obtain a personal benefit or for a third party; (4) influence peddling; (5) deliberate violation of laws and regulations that costs the state or a public domain entity a financial loss; (6) any act or behavior that means an interference in the work of the judiciary or any entity with judicial jurisdiction; and (7) interference in the election or the referendum process to direct its result either by issuing illegal orders or using illegal procedures." Law No. 79 of 1958, *al-Jarida al-Rismiyyah*, 22 June 1958 (Egypt).

67. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *al-Jarida al-Rismiyyah*, Aug. 1937 (Egypt).

68. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 152.

69. *Id.*

tive chamber.⁷⁰ Likewise, a two-thirds majority to indict the executive could be a further obstacle to thwart the impeachment process, especially if such a special majority is required to convict.

In determining the court of impeachment, it should be noted that the 2012 Constitution followed that of 1971 in establishing a bicameral legislature, the House of Representatives and the Shura Council.⁷¹ However, unlike the 1971 Constitution, which assigns the Shura Council with only consultative functions, the 2012 Constitution followed that of 1971 in establishing a bicameral legislature, the House of Representatives and the Shura Council.⁷² However, unlike the 1971 Constitution which assigns the Shura Council with only consultative functions, the 2012 Constitution expands the functions of the Shura Council to include passing laws,⁷³ assuming legislative powers that were previously shared with the House of Representatives in case this latter is dissolved,⁷⁴ and approving the presidential appointments of the chairmen of the independent bodies and supervisory organs.⁷⁵

However, the 2012 Constitution did not designate the Shura Council as the court of impeachment to try the president after being impeached by the House of Representatives; rather, it assigned a special tribunal for this task.⁷⁶ Specifically, Article 152 stipulates:

The President of the Republic is to be tried before a special court headed by the President of the High Council of Judges and staffed by the senior deputies of the President of the Supreme Constitutional Court and the State Council, and the two most senior presidents of the appeals courts. The Public Prosecutor assumes the role of prosecutor. If the most senior person is unable to play his part, the person next in seniority takes his place.⁷⁷

70. Law No. 247 of 1956, *Al-Jarida al-Rismiyyah*, 14 June 1956 (Egypt).

71. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 82.

72. “The legislative power consists of the House of Representatives and the Consultative Assembly. Each exercises its authority in accordance with the Constitution.” *Id.*

73. *Id.* at art. 102.

74. *Id.* at art. 131.

75. *Id.* at art. 202.

76. *Id.* at art. 152.

77. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 152.

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In fact, a cursory examination of this special court reveals that it has a predominantly judicial formation. Unlike, Article one of Law No. 247/1956, which designated a special court of twelve members (half of them are parliamentary members) to try the president, the court of impeachment designated by Article 152 of the 2012 Constitution did not include any parliamentary representation.

Once again, Article 152 reduced the parliamentary role in the impeachment trial when it assigned the Public Prosecutor the task of presenting the case against the president instead of requiring the House of Representatives to appoint managers to do so.⁷⁸ In practice, designating the Public Prosecutor to present the impeachment case against the president is likely to hurt the neutrality of the case. More precisely, according to Article 173, the Public Prosecutor is appointed by the president upon a recommendation from the Supreme Council of Judges.⁷⁹ Consequently, the president is directly involved in the appointment of the Public Prosecutor who would present the case of impeachment against him, a situation that confers considerable doubt upon the neutrality of the impeachment process.⁸⁰

In determining punishments for impeachment, Article 152 requires the law should specify the sentence; however, if convicted, the president is to be removed from office. Thus, according to the article, punishment for impeachment would be removal from office in addition to sanctions prescribed in law, which in this case would be

78. *Id.*

79. Article 173 required the Supreme Council of Judges to choose the Public Prosecutor from among the deputies to the President of the Court of Cassation, the presidents of the appeals courts, and the assistant public prosecutors. *Id.* at art. 173.

80. Indeed, one can argue that according to Article 173, the Supreme Council of Judges plays the vital role in the process of appointing the Public Prosecutor by choosing him, and that the role of the president is limited to issuing a presidential decree to enforce the choice. However, in fact, a careful examination of Article 173 reveals that the process of appointing the Public Prosecutor requires that two different actors take two separate actions: (1) the Supreme Council of Judges to choose, (2) and the president to enforce the choice through a presidential decree. Thus, the presidential role in such appointment is evident and indeed indispensable given that the Article 173 did not address the case of who should prevail if the president refuses the choice of the Supreme Council of Judges. *Id.*

the penal code as well as Law No. 247/1956.⁸¹ The penal code governs punishment for felonies—death, life imprisonment, aggravated imprisonment, or imprisonment.⁸² On the other hand, Law No. 247/1956 sets the punishment for high treason—death or life or aggravated imprisonment.⁸³ Adopting the approach of the previous constitutions, Article 152 ignored any mention of disqualification as a possible punishment for impeachment; however, as mentioned above, according to Article 25 of the penal code, disqualification is an ancillary penalty that should be imposed in case of a felony conviction.⁸⁴

It is evident that Article 152 failed to confirm the political nature of the impeachment process. Specifically, the article neglected to define the crime of high treason as an impeachable offense against the president, making referral to the penal code and Law No. 247/1956, which lists criminal punishments for high treason, inevitable. Further, the article's approach in designating the court of impeachment with a purely judicial formation, lacking any parliamentary representation, raises considerable doubts, i.e., whether the impeachment process is of a political nature in that it requires the involvement of the people's representatives in the trial of the president; or whether it is of a criminal nature in that a regular judicial court is sufficient to try the president.

In fact, the 2012 Constitution would have been an ideal opportunity to adopt an impeachment clause to ensure the political accountability of the president, not only because it was the outcome of a popular uprising that toppled a defiant dictator, but also because it maximized the political role to be played by the president. More precisely, the Constitution designated the president as an arbiter between the three governmental powers when Article 132 assigned him the role of maintaining separation of powers.⁸⁵

The concept of presidential arbitration was first introduced by President Charles de Gaulle of France and was adopted in the French

81. *Id.* at art. 152.

82. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *al-Jarida al-Rismiyyah*, Aug. 1937 (Egypt).

83. Law No. 247 of 1956, *al-Jarida al-Rismiyyah*, 14 June 1956 (Egypt).

84. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *al-Jarida al-Rismiyyah*, Aug. 1937, art. 25 (Egypt).

85. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 132.

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Constitution of 1958.⁸⁶ According to this concept, the president was assigned a new role and thereby became more involved in political life of the nation as his role developed from merely guaranteeing the safeguards to enable each power to function properly, to becoming an actual arbiter between them.⁸⁷ Consequently, the political accountability of the president should have been raised to a level commensurate with his new political role, in order to help curb any official misconduct.

Ironically, the 2012 Constitution included a clause that is likely to relieve the president from most of his political accountability.⁸⁸ According to Article 141, the president assumes his powers through the prime minister and the prime minister's deputies and ministers, except for powers of defense, national security, foreign policy, appointing the prime minister and civilian and military public officials, representing the state and concluding treaties, declaring war and emergency, issuing pardons and reducing sentences.⁸⁹ Accordingly, this article assumes two scenarios, both of which negate the political accountability of the president.⁹⁰ First, the article could be construed to mean that powers – such as dissolving the parliament, enforcing laws, setting out the state's public policy, and issuing presidential decrees with the power of law – are to be performed only by the prime minister, his deputies, or the ministers, without there being any role for the president.⁹¹ In this scenario, the cabinet would be solely accountable for the consequences of such actions.⁹² Alternatively, the article could be interpreted as designating the cabinet to be the prin-

86. “The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties.” FRENCH CONSTITUTION OF 1958, Art. 5.

87. MICHEL BELANCER, CONTRIBUTION A L'ETUDE DE LA RESPONSABILITE POLITIQUE DU CHEF DE L'ETAT 1276 (1979).

88. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 141.

89. Nariman Youssef, *Egypt's Draft Constitution Translated*, EGYPT INDEP. (Feb. 12, 2012), art.166, <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

90. *Id.*

91. Zaid Al-Ali, *The Constitutional Court's Mark on Egypt's elections*, FOREIGN POL'Y (Jun. 6, 2013), <http://foreignpolicy.com/2013/06/06/the-constitutional-courts-mark-on-egypts-elections>.

92. Youssef, *supra* note 89.

principal, and delegating those powers to the president. Consequently, if the president committed misconduct during his exercise of the delegated powers, the responsibility would be divided between him and the principal (cabinet), and the latter would bear most of it.⁹³

Finally, regarding ministerial impeachment, Article 166 of the 2012 Constitution granted the President, the Public Prosecutor, and one-third of the House of Representatives the right to submit a motion to impeach the prime minister or a member of the cabinet for crimes committed during or because of their tenure, whereas a decision to impeach can only be issued by two-thirds of the membership of the House of Representatives.⁹⁴ It is evident that the article did not list impeachable offenses; however, according to Law No. 79/1958, members of the cabinet can be impeached for the following reasons: high treason, violation of the basic provisions in the constitution, manipulation of prices of commodities, real estates, governmental securities, or securities of the stock markets to obtain a personal benefit or for a third party, influence peddling, violation of laws and regulations that costs the state or a public domain entity a financial loss, interference in the work of the judiciary or any entity with judicial jurisdiction, or interference in the election or the referendum process to direct its result either by issuing illegal orders or taking illegal procedures.⁹⁵

Further, the article required the impeached official to stop all work until a verdict is reached and stated that termination of his service does not preclude a prosecution. Ultimately, since the article did not determine the court of impeachment and the trial procedures, Law No. 79/1958 should govern these issues.

93. *Id.*

94. *Id.*

95. *First: Political Headlines*, ARAB REPUBLIC OF EGYPT MINISTRY OF FOREIGN AFFAIRS (Jun. 8, 2006), <http://www.mfa.gov.eg/English/MediaCenter/ForeignMedia/Pages/PressDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&newsID=0500a298-e562-48afa08c-cc8d2f0341b1>; Law No. 46 of 1972 (Civil Code), *al-Jarida al-Rasmiyya*, 28 Oct. 1972, No. 77(2) & 119 (Egypt).

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The Constitution of 2014

A. Background

The Muslim Brotherhood's gateway into Egypt's political life was the 2011 Revolution. After their recognition as a banned group during Mubarak's era changed to a recognized political power, they established a political party (The Freedom and Justice Party), which dominated the 2012 parliament with the Salafists, and their candidate Mohamed Morsi winning the presidency.⁹⁶

However, right from the start, it seemed that Morsi's days in the presidency were limited. Morsi's dramatic fall started with his 2012 Constitutional Declaration. On November 22, 2012, Morsi issued a constitutional declaration immunizing the Constituent Assembly responsible for drafting the 2012 Constitution from being dissolved by the judiciary, as well as immunizing its work from being challenged in courts,⁹⁷ in violation of the 2011 Constitutional Declaration issued by the SCAF that it would serve as the country's fundamental law pending the drafting of a new constitution.⁹⁸ Moreover, the declaration dismissed the Prosecutor General Abdul Majid Mahmoud, who was appointed by Mubarak, and replaced him with one of Morsi's allies in violation of the Judicial Authority Act.⁹⁹ Morsi's declaration ordered a retrial for those accused of killing the protesters in Mubarak's era by the Egyptian courts.¹⁰⁰ Further, the declaration immunized Morsi's presidential decrees from judicial oversight¹⁰¹ and authorized him to take any necessary measures to protect the revolution.¹⁰²

96. *Freedom and Justice Party*, ENCYCLOPEDIA BRITANNICA (2015), <http://www.britannica.com/topic/Freedom-and-Justice-Party>.

97. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 5.

98. "The text of law forbids any action or administrative decision from being absolved of judicial oversight." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 23 Mar. 2011, art. 21.

99. *Id.* at art. 3. "The Supreme Judicial Council considers all matters related to the appointment, promotion, transference, delegation, and loaning of judges and public prosecutors . [T]he General Prosecutor could [resign his office] asking to return to the judiciary." Law No. 46 of 1972 (Civil Code), *al-Jarida al-Rasmiyya*, 28 Oct. 1972, No. 77(2) & 119 (Egypt).

100. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 1.

101. *Id.* at art. 2.

102. *Id.* at art. 6.

Indeed, the 2012 Constitutional Declaration's approach in immunizing presidential decrees, the work of the Constituent Assembly, from judicial oversight, and dismissing the prosecutor general and ordering a retrial for those who had been previously acquitted, upset the general public and lead to massive protest movements against President Morsi.¹⁰³ Likewise, the declaration aroused the anger of the judiciary to such an extent that the Supreme Judicial Council stated the declaration was an "unprecedented assault on the independence of the judiciary and its rulings."¹⁰⁴

In response to the declaration, *Gabihet al-enkaz al-watani* (National Salvation Front), a coalition of certain liberal parties and political figures, was formed.¹⁰⁵ The Front asked Morsi to rescind the declaration and claimed that he lost legitimacy when he refused to do so.¹⁰⁶ Later on, under the pressure of wide protests, Morsi agreed to amend the declaration and to limit the scope of his immunized decrees to include only "sovereign matters."¹⁰⁷ Further, he agreed that there would be retrials for those who had been previously acquitted only if new evidence was presented.¹⁰⁸ Nevertheless, these concessions did not sufficiently quell public outrage against Morsi.

In fact, it was not only the 2012 Constitutional Declaration that outraged the general public against president Morsi. The 2012 Con-

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103. Mohamed El Baradei described the declaration as follows, "Morsi today usurped all state powers & appointed himself Egypt's new pharaoh." Michael Birnbaum, *Egypt's President Morsi takes sweeping new powers*, WASH. POST (Nov. 22, 2012), http://articles.washingtonpost.com/2012-11-22/world/35512324_1_morsi-new-powers-muslim-brotherhood.
104. *Egypt's Top Judges Slam Morsi's New Powers*, BBC NEWS (Nov. 24, 2012), http://www.cbsnews.com/8301-202_162-57553859/egypts-top-judges-slam-morsis-new-powers/?pageNum=2.
105. *Profile: Egypt's National Salvation Front*, BBC (Dec.10, 2012), <http://www.bbc.com/news/world-middle-east-20667661>. The National Salvation Front was formed on November 22, 2012, in response to the 2012 Constitutional Declaration. The Front included a coalition of thirty-five political parties as well as political figures and activists, all of whom belonged to the liberal-leftist bloc. The Front significantly contributed to mobilizing the public opinion against Morsi and the whole regime by heavily criticizing his policies. *Id.*
106. *Id.*
107. *Egypt: Who Holds Power?*, BBC (July 3, 2013), <http://www.bbc.co.uk/news/world-middle-east-18779934>.
108. Mohamed Fadel Fahmy & Jason Hanna, *Egypt's Morsi Says Court Can't Overturn Him*, CNN (Nov. 23, 2012), <http://www.cnn.com/2012/11/22/world/meast/egypt-morsy-powers/>.

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stitution itself significantly contributed in escalation of the outrage. Many Egyptians doubted the legitimacy of the 2012 Constitution for several reasons including the low approval rating and population turnout in the referendum, several boycott movements from the liberal bloc, the widely disseminated message that the constitution restricted freedoms and imposed a strict religious ideology, and the Islamists' dominance over the formation of the Constituent Assembly.

Morsi's poor performance as a ruler made matters even worse. According to Morsi's opponents, he desperately attempted to erase Egypt's moderate-diverse identity through his approach in *Akhwanet* "Brotherhooding"¹⁰⁹ the country by favoring his party's fellows and appointing them to leadership positions.¹¹⁰ Moreover, Morsi defiantly ignored the several calls, prompted by its apparent poor performance failure to meet the people's economic demands and expectations, to dismiss the government.¹¹¹ Further, police brutality persisted during Morsi's regime.¹¹²

109. Matt Bradley & Reem Abdellatif, *Five Things to Know About Egypt Protests*, WALL ST. J. (July 1, 2013), <http://blogs.wsj.com/middleeast/2013/07/01/five-things-to-know-about-egypt-protests/>.

110. Tara Rhodes, *Protests in a New Perspective: A Discourse Analysis of the Arab Spring*, APSA Ann. Meeting Paper (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302074&download=yes.

111. Dahlia Kholaf, *Morsi's downfall hammers Hamas*, AL-JAZEERA (July 10, 2013), <http://www.aljazeera.com/indepth/features/2013/07/2013710113757741999.html>. On July 24, 2012, President Morsi appointed Hesham Qandil as Egypt's prime minister. Besides the fact that Qandil's appointment was met with tremendous objections due to his inexperience, Qandil's cabinet also displayed a pitiful performance in dealing with Egypt's economic and political challenges. For instance, instead of focusing on how to develop and use the country's resources, the cabinet depended on foreign subsidies and aid, especially from Qatar, and entered negotiations with the International Monetary Fund to provide the country with a \$4.8 billion dollar loan. Further, the cabinet proved a great dismal failure on the diplomatic front, when it failed to reach an agreement with Ethiopia regarding *Sad Al-nahda* (Renaissance Dam), which is believed to be causing a significant reduction of water availability in Egypt. On July 3, 2013, an Egyptian appeals court upheld a verdict dismissing Qandil's cabinet and sentencing him to one year in prison for refusing to execute a judicial judgment to re-nationalize Tanta Flax and Oil Company after it was sold to private interests in 2005. During Qandil's cabinet, Egyptians continued to suffer from high prices, fuel shortag-

The deteriorating security state in the country must also not be overlooked. Morsi was blamed for failing to restore security after the chaotic conditions that followed the 2011 Revolution. In fact, the security situation became even worse during his regime.¹¹³ Many Egyptians attributed blame for worsening the nation's security to Morsi when he granted presidential pardon for Islamist extremists convicts,¹¹⁴ including *Al-Gama'a al-Islamiyya* (The Islamic Group), a

es, and power outages. Many Egyptians and analysts claimed that as a result of Morsi's friendly relations with the Hamas government, he had allowed fuel to be smuggled out through the underground tunnels in Sinai to the Gaza Strip, which caused the fuel shortages and power outages in Egypt. *Id.*

112. Yolande Knell, *Egypt police beating: The strange case of Hamada Saber*, BBC (Feb. 4, 2013), <http://www.bbc.co.uk/news/world-middle-east-21330132>; *Egypt protester El-Gendy was tortured: Security sources*, AHRAM ONLINE (Feb. 6, 2013), <http://english.ahram.org.eg/NewsContent/1/64/64151/Egypt/Politics-/Egypt-protester-ElGendy-was-tortured-Security-sour.aspx>. For instance, on February 1, 2013, protesters against president Morsi marched to *Itahadia*, the presidential palace asking Morsi to resign his office and allow early presidential election. The protesters clashed with the police forces as well as Morsi's supporters. The police showed excessive force, using tear gases and snipers against the protesters. Moreover, on February 3, 2013, the Egyptian media unveiled a video of a man who had been stripped naked, dragged, and beaten by the police before being put in a police van. The man, who was identified as an unemployed fifty-year-old named Hamada Saber, appeared on state television from a police hospital where he claimed that he was beaten by protesters who took his money and clothes. However, after he was moved to a public hospital, he changed his testimony, claiming that he was beaten and stripped naked by the police forces and that he had been forced to give false testimony, as he feared further police abuse. Further, On February 4, 2013, Mohamed El-gendy, a political activist, died in a hospital because of the grave injuries he suffered after being arrested, detained, and tortured by the police. *Id.*
113. Martin Chulov & Patrick Kingsley, *Mohamed Morsi ousted in Egypt's second revolution in two years*, GUARDIAN (July 4, 2013), <http://www.theguardian.com/world/2013/jul/03/mohamed-morsi-egypt-second-revolution>.
114. In fact, many of the released Islamist convicts were responsible for the hate speeches against Egypt's Christians and anti-Morsi activists. Indeed, these Islamists tried to implant in the people's minds that those who oppose Morsi in fact oppose Islam and God's rule. Mohamed Fadel Fahmy, *The Jihadist Threat in Egypt's Sinai*, AL-MONITOR: THE PULSE OF THE MIDDLE EAST (July 22, 2013), <http://www.al-monitor.com/pulse/originals/2013/07/jihad-threat-egypt-sinai.html>.

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prominent extremist Islamic group,¹¹⁵ and allowing them into Egypt's social and political life.¹¹⁶

In April 2013, Morsi continued to ignore the public outrage as the severity of violence continued to escalate. A political youth activist group founded *Haraket Tamarod* (Rebel Movement) with the intention of collecting signatures calling for President Morsi to step down and allow an early presidential election.¹¹⁷ After announcing that it had successfully secured more than twenty-two million signatures against the regime,¹¹⁸ *Tamarod* called for massive demonstrations on June 30, the first anniversary of Morsi's inauguration, in Tahrir Square and around the presidential palace.¹¹⁹ By June 30, millions of Egyptians flooded the streets nationwide in rage over Morsi's regime, and the popular chant *Al-sha'ab Yureed Esqaat al-Nizam* ("The people want to topple the regime") could be heard loudly.¹²⁰ Amid these circumstances, on July 1, the Commander-In-Chief of the Egyptian Armed Forces General Abdul Fattah el-Sisi issued a 48-hour ultimatum, giving Morsi until July 3 to reach a political com-

115. *Al-Gama'a al-Islamiyya* ("the Group") was founded in the early 1970 in Egypt for the purpose of *jihad*, establishing an Islamic state and reviving the Caliphate system. The Group's activity was always accompanied with by extreme violence. For example, the Group was responsible for the assassination of President Sadat in 1981 and for the killing of more than 100 policemen and soldiers in Asyut city in southern Egypt. Further, in 1997, the Group was responsible for the Luxor massacre of least 62 people, most whom were Swiss tourists, in Luxor city. The United States and the European Union list *Al-Gama'a al-Islamiyya* as a terrorism group. Tom Perry, *Egypt's Mursi frees Islamists jailed by Mubarak*, REUTERS (July 31, 2012), <http://www.reuters.com/article/2012/07/31/us-egypt-mursi-pardon-idUSBRE86U13K20120731>.

116. For instance, on June 17, 2013, President Morsi appointed Adel el-Khayat, an Islamists who belongs to *Al-Gama'a al-Islamiyya*, as governor of Luxor, a major tourism city in Egypt. In fact, the appointment sparked the anger of the Egyptians since it is know that *Al-Gama'a al-Islamiyya* was linked to the Luxor massacre. *Id.*

117. Mbaye Lo, *Morsi, the last caliph-president of Egypt*, MONDOWEISS (July 28, 2013), <http://mondoweiss.net/2013/07/morsi-the-last-caliph-president-of-egypt>.

118. Nada Hussein Rashwan, *Egypt's 'Rebel' Campaign Gathered 22 mn Signatures, Says Spokesman*, AHARAM ONLINE (June 29, 2013), <http://english.ahram.org.eg/NewsContent/1/64/75244/Egypt/Politics-/Egypts-Rebel-campaign-gathered—mn-signatures,-say.aspx>.

119. *Egypt on the Brink: Nationwide Protests Call for Morsi's Ouster*, N.Y. POST (June 30, 2013), <http://nypost.com/2013/06/30/egypt-on-the-brink-nationwide-protests-call-for-morsis-ouster/>.

120. *Id.*

promise and meet the demands of the people.¹²¹ The following day, as the Army's ultimatum deadline approached, Morsi addressed the nation rejecting the Army's ultimatum and refusing to resign declaring "he would defend legitimacy and his office with his life"¹²²

By the end of the ultimatum and under the pressure of massive demonstrations, on July 3, General El-Sisi announced that Morsi was removed from power.¹²³ Further, General El-Sisi announced the suspension of the 2012 Constitution and installed Chief Justice Adly Mansour as an interim president during a transition period until a new constitution could be drafted and new presidential and parliamentary elections could be held.¹²⁴

Following his ousting, Morsi was arrested and detained.¹²⁵ Further, the Egyptian Public Prosecution Authority charged him and leaders of the Muslim Brotherhood with inciting police forces and their allies to kill the protesters,¹²⁶ and with collaboration with a foreign entity to escape from prison after the 2011 Revolution.¹²⁷ Morsi

121. Salma Abdelaziz, Reza Sayah & Ben Wedeman, *Egypt's military gives Morsy ultimatum*, CNN (July 2, 2013), http://edition.cnn.com/2013/07/01/world/meast/egypt-protests/index.html?hpt=hp_t1.

122. *Egypt's Mohammed Morsi Defiant as Protest Deaths Rise*, BBC (July 3, 2013), <http://www.bbc.co.uk/news/world-middle-east-23154233>. In fact, Morsi's opponents saw this statement as the green light to his supporters and allies to crack down on his protesters and demonstrators. Likewise, many analysts as well as political activists interpreted the president's statement to mean a call for a civil war. *Id.*

123. David Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken Into Military Custody*, N.Y. TIMES (July 3, 2013), http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html?_r=0.

124. *Id.*

125. *What's Become of Egypt's Morsi*, BBC (June 16, 2015), <http://www.bbc.com/news/world-middle-east-24772806>.

126. The Prosecution Authority based the accusation against Morsi on the events that took place in December 2012, when masses of protesters organized a sit-in at the presidential palace and the security forces were so reluctant to protect the palace. Consequently, leaders of the Muslim Brotherhood called their supporters to defend the palace and the president. As president Morsi did nothing regarding this call, many of the Brotherhood and the president supporters attacked the protestors causing many injuries and deaths among them. *Id.*

127. During the events of the 2011 Revolution, on January 28, president Morsi was arrested and detained in *Wadi el-Natroun*, before being released along with some fellows in the Muslim Brotherhood two days later under suspicious circumstances. Indeed, amid the chaotic atmosphere that accompanied the 2011 Revolution, many prisons were broken into by unknown people and thousands of prisoners, including president Morsi, were able to escape. In June 2013, while investigating a case against an inmate who had

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made his first appearance in court on November 4, 2013, making him the second Egyptian president to be criminally prosecuted in almost three years.¹²⁸

Pursuant to a constitutional declaration issued on July 8, 2013, a ten-member committee of legal experts was formed by a presidential decree to amend the Constitution of 2012 before having these amendments discussed by a fifty-member committee representing major stakeholders in Egyptian society.¹²⁹ The amended constitutional copy was approved in a public referendum in January 2014.¹³⁰

B. Impeachment in the 2014 Constitution

Article 159 of the 2014 Constitution provides,

A charge of violating the provisions of the Constitution, high treason or any other felony against the President of the Republic is to be based on a motion signed by at least a majority of the members of the House of Representatives. An impeachment can only be issued by a two-thirds majority of the members of the House of Representatives and after an investigation to be carried out by the Prosecutor General. If there is an impediment, he is to be replaced by one of his assistants.¹³¹

fled, and after hearing the testimonies of police officials and intelligence agents, Ismailia Criminal Court blamed the Palestinian militant group Hamas for helping the prisoners to escape during the revolution including those detained in *Wadi el-Natroun*. Further, the Court emphasized that strong evidence confirms that president Morsi and the Brotherhood's leaders conspired with Hamas for the jailbreak. *Id.*

128. Kirkpatrick, *supra* note 123.

129. According to Article 28 of the declaration, two members of the Supreme Constitutional Court and its College of Commissioners, and two of the judges of the State Council, and four constitutional law professors should be represented in the Committee of Ten. Article 29 provided that members of the Committee of Fifty should represent Political parties, Workers, Peasants, Members of Labor Unions and Federations, National Councils, Churches, Al-Azhar, Armed Forces, Police, and Public figures. Also, the committee should include at least ten youth from both sexes. Mohamed Abdelaal, *Reforming the Constitution of Egypt: An Ugly Institutional Competition*, C.J.I.C.L. (Mar. 25, 2015), <http://cjcil.org.uk/2015/03/25/reforming-the-constitution-of-egypt-an-ugly-institutional-competition/>.

130. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014.

131. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 159.

At the outset, it seems that Article 159 follows the same impeachment mechanism found in Article 152 of the 2012 Constitution, with only two slight differences regarding the impeachable offenses and the majority rule required to impeach the president. Unlike Article 152 of the 2014 Constitution, under which the president could be impeached only for committing high treason or felony, Article 159 of the 2014 Constitution added violation of the constitution as a possible impeachable offense.

In fact, it seems that President Morsi's misconduct (when in violation of the 2011 Constitutional Declaration he immunized his presidential decrees as well as the work of the Constituent Assembly from judicial oversight) was the motive that urged the drafters to include "violation of the constitution" as an impeachable offense when committed by the president. Further, listing violation of the constitution as an impeachable offense enhances the political sense of the process of presidential impeachment, given that criminality overshadows offenses like high treason and felony in the content of the Egyptian legislation and jurisprudence.

Second, unlike Article 152 of the 2012 Constitution, which required at least one-third of the members of the House of Representatives to sign the impeachment resolution against the president, Article 159 of the 2014 Constitution requires that such resolution be signed by a majority of the members of the House of Representatives.¹³² Despite that difference, both Articles require a two-thirds majority of the House to impeach the president.¹³³ As mentioned, requiring any kind of majority to submit an impeachment resolution seems unreasonable since it acts as an undue. Further, a simple majority in the House seems sufficient to impeach the president simply because a decision to impeach represents the indictment against the president, not the conviction.

In case an impeachment decision is reached, Article 159 requires "the President of the Republic to cease all work [in which] this is treated as a temporary impediment preventing the President from car-

132. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 152;
CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 159.

133. *Id.*

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rying out presidential duties until a verdict is reached in the case.”¹³⁴ According to Article 160, if the president encounters a temporary impediment that renders him unable to exercise his official duties, the prime minister should take over the presidency.¹³⁵ Consequently, if the president is impeached in the House, the prime minister should assume the office of presidency until a verdict is reached.¹³⁶

Interestingly, the Article states that the House can only be convened to vote on impeaching the president after the Prosecutor General has investigated the case. The Article is extremely vague regarding whether the Prosecutor General should replace the committee of investigation found in Law No. 247/1956, responsible for investigating the impeachment resolution and for filtering any partisan interest or malicious motive. Further, the 2014 Constitution followed the same course of the 2012 constitution regarding the appointment of the Prosecutor General, stating that the Prosecutor General is to be selected by the Supreme Judicial Council and appointed by a presidential decree,¹³⁷ which again guarantees the involvement of the president in the process of the prosecutor’s appointment.¹³⁸ Thus, designating the Prosecutor General to investigate the case against the president could hurt the impartiality of the impeachment process.¹³⁹

In designating the court of impeachment, the 2014 Constitution adopted the same formation introduced in the 2012 Constitution, in which Article 159 provided,

The President of the Republic is tried before a special court headed by the president of the Supreme Judicial Council, and with the membership of the most senior deputy of the president of the Supreme Constitutional Court, the

134. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 159.

135. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 160.

136. *Id.*

137. *Id.* “Public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge’s career.” *Id.*

138. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014.

139. *Id.*

most senior deputy of the president of the State Council, and the two most senior presidents of the Court of Appeals.¹⁴⁰

In fact, the approach of Article 159 in designating a special court to try the impeached president is justified by the fact that, unlike the 2012 Constitution, the 2014 Constitution established a unicameral parliament with only one legislative chamber, the House of Representatives.¹⁴¹ Consequently, the parliament lacks the upper house that could be vested with the power to try impeachments. Notably, Article 159 failed to avoid the criticism that it does not include any parliamentary representation, which was directed at the formation of the court of impeachment in the 2012 Constitution.

In addition, Article 159 did not follow Article 3 of Law No. 247/1956, stating that the House should elect managers to present the case; however, it designated the Prosecutor General to present the case of impeachment against the president before the court of impeachment, which is likely to harm the neutrality of the case.¹⁴² Further, according to the Article, the Prosecutor General is to investigate the case before the House convenes to vote, and if there is an impediment, one of his assistants should take over such investigation.¹⁴³ Moreover, the Article requires that if the Prosecutor General is impeded from presenting the case against the president, he should be replaced by order of seniority.¹⁴⁴ Consequently, a situation could occur wherein the Prosecutor General would investigate the case, but somebody else would present it.

The Article requires that the investigation and the trial procedures are to be organized by Law No. 247/1956.¹⁴⁵ Regarding punishment of impeachment, the Article requires the convicted president to be removed from office without prejudice to other penalties.¹⁴⁶ Ac-

140. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 159.

141. Records from the drafting process reveal that the drafters of the 2014 Constitution abolished the Shura Council found in the 2012 Constitution as the upper legislative chamber, arguing that it costs the state a financial burden without having a real legislative function. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014.

142. *Id.*; Law No. 247 of 1956, *al-Jarida al-Rismiyyah*, 14 June 1956. (Egypt).

143. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014.

144. *Id.*

145. *Id.*

146. *Id.*

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ording to Article 6 of Law No. 247/1956 and Article 10 of the penal code, these penalties would be death, life imprisonment, aggravated imprisonment, or imprisonment for high treason and felonies.¹⁴⁷ Further, Article 25 of the Penal Code requires disqualification from assuming public office if one of the previous penalties is secured against the convict.¹⁴⁸

Interestingly, in the course of enhancing presidential accountability, the 2014 Constitution took an unprecedented step stating that the House of Representatives may vote no confidence against the president.¹⁴⁹ Specifically, Article 161 stipulates that,

The House of Representatives may propose to withdraw confidence from the President of the Republic and hold early presidential elections upon a causal motion signed by at least a majority of the members of the House of Representatives and the approval of two-thirds of its members. . . Upon the approval of the proposal, the matter of withdrawing confidence from the President of the Republic and holding early presidential elections is to be put to public referendum by the Prime Minister. If the majority approves the decision to withdraw confidence, the President of the Republic is to be relieved from his post. . . .¹⁵⁰

In fact, Article 161 reveals the concerns of the constitutional drafters that after two uprisings, which toppled two regimes and severely affected the country politically and economically, a constitutional tool should be adopted to curb the presidential powers and redress presidential misconducts.¹⁵¹ Though these concerns are legitimately justified, the constitutional drafters addressed them in the wrong way. To be precise, subjecting the president to two different mechanisms to unseat him, impeachment and confidence withdrawal, reveals the great confusion the drafters had regarding systems of governance. On the first hand, a parliamentary vote of no-confidence is a

147. Law No. 58 of 1937, *Al-Jarida al-Rismiyyah*, 14 June 1956 (Egypt).

148. Law No. 58 of 1937 (The Penal Code), *al-Jarida al-Rasmiiyya*, Aug. 8, 1937, amended by Law No. 95 of 2003, *al-Jarida al-Rasmiiyya*, June 19, 2003 (Egypt).

149. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 161.

150. *Id.*

151. *Id.*

mechanism known in parliamentary systems to redress the executive where the president is a mere figurehead and the prime minister is the real executive. On the second hand, impeachment is the recognized tool in both presidential and semi-presidential systems to redress the executive's misconduct where the president is a powerful figure who is highly involved in managing the state. Provisions of the 2014 Constitution reveal that Egypt is not by any means a parliamentary republic, such as would be appropriate to include an article that the president could be overthrown by a parliamentary no-confidence vote. Further, despite the indispensability of having a constitutional tool that effectively holds the executive accountable for his official misconduct, the executive is likely to delegate most of his powers or to refrain from taking crucial decisions if he feels restricted by prosecution or removal. Accordingly, an attempt to trap the president between impeachment and the no-confidence vote would be of no use.

Finally, the 2014 Constitution recognized ministerial impeachment when Article 173 stated that,

[T]he Prime Minister and members of the government are subject to the general rules organizing investigation and trial procedures, if they commit crimes while exercising the functions of their posts or because of them. . . .In case of a charge of high treason against any members of the government, the provisions stipulated in Article 159 of the Constitution apply.¹⁵²

Indeed, a careful examination of the article reveals that it is untenably vague regarding the impeachable offenses against ministers. Specifically, the beginning of the article subjects the prime minister and members of the government to the general rules of investigation and trial procedures if they commit crimes while exercising their official duties, without precisely naming any crime.¹⁵³ Next, the end of the

152. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 173. In addition, Article 131 of the constitution granted the House of Representatives the right to withdraw confidence from the prime minister, his deputies, ministers, or their deputies upon at least one-tenth of the members of the House, whereas a decision to withdraw confidence requires a majority of members. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 131.

153. *Id.*

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article subjects the prime minister and members of the government to provisions of Article 159, regarding impeaching the president, if they commit high treason.¹⁵⁴ Consequently, the article considers high treason as the only offense that merits impeachment procedures against the prime minister and members of the government, whereas provisions of Law No. 79/1958 should govern the impeachment procedures and trial.¹⁵⁵ However, if the prime minister and members of the government committed any crime other than high treason that is related to the performance of their official duties, they should be subject to general rules of investigation and trial procedures, which in this case would be provisions of the Civil and Commercial Procedures Code, Criminal Procedures Code, and Penal Code.¹⁵⁶

In short, of fair assessment to the impeachment articles introduced in the 2014 Constitution reveals another failure in liberating the impeachment process from the dominance of criminality. Despite the fact that the 2014 Constitution introduced “violation of the constitution” as an offense meriting presidential impeachment, which helped to emphasize the political nature of the impeachable offense, it failed to define the crimes such as high treason and felony as impeachable offenses referring to Law No. 247/1956 and the Penal Code, which consider them criminal offenses.¹⁵⁷ Likewise, as mentioned in the context of the 2012 Constitution, designating a special court with a dominant judicial formation without any parliamentary involvement to try the president raises considerable problems in that the impeachment trial excludes participation by the people’s representatives.¹⁵⁸

154. Law No. 79 of 1958, *al-Jarida al-Rasmiyya*, 1958 (Egypt).

155. *Id.*

156. Law No. 13 of 1968, *al-Jarida al-Rasmiyya*, 5 Sep. 1968 (Egypt). Law No. 150 of 1950, *al-Jarida al-Rasmiyya*, 15 Oct. 1951, amended by Law No. 95 of 2003, *Al-Jarida Al-Rasmiyya*, 19 June 2003 (Egypt). Law No. 58 of 1937, *al-Jarida al-Risimiyyah*, 8 Aug. 1937, amended by Law No. 95 of 2003, *al-Jarida al-Rasmiyya*, 19 June 2003 (Egypt).

157. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, Mar.26, 2007, Jan. 18, 2014; Law No. 247 of 1956, *al-Jarida al-Rasmiyya*, 1956 (Egypt).

158. Law No. 58 of 1937, *Al-Jarida Al-Rasmiyya*, 8 Aug. 1937, amended by Law No. 95 of 2003, *al-Jarida al-Rasmiyya*, 19 June 2003 (Egypt).

Practicing Impeachment: The Case of President Morsi

An impeachment mechanism cannot be fairly judged until it is tested. Specifically, carrying out an impeachment could reveal to what extent a rigid impeachment provision is likely to achieve its purpose regarding the clearness of impeachable offenses and the efficiency of the legislative chamber in weighing the official misconduct and initiating the indictment procedures. Further, carrying out an impeachment tests the possibility of arguing and proving the official misconduct before the court of impeachment and the ease of access to governmental records.

The absence of a precedent in which an Egyptian president has been impeached and removed renders the determination of the standards of impeachment a challenging process. However, this section will create a hypothetical case of impeachment by subjecting President Mohamed Morsi to impeachment procedures. More precisely, it will address the question of what might have occurred if the Egyptians had chosen a constitutional tool to overthrow President Morsi and whether it may have been possible to remove him through impeachment.

Before proceeding to answer this question, it should be noted that the motive for examining President Morsi's case rather than President Mubarak's is that the ousting of the former is more recent and had serious repercussions. Further, the fact that President Morsi was an elected president who had assumed power through a popular election urges consideration of his ousting as a paradigm for an impeachment case that might have happened.

In the course of determining Morsi's misconduct, we should exclude crimes for which he is currently being prosecuted simply because most of them are criminal in nature, such as inciting the police to kill protesters. Moreover, crimes that could be construed to mean high treason offenses—such as Morsi's alleged collaboration with a foreign entity (the Palestinian militant group, Hamas) to escape from prison after the 2011 Revolution—were, if true, committed before he assumed power, though he was accused of them after his ouster. Likewise, we should also exclude misconduct that could be classified under the broad category of poor performance simply because impeachment is a very grave step that should not be triggered by a mere mistake in governance or bad political decision, as long as such mistake or decision does not entail a violation of the country's laws, con-

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stitution, or national interest. Further, it is hard to find a definite measuring stick for poor performance, since what may be regarded by some as a poor performance deserving of impeachment may not be so in the eyes of others.¹⁵⁹ Consequently, Morsi's conduct in refusing to dismiss an apparently inefficient cabinet and favoring his party's members, as well as his economic and political acts, should be excluded.

Having excluded Morsi's non-impeachable misconduct, the question becomes what misconduct can appropriately be considered in building the impeachment case against him. One could argue that Morsi's 2012 Constitutional Declaration, in which he immunized his presidential decrees and the work of the Constituent Assembly from judicial oversight in violation of the SCAF 2011 Constitutional Declaration and dismissed the Prosecutor General in violation of the Judicial Authority Act, constituted an impeachable offense.¹⁶⁰ Addi-

159. The Iraqi constitution of 2005 is the only constitution of an Arabic country that allows the impeachment of the president for crimes, certain of which could be classified as poor performance. Article 138(2) (D) reads, "The House of Representatives can remove any member of the Presidency Council by a majority of three-fourths of its members because of inefficiency or lack of integrity." Article 138, Section 2, *Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005*. Ali Youssef Al-shoukry defines lack of integrity to mean, "abusing using the office of the presidency to achieve material or moral illegal gains." Further, he defines presidential inefficiency to mean "incapacity and inability of the president to perform the constitutional functions entrusted to him." ALI YOUSSEF AL-SHOUKRY, *AL-TANASOB BAIN SOLTET RA'YES EL-DAWLA W MAS'OLYATHO FI AL-DASATIR AL-ARABIA [PROPORTIONALITY BETWEEN THE POWER AND THE RESPONSIBILITY OF THE PRESIDENT IN THE ARAB CONSTITUTIONS]* 170, 171 (2010).

160. In fact, the 2012 Constitutional Declaration raises the dilemma of the constitutionality of constitutional acts, specifically, whether constitutional acts and amendments can be subjected to judicial review to determine their constitutionality. The constitutions of some countries grant the Supreme and Constitutional Courts such powers, such as Art.146(a) of the 1991 Romanian Constitution. ROMANIAN CONSTITUTION, 1991, art. 146; Ion Deleanu & Emil Boc, *The Control of the Constitutionality of Laws in Romania*, 2(1) J. CONST. L. E. & C. EUROPE 119, 120, 124 (1995); Ioan Deleanu, *Separation of Powers: Constitutional Regulation and Practice of the Constitutional Court*, 3(1) J. CONST. L. E. & CENT. EUROPE 57, 63 (1996). See Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act*, 8(1) VIENNA J ON INT'L CONST. L. 29 (2014) (showing how the Czech Constitutional Court extended the scope of its judicial review to include the constitutionality of constitutional acts and analyzing the court's decision regarding declaring the Constitutional Act no 195/2009 coll, on Shortening the Fifth Term of Office of the Chamber of Deputies to be unconstitu-

tionally, his conduct in denigrating the judiciary in his public speeches, in which he blamed judges for acquitting Mubarak and his assistants and rigging elections and referenda during Mubarak's regimes, could be considered an impeachable offense. Further, his conduct in issuing a presidential decree reinstating the 2012 Islamist-dominated People Assembly, after it had been dissolved by a decision of the Supreme Constitutional Court (SCC), was potentially impeachable.¹⁶¹ Ultimately, one could see Morsi's decision to pardon the Islamist terrorist-convicts as an act that deserves impeachment, given that the decision likely contributed to the worsening of the already deteriorated security status in the country.¹⁶²

tional.) Despite the fact that the 2012 Constitutional Declaration was a constitutional act, its legitimacy is highly doubtful as compared to that of the 2011 Declaration. Specifically, the 2011 Declaration was approved by virtue of a popular referendum, and so gained its legitimacy from the approval of the public. In contrast, the 2012 Declaration was a unilateral act issued by a mere presidential decree, without subsequent approval by the public.

161. On June 14, 2012, the Supreme Constitutional Court ruled that the parliamentary election that inaugurated the People's Assembly was unconstitutional because one-third of the seats were illegitimately filled because political parties ran for independent seats, and ordered the dissolution of the entire legislative chamber. al- Mahkamah al-Dusturiyah al- Ulya [Supreme Constitutional Court], case no. 20, 2012. In fact, the Court's decision ignited the anger of Egypt's Islamists and pro-Morsi who blockaded the Court's building to overturn its ruling. As a result, on July 8, 2012, President Morsi issued a presidential decree ordering the re-institution of the dissolved legislative chamber ignoring the Court's decision. See Mohamed Abdelaal, *Egypt's Public Protest Law 2013: A Boost to Freedom or a Further Restriction?*, 9 US-CHINA L. REV. n5 (2014). Further, rumors started to leak that the SCC was considering dissolving the Constituent Assembly formed by the People Assembly to draft the 2012 Constitution, a matter which rushed the 2012 Constituent Assembly to vote on the constitutional draft in brief all-night sessions. NOAH FELDMAN, *THE FALL OF THE ARAB SPRING* 16, 17 (Yale Law School Occasional Paper, 2013).
162. Some politicians and activists blamed Morsi's decision to release the Islamist convicts for the turmoil and bombings that occurred after his ouster.

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The question, then, is judging these offenses according to the impeachment clause found in the 2012 Constitution, could President Morsi have been impeached? As mentioned before, Article 152 of the 2012 Constitution lists felonies and high treason as impeachable offenses if committed by the president.¹⁶³ For the sake of discussion, we will assume that Morsi committed this misconduct after the approval of the 2012 Constitution. The situation is that Morsi immunized his presidential decrees, dismissed the Prosecutor General, denigrated the judiciary, and pardoned convicted Islamic extremists. Although this misconduct seems to have been a clear violation of the 2012 Constitution, none of these acts are considered felonies or acts of high treason in the meaning of Article 152 of the 2012 Constitution. As mentioned earlier, according to Article 10 of the Penal Code, felonies are those crimes punishable by death, life imprisonment, aggravated imprisonment, and imprisonment.¹⁶⁴ Further, Article 5 of Law No. 79 of 1958 considers “every crime that affects the safety or the external or the internal security of the state, or the republic regime” to be high treason.¹⁶⁵ It is obvious that misconduct such as violating the law and the constitution, denigrating the judiciary, and pardoning radical convicts does not fall under the category of either felonies or high treason. Further, although the Egyptian Penal Code punishes public officials who refrain from executing a judicial ruling by imprisonment and removal from office, such offenses are considered misdemeanors that do not fall into the category of either impeachable felonies or treason.¹⁶⁶ Consequently, it would not likely have been possible to impeach President Morsi under the 2012 Constitution.

163. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 25, 2012, art. 152.

164. Law No. 58 of 1937, *al-Jarida al-Rasmiyya*, 8 Aug. 1937, *amended by* Law No. 95 of 2003, *al-Jarida al-Rasmiyya*, 19 June 2003 (Egypt).

165. Law No. 79 of 1958, *al-Jarida al-Rasmiyya*, art. 5, (Egypt).

166. “Imprisonment and removal from office shall be the penalty inflicted on any public official or civil servant who uses the authority of his position in suspending the execution or orders issued from the government, or the provisions of laws and statutes, or in delaying the collection of funds and fees, or deliberately refrain from executing a ruling or order issued by the court or by any competent authority.” Law No. 58 of 1937, *al-Jarida al-Rasmiyya*, 8 Aug. 1937, *amended by* Law No. 95 of 2003, *al-Jarida al-Rasmiyya*, 19 June 2003 (Egypt).

Regarding Morsi's crisis with the SCC, as mentioned before, the conflict escalated when Morsi issued a presidential decree ordering the reinstatement of the People's Assembly after it was dissolved by the SCC for its unconstitutional formation.¹⁶⁷ In delivering its decision, the SCC firstly argued that Law No. 108 of 2011, which replaced certain articles of Law No. 38 of 1971 regarding the organization of the People's Assembly, allowed political parties to run for independent seats as well as partisan seats in the People's Assembly, and thus one-third of the Assembly's seats had been illegitimately filled.¹⁶⁸ In the second part of its decision, the court recommended the dissolution of the entire assembly, grounding its reasoning on the idea that since the 2012 parliamentary election was conducted pursuant to an unconstitutional law, Law No.108 of 2011, the entire legislative assembly must be declared null.

A fair analysis of the Court's decision reveals that the Court's decision to nullify the Assembly's partisan seats was valid because Law No. 108 of 2011 allowed political parties to run for independent seats, and thus there was direct infringement of the principle of equality. However, the Court's decision to dissolve the entire legislative chamber was highly questionable. At first sight, the issue before the Court was only the constitutionality of Law No. 108 of 2011 in allowing political parties' candidates to run for independent parliamentary seats and to the requirement that independent candidates include which political party they were affiliated with in the final electoral sheet.¹⁶⁹ Accordingly, the Court's approach in proceeding to dissolve the entire Assembly is likely to be interpreted as having exceeded its jurisdiction. Moreover, not only did the Court go beyond its designed jurisdiction by recommending the dissolution of the Assembly, it did so above the will of the people who had elected the As-

167. See Mohamed Abdelaal, *Egypt's Public Protest Law 2013: A Boost to Freedom or a Further Restriction?*, 9 US-CHINA L. REV. n.5 (2014) [hereinafter *Public Protest Law*].

168. Law No.108 of 2011, *Al-Jarida Al-Rasmiyya*, 19 July 2011 (Egypt). "Candidates seeking membership of the People's Assembly should present their application in the constituencies allocated to [independent candidates]. [This provision] should be applied on candidates running on the list of political parties." *Id.* at art. 1.

169. "The Electoral Commission in each provision should prepare two final sheets; one includes names of independent candidates and the other includes names of partisan candidates. Each sheet must include the status of each candidate as well as the party to which he affiliates." *Id.* at art. 2.

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sembly's members. Further, it should be borne in mind that Mubarak appointed the Court's justices who issued this ruling and most of them opposed Morsi's rule and policies.¹⁷⁰ Thus, their desire to dissolve the Assembly just for being heavily dominated by the Islamists and the Muslim Brotherhood should be taken into account.¹⁷¹ Of course, one can sincerely argue that the law is the law and a judicial ruling must be honored regardless of the judge who issued it, especially if we know that Morsi's intent towards the SCC was not innocent, either. Specifically, Morsi did not try to render the Court free from the executive's influence. The 2012 Constituent Assembly, which was responsible for drafting the 2012 Constitution, deliberately "minimized the Court's membership from 18 justices to 11" in an attempt to control the Court and exclude justices who opposed Morsi.¹⁷² Likewise, the Constitution of 2012 followed that of 1971, granting the president the sole power to appoint the president of the Court.¹⁷³

One can sincerely argue that the law is the law and a judicial ruling must be honored regardless of the judge who issued it; however, when a ruling is highly questionable to the extent of challenging the will of the people, something should happen. Consequently, I think Morsi would not have been impeached for reinstating the dissolved Assembly simply because his conduct seems to have been an attempt to correct the Court's mistake given that the Court's decisions are final and cannot be judicially appealed.

Second, given the tense relations between President Morsi and the judiciary, the former engaged in a series of misconduct regarding insulting the judiciary and degrading its legitimacy. For instance, in one of his public speeches, President Morsi accused an Egyptian

170. After the issuance of the 2012 Constitutional Declaration, some of the Court's justices publicly criticized Morsi claiming that he has lost his legitimacy as a president for seizing powers and immunizing his decisions and decrees. *Id.*

171. *Id.*

172. Abdelaal, *supra* note 46, at 210.

173. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 25 Jan. 2012, art. 176 ("Appointments take place by a decree from the President of the Republic.") Law No. 48 of 1979, *al-Jwida al-Rasmiyya*, art. 5 (Egypt)(Further, the Court's law provides that "The President of the state has the sole power to appoint the president of the Court, while members of the Court are to be appointed by the President with the approval of the Supreme Judicial Counsel.")

judge named 'Ali El-Nimer of rigging elections and referendums conducted in Mubarak's era without providing any evidence.¹⁷⁴ Further, Morsi argued that at least twenty-two judges were corrupt and had to be investigated and dismissed from the judiciary.¹⁷⁵ According to Article 186 of the Egyptian penal code,

Whoever affronts by any of the foregoing methods, the standing, dignity, or authority of a judge in connection with a court action, shall be penalized with imprisonment for a period not exceeding six months and a fine of not less than five thousand pounds and not exceeding ten thousand pounds or either penalty.¹⁷⁶

Thus, in the meaning of the penal code, insulting or denigrating the judiciary is a misdemeanor that does not belong in the category of impeachable offenses under Article 152 of the 2012 Constitution, which allows impeachment of the president for felonies or treason.

Third, Morsi's conduct in pardoning convicts, while ignoring final judgments secured against them as well as the country's surge in insecurity, could be construed as an impeachable offense. Specifically, as mentioned earlier, Morsi pardoned many of the Islamic extremists who belong to *Al-Gama'a al-Islamiyya* (The Islamic Group), which has been responsible for many terrorist attacks in Egypt, and appointed one of its members as the governor of Luxor City despite being involved in the 1997 Luxor massacre of tourists. Additionally, shortly after assuming power, Morsi issued a presidential decree pardoning twenty-six convicts, some of whom had been sentenced to death for joining terrorist groups, inciting violence, and sabotaging police and military facilities.¹⁷⁷ It should be noted that one of those pardoned convicts is Wagdy Ghoneim, who was convicted of inciting violence against non-Muslims and funding terrorist militias, and has

174. Mariam Rizk, *Egypt: Islamist to be Tried for Insulting Judges*, ASSOCIATED PRESS (Oct. 12, 2013), <http://news.yahoo.com/egypt-islamist-tried-insulting-judges-155750489.html>.

175. *Id.*

176. Law No. 58 of 1937 (Promulgating the Penal Code), *al-Jarida al-Rasmiyya*, art. 186 (Egypt).

177. Law No. 75 of 2012 (Presidential Decree), *al-Jarida al-Rasimiyah*, 26 July 2012 (Egypt).

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been banned from entry to the United States, Canada, the United Kingdom, Switzerland, and Bahrain for glorifying violence and committing hate speech.¹⁷⁸ Further, in September 2012, Morsi issued two decrees whereby he pardoned 123 Sudanese convicted of military felonies and misdemeanors for entering Egypt illegally and being present in prohibited military bases while carrying weapons.¹⁷⁹

Of course, one may argue that pardoning convicts lies within the limits of the constitutional presidential powers since Article 149 of the 2012 Constitution grants the president such power. However, in fact, given the chaos and surge of insecurity that Egypt witnessed after the ouster of Mubarak and during the regime of Morsi, pardoning these convicts was apparently an unwise decision. By this decision, Morsi, who was an unpopular president, aimed to appease Egypt's Islamists and sought their support along with his group, the Muslim Brotherhood, in an attempt to form a coalition to stand against Egypt's liberal bloc. Despite the fact that pardoning convicts is a constitutional presidential power, Morsi's conduct in pardoning Islamic extremists would likely be construed as abusing his presidential powers. Specifically, President Morsi abused his presidential power in pardoning convicts when he used that power to appease his allies and gain a political victory over his opponents while ignoring the country's security interest; this was misconduct that deserved impeachment.¹⁸⁰

In fact, impeachment has been and will continue to be an ineffective tool to hold the executive accountable for his official misconduct. As mentioned, President Morsi was unlikely to be impeached because the impeachment clause in the 2012 Constitution failed to define the impeachable offenses and focused only on criminal ac-

178. Law No. 75 of 2012 (Presidential Decree), *al-Jarida al-Rasimiyah*, 26 July 2012 (Egypt).

179. Law No. 155 of 2012 (Presidential Decree), *al-Jarida al-Rasimiyah*, 3 Sept. 2012 (Egypt); Law No. 157 of 2012 (Presidential Decree), *al-Jarida al-Rasimiyah*, 3 Sept. 2012 (Egypt).

180. *See supra* section II. The catchall phrase "high crimes and misdemeanors" found in the U.S. Federal Constitution accommodates non-criminal acts such as maladministration and betrayal of the public trust. In fact, Morsi's misconduct in immunizing his presidential decrees, undermining the judiciary, and abusing his presidential powers in pardoning Islamic convicts could be construed to mean maladministration and betrayal of the public trust.

countability. Given the fact that the impeachment clause introduced in the 2014 Constitution greatly resembles that of the 2012 Constitution, the next president is likely to escape the grip of impeachment. Accordingly, in Egypt, finding an alternative to impeachment in holding the executive accountable for official misconduct is a must. As mentioned in the introduction, we find the recall election to be the best alternative.

The Recall Election as an Alternative

Direct democracy, which means “delegation of political decisions to the ordinary voter,” was the outcome of the doctrine of the consent of the governed, i.e. that an official derives his legitimacy from the consent of those who elect him.¹⁸¹ Consequently, direct democracy guarantees greater involvement by ordinary citizens in the process of decision-making, especially when the legislative bodies are mistrusted because of factional interests or malicious motives.¹⁸²

Direct democracy encompasses the notion of recall elections in addition to the initiative and referendum.¹⁸³ On the first hand, the initiative enables ordinary voters to be directly involved in the process of legislation in that they can submit petitions proposing constitutional or legislative amendments.¹⁸⁴ A referendum entails “the referring of a law or ordinance or any specific question to the people for decision at the polls.”¹⁸⁵

181. Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American War*, 2 MICH. L. & POL’Y REV. 11, 13 (1997); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 12 (1999). (“Governments are instituted among men deriving their just powers from the consent of the governed.”) THE DECLARATION OF INDEPENDENCE (U.S. 1776).

182. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 10 (1999).

183. *Id.* Proponents of direct democracy claim that, “Referendum, initiative, and recall are nonviolent means of political participation that fulfill a citizen’s right to petition the government for redress of grievances. Direct democracy increases voter interest and election-day turnout, giving the citizen more of a role in governmental processes might lessen alienation and apathy.” *Id.* at 11.

184. *Id.* at 2.

185. FRANK PARSON ET AL., A PRIMER OF DIRECT-LEGISLATION 3 (1906). Thomas Cronin defines the referendum to mean “[referring] a proposed or existing law or statute to voters for their approval or rejection.” CRONIN, *supra* note 182, at 12.

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On the second hand, the recall is a mechanism whereby ordinary voters can remove an elected official before the end of their designated term.¹⁸⁶ Nathaniel Persily argues that recall is “a method by which voters check their legislators at the polls.”¹⁸⁷ Moreover, Timothy Power emphasizes the concept of direct democracy in a recall claiming, “recall elections are based on the principle that a popular mandate can be revoked by the people themselves, and thus constitute a powerful instrument of democratic accountability.”¹⁸⁸ Likewise, Delos Wilcox argues that recall elections “[guarantee the] right of the people to discharge their public servants when these public servants cease to be satisfactory to them.”¹⁸⁹ Further, Thomas Cronin defines it as “the procedural democracy device that allows voters to discharge and replace a public official.”¹⁹⁰

Recall, an efficient tool of direct democracy to discharge elected officials, differs from impeachment.¹⁹¹ The common thread between the recall and impeachment is their constitutional function in unseating an incompetent elected official; however, unlike impeachment, which usually is initiated by legislators and requires a crime named in the constitution, ordinary voters (citizens) can initiate recall elections without requiring a specific crime to be committed by the recalled official.¹⁹²

The recall device, which originated in the practice of Athenian democracy, allows citizens to vote to expel a politician from office.¹⁹³ Likewise, the Swiss customary law authorized citizens to vote to remove elected officials and councilmen before the expiration of their terms.¹⁹⁴ In the United States, the recall tool can be dated back to the colonial era; it first appeared in the laws of the General Court of the Massachusetts Bay Colony in 1631 as a device to remove elected of-

186. Rachel Weinstein, *You're Fired!, The Voters' Version of "The Apprentice": An Analysis of Local Recall Elections in California*, 15 S. CAL. INTERDISC. L. J. 131, 133 (2005).

187. Persily, *supra* note 181, at 13.

188. TIMOTHY J. POWER, POLITICAL RIGHT IN POST AUTHORITARIAN BRAZIL: ELITES, INSTITUTIONS, AND DEMOCRATIZATION 123 (2000).

189. DELOS F. WILCOX, GOVERNMENT BY ALL THE PEOPLE 169 (1912).

190. CRONIN, *supra* note 182, at 125.

191. Weinstein, *supra* note 186, at 133.

192. *Id.*; Persily, *supra* note 181, at 13.

193. CRONIN, *supra* note 182, at 128.

194. *Id.* at 129.

officials.¹⁹⁵ Moreover, during the American Revolution, the Articles of Confederation authorized state legislatures to recall delegates of the Continental Congress appointed by them.¹⁹⁶ The recall was also debated at the ratifying conventions; the New York convention proposed a constitutional amendment whereby state legislatures could recall their senators.¹⁹⁷ Further, the Virginia Plan proposed a bicameral legislature in which recall was to be applied in the national legislature.¹⁹⁸ However, the recall provision failed to survive and was not adopted in the federal constitution.¹⁹⁹

The Progressive Movement in the west witnessed the rise of direct democracy provisions in the U.S. western states.²⁰⁰ However, such states limited direct democracy to the initiative and referendum without including the recall device. For instance, in 1898, South Dakota amended its constitution to allow its citizens to propose laws through initiatives and to approve laws through the referendum device.²⁰¹ In 1902, the state legislature of California amended the state constitution so that citizens of certain cities could amend their char-

195. Joshua Spivak, *California's Recall: Adoption of the "Grand Bounce" for Elected Officials*, 81 CAL. HIST. 20, 22 (2004).

196. "A power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year." THE ARTICLES OF CONFEDERATION, art. V; see CRONIN, *supra* note 182, at 129.

197. CRONIN, *supra* note 182, at 129.

198. "...members of the first branch of the National Legislature ought to be elected by the people of the several States . . . and to be subject to recall." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand, ed., 1911). Patrick Henry of Virginia argued that the constitution lacks "a mechanism to ensure that senators would follow the instructions of their states." Weinstein, *supra* note 186, at 134.

199. Those who opposed a federal recall provision argued that it would cause the national senators to serve at the "emotionalism of the people." Alexander Hamilton argued that the proposed national senate should be in some measure a check upon the state governments." CRONIN, *supra* note 182, at 129.

200. Persily, *supra* note 181, at 15. Populists and progressives argued that impeachment provisions in the federal constitution were insufficient to redress elected officials claiming that "impeachment punishes only malfeasance in office, not misfeasance or nonfeasance," and that impeachment is hard to reach beyond the boundaries of graft. CRONIN, *supra* note 182, at 130.

201. Steven L. Plot, *The Origins of the Initiative and Referendum in South Dakota: The Political Context*, 12 GREAT PLAINS Q. 181 (1992).

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ters by initiative.²⁰² From 1898 to 1959, as direct democracy provisions continued to rise, many states and cities adopted the initiative and referendum in their charters and constitutions as a means of direct democracy.²⁰³

In 1903, the idea of a recall was first adopted in the United States on the municipal level when Los Angeles approved a new charter that included the recall device.²⁰⁴ In 1908, Michigan and Oregon became the first two states to adopt the recall device on the state level.²⁰⁵ Today, Nineteen states allow the recall of state officials,²⁰⁶ Thirty-six states and the District of Colombia allow recalling local officials²⁰⁷ and Twenty-nine states include recall provisions in their statutes, allow the use of such provision at the local level throughout the state.²⁰⁸ Since the adoption of the recall device in the constitutions and statutes of these states, many state legislators and local officials have been recalled. However, only two governors—Lynn Frazier of North Dakota in 1921 and Gray Davis of California in 2003—have been successfully recalled.²⁰⁹

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202. Weinstein, *supra* note 186, at 135 (citing V.O. Key & Winston W. Crouch, *THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA* 428 (G.M. McBride et al. eds., 1939)).
203. For instance, in 1910, California cities of Alameda, Berkeley, Eureka, Long Beach, Los Angeles, Modesto, Monterey, Palo Alto, Petaluma, Richmond, Riverside, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Louis Obispo, Santa Barbara, Santa Cruz, and Santa Monica adopted the initiative and referendum. After being admitted into the United States, in 1956, Alaska adopted the initiative and referendum in its constitution. Further, states including Illinois, Florida, and Mississippi passed constitutional amendments allowing the initiative and referendum. *Id.*, at 134-35.
204. *Id.* at 136. Dr. John Randolph Haynes, founder of the Direct Legislation League of Los Angeles and a member of the committee to revise the Los Angeles charter, played a great role in adopting the recall provision after he observed the role of the recall device in Switzerland, arguing that it is an effective mechanism for overthrowing incompetent or corrupt officials. Cronin, *supra* note 182, at 131.
205. Spivak, *supra* note 195, at 23; *See also Recall of State Officials*, NAT'L. CONF. OF ST. LEGIS. (Sept. 11 2013), <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx#History>.
206. *Id.* These states are Alaska, Arizona, California, Colorado, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin.
207. Weinstein, *supra* note 186, at 138.
208. NAT'L. CONF. OF ST. LEGIS., *supra* note 205.
209. *Id.*

Despite the fact that state statutes vary widely regarding the required number of signatures to initiate a recall, and the grounds for recall,²¹⁰ states are likely to follow the same procedures to initiate the recall device. Specifically, registered voters should initiate a petition campaign;²¹¹ once the petition meets the required number of signatures, it should be circulated to an election committee for review.²¹² Once the committee declares the petition and its signatures valid, a recall election must be held.²¹³

Internationally, Venezuela seems to be the only country that lists the recall as a constitutional tool for removing a president.²¹⁴ Specifically, Article 233 of the 1991 constitution provides that “[T]he President of the Republic shall become permanently unavailable to serve by reason of any of the following events: death, resignation, or recall by popular vote.”²¹⁵ Further, a detailed constitutional mechanism regarding the number of signatures required to initiate a recall petition and the percentage of the vote required to render the recall referendum valid can be found in Article 72 of the 1991 Constitution, which reads,

210. *Id.* Only eight states require specific grounds for recall. These states are Alaska, Georgia, Kansas, Minnesota, Montana, Rhode Island, Virginia, and Washington. Most of these grounds are limited to some forms of malfeasance, incompetence, misconduct or misuse in office, violation of oath, conviction of certain felonies and misdemeanor, or negligence of duty.

211. Elizabeth Mack, *Comment, The Use and Abuse of Recall: A Proposal for Legislative Recall Reform*, 67 NEB. L. REV. 617, 625 (1988), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1818&context=nlr>.

212. *Id.*

213. *Id.*

214. POWER, *supra* note 188. In Philippines, according to the 1987 Constitution and the Local Government Code of 1991, elected local government officials are subject to removal by recall. A recall election may be called if either at least 25% of the registered voters in a Local Government Unit or a majority of all elected official in this Local Government Unit endorse it. In Brazil, Domingos Leonelli, a member of the Brazilian Democratic Movement Party (PMDB) submitted a proposal to adopt the recall device to the National Constituent Assembly (ANC) arguing that “the notorious lack of accountability of elected officials is perhaps the leading popular complaint against the political system.” However, the Assembly overwhelmingly rejected the proposal.

215. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Dec. 15, 1999, art. 233.

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[A]ll offices filled by popular vote are subject to revocation. Once one-half of the term of office to which an official has been elected has elapsed, a number of voters representing at least 20% of the registered voters in the affected constituency may petition for the calling of a referendum to revoke that official's mandate. When a number of voters equal to or greater than the number of those who elected the official vote in favour of the recall, provided that a number of voters equal to or greater than 25% of the total number of registered voters vote in the recall referendum, the official's mandate shall be deemed revoked and immediate action shall be taken to fill the permanent vacancy as provided for by this constitution and by law.²¹⁶

The recall device has only been used against the Venezuelan President Hugo Chávez.²¹⁷ The February 2003, the first attempt to recall President Chávez occurred when opposition figures campaigned for collecting signatures against Chávez after a nationwide strike.²¹⁸ In August 2003, Súmate, a Venezuelan volunteer civic society organization, succeeded in gathering and submitting approximately 3.2 million signatures to the National Electoral Council (CNE).²¹⁹ However, the CNE invalidated the signatures, arguing that they had been collected prematurely before the elapse of the midpoint of the presidential term as provided by Article 72 of the constitution.²²⁰

In November 2003, the second attempt to recall President Chávez commenced when the opposition began to collect a new set of signatures in support of recalling him. According to the 20% of voters required by Article 72, only 2.4 million signatures are needed,²²¹ however, the opposition claimed to have submitted more than 3.4

216. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Dec. 15, 1999, art. 72.

217. *See generally* OBSERVING THE VENEZUELA PRESIDENTIAL RECALL REFERENDUM: COMPREHENSIVE REPORT (The Carter Center, 2005), <https://www.cartercenter.org/documents/2020.pdf> [hereinafter VENEZUELA PRESIDENTIAL RECALL REFERENDUM].

218. *Id.* at 26.

219. *Id.*

220. *Id.* In fact, the CNE was formed by the Venezuelan Supreme Court (TSJ) after the National Assembly failed "to reach a consensus and choose unbiased, nonpartisan representatives."

221. *Id.* at 28.

million to the CNE for verification in December of the same year.²²² In April 2004, the CNE declared 1,910,965 signatures valid,²²³ 375,241 completely invalid,²²⁴ and 1,192,914 signatures dubious with the possibility of being reaffirmed.²²⁵ Accordingly, in May, the CNE held a *reparo* process allowing owners of dubious signatures to reaffirm them.²²⁶ The outcome of this *reparo* was that 754,397 signatures were accepted, bringing the total number of signatures collected to 2.5 million.²²⁷ As a result, in June, the CNE announced that a recall referendum would be held on August 15, 2004.²²⁸ The referendum was defeated when 59% of the electorate (5.8 million) voted in favor of President Chávez to stay in office,²²⁹ while 41% (3.9 million) voted in favor of recalling him.²³⁰

The Case of Egypt

The overthrow of Mubarak and Morsi through popular uprisings, notwithstanding the presence of impeachment clauses in the 1971 and 2012 Constitutions, reveals the extent to which the impeachment device is ineffective and very difficult to be triggered in Egypt for many reasons. For example, as previously mentioned, due to the vagueness of the impeachment clause means it is very hard to stand on the actual grounds of impeachment and that it only raises the criminal accountability of the executive, while ignoring political accountability.²³¹

The weakness of Egypt's successive parliaments significantly contributed to rendering the impeachment device ineffective because they were subordinate to the chief executive. Specifically, Mubarak ruled the country for almost thirty years, during which the National Democratic Party ("NDP"), Mubarak's political party, was the ruling

222. *Id.*

223. VENEZUELA PRESIDENTIAL RECALL REFERENDUM, *supra* note 217.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. VENEZUELA PRESIDENTIAL RECALL REFERENDUM, *supra* note 217.

229. *Id.*

230. *Id.*

231. Sahar Aziz, *Egypt's Impeachment Alternative*, SADA (Oct. 31, 2013), <http://carnegieendowment.org/sada/?fa=53475> [hereinafter *Impeachment Alternative*].

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party. Consequently, during Mubarak's era, the parliamentary majority was always reserved to the NDP, which rendered the country without an effectively represented opposition. Similarly, during Morsi's era, the parliament was heavily dominated by Egypt's Islamists, particularly the Freedom and Justice Party ("FJP"), the political party of the Muslim Brotherhood, under the flag of which President Morsi ran for the presidency.²³² Thus, parliament, who initiates the impeachment procedures, was always controlled by the president, which rendered the whole process unlikely to occur.²³³

As previously mentioned, listing withdrawal of confidence as a constitutional way to discharge the president aside from the impeachment device is likely to be interpreted as an attempt by the drafters to curb the president by a parliamentary vote of no confidence rather than the ineffective impeachment device.

Therefore, the recall election could be the optimal alternative to impeachment in Egypt. Egypt had a remarkable incident where certain elements of the recall device were prematurely tested. After public outrage escalated against President Morsi, the opposition urged him to call for a recall election so that he could run again for the presidency; however, Morsi remained adamant and refused. A movement, named *Tamarod* (Rebel), formed with the intention of gathering signatures from citizens to call for President Morsi to step down and allow an early presidential election.

Both the positions of the opposition, in gathering signatures calling for an early election, and of President Morsi, refusing to step down, were justified. At first, it seems that the opposition sought to avoid chaos that accompanied Mubarak's removal by deferring to a civilized, constitutional means of direct democracy in which ordinary voters would be involved through signing petitions calling for an early presidential election. On the other hand, President Morsi's conduct in refusing to call for an early election can be criticized for exposing the country to chaos and the climate of polarization between his allies and opponents. He cannot be blamed constitutionally because, according to the 2012 Constitution, the only way to discharge the president is either through his resignation or impeachment. Con-

232. Aziz, *supra* note 49.

233. *Impeachment Alternative*, *supra* note 231.

sequently, since the constitution does not stipulate so, it would have been just a presidential grant if Morsi had agreed to step down and allow an early presidential election.²³⁴

Indeed, the process of initiating a petition and gathering signatures against President Morsi reveals the extent to which the Egyptians were near the recall device and how they sought the involvement of ordinary voters to overthrow Morsi when it was clear that the parliament was too weak to initiate impeachment procedures against the President. However, the only obstacle that the opposition met was that the recall device was not recognized in the 2012 Constitution. It seems that the drafters of the 2014 Constitution did not realize the importance of the recall in the Egyptian political system, since it was excluded from the country's current constitution.

Since the impeachment provision is unlikely to redress presidential misconduct for the reasons stated above, the recall device seems to be the adequate alternative. In fact, an amendment is indispensable to adopt the recall device as a constitutional way to discharge the president with Egypt's current constitution. However, the question is, how can the recall provision to be drafted?

First, the proposed provision should provide that the president could be recalled after the expiration of half of the presidential term, "two years."²³⁵ In fact, two years will be sufficient to evaluate the work of the president and his competency, as any judgment before this period is likely to be hasty and premature. Second, the recall provision should require that at least 40% of the registered voters (20 million)²³⁶ petition by gathering signatures, calling for a popular referendum to recall the president. Third, the president should be deemed recalled if at least 45% of the total number of the registered voters (22.5 million) vote in the referendum, provided that at least a number of voters who elected the president vote "yes" to recall the president.

234. *Id.*

235. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 140 ("The President of the Republic is elected for a period of four calendar years, commencing on the day the term of his predecessor ends. The President may only be reelected once").

236. The total number of the eligible registered voters in Egypt is estimated to be 50 million. *Egyptian elections preliminary results*, JADALIYYA (Jan. 9, 2012), <http://www.jadaliyya.com/pages/index/3192/the-concise-idiots-guide-to-the-egyptian-elections>.

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Finally, the recall provision should also assign the task of receiving and checking the validity of the signatures and calling for the referendum to the National Elections Commission established by the 2014 Constitution,²³⁷ and specify that the Supreme Constitutional Court (SCC) should oversee any dispute regarding the number and validity of the gathered signatures. Further, the provision should specify whether only ordinary voters have the right to participate in the petition campaign or whether civil society organizations could be involved as well.

However, the main drawback of the recall device is the lack of definition of the misconduct required by the law to recall the official. More specifically, the proposed recall provision should make clear that the president must display certain misconduct such as malfeasance, misfeasance, or apparent incompetency to be recalled. Such a requirement is very important in a country like Egypt where the opposition is far from being organized, and people are likely to be led by the media to avoid removing a president for being unpopular and to avoid harassing or threatening him. Further, if the impeachment provision is to be revoked, defining what counts as presidential misconduct in the recall provision will be inevitable.

However, the recall mechanism could be challenging and risky in that it could produce a polarized political atmosphere in which a petition campaign could be initiated to remove the executive just for his policy's views,²³⁸ which might lead to political turmoil.²³⁹ Moreover, the process of gathering the required number of signatures might be costly and require a dedicated number of individuals to place the initiative on the ballot.²⁴⁰ Further, the fact that ordinary voters who initiate the petition campaign bear the burden of proving the official misconduct makes the process of holding the president

237. "The National Elections Commission is exclusively responsible for managing referenda and presidential, parliamentary and local elections, which includes the preparation and update of a database of voters, proposal and division of constituencies, setting regulations for and overseeing electoral campaigns, funding, electoral expenditure declaration thereof, and managing the procedures for out-of-country voting by expatriate Egyptians, and other procedures, up to the announcements of results." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 208.

238. CRONIN, *supra* note 182, at 146.

239. *Id.*

240. *Id.* at 62.

accountable through the recall more challenging due to their inexperience and the difficulty of gaining access to official records and documents.²⁴¹

Thus, criticism of the recall petition campaign for being lengthy and costly could be contained by allowing volunteers from each province and registered civic organizations to participate under the supervision of the National Electoral Commission. Further, one could rely on the role of political parties, impartial media, and civic community awareness campaigns to train ordinary voters to initiate a petition and to educate them that removing the president is a grave step, which should be taken only with high caution when determined by a simple yes or no vote.

Conclusion

In sum, given that Egypt's impeachment clause is weak and vague to effectively hold the president accountable, as well as the difficulty of proving official corruption in a court of law and the fact that the recall device provides a reasonable and effective check on the executive when the legislature is inefficient or corrupt; guarantees the involvement of the people in the process of removing the elected official; increases trust in the elected official who survives a referendum; and limits undesirable factional interests that might steer the impeachment vote in the legislature,²⁴² the recall device seems to be a good embodiment of accountability as well as an excellent alternative to impeachment in Egypt.

241. *Id.* at 135.

242. *Id.* at 134–35. Indeed, ordinary voters might be directed by their factional interests in initiating the petition campaign; however, such factional interests are likely not to be as influential as law-makers during impeachment. Further, any factional interest or malicious motive is likely to be defeated in the recall referendum. *Id.*

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