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Carter Center Urges Inclusive Constitutional Reform Process and Increased Political Space Ahead of Egypt's Referendum

On Jan. 14-15, Egyptians will go to the polls to vote on constitutional arrangements for the third time in less than three years. While The Carter Center supports the strong desire of Egyptians to move forward with a transition to an elected civilian government, the Center is deeply concerned about the polarized environment and the narrowed political space surrounding the upcoming referendum, as well as the lack of an inclusive process for drafting and publicly debating the draft constitution.

Despite these concerns, it is clear that many Egyptians view the constitutional referendum as an important opportunity to voice their opinion about the transition roadmap and the way forward. To increase the credibility of this process, the Center recommends that Egyptian authorities reverse the crackdown on the Muslim Brotherhood and other opposition activists and rescind the recently enacted protest law¹ that severely restricts public gatherings and rallies, including for electoral campaigning. Restrictions on media outlets sympathetic to Islamists also should be lifted. While the fundamental freedoms of association and expression must be protected, it also is essential for all Egyptians to refrain from acts of violence, incitement, and intimidation, and that security forces refrain from the use of excessive force in the event of disturbances.

The Center also recommends that Egyptian authorities provide clear information about the parameters of the referendum, including what results or thresholds will constitute approval as well as what will happen if the referendum fails. Further, the Center recommends the publication of rules to regulate campaign activities and spending, full access to all phases of the electoral process for all interested Egyptian citizen observer groups and party agents, and the implementation of procedural improvements identified in recent elections to safeguard the integrity of the polling process.

¹ Law No.107/2013.

Most importantly, Egyptians should ensure that after the referendum is completed, genuine steps are taken to initiate and sustain an inclusive and meaningful dialogue on additional constitutional reforms and a broadly accepted framework for future elections.

The Carter Center has deployed election witnesses for most of Egypt's recent electoral processes, including the 2011-2012 parliamentary elections and the 2012 presidential elections. For the current constitutional referendum process, the Center deployed a small expert mission focusing on the broader legal and political context of the ongoing transition. The Center requested and the Supreme Commission for Elections approved accreditations for a maximum of 10 international witnesses to carry out this work. Given its size, the Center's mission will not focus on witnessing voting procedures on referendum day. The Carter Center's electoral assessment and observation activities around the world are implemented in accordance with the Declaration of Principles for International Election Observation, which establishes guidelines for professional and impartial election observation.

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Carter Center Pre-Referendum Statement: The Political and Legal Context of the 2014 Constitutional Referendum in Egypt

The central challenge to a meaningful democratic transition in Egypt has been the implementation of an inclusive constitutional reform process reflecting input from the full spectrum of Egyptian society, while protecting democratic principles and fundamental rights and freedoms. Each of Egypt's recent constitution-building processes has been deeply flawed. Rather than open, deliberate, and inclusive, they have been opaque and rushed, ultimately serving as a source of political conflict and polarization rather than a means to achieve consensus.

2011 Referendum and the March 30 Constitutional Declaration

The first constitutional reform process took place in March 2011, when Egyptians voted to support amendments to nine articles of the suspended 1971 constitution intended to further define the post-Mubarak transition.² On March 30, 2011, the interim ruling authority, the Supreme Council of the Armed Forces (SCAF), issued a provisional constitutional declaration composed of 63 articles.³ In accordance with provisions in the declaration, parliamentary election procedures were required to start no later than six months from its ratification date.

Parliamentary elections took place between December 2011 and February 2012. The Muslim Brotherhood's Freedom and Justice Party (FJP) won 43 percent of seats and together with other Islamist parties made up nearly 75 percent of the People's Assembly, Egypt's lower house. By early March, the People's Assembly was engaged in nominating a Constituent Assembly to draft a new, more permanent constitution in accordance with the terms of the March 30 Constitutional Declaration.

2012 Constituent Assembly and Referendum

Despite the short timeline, the SCAF set a June 30, 2012, deadline for handing over power to a civilian government. Although the presidential elections were held in May-June 2012, constitution-building efforts stalled for months over the selection of the 100-member Constituent Assembly that would draft the new constitution.

² Forty-one percent of eligible voters turned out to vote in the March 19, 2011, constitutional referendum, of whom 77 percent cast valid votes in favor of the proposed constitutional amendments. The absence of a minimum threshold for participation meant that the proposed amendments that would define the transition were approved by 31.5 percent of eligible voters.

³ Most of the articles were drawn from the 1971 constitution and had not been voted on in the referendum. In addition, the text in some of the nine articles that had been voted on was altered, making it unclear whether the country would elect a new president or proceed to writing a new constitution following parliamentary elections.

According to the March 30 Constitutional Declaration, the People’s Assembly had the prerogative to appoint the Constituent Assembly, but the selection process was vague and left the drafting body’s composition open to both interpretation and legal challenge. In fact, the first Constituent Assembly was dissolved as the result of an administrative court decision.⁴ A new Constituent Assembly was selected but also had to work under threat of dissolution, in part because the Supreme Constitutional Court (SCC) would soon rule to dissolve the People’s Assembly itself on the basis that it was unconstitutionally elected.

Ultimately, Egypt’s 2012 constitution-building process was undermined by the lack of a clear and agreed upon roadmap that would guarantee a new constitution based on consensus, transparency, and inclusivity. Several sectors of Egyptian society, especially women, were underrepresented on both constituent assemblies. Of particular concern were the hurried final stages of the process as then President Mohamed Morsi attempted to shield the Islamist-dominated Constituent Assembly from dissolution by the SCC by issuing a Nov. 21, 2012, constitutional declaration that made it impossible for any court to dissolve the body. The declaration also made all of the president’s decisions immune to legal challenge, and authorized the president to take any measures needed to protect the revolution – moves that were widely seen as an attempt to seize broad new powers and ensure that the Islamist-led constitution drafting process would proceed unhindered by opposition.

On Nov. 28- 29, 2012, the Constituent Assembly convened a marathon 17-hour voting session to approve the 236 articles of the draft constitution. By that time, nearly all members of the Constituent Assembly representing minority and liberal viewpoints had either suspended their memberships or resigned. As a result, most non-Islamists in the assembly did not participate in the final vote.

After the Constituent Assembly’s approval of the draft constitution, there were only 15 days to organize a referendum. This short timeframe precluded any significant voter education campaigns about voting procedures or the consequences of a “yes” or a “no” outcome, as well as training for judges and polling staff.

The constitutional referendum took place on Dec. 15 and 22, 2012, 32.9 percent of eligible voters participating. Of valid votes cast, 63 percent were in favor of the constitution, representing about 21 percent of the total electorate.⁵

Together with President Morsi’s attempt to seize new powers in November, the lack of broad public support for the 2012 constitution and the contentious political process that produced it was a significant contributing factor to the wave of mass protests that began on June 30, 2013, calling for President Morsi’s resignation and early presidential elections.

The 2013 Constitutional Declaration and Transitional Roadmap

⁴ The court found that the inclusion of sitting members of parliament violated the terms of the selection criteria.

⁵ No minimum threshold for voter participation or approval was established.

On July 3, the armed forces suspended the 2012 constitution, removed President Morsi, and transferred executive and legislative authority to the head of the Supreme Constitutional Court, Adly Mansour, until the suspended constitution could be amended and elections for a new parliament and president held. On July 8, 2013, interim President Adly Mansour issued a constitutional declaration that elaborated on the armed forces' July 3 roadmap, establishing the procedures and a timeframe for a constitutional amendment and referendum process.

Violence in Egypt escalated tragically on Aug. 14 when security forces moved to forcibly disperse the two large pro-Morsi sit-ins in Cairo, leaving at least 638 dead and 4,000 wounded. Vice-President Mohammed ElBaradei resigned in protest and churches around the country went up in flames as retribution for the perceived support of Coptic Church to the military takeover.

Repeating mistakes of earlier exclusionary constitution-building efforts, the current constitutional reform process has been undermined by the polarization of Egyptian society and the lack of dialogue among a broadly representative group of political stakeholders. Instead of serving as a means to generate political compromise, the process has excluded a significant segment of Egyptian society. Completed in just five months, the process has not allowed sufficient time for substantive public review and debate of the draft constitution, nor extensive voter education efforts to familiarize the Egyptian public with its contents.

The July 8, 2013, Constitutional Declaration laid out a two-step process for amending the constitution, contained in articles 28, 29, and 30. The first step required the interim president to call for the formation of a committee of 10 legal experts⁶ tasked with drafting a list of constitutional amendments within 30 days. In the second step, the interim president called for the formation of a Committee of 50, whose representatives would reflect all segments of society and which would have 60 days to complete its work.⁷ The committee approved the amendments to the 2012 Constitution on Dec. 2, 2013 and submitted the final draft to the interim president the following day.

On Dec. 14, 2013, interim President Mansour called for a referendum to be held one month later on Jan. 14-15, 2014. The January 2014 constitutional referendum will be the first opportunity since President Morsi's ouster for Egyptians to express their will at the ballot box.

⁶ On July 21, 2013, interim President Mansour issued Presidential Decree 489/2013, announcing the formation of a committee of 10 legal experts tasked with proposing amendments to the suspended 2012 constitution within a 30-day period. The experts included two members of the Supreme Constitutional Court, two members from Egypt's regular judiciary – the Cairo Court of Appeal and the Cassation Court, two members from the Council of the State, and four scholars of constitutional law from Egyptian universities.

⁷ Presidential decree No. 570/2013, issued Sept. 1, 2013, clarified the composition and mandate of the Committee of 50 and set it to convene on Sept. 8, 2013. The Committee's by-laws, issued on Sept. 12, allotted the body 60 working days. Although requests for nomination to the Committee of 50 were sent to eight Islamist parties, including the Freedom and Justice Party, the Committee was ultimately composed entirely of representatives from political parties and institutions that supported Morsi's ouster. Youth, women, and civil society were poorly represented and the nomination procedures for both committees conducted in an opaque manner.

The Carter Center is deeply concerned about the environment surrounding the referendum. Given the deep polarization of society and short timeframe, Egyptians are likely to view the referendum more as a vote on the roadmap itself than on the content of the new constitution. Meanwhile, supporters of ousted President Mohamed Morsi refuse to recognize the legitimacy of the process, some resorting to non-peaceful means to express their opposition and/or to resist state security forces' violent crackdown. Thousands of Muslim Brotherhood supporters and others who oppose the military's intervention have been arrested in street protests across the country. Islamist satellite stations have been banned from broadcasting for months, the Freedom and Justice Party newspaper recently was shut down, and journalists have been accused of threatening national security for maintaining contact with Brotherhood sources.

Separately, radical militant groups have increased attacks on Egypt's security forces since Morsi's ouster. The interim government, however, does not distinguish between the two, pinning blame for the violence on the Muslim Brotherhood and supporters of the ousted president, and imposing even tighter restrictions on freedom of expression and assembly.

On Dec. 24, 2013, a deadly bomb exploded in the Mansoura police headquarters. Although the Sinai-based militant group Ansar Beit El-Maqdis claimed responsibility for the attack and the Muslim Brotherhood denounced it, government authorities publicly linked the attack to the Brotherhood and officially designated the group a terrorist organization on Dec. 25.

The crackdown is not limited to the Muslim Brotherhood and its ideological allies, but extends to other dissenting voices across the political spectrum. Prominent non-Islamist civil society leaders have been arrested for their peaceful opposition to the protest law and provisions in the constitution such as military trials for civilians. The offices of respected human rights NGOs also have been raided.

Recommendations

Despite this troubled context, it is clear that many Egyptians view the upcoming constitutional referendum as an important opportunity to voice their opinion about the transition roadmap and the way forward. To increase the credibility of the referendum, the Center recommends the following steps, offered in the spirit of respect and support:

Reverse the crackdown on the Muslim Brotherhood and other opposition activists; Rescind the Protest Law

The Dec. 25 decision by the Egyptian government to designate the Muslim Brotherhood as a terrorist organization further intensifies a severe and ongoing crackdown on the group's supporters. In order to expand the already narrow political space surrounding the referendum, to protect fundamental freedoms of association and expression, and reduce the deep political polarization in the country, The Carter Center urges Egyptian authorities to reverse the decision to designate the Muslim Brotherhood a terrorist organization, and also to lift a range of other restrictions on peaceful activities by the group. At the same time, the Center urges all Egyptians to refrain from acts of violence,

incitement, and intimidation. Similarly, security forces should avoid using excessive force in the event of disturbances, especially against peaceful protesters.

The Carter Center also is concerned by the widening crackdown on activists promoting human rights, political liberalization, and security sector reform. In December, Egyptian authorities invoked the recently promulgated “Protest Law” (Law No. 107/2013) regulating public assembly to arrest and sentence four activists who have played leading roles in the protest movement that began in January 2011.

The Protest Law contradicts Egypt’s international commitments to freedom of assembly.⁸ Peaceful assembly is a fundamental right in a democracy and is essential for genuine political and societal dialogue, especially around electoral events. Provisions in the law related to electoral meetings restrict the fundamental rights of assembly and expression by inhibiting the ability to organize and campaign around the referendum, as well as upcoming electoral processes.⁹ The Carter Center, therefore, strongly urges Egypt’s interim president to rescind this law.

Lift restrictions against media operations; Issue regulations to ensure equal access to state and private media

While The Carter Center has not conducted a comprehensive media-monitoring effort, it notes with concern the lack of media space for dissenting views, the shutdown of all Islamist satellite channels, and the recent crackdown on other media outlets attempting to give them a voice. Even more concerning is the highly negative media portrayal of any opposition, both Islamist and non-Islamist, in both publicly funded and private media.

Political movements and parties should have equitable access to and fair treatment by the publicly funded media¹⁰. In the case of a referendum, it is reasonable to expect that this should apply to the campaigns for both the “yes” and the “no” vote. The Center urges the Supreme Commission for Elections (SCE) to set the rules for equitable distribution of

⁸ UN, Universal Declaration of Human Rights, art. 20: "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."

U.N., International Covenant on Civil and Political Rights, Article 22(1): “No restrictions may be placed on the exercise of th[e] right [to associate freely] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security of public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

⁹ On November 24, 2013, President Mansour issued Law No.107/2013 regulating public assembly. The law stipulates that anyone organizing a public meeting, defined as any gathering of ten persons or more in a public space without prior individual invitation to discuss or exchange opinions about a subject of public nature, must give prior notification to Ministry of Interior (MoI). In accordance with Article 2, the law specifically applies to public meetings among candidates, their representatives, and/or voters when the purpose of the meeting is candidate selection for parliament and/or the presentation of an electoral platform during the official campaign period. Organizers are required to provide their personal information in addition to the location, time, and subject of the meeting, including its aims, demands, and slogans adopted by participants. The interior ministry reserves the authority to prohibit, postpone or change the location of any meeting on “national security” grounds, which are defined only as “serious information or evidence of an existing threat to security and peace.”

¹⁰ UN, International Covenant on Civil and Political Rights, art. 19(2): "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

airtime for electoral campaigning, which according to Egyptian law applies to both public and private media.

Provide information about what constitutes “approval” and possible outcomes

On referendum day, Egyptians will vote to approve or reject the amended constitution. To make an informed decision, voters should have clear information about the rules of the process and the consequences of their choice. To date, however, there is no official information regarding what constitutes formal “approval,” nor about what happens if the electorate rejects the constitutional amendments. Although it is widely anticipated that the new constitutional amendments will be approved in the Jan. 14-15 referendum, the absence of clear information about what is needed for approval and the consequences of a “no” vote creates the impression that there is only one real choice.

Neither the interim government nor the SCE has indicated a minimum threshold of voter turnout, or whether only a simple majority of participating voters will be sufficient to approve the draft. Egypt’s 2011 and 2012 constitutional referendums were passed with relatively low voter participation, 32 percent and 21 percent of all eligible voters, respectively.¹¹ This limited the potential value of these constitutional exercises as a means to demonstrate popular support and confidence in the process.

While there is not a single, universal set of standard practices for constitutional referenda, Egyptian authorities should clearly define what constitutes “approval” and outline a contingency plan in case the referendum fails. In addition, the SCE should intensify neutral voter education and information efforts on the content of the constitution and the consequences of its adoption, as well as on polling station location and voting procedures. Egypt’s compulsory voting law gives authorities a particular responsibility to ensure all voters are well informed.¹²

Allow Egyptian citizen and political party witnesses access to all phases of the process

Citizen, civil society, and political party witnesses are important stakeholders in the constitutional reform and referendum process and can enhance transparency. Witnessing and other such observation / monitoring activities are key components of the democratic right to participate in political affairs.¹³

The Carter Center therefore urges the Egyptian government and the SCE to ensure that these rights are fully protected for all interested citizen observer groups. Further, the

¹¹ Only 41 percent of eligible voters turned out to vote in the March 19, 2011 constitutional referendum, of which 77 percent voted in favor of the proposed constitutional amendments. As a result, the amendments enjoyed less than 32 percent approval from the total number of eligible voters. The December 2012 constitutional referendum garnered only 32.9 percent voter turnout, of which 63.8 percent of valid votes cast were in favor for a total approval of only 21 percent of the electorate.

¹² Law on Exercise of Political Rights, Article 40, Law 73 of 1956 (as amended).

¹³ UN, International Covenant on Civil and Political Rights, art. 25(a): “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.”

AU, African Union Declaration on the Principles Governing Democratic Elections in Africa, art. 7: “Candidates or political parties shall have the right to be represented at polling and counting stations by duly designated agents or representatives.”

Center urges the SCE to provide party agents accreditation to witness the process in an equitable manner, regardless of political affiliations.

In order for election witnesses to be able to provide a comprehensive and accurate assessment, they should have adequate access to all aspects of the process, including the final phase of vote aggregation at the national level. The Carter Center urges the SCE to ensure that accredited witnesses have sufficient access, including to national level aggregation. If necessary due to space limitations, various options could be considered, such as allowing witnessing organizations and parties to nominate a small number of representatives to observe aggregation or allowing for accredited witnesses to rotate in at the presiding officer's discretion.

Implementation of procedures, safeguards, and training

In the course of the 2011 and 2012 elections, The Carter Center and other election witnesses identified a number of improvements and safeguards to the electoral process. To maximize the integrity and transparency of the referendum, the SCE should ensure that all judges and polling staff are trained in electoral law and procedures, and that they are provided with clear, comprehensive manuals, factsheets, or other aids in a timely manner to increase consistency and uniform implementation. In addition, the Center urges the SCE to implement the following training, procedural, and polling safeguards:

- Consistent with widely-recognized good practice in election administration, and in light of legitimate expectations of electoral stakeholders, the SCE should refrain from making last-minute changes to laws and procedures unless they are absolutely critical to the integrity of the technical process or the protection of fundamental rights.
- Ensure polling staff is trained adequately regarding steps to secure sensitive ballot materials. Because the referendum is scheduled to take place over two days, there are additional security and logistical challenges to secure ballot boxes and materials overnight.
- Ensure that after the end of the each voting day a reconciliation form showing the following information is recorded and posted outside the polling station: the total number of ballots received at the polling station, the number of ballots unused, the number of ballots cast, and spoiled ballots.
- Ensure that after the second and final day of voting the final result is posted outside each polling station.
- Ensure access to polling places is controlled by SCE officials. Security forces stationed outside polling stations should not block access to any voters or accredited witnesses, etc., and should have a designated liaison to interact with the SCE.
- Ensure that all polling staff is issued means of identification, including badges and vests, to distinguish them and to prevent allegations of interference by unauthorized persons. In addition, the SCE should issue official badges to all accredited election witnesses, party agents, and the media in a timely fashion.
- Ensure that training materials for polling staff, as well as voter information materials for election witnesses, party agents, and the media, indicate that only judges and polling staff can participate directly in the electoral process, while witnesses, party

agents, and media are limited to observing the process and seeking and recording information.

- Ensure clear guidelines for the provision of impartial assistance to illiterate voters by the presiding officer or a person of the voter's choice are implemented.
- Ensure polling staff is properly trained to check voter identification, apply ink, and check voters' fingers for ink before distributing ballot papers.
- Ensure ballots are stamped with the official stamp in front of the voter by the authorized person when the ballot is issued.
- Ensure that the regulations and procedures protecting the secrecy of the ballot are clear and understood by voters, and enforced by judges and polling staff.
- Ensure that neutral voter education materials are made widely available to Egyptians across the country, informing them about the choices on the ballot, the meaning and consequences of a "yes" and a "no" vote, the location of designated polling places, voting procedures, and voters' rights and duties.
- Ensure that only SCE voter education materials incorporate the SCE logo. Materials provided by any others, including but not limited to political parties, movements, civil society organizations, and private companies and citizens should not.
- Ensure clear regulations concerning ballot validity and that judges are properly briefed on these regulations so that they are applied consistently.
- Ensure that unique serial numbers for ballots are only on the ballot paper stub that remains in the ballot book, and not be printed on any part of the ballot (which could undermine ballot secrecy and create an opportunity for vote buying and intimidation).
- Make polling stations easily accessible wherever possible to improve access for elderly and disabled voters.
- Publish the full and final results for polling stations, general district committees, governorates, and the national level on the SCE website in a reasonable timeframe.
- Establish a unified process for filing all electoral complaints, through the use of a standardized complaint form, widely available both online and offline at locations throughout the country, to facilitate access to the complaints process. Also establish a transparent, unified appeals process for those who wish to challenge decisions of the SCE, and ensure that all decisions of the courts pertaining to the SCE are publicized.

Completing the Transition Period

The deep divisions in Egyptian society, worse since the overthrow of President Morsi, have made it difficult to carry out genuine and sustained dialogue among a broadly representative group of political stakeholders. So far, the few limited institutional and individual initiatives to reach out to groups opposing the roadmap have failed. In addition, the legal and procedural framework for amending the constitution has precluded a fully inclusive and transparent constitutional amendment process.

If the January referendum results in the approval of the amended constitution, The Carter Center recommends urgent steps to initiate and sustain an inclusive and meaningful dialogue on additional constitutional reforms and a broadly accepted framework for future elections, including the formation of a permanent commission to regularly examine and recommend changes to the constitution. To address the deep divisions in society, the commission should ensure that all political and societal sectors have adequate

representation and a meaningful voice in the amendment process. If the constitution is not adopted, The Carter Center recommends that a new Constituent Assembly be elected that represents the diverse viewpoints of the Egyptian people, especially women, youth, and minority groups.

Parallel to moving forward in the constitution-building process, Egyptian leaders should pursue inclusive dialogue and national reconciliation efforts, consistent with those the interim government announced when it established a high commission for national reconciliation in September 2013.¹⁴ This process should include mechanisms for both political reconciliation and transitional justice. A meaningful democratic transition based on peaceful political participation, pluralism, and respect for the rule of law will come about only when all sectors of society have a voice in determining their country's future.

The Carter Center has deployed election witnesses for most of Egypt's recent electoral processes, including the 2011-2012 parliamentary elections and the 2012 presidential elections. For the current constitutional referendum process, the Center deployed a small expert mission, focusing on the broader legal and political context of the ongoing transition. The Center requested and the Supreme Commission for Elections approved accreditations for a maximum of 10 international witnesses to carry out this work. Given its size, the Center's mission will not focus on witnessing voting procedures on referendum day. The Carter Center's electoral assessment and observation activities around the world are implemented in accordance with the Declaration of Principles for International Election Observation, which establishes guidelines for professional and impartial election observation.

¹⁴ The July 3 statement of the General Command of the Armed Forces that ousted President Morsi tasked interim President Mansour with forming a high commission for national reconciliation. A committee was formed by interim Prime Minister Hazem Beblawi in September 2013 to carry out a national reconciliation initiative launched by Deputy Prime Minister Ziad Bahaa El-Din to include all peaceful political factions.