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Carter Center Expresses Concern about the State of Egypt's Political Transition

The Carter Center is concerned about the restrictive political and legal context surrounding Egypt's electoral process, the lack of a genuinely competitive campaign environment, and the deep political polarization that threatens the country's transition as May 26-27 presidential elections quickly approach.

Although a significant part of the Egyptian population appears to support the military-backed transition, the period following the July 2013 ouster of President Mohamed Morsi has been marked by severe and escalating political conflict, polarization, and the failure to advance national reconciliation. In addition to the oppression and exclusion of the Muslim Brotherhood and its supporters, there has been a crackdown on opposition and media across the political spectrum and expanding limitations on fundamental political freedoms of association, expression, and peaceful assembly. There also has been a sharp rise in the incidence of militant attacks against the military and police. While a new constitution was approved in January 2014, the document itself was drafted quickly and without an inclusive process, failing to build broad consensus on a shared vision for a democratic society.

As a result, Egypt's political transition has stalled and stands on the precipice of total reversal. While it is important for Egypt's leaders to improve the political climate before the presidential elections, the immediate post-election environment will be even more critical if Egypt's transition is to result in a democratic outcome. The new president will hold not only executive authority, but also sole legislative powers until a new parliament is elected, thus greatly strengthening the president's ability to shape the course of political events.

"I am gravely concerned that Egypt's democratic transition has faltered. Egypt's next president should take immediate steps to foster dialogue and political accommodation to ensure that the full spectrum of Egyptian society can participate meaningfully in politics," said former U.S. President Jimmy Carter. "Constitutional reforms, based on inclusive dialogue and consensus-building efforts, also would help to create a shared vision for Egyptian society. These and other steps forward will be possible only if all Egyptians renounce violence and commit to peaceful political dialogue and reconciliation."

The Carter Center deployed a small expert mission to assess the political and legal context surrounding the May 2014 presidential electoral process. Based on the mission's analysis, and in a spirit of respect and support, The Carter Center recommends the following steps to open political space before the presidential elections and to advance political accommodation in the post-election period ahead of parliamentary elections:

- End the government crackdown on peaceful dissenting forces, including the Muslim Brotherhood and its supporters as well as opposition activists and movements such as the April 6th movement and others.
- Immediately rescind the Protest Law, which severely restricts public gatherings and rallies, including for electoral campaigning, and release persons imprisoned under the law. Ensure key rights of the accused, including the right to a fair trial.
- Ease restrictions on media outlets to enable a more open political debate during the electoral process. Going forward, put in place a media code of ethics.
- Ensure that the forthcoming parliamentary election law is developed with broad political inclusion, protects core political rights enshrined in the constitution, and serves to promote strong parties and a vibrant legislative branch.
- Pursue dialogue and national reconciliation efforts, including independent judicial investigation into wrongful deaths and allegations of torture.
- Consider new constitutional amendments to ensure protection of core human rights and political freedoms.
- Ensure maximum access for elections observers throughout the rest of the presidential election process, including during the aggregation of results.
- Establish new regulations on election observation for future elections to ensure that observer groups, especially national citizen observers, can be accredited early enough to assess and have adequate access to the entire electoral process.

The Carter Center has observed most of Egypt's recent electoral processes, including the 2011-2012 parliamentary elections and the 2012 presidential elections. For the recent constitutional referendum process and the upcoming presidential elections, the Center deployed smaller expert missions focusing on the broader legal and political context on the transition.

The Center's expert mission for the May 26-27 presidential elections requested and the Presidential Election Commission approved accreditations for 10 people to carry out this work. Given its size, the Center's limited mission will not deploy to observe election day procedures. 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 Statement on the Legal and Political Context of Egypt's Presidential Elections

May 16, 2014

Background: The Transition Roadmap

In July 2013, in the wake of large scale protests against President Mohammed Morsi and his government, Egypt's armed forces suspended the 2012 constitution, deposed Morsi, transferred executive and legislative authority to the head of the Supreme Constitutional Court, and announced a transition roadmap. The roadmap called for constitutional reforms, media reforms, the integration of youth into decision-making, and the formation of a committee for national reconciliation.

On July 8, 2013, Interim President Adly Mansour issued a Constitutional Declaration that institutionalized parts of the roadmap. It set a timeline for the political transition, including the process to amend the 2012 constitution and hold parliamentary and presidential elections. However, it remained vague or silent with regard to other key issues, including the envisioned scope of constitutional reform, media reforms, the political participation of youth, and the critical issue of national reconciliation. Moreover, the short timeframe prescribed for the transition, limited the prospects for reconciliation and building a broad consensus on a shared vision for a democratic future.

The repression of the Muslim Brotherhood that followed the military intervention - including the killing of hundreds of Muslim Brotherhood supporters, the detention of thousands more, and the ongoing trials of Muslim Brotherhood leadership - opened a political abyss between those who viewed these measures as justified and necessary to preserve the integrity and identity of the Egyptian state and those who opposed them as a bloody military coup. The military-backed government's "war on terrorism" has used the threat of Islamic extremism to justify the suspension of freedoms and human rights protections, while both private and state media have participated in the campaign against Islamists and other critics. On the other hand, supporters and sympathizers of the Muslim Brotherhood deny or minimize any mistakes in governance or undemocratic tendencies on the organization's part, as well as the extent popular disaffection with the Islamist group.

The 2014 presidential elections will occur within the framework of the recently promulgated constitution, which was approved in a referendum on Jan. 14-15, 2014. As noted in earlier Carter Center reports released on Jan. 6 and March 12, 2014, the Center found that the constitution-making process was deeply flawed.¹ Rather than open and inclusive, the process was opaque and rushed, ultimately serving as a source of political conflict and division rather than a means to achieve consensus.

Going forward, therefore, it is critical that Egyptian leaders, especially including the next president, take urgent steps to initiate meaningful political dialogue and accommodation and to open political space to enable the full spectrum of Egyptian society to participate meaningfully in

¹ For a detailed analysis of the content of the 2014 constitution see "Carter Center Urges Dialogue and Constitutional Change to Strengthen Democratic Governance in Egypt", March 12, 2014. <http://www.cartercenter.org/resources/pdfs/news/pr/egypt-constitution-031214.pdf>; "Carter Center Urges Inclusive Constitutional Reform Process and Increased Political Space Ahead of Egypt's Referendum" Jan. 6, 2014 - <http://www.cartercenter.org/resources/pdfs/news/pr/egypt-010614.pdf>

politics. To this end, the legal framework for the upcoming legislative elections due later this year should be developed with broad political inclusion and should ensure protections for the core political rights that are enshrined in the constitution. In addition, over the longer-term political dialogue is needed to build consensus on constitutional reforms that reflect a shared vision for Egypt.

The Carter Center expert mission included staff and electoral and legal experts. The mission's report examines the legal framework governing Egypt's presidential elections, including the new constitution and the presidential election law, as well as key aspects of election administration. In addition, the report assesses the conditions facing Egyptian domestic citizen observer groups, focusing on obstacles to their accreditation and access to critical phases of the electoral process.

Legal Framework for the Presidential Elections

2014 Constitution. The constitution approved in January 2014 provided some important improvements to human rights protections, but undermined these improvements by formalizing extraordinary privileges for the armed forces and the judiciary. The constitution also restored a stronger executive, and left many critical decisions to the House of Representatives, which will be elected later this year. In practice, the institutional balance of power between the executive and legislative branches of government will depend greatly on a strong pluralistic party system that allows genuine debate in the future House of Representatives. As such, it will be critical for Egypt's interim government to adopt legal framework for the parliamentary elections that maximizes the role of political parties and encourages broad political representation.

The constitution gives wide scope to the legislation to determine the limits that can be placed on many rights and freedoms. This is problematic, however, in the absence of a robust "limitation clause," which would delineate rights-based principles to restrict the scope within which political and legislative actors can limit rights. It raises serious concerns with respect to the protection of rights and freedoms during states of emergency and in military trials of civilians. It also raises considerable doubts about the enforcement of key rights protections.²

The constitution includes explicit language regarding core political rights and freedoms, including freedom of expression, freedom of assembly, freedom of the press, freedom of association, and the right to form, join, and participate in the activities of political parties. The respect for these freedoms is essential for genuinely democratic elections and in order for Egypt to fulfill the constitution's promises of political pluralism, the peaceful rotation of power, and the realization of a modern democratic state.³

The Presidential Election Law. In addition to the constitution, the new Presidential Election Law (PEL) will govern the upcoming elections. The PEL is the first significant piece of electoral legislation adopted under the new constitution and was issued on March 8, 2014, by Interim President Adly Mansour using his unilateral legislative authority provided in Article 232 of the

² Lawful Restrictions on Civil and Political Rights, DRI, Briefing Paper 31, October 2012.

³ UNHRC, General Comment No. 25, para. 12. "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas."

constitution.⁴ No direct consultation with political stakeholders took place before the law was issued. There was only a short window of time for political parties and leaders to send written suggestions to the presidency before the draft law went to the State Council Legislative Department for review and redrafting, and then back to the presidency to be issued.

The 2014 PEL is structurally very similar to the PEL that governed the 2012 presidential elections. It includes articles on candidate eligibility requirements, the composition and jurisdiction of the Presidential Election Commission (PEC), candidate application requirements, campaign restrictions, voting and sorting procedures, and penalties. Indeed many of the provisions appear to be identical to articles in the 2012 law. A main concern with the law, and a source of political debate and tension, is Article 7, which immunizes the decision of the PEC from appeal. This provision is essentially unchanged from 2012. An initial draft of the law, which was applauded by almost all the political parties, eliminated PEC immunity and allowed for appeals to the Supreme Administrative Court (SAC) with an expedited period for review and decisions (see the section below under “Right to Effective Remedy” for additional points). Only after the law was issued did the presidency invite political parties and figures to explain the reasoning behind their decision to immunize the PEC decisions.

Article 228 of the 2014 Constitution stipulates that the PEC shall be mandated to manage the first Presidential elections following the adoption of the new constitution, and the new 2014 PEL follows this by establishing the PEC as an independent body vested with full authority to manage all aspects of the presidential election process. Members of the PEC are appointed *ex-officio* from the judiciary. The PEC is chaired by the head of Supreme Constitutional Court (SCC), and includes four other senior judges.⁵ According to the PEL, at least four members, including the chairman, have to be present for an official meeting of the PEC. Decisions by the PEC are to be taken with a majority of at least three members. It is worth noting that the *ex-officio* nature of the PEC means that there is no women's representation as members of the PEC have to be senior judges, none of which are currently women.

The current PEC is chaired by the deputy chairman of the SCC, due to the appointment of the head of the SCC as the interim president. The PEC is supported by a general secretariat, which is headed by a secretary-general appointed from a judicial body.⁶ Moreover, the PEC may form committees to monitor specific issues relevant to its work, such as campaign finance and the media. The law obliges relevant state apparatuses to assist the PEC in conducting its work, and allows the PEC to request data, information, or documents from official stakeholders, including the Ministry of Local and Administrative Development which manages the voter database and the Ministry of Interior (MoI) which provides a wide range of administrative, operational, logistical, and security support.⁷

The PEC enjoys broad powers, duties, and responsibilities in all phases of the presidential electoral process. This includes voter registration, candidate registration, regulating campaigning, as well as supervising the polling, counting, and tabulation of the electoral results. Furthermore, the PEC has the prerogative to verify and announce the final election results, and decide on complaints and challenges related to the election. At the governorate level, the PEC is supported

⁴ In accordance with Article 232 of the 2014 Constitution The Interim President of the Republic shall continue to exercise presidential powers stipulated herein until the elected President of the Republic takes the constitutional oath.

⁵ Article 3 of the Law Regulating Presidential Election determines “the head of the Cairo Court of Appeal, the most senior deputy head of the Supreme Constitutional Court, the most senior deputy head of the Court of Cassation, and the most senior deputy head of the State Council” as the remaining four members of the PEC.

⁶ Presidential Elections Commission Decree 1/2014 Art.9

⁷ Article 9, of Presidential Decree Law No.22/2014 on regulating presidential elections.

by the 352 District General Committees (DGCs), composed of the judges, members of judicial bodies and seconded public employees, which are set up in Egypt's governorates only shortly before the elections.

The temporary nature of the PEC as an electoral body and its appointment⁸ only shortly in advance to the presidential election does not leave much opportunity to build on institutional knowledge in preparing for the elections. The abbreviated electoral calendar leading up to the presidential election provided a substantial challenge to electoral preparations, including the training of polling station staff and the accreditation of observers. New procedures regarding the out-of-governorate voters and out-of-country voting (OCV) provided an opportunity for greater political participation, but new challenges for election administration.

The PEC has taken positive actions to issue new regulations to address recommendations made by observation organizations during past electoral events in Egypt. These include the formation of committees to monitor the state media and candidate campaigns, introduction of new technology to enhance and accelerate the accreditation process for election observers, media, and the candidate nomination process, the use of tamper-evident bags, and the provision of limited training to judges and police officers in the polling centers and stations.

Assessment of the Legal Framework and Protections for Core Democratic Rights

The sections below examine key aspects of the legal framework for the presidential election process, especially the 2014 constitution and Presidential Election Law (PEL), and assesses the degree to which Egypt is meeting its international obligations to ensure respect for core democratic rights and freedoms.⁹ The assessment draws on meetings with various stakeholders including election authorities, local observation groups, think tanks, political parties, and candidate campaigns. The assessment is limited in both time and scope and does not cover issues related to the conduct of electoral procedures.

Freedom of Expression and Freedom of the Press

The right of all individuals to freedom of expression and to share information through media of any kind is a core international obligation.¹⁰ Similarly, the maintenance of an open and transparent campaign environment is vital to the integrity of the democratic process.¹¹ In seeking votes, candidates and political parties inevitably have a large role in informing and mobilizing voters. Reasonable, enforceable and well-implemented policies with proportionate and predictable consequences can encourage positive contributions by electoral contestants.

Article 65 of the 2014 Constitution protects freedom of thought and opinion and Article 71 states that no one shall be imprisoned for "crimes committed by way of publication or the public nature thereof." In spite of the protections afforded by the Article 65 to express opinions, there are substantial limitations on artistic, literary, and intellectual works contained in Article 67. In

⁸ The PEC was appointed on Jan. 27, 2014, by Presidential Decree/Law No.10/2014.

⁹ Treaties ratified by Egyptian Government: UN Convention on the Elimination of All Forms of Discrimination against Women; UN Convention on the Political Rights of Women; UN Convention on the Rights of Persons with Disabilities; UN Convention on the Rights of the Child; UN International Covenant on Civil and Political Rights; UN International Convention on the Elimination of All Forms of Racial Discrimination; UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; UN United Nations Convention Against Corruption; AU African Charter on Human and Peoples' Rights; AU Convention on Preventing and Combating Corruption; UN Communication No. 488/1992. *Toonen v. Australia*

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

¹¹ African Charter on Human and People's Rights, Articles 2 and 13(1); U.N., ICCPR, Article 25(b).

addition, Articles 70 and 71 place limits on newspapers, television and radio broadcast stations, online newspapers, and other media outlets. According to Article 70, newspapers can be issued only once authorities are notified. Whether the application of restrictions contradicts Egypt's international commitments will depend on the interpretation of terms like 'incitement of violence', 'discrimination between citizens', and 'violations of personal honor,' which are specified as reasons for prosecuting public forms of expression.¹² Importantly, the Supreme Council for the Regulation of the Media, which is tasked with guaranteeing freedom of the press, is given authority not only to ensure compliance with professional and ethical standards, but to monitor media outlets' sources of funding. The Supreme Council may also regulate media compliance with unspecified "national security needs".¹³ These wide powers undermine the broad rights guaranteed in Article 65 and could result in the arbitrary limitation of freedom of expression.

In light of the state's historical control over the media, The Carter Center strongly recommends that media outlets be regulated by private law to the greatest extent possible, and that any limitations be subject to a strict proportionality analysis that takes into account the paramount importance of free expression in a democratic society. The Center also advises Egypt's future lawmakers to rescind the requirement that newspapers notify authorities before publication and limit extraordinary measures to the strict conditions of a state of emergency. Furthermore, The Carter Center urges Egyptian authorities to put in place a media code of ethics that ensures professional conduct, credibility, and objectivity with the aim of advancing the national interest as promised in the July 3 roadmap.

Separate from the constitutional provisions, the PEL contains a number of provisions that are unclear and open to an unacceptably wide range of interpretations. For example, Article 19 refers to the introduction of candidates' "private lives" into campaigns, and campaign tactics that threaten "national unity" include terms that are too vague and may contribute to uneven or selective prosecution, or the unfair exclusion of some candidates.¹⁴ The Carter Center, therefore, recommends that lawmakers provide more precise definitions of vague terms and that election officials ensure training and education materials for polling officials, voters, and other stakeholders.

The 2014 PEL also contains explicit prohibitions on certain types and sites of campaigning. In addition to the restrictions contained in the previous 2012 law (e.g., bans on use of "religious slogans," prohibitions on campaigning in educational institutions or houses of worship), the new PEL explicitly prohibits campaigns to use the headquarters or organizations of CSOs or spend CSO resources on behalf of any campaign. Another new provision bans writing on public or private walls "by any means" for the purpose of electoral campaigning.

In contrast to those restrictions, the law increases campaign expenditure limits both for the first and second rounds of the presidential elections. PEC Decision No. 9/2014 which establishes the framework for regulating campaigning activities and campaign finance for the 2014 presidential elections includes more detailed regulations on donations, spending and reporting.

¹² Article 67 of the 2014 Constitution of the Arab Republic of Egypt

¹³ Article 211 of the 2014 Constitution of the Arab Republic of Egypt

¹⁴ A certain degree of abstraction in legal terminology is unavoidable. It is important, however, that Egyptian decision makers and key electoral stakeholders educate the Egyptian public to the extent possible on the definitions and scope of broad legal terms within the current electoral legal framework. EU, Handbook for European Union Election Observation, Second Edition, p. 29: "Whatever the source, legislation should be consistent with other laws and provide adequate detail on all aspects of the electoral process, limiting the opportunity for inconsistent or subjective interpretation."

The potential inability of election officials to fully monitor some electoral activities and completely enforce some electoral provisions can affect the perceived fairness and legitimacy of the process.¹⁵ Campaign finance limitations, that were allegedly exceeded in 2012 and which were increased under the new PEL, appear difficult or impossible to enforce. This includes the recording and fair valuation of “in-kind” (non-monetary) contributions and campaign expenditures by supporters who are formally unaffiliated but colluding with presidential campaigns. The improper use of state or CSO property or resources for campaign purposes, improper campaigning in houses of worship and educational institutions, and potential bias in state media, are examples of campaign-related violations that, if not addressed in a comprehensive and balanced manner, could challenge the perceived fairness of the electoral process and result.¹⁶

With regard to electoral campaigning, The Carter Center has the following observations: (1) Election authorities need to strengthen and enforce campaign finance monitoring, especially with the limit on campaign expenditures and reporting mechanisms.¹⁷ More detailed regulations on donations, spending and reporting are needed, and should include specific and proportionate measures on failure to report and severe breaking of the campaign rules;¹⁸ (2) Additionally, parties and candidates should be required to fully, accurately, and periodically disclose contributions received and expenditures made on behalf of their campaigns.¹⁹ These reports should be made public. Egypt’s lawmakers should empower election officials, or other law enforcement officials, with clear authority to investigate and prosecute allegations of campaign finance violations, and address potential loopholes²⁰ in campaign finance regulations, in order to prevent parties and candidates from skirting campaign-finance restrictions by improperly relying upon independent spending by individuals, charities, or other domestic or foreign sources; (3) Measures against campaign regulation violations need to be tightened and not limited to fines. The Center recommends that penalties for such violations be proportionate so that smaller campaign finance infractions result in fines, while violations that unfairly affect the results of the election should be judged more severely; (4) Reforms should be considered that would allow contributions from sources other than natural persons, especially including political parties; (5) The PEC should have the resources to investigate candidates expenditures and assess the conduct of both public and private media to make sure that a level playing field is provided for all contestants and that the public media is offering an equal access to all candidates. This is especially important in the current race, since one of the candidates held an important role in the interim government and enjoys the support of government institutions.

Freedom of Association

¹⁵ SADC PF, Norms and Standards for Elections in the SADC Region, para. 6: “The Electoral Commission should...be legally empowered to prohibit certain types of expenditures so as to limit the undue impact of money on the democratic process and the outcome of an election.” Along with empowerment, the PEC should be given the resources to investigate and prohibit attempts to evade campaign finance restrictions.

¹⁶ UN, Human Rights and Elections: A Handbook on the Legal, Technical, and Human Rights Aspects of Elections, para. 49: “Under article 26 of the Covenant, a State has both a positive duty legally to prevent discrimination and a negative duty to refrain from discriminating.”

¹⁷ The 2014 PEL limits fines on breach of campaign finance to a fine 5,000- 500,000 EGP. Also, no specific measures are clearly stipulated in the law for failure to report on campaign finance.

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¹⁹ As mentioned in the Carter Center’s Preliminary Report On All The Three Phases Of The People’s Assembly Elections, Jan. 24, 2012. (19)

²⁰ Spending by wealthy individuals on behalf of parties, and by charities, have been reported. Moreover, there are reports that some parties or candidates have received funding from charities that in turn have received foreign funding.

The right to freedom of association is another fundamental obligation, and should only be restricted when necessary to preserve the public interest in a democratic society.²¹ Article 75 of the constitution grants all citizens the right to form non-governmental associations whose internal structures are democratic. Once established, associations and foundations have the right to pursue their activities free of administrative intervention. Associations or foundations, or their boards of directors, can be dissolved only by court judgment and only the establishment or continuation of secret, military or paramilitary organizations is prohibited.

The right to form political parties is subject to more limitations than freedom of association. The 2012 constitution treated political parties in a liberal manner equal to that of associations and foundations.²² The 2014 Constitution, however, opens the notification requirement to further regulation by law and prohibits political parties formed on the basis of religion, or discrimination based on gender or origin, sectarian distinctions, and geographic location. Parties may not engage in activities that violate democratic principles, are secretive, or are of a military or paramilitary nature.²³

Freedom of Assembly

Another core obligation is the freedom of assembly, which is especially critical during electoral campaigns.²⁴ Political rallies should enjoy special protection given their direct connection to the democratic process. Article 73 of the constitution grants citizens the right to organize public meetings, marches, demonstrations, and other peaceful protests as long as they are unarmed. However this right is seriously restricted by the fact that any such public meeting requires prior notification of authorities as regulated by the law. This requirement to notify the authorities, which according to past practices entails the necessity to receive a positive response, may in practice lead to an erosion of the freedom of assembly.²⁵

Most importantly, The Carter Center is concerned that several provisions of the recently enacted “Protest Law” (Law 107 of 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations) contradict the freedom of assembly delineated by Article 73 of the 2014 Constitution. A number of provisions in the Protest Law have and will continue to result in unnecessary limits on freedom of assembly. Article 2 of the Protest Law stipulates that the law applies to public meetings during the official campaign period for elections, or any meetings of voters and the candidates or their representatives and meetings to select a candidate. The Protest Law also requires organizers of demonstrations, processions, and public meetings of more than ten people that take place in a public place without prior individual invitation to notify the Interior Ministry three days in advance. Article 10 grants Ministry of Interior officials an absolute right to ban any protest or public meeting on the vague basis of “serious information or evidence that

²¹ 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.”, International Covenant on Civil and Political Rights, Article 22(2): “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.”

²² Article 51 of the 2012 Constitution of the Arab Republic of Egypt

²³ Article 74 of the 2014 Constitution of the Arab Republic of Egypt

²⁴ 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.”

²⁵ The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association stated that, “A notification should be subject to a proportionality assessment, not unduly bureaucratic and be required a maximum of, for example, 48 hours prior to the day the assembly is planned to take place.” He also said that, “Prior notification should ideally be required only for large meetings or meetings which may disrupt road traffic,” May 2012

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>

there will be a threat to peace and security,” without any requirement to provide specific justification. Article 7 allows the banning of public meetings, processions, or protests if citizens’ interests are affected or road traffic is obstructed. Since any large assembly, however peaceful, has can be cited as likely to obstruct people and traffic, the law in effect provides a legal carte blanche to ban protests.

While organizers can, in theory, appeal a ban before the competent court, the law sets no time frame for the appeal process, meaning that the court could hear the appeal after the scheduled date of the event. Organizers are also required to notify the police of participants’ demands and messages.²⁶ While the law allows for a list of “specified safe areas” for each governorate in Egypt where assemblies are prohibited, it is not clear whether these will be in locations visible to the public.²⁷ Importantly, the level of force and tactics used in crowd dispersal is left mainly to the discretion of security forces on the ground, which will not always have direct contact with their commanding officers.

Since the adoption of this law, a number of high profile activists and opponents have been jailed and the police and other security forces have met peaceful public protests with violent responses.²⁸ Persons campaigning for a "No" vote during the January constitutional referendum were persecuted based possibly on provisions of the Penal Code or/and the Protest Law.²⁹

The passage of the Protest Law comes in the context of a violent crackdown focused initially on the Muslim Brotherhood but which has expanded to include journalists, academics, demonstrators, and groups such as the April 6 movement. A wide variety of people from this range of backgrounds have been referred to the criminal court and in some cases arrested and jailed for peacefully expressing their views. Following the violent dispersal of pro-Muslim Brotherhood demonstrators in August 2013, which left more than 1,000 dead, the Muslim Brotherhood was designated a terrorist group.³⁰ More recently, a criminal court in Minya sentenced to death sentence the spiritual leader of the Muslim Brotherhood along with over 1,000 others in the last two months. This continued crackdown on dissent by the government has seriously limited Egyptian citizens’ freedoms during the pre-electoral environment and created an atmosphere of fear and violence leading up to the election.³¹

Universal Suffrage, the Right to Vote: Voter Registration and Voter Education

A comprehensive and inclusive voter registration process is internationally recognized as an integral component of ensuring universal suffrage and the enjoyment of the fundamental right to vote.³² Since 2011, Egypt elections authorities have initiated a voter registration process based on the national ID database. The database has been improved over successive electoral events and the number of registered voters has significantly increased. However, the display and challenge process of the voter lists are still limited in time and mostly done with little voter education, thus undermining the potential role citizens could play to check their registration data and provide corrected data. Positive measures have been taken in the regulatory framework to provide a more

²⁶ Article 8 No. 3, Law 107 of 2013.

²⁷ Article 15, Law 107 of 2013.

²⁸ HRW, Egypt: High Price of Dissent, Journalists, Protesters, Academics Charged over Speech Offenses, February 20, 2014

²⁹ Egypt Constitutional Referendum, Observation Report, Democracy International, April, 2014

³⁰ The interim government cited recent attacks on security installations as the reason for this classification but provided no evidence linking the Brotherhood to those attacks. HRW, Egypt: High Price of Dissent, Journalists, Protesters, Academics Charged over Speech Offenses, February 20, 2014

³¹ HRW, Egypt: High Price of Dissent, Journalists, Protesters, Academics Charged over Speech Offenses, February 20, 2014

³² UNHRC, General Comment 25, para. 11

accessible process for voters. These measures include the PEC's introduction of election-day registration for OCV voters and allowing Egyptians residing outside their electoral domicile to register in the nearest polling center for a specified period of time prior to election day. Despite these efforts, only a small fraction of these voters actually registered.³³ The Carter Center urges the PEC to take necessary measures to ensure a more effective out-of-governorate registration process and to prevent multiple voting both for OCV and out-of-governorate voting.

In addition, The Carter Center urges Egyptian election authorities to extend their efforts for a more inclusive registration process that includes all eligible voters in the database, especially including women in rural areas, citizens not registered in the civil registry, and Egyptians residing out of the country.

Voter Education. Voter education and information efforts are necessary to create an informed electorate that can effectively participate in the electoral process and freely express their electoral preferences.³⁴ The Presidential Election Law indicates that the PEC may contribute to increasing citizens' awareness about the presidential elections and calls for the PEC's participation in the process.³⁵ In spite of this provision, the law does not establish a sufficiently clear mandate for the PEC to undertake voter education and information activities. Even in the absence of a strong mandate, election management bodies have an internationally recognized responsibility to inform stakeholders on the process. The Carter Center recommends that, in the future, Egypt's lawmakers place a clearly defined mandate on election authorities to inform stakeholders about the election process.

For these presidential elections, the PEC has taken some measures to inform voters and stakeholders on electoral procedures. In addition, the PEC has established some channels of communication with presidential candidates, their representatives and their respective campaigns. However, these efforts have been limited in size and scope, especially in crucial phases of the electoral process such as the finalization of voter lists and the out-of-governorate and OCV registration. The Carter Center urges future election commissions to continue and expand such efforts. In addition, the Center encourages the PEC to consider expanding its voter information and education campaigns to include as many forms of media as possible to provide as much coverage as possible to Egypt's voting population. This is especially important in countries experiencing transitions because of the considerable changes to the political system, legal framework, and procedures for elections.

Separate but related, the 2014 PEL fails to explicitly address the question of assistance of illiterate voters, which might result in inconsistent approaches to assisting illiterate voters in polling stations, as occurred during the 2012 presidential elections.

Right to be Elected

Core international obligations indicate that the candidate nomination process should ensure that the fundamental right to be elected is protected, and that any restrictions on the right to be elected and on the right of people to freely choose their representatives "must be justifiable on objective and reasonable criteria."³⁶

³³ There are no accurate figures regarding the number of eligible out-of-governorate voters, but some estimates indicate that there are at least 4 million. The registration deadline for these voters was May 10, 2014. At the close of registration only 57,000 had registered to vote.

³⁴ UNHRC, General Comment 25, para. 20

³⁵ Article 8 of the Presidential Election Law 22/2014

³⁶ U.N. General Comment 25, para 15. indicates that any restrictions on the right to be elected and on the right of people to freely choose their representatives "must be justifiable on objective and reasonable criteria. Furthermore,

The new PEL, however, contains provisions regarding who is eligible to run for president that may unfairly exclude qualified Egyptians from the process. For example, the prohibition against candidates whose parents or spouse have possessed non-Egyptian nationality excludes persons based solely on their descent, or the decisions by others regarding their nationality. The prohibition in the PEL against candidates who have not obtained a university degree,³⁷ a prohibition that did not exist in the 2012 law or in the current Egyptian constitution, unfairly excludes many capable Egyptians.³⁸ Banning candidates who have been legally rehabilitated after having been convicted of felonies, morals crimes, or breaches of trust may also improperly exclude from the process those Egyptians.³⁹

The new PEL also reduces the options for the nomination of presidential candidates compared to the previous law from 2012. Whereas the 2012 law allowed for candidates to be nominated by party support, or by endorsements from voters or members of Parliament, the new law allows presidential candidates to be nominated only by endorsements from voters or members of Parliament. Further, given the dissolution of Parliament in 2013, the only way presidential candidates can become nominated is through voters' endorsements. According to the PEL, presidential candidates needed to gather at least 25,000 endorsements from at least 15 different governorates, with at least 1,000 endorsements per governorate. The PEC introduced some positive procedures and new technologies to speed up the verification of endorsements and of endorsers' eligibility. While these moves were welcome by the candidates, there were reports of restrictions placed on supporters of Hamdeen Sabbahi to prevent them from notarizing their endorsements. For future elections, The Carter Center urges legislative reform to expand the criteria to including party endorsements to foster greater options and increase competition.

Right to Effective Remedy

While Article 97 of the new constitution provides citizens with a general right to access courts and forbids the immunization of any administrative act or decision from judicial review, the new PEL, as noted above, retains provisions of the previous law that prohibit the appeal of PEC decisions to another body. Article 7 of the 2014 PEL states: "PEC decisions shall be final, self-enforcing and incontestable by any means and before anybody whatsoever. Its decision shall not be suspended or invalidated."

There is sharp disagreement within Egypt regarding whether the PEL violates the constitution by prohibiting appeals of PEC decisions to another court. Some political leaders and legal scholars have argued that the PEC is an administrative body, and that therefore its decisions must be subject to appeal in accordance with Article 97 of the new constitution.⁴⁰ On the other hand,

General Comment 25 states that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education (...) or descent

³⁷ Reportedly a case has already been filed in the Egyptian courts challenging this criterion.

³⁸ As the Norwegian Helsinki Committee notes, "Discriminatory criteria [for candidates] such as education, residence, descent or political affiliation, are not acceptable..." See 'Election Observation' in Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers, p. 5.

³⁹ Restrictions on electoral candidacy should be narrowly tailored and based on reasonable criteria. See, for example, OSCE, Existing Commitments For Democratic Elections In OSCE Participating States, p. 63; "As with the right to vote, restrictions on the right to be elected must be confined to accepted criteria: age requirements, which may be somewhat higher than the legal voting age in the case of candidacies for high governmental office; citizenship requirements; reasonable residency requirements; and proportionate restrictions or disqualification in cases of findings of mental incapacity and criminal convictions."

⁴⁰ It is worth noting that the PEC's immunity from appeal was also included in the SCAF's Constitutional Declaration of March 30, 2011, in force during the 2012 Presidential election. There is no such provision specifically immunizing the PEC in the 2014 Constitution.

interim President Mansour, many senior judges, and other experts contend that the PEC is a judicial body and its decisions are therefore judicial and not subject to Article 97.⁴¹ A case before the Administrative Court challenging the immunizing of PEC decisions was reportedly dismissed because of lack of jurisdiction.

International obligations for democratic elections suggest that candidates and others who object to an electoral management body's decision should have the opportunity to bring their claim or appeal to an independent tribunal for consideration.⁴² Electoral management bodies should not have an ultimate, un-appealable authority over the adjudication of electoral disputes, since such bodies will often have an interest in the underlying dispute.⁴³

The problem of the PEC's ultimate authority over decision-making is compounded by the fact that by law the PEC is chaired by the Head of the Supreme Constitutional Court and its other four members are all senior judges from Egypt's highest courts. In cases where the PEC refers matters, such as campaign or election day violations to the ordinary courts, or refers constitutional matters, such as the validity of the Political Exclusion Law, to the Supreme Constitutional Court, the potential for conflict of interest, real or in appearance is essentially unavoidable and runs counter to international good practice.⁴⁴ The Center recommends, therefore, that future electoral laws should ensure that there is an opportunity to appeal to an impartial tribunal any decisions taken by an election management body. This tribunal should be independent of the election management body.

Right to Participate in Political Affairs

Egyptian Citizen Observation Groups. The right of citizens to participate in political affairs is a fundamental obligation for democratic elections.⁴⁵ When allowed to operate freely, citizen observers can play a critical role to foster transparency and lend credibility to the electoral process. Similar and supplemental roles are often played by international observers.⁴⁶ Given their status as citizens, it is especially critical to ensure that national citizen observers are allowed to fully and effectively exercise their right to participate in political affairs.

⁴¹ On March 12, 2014, President Mansour invited some political leaders to the Presidential Palace to discuss their concerns about this and other provisions of the 2014 PEL. Some of these leaders appear to have changed their minds and have accepted the provision "Mansour meets 13 politicians over presidential election law," State Information Service, March 13, 2014. <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=76623#.UybKra2SxuA>; "Egypt's President Fights for Support to Limit Appeals in Presidential Polls," Gamal Essam el-Din, Ahran Online, March 12, 2014. <http://english.ahram.org.eg/NewsContent/1/64/96534/Egypt/Politics-/Egypts-president-fights-for-support-to-limit-appea.aspx>.

⁴² UNHRC, General Comment No. 31, para. 15; AU, African Union Declaration on the Principles Governing Democratic Elections in Africa, para. iii. Also, "Electoral Justice", International IDEA, 24 Nov. 2010, para 37 "Several international human rights instruments have developed a series of principles related to the right of access to justice that should be observed in relation to the right of access to electoral justice and, in particular, to an electoral dispute resolution system that guarantees the protection and defence of electoral rights. These principles include, among others, the right to an effective remedy before an impartial, previously established court."

⁴³ The International Covenant on Civil and Political Rights as the African Charter on Human and Peoples' Rights provide the foundation for an understanding of the principles for election dispute resolution mechanisms based on public international law. In addition, General Comments 31 and 32 of the United Nations Human Rights Committee, the Venice Commission's Code of Good Practice in Electoral Matters, and other sources can help to add detail focus on the right to an effective remedy and the right to a fair and public hearing. See "International Obligations on electoral dispute resolution", The Carter Center, Feb. 2009 <http://www.cartercenter.org/resources/pdfs/peace/democracy/des/edr-approach-paper.pdf>

⁴⁴ UNHRC, General Comment No. 32, para. 19; AU, African Union Declaration on the Principles Governing Democratic Elections in Africa, para. Iii.

⁴⁵ UN ICCPR, Art. 25; UN CEDAW, Art. 7

⁴⁶ Declaration of Principles for International Observers, Article 16

The Carter Center notes that the current rules regulating observation create a very short timeline for accrediting national observers, which severely limits their ability to recruit and mobilize to full capacity, thus preventing them from conducting comprehensive missions. In addition, the regulations do not provide observers with access to the processes of aggregating and compiling election results. Further, the regulations include restrictions on the right of national citizen observers to issue statements about the electoral process before the final results have been issued.⁴⁷ Limiting observation missions to *post facto* statements undermines their role and potential to positively impact the election process. The Center urges the PEC to reconsider these regulations to allow for a genuinely comprehensive observation.

In order to create an environment that is conducive to non-partisan election witnessing by both domestic and international civil society organizations, The Carter Center urges Egypt's government and election authorities to take the following measures: (1) Ensure a transparent process that is open and accessible for both Egyptian citizen observers and international observers. To this end, implement provisions to facilitate election observation in accordance with good practice and international standards for election observation. Clear and timely provisions for are necessary to enable CSOs to properly understand the provisions as well as raise questions or concerns with the election authorities; properly recruit, train and deploy election observers; (2) Provide accreditation for observers early enough so that they can assess and have access to all stages of the electoral process, including voter registration, candidate nominations and campaigning, voting, counting, and aggregation. To this end, authorities should provide accreditation several months in advance of the elections; (3) Ensure that regulations governing observation allow citizen observation groups to issue public statements without interference at any stage in the process; (4) Eliminate time restrictions that limit the amount of time observers can stay inside the polling place. Such limitations undermine the core mission of observers and are counter to principles of transparency and access to public information. If a polling place is unusually crowded, the head of the polling station can simple measure, such as rotating access for election witnesses, media, and agents of candidates or parties.

Summary and Recommendations

In the period leading up to the presidential election, the legal framework and the actions of the government have severely limited political freedoms, marginalized opposition groups, and prohibited free and open political participation. At this pivotal moment in Egypt's transition, it is critically important for the Egypt government, especially its next president, to take steps to foster a more inclusive and democratic political process.

In a spirit of goodwill and mutual support, The Carter Center offers the following recommendations:

Political Environment

- **End crackdown on dissent.** The government should end the crackdown on dissenting forces, including the Muslim Brotherhood and its supporters as well as opposition activists and movements such as the April 6th movement and others.

⁴⁷ PEC decision no. 5, 2014. The Declaration of Principles for International Election Observation and the Declaration of Global Principles for Non-Partisan Election Observation and Monitoring by Citizen Organizations stipulate that election observation missions should be able to freely issue public statements and reports regarding their findings and recommendations

- **Rescind the Protest Law.** The Protest Law, which severely restricts public gatherings and rallies, including for electoral campaigning, should be rescinded immediately and persons imprisoned under the law should be released. All others accused, should be ensured key rights, including the right to a fair trial.
- **Pursue national dialogue and reconciliation.** National dialogue and reconciliation efforts should be pursued, including independent judicial investigation into wrongful deaths and allegations of torture.

Constitutional and Legislative Reform

- **Consider new constitutional amendments.** New constitutional amendments should be considered as soon as possible to ensure protection of core human rights and political freedoms, based on an inclusive political dialogue. In particular, consideration should be given to amendments that would strengthen the enforcement of human rights protections, the transparent exercise of public authority, and political and institutional processes to ensure that the armed forces and judiciary are accountable to the people.
- **Pass a new parliamentary election law that promotes strong parties and political representation.** Ensure that the forthcoming Parliamentary Election Law is developed with broad political inclusion, protects core political rights enshrined in the constitution, and serves to promote strong parties and a vibrant legislative branch.
- **Ease restrictions on media outlets and institute reforms to protect media freedoms.** To enable a more open political debate during the electoral process, restrictions on media outlets should be eased immediately. In addition, going forward, the Center strongly recommends that media outlets be regulated by private law, and that limitations be subject to a strict proportionality analysis to protect free expression. Further, the Center recommends ending the requirement that newspapers notify authorities before publication and limit extraordinary measures to the strict conditions of a state of emergency. Finally, the Center recommends the development of a media code of ethics.
- **Strengthen the rights of Egyptians to be elected.** Legal and constitutional reforms should strengthen provisions regarding the rights of Egyptians to be elected, and eliminate restrictions based on descent, education, and rehabilitation after conviction. In addition, reforms should expand the criteria for nominating presidential candidates to including party endorsements in order to foster greater options and increase competition.
- **Ensure that the future election provide the right to appeal decisions of the electoral authority.** To ensure the right to effective remedy, future electoral laws should provide an opportunity to appeal any decisions taken by an election management body to an impartial tribunal that is independent of the election management body.
- **Strengthen and enforce campaign regulations.** Strong campaign finance regulations are needed, especially those regarding the definition of what constitutes campaigning and where and when it can take place. Parties and candidates should be required to fully, accurately, and periodically disclose contributions received and expenditures made on behalf of their campaigns. This reporting should be made public.

Election Administration

- **Expand voter registration.** Government and election authorities should ensure a comprehensive and inclusive voter registration process and continue efforts to ensure all citizens are included in the civil registry, especially women in rural areas and Egyptians living abroad, so that they may be included in the voter's database.
- **Improve voter education.** Legislative reform is needed to create a clear mandate for election authorities to carry out vigorous voter education efforts through as many forms of media as possible. Legislative authorities should also issue clear regulations for assistance to illiterate voters.
- **Election observation.** Ensure full access for election observers throughout the rest of the presidential election process, including during the aggregation of results. For future elections, new regulations should ensure that observer groups, especially national citizen observers, can be accredited early enough to assess and have adequate access to all stages of the electoral process, including voter register updates, electoral preparations, the campaign period, voting, counting, and national-level aggregation.