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Carter Center Urges Dialogue and Constitutional Change to Strengthen Democratic Governance in Egypt

The Carter Center encourages Egyptians to initiate an inclusive political dialogue and to consider future amendments to the constitution to strengthen the core principles of democratic governance and bring the constitution better into alignment with Egypt's international political and human rights obligations.

In particular, the Center urges consideration of amendments to strengthen the enforcement of human rights protections, the transparent exercise of public authority, the balance of powers, and political and institutional processes that hold the Supreme Council of Armed Forces and judiciary accountable to the people.

On Jan. 14-15, 2014, Egyptians voted in a referendum to approve their second constitution in little more than a year. While the referendum results indicated that a significant part of the population supports the military-backed transition toward an elected civilian government, the short constitution-drafting period and lack of broad participation was a missed opportunity for Egyptians to build consensus on a shared vision of a democratic future.

The 2014 constitution contains key advances, including steps to bolster human rights protections. However, respect for key rights is undermined by provisions that formalize extraordinary privileges for the Supreme Council of the Armed Forces and the judiciary. The constitution also leaves many critical decisions to the House of Representatives, which will be elected later this year. A strong pluralistic party system that allows genuine debate in the House of Representatives will be necessary to ensure appropriate balance between the executive and legislative branches. Debate should be driven by mutual respect, especially given the requirement of a two-thirds majority in the House of Representatives for legislation affecting rights and freedoms and a referendum for all constitutional amendments.

Open public dialogue is crucial to transcend the ideological divides that separate Egyptians. Unfortunately, the constitution-drafting process served to deepen these divides rather than heal them. The referendum took place in an environment that already threatened many of the constitution's key tenets. Arrests of regime critics and of journalists have become widespread, and drafting took place in the shadow of a violent crackdown by security forces that left more than one thousand dead.

In a spirit of respect and good will, The Carter Center offers the following recommendations for possible constitutional amendments to the president and legislature in the hope that Egyptians will work together to build a common vision of the future.

review). Members of the House of Representatives could be enabled to challenge the validity of the annual budget law if constitutionally mandated shares of the GNP are not spent on health care (Article 18), education (Article 19), university education (Article 21), and research (Article 22).

- (7) ***Accountability of the Supreme Constitutional Court.*** To provide greater accountability, consideration should be given to the selection process for Supreme Constitutional Court members, so that the body does not choose its own members or determine its size.
- (8) ***Women's representation.*** Consistent with international obligations and the constitution's intent to improve the representation of women in the legislature, provisions should be considered to ensure that at least 30 percent of seats in the parliament are held by women. This could be achieved through the use of quotas,

The 2014 constitution is significant both because of its content and its status in Egyptian legal practice as the highest law of the land. A constitution determines the institutional framework of the state and the way legislative, executive, and judicial power is exercised. It identifies key values of a society and important principles of human rights protection, and apportions scarce resources in the face of competing needs. It can give expression to the ideals and aspirations of a nation. A well drafted constitution contains a robust system of checks and

courts to declare void any law, regulation, executive action, or cou

utilize general principles such as the rule of law (Article 1) to establish constitutional constraints not expressly mentioned in the text.

The constitution also establishes a personal responsibility of the president to abide by¹⁵ and respect¹⁶ the constitution and reinforces it with the possibility of impeachment.¹⁷ However, the constitution does not clearly subject executive authority in general to the same obligations.¹⁸ An exception in both the 2012 constitution¹⁹ and 2014 constitution is the police force, which is bound to “comply with the duties set out in the constitution and the law, and shall respect human rights and fundamental freedoms.”²⁰ This language demonstrates drafters’ intent to redress police authorities’ poor track record of human rights violations under past regimes.

There are no explicit constitutional constraints on the judiciary. Judges are “subject to no other authority but the law,²¹ which the SCC can itself declare unconstitutional.²² The appeals process, which allows citizens to raise constitutional arguments against the way in which rights and freedoms are interpreted by judges in lower courts, is not a sufficient safeguard given the very limited direct individual access to the SCC.²³

The SCC has in the past focused its work on reviewing the constitutionality of laws and regulations. Most violations of rights and freedoms, however, occur through administrative rather than legislative acts. The Carter Center therefore strongly recommends that the SCC apply its authority to interpret legislation²⁴ to review the constitutionality of administrative decisions challenged by citizens but confirmed in lower courts. Judges on the lower tiers of the court system would also benefit from guidance on the interpretation of the constitution, particularly with respect to rights and freedoms.

The 2014 constitution places the size of the SCC and selection of its members entirely in the hands of the General Assembly of the SCC itself, giving the highest court an unprecedented level of independence from the other institutions.²⁵ This was not the case under the 2012 constitution, which left this question to be decided through ordinary legislation.²⁶ In order to redress this excess of independent authority, consideration should be given to a new mechanism for appointing the court’s members. This could involve the legislature and/or the executive, or an independent commission composed of institutional and societal stakeholders such as legislators, judges, and lawyers.

The Constitution also lacks a clear statement of its supremacy with respect to the armed forces. Article 200, which sets out the general framework for the armed forces, does not require the armed forces to respect either the law or the constitution. An obligation could be

¹⁵ Article 139.

¹⁶ Article 144.

¹⁷ Article 159.

¹⁸ Article 139 states that the president is the head of state and the head of executive power, but no more explicit clause exists.

¹⁹ Article 199 of the 2012 Constitution.

²⁰ Article 206.

²¹ Articles 184, 186 and 194.

²² Article 192.

²³ See Law 48 of 1979.

²⁴ Article 192.

²⁵ Article 118 of the Tunisian constitution of 2014, in contrast, clearly sets the size of the SCC (12), the profile of its members (three-quarters legal experts with at least 20 years of experience), and the length of members’ terms (9 years). The constitution also attempts to prevent any institution from exercising undue judicial influence by giving the president, the Chamber of the People’s Deputies, and the Supreme Judicial Council the power to appoint four members each.

²⁶ Article 176 of the 2012 constitution.

inferred from the fact that the president, as Supreme Commander,²⁷ is obliged to abide by the constitution.²⁸ This provision, however, is closely linked to the declaration of war and combat missions outside Egypt, and is not necessarily applicable to military operations within Egypt and in peacetime. Past practice in crisis situations, especially under the 2012 Constitution, suggests that the president's personal responsibility to uphold the Constitution under Articles 139 and 152 will not effectively translate into any institutional responsibility of the armed forces to do so. The Minister of Defense, who is Commander in Chief and must be an officer of the armed forces,²⁹ will in 29

The constitution also leaves too many important decisions about the institutional framework of the state to the House of Representatives. Prominent examples include additional candidacy requirements for members of the House of Representatives³³ and the President;³⁴ conditions for declaring a state of emergency;³⁵ the mandate of local administrators; the selection of governors;³⁶ access to the SCC;³⁷ definition of crimes under the jurisdiction of the Military Court;³⁸ and the responsibilities and powers of the National Council for Human Rights.³⁹ Leaving these matters to be addressed through ordinary legislation shifts the balance of power to the House of Representatives, which requires only an absolute majority of the members present at a vote, or as few as a third of its total members, for passage.⁴⁰ Unlike laws impinging on human rights, none of these require special legislative procedure.

The Carter Center strongly recommends that the provisions dealing with states of emergency, the functions of local government, the size of and access to the SCC, the authority of the Military Court, and the National Council for Human Rights be given further consideration through future amendments that provide greater detail. The Center welcomes the inclusion of Article 224, which requires the House of Representatives to issue laws that are necessary to make the constitution operational, but suggests that members of the House of Representatives, the president, the prime minister, and governors and other key local administrators be granted standing in the SCC in order to challenge legislative inactivity.

3. Human Rights

Overview

The Carter Center commends efforts to expand protection of civil rights and liberties, especially in light of Egypt's history of human rights abuses. Positive indicators of the drafters' deliberations over human rights provisions include the allocation of fixed percentages of the GNP for socioeconomic entitlements,⁴¹ the requirement that laws

ensure the enforcement of guaranteed rights. Authorities should provide citizens a transparent and reasonable justification for any law, regulation, administrative decision, or court judgment that affects their rights and freedoms.

Many supporters of the constitution maintain that acts of terrorism justify the state's restriction of important civil rights and freedoms such as free speech or the right to peaceful assembly. But rights and freedoms must prevail ev

that extend human rights to legal entities do so either in the form of specific entitlements or through a general clause such as Article 19(3) of the German Basic Law. This provision declares that “basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.”⁵¹

The 2014 constitution does not clearly state if and when human rights are protected if only private parties are involved. It grants workers a share in the management and profits of enterprises⁵² and the right to strike peacefully,⁵³ and children the right to family care,⁵⁴ but does not explicitly bind private parties to uphold constitutional rights. Some constitutions declare human rights directly applicable in these and similar relationships⁵⁵ while others only

contains a limitation clause in Article 92. However, its failure to clearly define substantive conditions for the regulation of rights leaves room for legislative overreach.

Article 92 creates a two-tiered system of rights protection. It states that “inalienable rights and freedoms may not be suspended or reduced.” All other rights and freedoms, however, may be regulated unless the law infringes on their fundamental ‘essence’. The relevance of Article 92’s protection of inalienable rights is unclear given that the text of the constitution does not specifically mention any inalienable rights and freedoms. Certain rights appear to be guaranteed in unqualified terms, including human dignity (‘inviolable’),⁵⁸ freedom of belief (‘absolute’),⁵⁹ the right to peaceful private assembly,⁶⁰ and the right to litigate in court.⁶¹ The Carter Center urges the courts to clearly elevate to ‘inalienable’ the status of human dignity, freedom of belief, freedom of thought and opinion, life (which is currently not protected at all), freedom from torture and slavery or servitude, and the rights to habeas corpus, a fair trial,

Most systems that allow the declaration of a state of emergency specify in the constitution the reasons for which this extraordinary measure may be imposed. These include a threat or actual state of war or aggression; serious threats to the independence or internal security of a country; threats to the functioning of important state institutions; armed rebellion; natural disasters; or serious economic emergencies. Some constitutions require more generally that the declaration of a state of emergency be necessary for the protection of a particularly important public interest or to restore peace and order.

After more than forty years of a constant state of emergency in Egypt, it is crucial to restore the exceptional nature of the measure and limit its use to combating threats that fundamentally threaten the national interest. This is best done on the constitutional level given the importance of the issue and the risk of abuse that a tool of this kind entails.

The Carter Center strongly recommends that the following steps be taken to protect against the abuse of states of emergency:

- Require that a declaration under Article 154 be tied to specific reasons that convey the exceptional nature of the measure;

- Clearly define the measures that may be imposed in a state of emergency and the legal consequences for citizens;

- Grant members of the House of Representatives standing in the SCC to challenge the validity of a state of emergency;

- Exempt certain rights and freedoms from any limitation, even under states of emergency, including the right to life; human dignity; the principle of equality; freedom from torture and cruel, inhuman, or degrading punishment; freedom from forced labor, slavery, or servitude; the right to a fair trial; and key rights of the accused.

This approach would bring the 2014 constitution into line with the requirements of Article 4 of the International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a party.

3.1.7 Enforcement of Rights and Freedoms

A declaration of rights and freedoms in a constitution is only meaningful if accompanied by an institutional framework that promotes their enforcement. Institutions and mechanisms that can contribute to the protection of human rights include an independent human rights commission, special scrutiny of draft laws by the legislature or judiciary, and individual or collective access to the court system in cases of alleged violations.

National Council for Human Rights

Comparative experience suggests that an independent commission with powers to investigate and report human rights violations, provide support for victims, and foster concern for the protection of rights and freedoms in government and civil society can transform countries with a history of serious human rights violations. Specialized independent commissioners who are embedded in particularly sensitive areas of public administration, such as the police or intelligence agencies, can be an effective extension of a general human rights commission.

The National Council for Human Rights (NCHR) is one of several independent national councils mentioned in Article 214.⁷⁵ The constitution gives these councils legal personalities and technical, financial, and administrative independence. They must be consulted with respect to pending legislation and have the right to report to public authorities that operate in their respective areas of expertise. The details, including the exact composition of these councils and any institutional guarantees for the independence and neutrality of their

⁷⁵Other examples specified in the provision are the National Council for Women, the National Council for Childhood and Motherhood, and the National Council for Disabled Persons.

members, are left to regulation by law. The NCHR, in particular, is also given a role in supporting victims of specific human rights violations. Article 99 allows the commission to file complaints with the public prosecutor and to intervene, at the request of victims, in civil lawsuits for compensation. This will likely include actions against both the state and individual perpetrators.

Two decisions weakened the role of the NCHR and other independent councils in the final stages of the drafting process. Drafters removed a reference to the right of independent bodies and regulatory authorities, already granted in the 2012 constitution, to present annual reports to the president, House of Representatives, and general public. They also deleted the obligation of the House of Representatives to redress violations outlined in the reports within six months.⁷⁶

The NCHR's ability to work effectively depends nearly entirely on the independence, resources, investigative powers, and reporting rights granted by the House of Representatives.

strongly recommends adding a provision that expands the circle of potential plaintiffs in cases of alleged human rights violations to persons acting on behalf of victims who are unable to defend their own rights and freedoms (including family members of those killed by the police or military), companies or associations acting on behalf of their members, and perhaps NGOs acting in the public interest.⁷⁹

Individual access to the SCC is limited in the current legal framework, under Article 29 of Law 48 of 1979, to two situations. Questions regarding the validity or interpretation of statutes are either referred to the SCC by lower courts, or these courts may grant citizens the opportunity to file a case with the SCC themselves.⁸⁰ In all cases, the decision to grant access to the SCC rests solely with the court that has jurisdiction over the case.

The Carter Center strongly recommends the expansion of individual access to the SCC, allowing citizens alleging a violation of their rights and freedoms to access the court once they have exhausted all other legal remedies. In countries that give citizens such direct access, this mechanism has shown itself to be a powerful way to enforce human rights. While some opponents have expressed concern about overloading the SCC with cases, the Court can choose cases it wants to hear (certiorari) or use screening committees to identify and dismiss cases concerning questions on which the SCC has previously decided.

Another effective institutional safeguard for the protection of human rights is the ability of legislators or the executive to challenge directly in court the constitutional validity of a legislative proposal, decision, or law.⁸¹

governments to guarantee a minimum level of support for the most vulnerable members of society.

The 2014 constitution contains a large number of socioeconomic entitlements that, if provided, will put considerable pressure on the budget. The following provisions may require direct or indirect public expenditure:

- Article 7 (financial support for Al-Azhar);
- Article 8 (means to achieve social interdependence);
- Article 11 (protection of women);
- Article 12 (right to work);
- Article 16 (individuals who sacrificed their health or lives for the nation);
- Articles 17 and 18 (social security; pension systems; health care);
- Article 19 (right to education);
- Article 20 (development of technical education as well as vocational training);
- Article 21 (funding for a wide range of academic institutions);
- Article 22 (support for teachers);
- Article 23 (support for scientific research);
- Article 25 (eradication of illiteracy);
- Article 29 (support for agricultural production);
- Article 30 (support for fishermen);
- Article 46 (right to a healthy environment);
- Article 48 (access to culture);
- Article 54 (right to a lawyer, assistance for disabled; compensation for unlawful detention);
- Article 56 (rehabilitation of convicted persons);
- Article 59 (public safety);
- Article 68 (right to access information held by the state);
- Article 78 (adequate, safe and healthy housing);
- Article 79 (clean water and food);
- Article 80 (rights of children, including the right to basic nutrition, shelter, and health services);
- Article 81 (rights of persons with disabilities and dwarves);
- Article 82 (provision of care to the youth);
- Article 83 (rights of the senior citizens);
- Article 84 (support for athletes);
- Article 91 (asylum for foreigners);
- Article 96 (protection for victims, witnesses, accused, and informants);
- Article 98 (legal aid); and
- Article 99 (compensation for the violation of rights and freedoms).

Not all of these provisions are socioeconomic rights or entitlements, but all have financial implications and should be taken seriously in the context of the constitution's human rights commitments.

Some obligations will not require immediate expenditure, but can only be fulfilled if sufficient resources are dedicated to the task. The right to access information guaranteed in Article 68 is a fundamental human right as defined by Article 19 of the Universal Declaration of Human Rights and a critical link to many of the socioeconomic rights cited in the constitution. Implementation of the access to information requires public officials to respond

to citizens' requests; compile data from different sources; redact parts of documents to protect sensitive information; send the response to the applicant or facilitate access in a secure location, and address legal challenges arising from unfulfilled or denied requests. Comparative experience from other systems that grant citizens access to public sector information suggests that this entitlement can create considerable administrative and financial burdens for the state, and that not all costs can be passed on to citizens as fees if the right is to be meaningful.

The most demanding socioeconomic entitlements are found in Articles 18, 19, 21, and 22, which dedicate a share of the GNP to health care (at least 3 percent), education (at least 4 percent), university education (at least 2 percent) and scientific research (at least 1 percent).⁸⁴

prohibit restrictions except those necessary to preserve the public interest in a democratic society.⁸⁶

Article 75 grants all citizens the right to form non-governmental associations and foundations, and would be strengthened by including the right of members to participate in their activities. Authorities must be notified of an organization's formation if it wishes to acquire a legal personality. 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.

This expansion of freedom of association is an improvement on Article 55 of the 1971 constitution, which granted citizens the right to form associations but placed the entire regime at the disposal of the legislature. The 2014 text is ambiguous, however, with regard to the banning of associations and foundations. It reintroduces a ban on secret and military or paramilitary organizations,⁸⁷ but stops short of outlawing associations whose activities are generally detrimental to society, which was in the 1971 constitution and allowed arbitrary limitation of freedom of association. While a ban on military or paramilitary organizations is acceptable given the state's legitimate monopoly on the use of military force, it is not clear if the ability to dissolve an organization or a board of directors by court order is limited to these

According to Article 75, the internal structures of associations and foundations must be democratic. There is an important distinction, however, between associations or foundations and political parties. The Carter Center recommends that only organizations that decide to participate in the electoral process be defined as political parties and be bound to democratic principles. All other organizations are part of civil society and should be free to choose the way in which their members associate as long as they abide by the general laws of the land. Democratic structures are desirable but their absence is not a justifiable pretext for state control or intervention.

Political Parties

The right to form(to)-705.1 on.

assemblies. Police officials will have to decide how to deal with assemblies once notified⁹³ and security forces on the streets will have to determine how to interact with participants.⁹⁴ Courts may have to develop legal principles to guide both sides and inform the practical

private law to the 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 authorities to rescind the requirement that newspapers notify authorities before publication and limit extraordinary measures to the strict conditions of a state of emergency.

Article 237: Terrorism

The wide constitutional authority given to the state to combat terrorism, even though included in 'transitional' provisions, is likely to result in limits on freedom of association, the right to form political parties, the right to peaceful assembly, and freedom of expression. Article 237

could provide safeguards for the followers of the other religions in Egypt that are not expressly mentioned in the Constitution. Article 64 establishes freedom of belief as an absolute right of all citizens and protects private forms of its expression. Article 53 guarantees equality before the law regardless of religion or belief. These provisions establish a constitutional basis for the equal treatment of all citizens with respect to their religious affiliation and private belief. To ensure the application of these principles, the 'essence' of freedom of belief should include, for example, property rights and a family life (including marriage) without restrictions based on religious affiliation. Further, fair implementation of Article 53 would require that administrative functions, such as the formal registration of property or marriages, be performed in a neutral manner and regardless of the applicant's religious beliefs. Existing laws and regulations that violate these principles will have to be amended accordingly.

While the privileged status given to Muslims, Christians, and Jews is in conflict with international norms for the freedom of belief, The Carter Center urges at a minimum the inclusion of a provision that requires the state to provide civil procedural alternatives regarding issues of property and marriage to followers of non-Abrahamic religions and nonbelievers, and as a choice for followers of the constitutionally privileged Abrahamic faiths.

3.1.11 Military Courts

Article 204 is the single most criticized provision of the 2014 constitution. It subjects civilians to the jurisdiction of the Military Court for crimes that constitute a direct assault against military facilities or camps of the armed forces, military zones (including designated border areas), equipment, vehicles, weapons, ammunition, documents, military secrets, public funds, military factories, military service, or officers and personnel of the armed forces acting in their official capacity.

The Carter Center strongly opposes the jurisdiction of the Military Court over civilians as it does not comply with the rule of law as set out in Articles 1 and 94 and is fundamentally incompatible with the vision of civilian government. While international law does not strictly prohibit military trials of civilians, such tribunals often do not meet the standards of independence and openness required by international obligations.¹⁰⁸ Past experience in Egypt suggests that the basic right to due process is not respected in military trials of civilians. Detained civilians have been subjected to serious human rights violations, including physical and sexual abuse, while in the custody of the Armed Forces.

The Center urges authorities to consider discontinuing use of the Military Court to try civilians

