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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.

- (1) ***Responsibility to uphold the constitution.*** Constitutional provisions should be considered to bind public authorities at all levels of government, including judges and the armed forces, to uphold the constitution.
- (2) ***Stronger protection of fundamental rights and freedoms.*** New provisions should be considered to protect core rights, including but not limited to the right to life, human dignity, freedom from torture, and the right to a fair trial. Consideration also should be given to the inclusion of the principle of proportionality as means of regulating rights and freedoms. A proportionality test provides courts a coherent framework to guide their rulings on the constitutionality of legislation and administrative decisions, including that 1) the state pursues a legitimate public aim; 2) chooses an approach capable of achieving this aim; 3) that it impairs the right in question as little as possible; and 4) that the positive effects for society outweigh the negative impact on a right or freedom. The current requirement of a two-thirds majority of the members of the House of Representatives to pass laws regarding fundamental rights might prove difficult in practice. Steps also should be taken to strengthen the independence and powers of the National Council for Human Rights to make it a more effective champion of rights and freedoms. Consideration should be given to defining the composition and powers of the council in the constitution, requiring public authorities to monitor and regularly report on the status of human rights protection in their areas of competence, and restoring the duty of the House of Representatives to address shortcomings within a prescribed period.
- (3) ***Ensuring press freedom.*** The Center recommends that efforts be made to securing greater media freedoms, including the consideration of amendments that clearly define the authority of the Supreme Council for the Regulation of the Media so as to prevent its overreach and rescind the requirement of newspapers to notify the government before publication. Any limitations on media freedoms should be subject to proportionality analysis.
- (4) ***Limitation of states of emergency and military trials.*** Authorities should take steps to protect against the abuse of states of emergency, including consideration of an amendment that would more clearly specify reasons to justify a state of emergency, define the measures that may be imposed, and guard certain rights and freedoms from being restricted when one is in effect. Given Egypt's history, the Center recommends banning the use of military trials for civilians, even in states of emergency, unless strict limits and conditions are defined to ensure independent trials, due process, and transparency.
- (5) ***Civilian oversight of the armed forces.*** Civilian authority over the military is an essential feature of democratic societies. To this end, it is important that Egyptians consider amendments to make the armed forces subject to the authority of elected civilian bodies and to regulate the competencies of the Supreme Council of the Armed Forces. To ensure greater transparency and accountability, amendments should be considered to enable the House of Representatives to discuss the armed forces' budget and details of military expenditure included in the annual budget.
- (6) ***Access to the Supreme Constitutional Court.*** Stronger protection of key rights could be ensured by allowing citizens to have a constitutional right to access the Supreme Constitutional Court once they have exhausted all other legal remedies. Provisions could be added to allow legislators and the executive to challenge directly in court the constitutional validity of a legislative proposal, decision, or law (abstract judicial

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, measures to promote the increased participation of female independent candidates, or amendments to the electoral system that ensure women are elected (e.g. the use of zippered party lists).
- (9) ***Stronger local democracy.*** Provisions should be considered to grant locally elected representatives greater legislative authority and resources to develop local government under the supervision of the central government.
- (10) ***Ongoing legislative review.*** As a means to promote regular review, a special legislative committee or permanent independent law commission should be convened to continuously review Egyptian laws and regulations with a view to their compatibility with constitutionally guaranteed rights and freedoms.
- (11) ***Simplification of the constitutional amendment process.*** Going forward, consideration should be given to removing the requirement of a referendum for all constitutional amendments (Article 226) in order to enable a simpler path to constitutional reform.

**Background on The Carter Center in Egypt.** 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 2013-2014 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. The Center did not witness voting procedures on referendum days. 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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## **1. Introduction**

The Jan. 14-15, 2014, referendum was for many Egyptians a vote on the transition roadmap set out by the Supreme Council of the Armed Forces (SCAF) on July 3, 2013 – and with it the general political course of the country – rather than the finer points of a new constitution. Many Egyptians hope that the country will now return to a path of political stability and economic recovery. While the drive to return to normalcy and transfer power to an elected civilian government is understandable, the lack of broad participation and consensus in the constitutional process resulted in the failure to capitalize on an important opportunity for lasting change. =

### **1.1 The Drafting Process**

The July 8, 2013, Constitutional Declaration laid out a two-step process for amending the 2012 constitution. The first step required Interim President Adly Mansour to form a committee of 10 legal experts,<sup>1</sup> who drafted a list of constitutional amendments within 30 days. President Mansour then called for the formation of the Committee of 50, whose representatives were to reflect all segments of society and which would prepare the final draft of the constitution for referendum. The selection of the committee's members was done according to opaque criteria and excluded an important group of political stakeholders. Just as secularists were sidelined from the 2012 constitution-drafting process, Islamists were almost entirely excluded from the Committee of 50. The drafting process thus served to deepen political divides among Egyptians rather than as a means to achieve consensus. Moreover, the process lasted just five months and did not allow sufficient time for substantive public debate of the draft constitution or extensive voter education.

The referendum was widely framed and perceived as a vote of support for the military, its transition roadmap, and Field Marshal Abdel Fattah Al-Sisi. It took place in an environment that already threatened many of the constitution's key tenets. Thousands of secular and Islamist opponents to the military-backed regime were arrested during the drafting of the constitution, and an increasing number of journalists also have been jailed.<sup>2</sup> Over a thousand were killed in security forces' crackdown in August 2013 and clashes that followed. Rights groups also have documented numerous accounts of torture of political detainees over the last several months.<sup>3</sup> Leading up to the January referendum, campaign materials urging a "yes" vote on the constitution were widespread throughout Egypt, while the few citizens who publicly advocated a "no" vote were arrested. These incidents created a climate of intimidation ahead of the vote.

### **1.2 Significance of the 2014 Text<sup>4</sup>**

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<sup>1</sup> 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.

<sup>2</sup> Human Rights Watch, "Egypt: High Price of Dissent," Feb. 20, 2014.

<sup>3</sup> Egyptian Initiative for Personal Rights, "Egyptian Rights' Organizations Demand Independent Investigation into Torture Allegations," Feb. 12, 2014.

<sup>4</sup> '2014 constitution' is used for practical reasons although the referendum of Jan. 14-15, 2014 in fact only amended the suspended 2012 Constitution; see the promulgation of the document as 'Issuance of the Amended Constitution of the Arab Republic of Egypt' by Interim President Adly Mansour, Official Gazette, Issue No. 3 *bis* (a), Year 57 (Jan. 18, 2014). Articles that are not attributed to a particular document refer to the 2014 constitution.

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 balances between the institutions of government, and provides mechanisms both for the peaceful transfer of power through democratic elections and the effective resolution of political disputes. A constitution can also be a tool for meaningful reconciliation to help a polarized society address past conflict. Egypt's 2014 constitution contains many of these elements. But it could have provided more effective solutions in key areas had the process been more inclusive of Egyptian society and had the members of the Committee of 50 tasked with drafting the constitution been given more time, opportunity, and incentives to explore alternative approaches that reflect international best practice and the experience of other societies that have faced similar challenges.

Egypt has a constitutional history that suggests that the content of the constitution will matter in legal practice. The Supreme Constitutional Court (SCC) has on a number of occasions invalidated laws and decisions of other institutions based on its interpretation of the 1971 and 2012 constitutions, confirming its regard for the constitution as the highest law of the land. Even when controversial, these judgments were enforced by the executive and legislative branches of government.<sup>5</sup> This is likely to continue under the 2014 constitution.

### **1.3 The 2014 Constitution as a Transitional Arrangement?**

The task of the Committee of 50 was only to amend the suspended 2012 constitution,<sup>6</sup> although most Egyptians regard the 2014 text as a completely new document.<sup>7</sup> Indeed, much of the substantive content of the 2014 constitution closely mirrors that of Egypt's two previous constitutions. While it promises to protect a broader scope of human rights and freedoms than its predecessors, more could have been done to ensure the enforcement of these rights and to foster the development of a vibrant and inclusive political culture and more transparent and accountable government. The constitution fails to redress Egypt's poor track record of human rights protection and political freedoms and long history of military privilege unrestrained by civilian oversight. The broad similarities between the 2014 constitution and its predecessors seriously limit the likelihood of any changes to deeply entrenched state institutions and practices.

While it would be desirable to amend the constitution to address these problems, the process is difficult and costly and is not in the interest of powerful institutions that have secured considerable influence. Egypt also lacks a tradition of frequent constitutional reform and many citizens are eager for political stability.<sup>8</sup>

## **2. General Issues**

### **2.1 Supremacy of the Constitution**

A supremacy clause declares a constitution the highest law of the land and is among the most important general provisions found in contemporary constitutions. It establishes the basis for

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<sup>5</sup> Article 195 declares that judgments of the SCC "shall be binding upon everyone and all state authorities."

<sup>6</sup> Article 29 of the Constitutional Declaration of July 8, 2013.

<sup>7</sup> See the many post-referendum media reports that refer to the "new 2014 constitution."

<sup>8</sup> Only four amendments, including the most recent reform of the 2012 constitution, were passed between 1971 and 2014.

courts to declare void any law, regulation, executive action, or court judgment that contradicts fundamental constitutional rules and values.<sup>9</sup> Some constitutions contain a clause that reiterates the supremacy of the document in the specific context of human rights protection.<sup>10</sup> A supremacy clause powerfully expresses the idea that a constitution is the ultimate yardstick with respect to the exercise of public authority.

Egyptian courts have in some past decisions stated more explicitly the supreme status of the country's constitution. The SCC has declared that the constitution is "the highest fundamental law which establishes principles and rules on which the system of government is based" and that consequently all public authority is obliged "to abide by the rules and principles of the constitution."<sup>11</sup> Unfortunately, this unambiguous language was not included in the 2014 constitution.

Like its predecessors, Egypt's 2014 constitution contains only indirect references to its supreme status.<sup>12</sup> It includes provisions that suggest the supremacy of the constitution with regard to the activity of the president and House of Representatives, but the judiciary and Armed Forces are subject to far less stringent constitutional controls.

According to the constitution, the House of Representatives enacts legislation and approves the general policy of the state, the general plan of economic and social development, and the budget "in the manner stated in the constitution."<sup>13</sup> This provision binds the House of Representatives to the formal procedures set out in the document. The most important procedural rule is the requirement of a two-thirds majority to pass legislation that regulates rights and freedoms (Article 121) or put constitutional amendments to a referendum (Article 226).

The strongest limitation in terms of content follows from Article 92, which states that no law regulating the exercise of rights and freedoms may restrict these "in a manner that prejudices their substance and essence." The constitution also bans the House from approving any constitutional amendment that deals with the re-election of the President or derogates the principles of freedom or equality.<sup>14</sup> As long as the House of Representatives acts within these procedural and substantive limits, it has wide authority to act as it wishes unless the courts

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<sup>9</sup> Article 2 of the South African constitution of 1996 declares: "This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Article 13 of the Iraqi constitution of 2005 declares: "(1) This constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. (2) No law that contradicts this constitution shall be enacted. Any text in any regional constitution or any other legal text that contradicts this constitution shall be considered void."

<sup>10</sup> Article 8(1) of the South African constitution of 1996 declares: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." Article 1(3) of the German Basic Law declares: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Article 2(1) of the Iraqi constitution of 2005 declares: "Islam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam. B. No law may be enacted that contradicts the principles of democracy. C. No law may be enacted that contradicts the rights and basic freedoms set out in this constitution."

<sup>11</sup> SCC Decision 37 of May 19, 1990, OJ June 3, 1990, SCC 4: 256-293.

<sup>12</sup> See Articles 5 (the political system), 101 (House of Representatives shall exercise its powers in the manner stated in the constitution), 139 (duty of the President to abide by the provisions of the constitution), 144 (oath of the President), 150 (duty of the President to develop and implement general state policy as stated in the constitution), 151 (publication of treaties in accordance with the provisions of the constitution), 159 (indictment of the President for violating provisions of the constitution), 165 (oath of the Prime Minister and members of the Government), 192 (exclusive power of the SCC to decide on the constitutionality of laws and regulations), 195 (binding effect of SCC judgments), and 224 (amendment or repeal of pre-constitutional laws and regulations only in accordance with the regulations and procedures established by the constitution).

<sup>13</sup> Article 101.

<sup>14</sup> Article 226.

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 by<sup>15</sup> and respect<sup>16</sup> the constitution and reinforces it with the possibility of impeachment.<sup>17</sup> However, the constitution does not clearly subject executive authority in general to the same obligations.<sup>18</sup> An exception in both the 2012 constitution<sup>19</sup> 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.”<sup>20</sup> 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,”<sup>21</sup> which the SCC can itself declare unconstitutional.<sup>22</sup> 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.<sup>23</sup>

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 legislation<sup>24</sup> 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.<sup>25</sup> This was not the case under the 2012 constitution, which left this question to be decided through ordinary legislation.<sup>26</sup> 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

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<sup>15</sup> Article 139.

<sup>16</sup> Article 144.

<sup>17</sup> Article 159.

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

<sup>19</sup> Article 199 of the 2012 Constitution.

<sup>20</sup> Article 206.

<sup>21</sup> Articles 184, 186 and 194.

<sup>22</sup> Article 192.

<sup>23</sup> See Law 48 of 1979.

<sup>24</sup> Article 192.

<sup>25</sup> 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.

<sup>26</sup> Article 176 of the 2012 constitution.

inferred from the fact that the president, as Supreme Commander,<sup>27</sup> is obliged to abide by the constitution.<sup>28</sup> 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,<sup>29</sup> will in practice exercise direct influence over their activities. He may have to choose between his oath as a member of the government (to respect the constitution and the law)<sup>30</sup> and his personal loyalty to and membership in the armed forces.

The Carter Center emphasizes the importance of a provision that binds public authorities at all levels of government, including judges and the armed forces, to uphold the Constitution. In light of serious concern about the independence of the armed forces from civilian and constitutional controls, The Carter Center strongly recommends the introduction of a provision that explicitly expresses the duty of members of the armed forces not only to "protect the country and to preserve its security and the integrity of its territory"<sup>31</sup> but also to uphold the constitution.<sup>32</sup> This should include activities of the Military Court under Article 204.

## **2.2 Decisions Left to the Legislature**

There is a crucial difference between deciding issues directly in a constitution and leaving matters to be regulated by ordinary legislation. Constitutions that attempt to overcome internal conflict and foster reconciliation, as in South Africa after the end of Apartheid, tend to be more detailed and contractual in style. International best practice suggests that many issues the Egyptian constitution leaves to the House of Representatives would be better regulated on the constitutional level.

Three key considerations influence the level of detail that is desirable: the importance of the matter in question, constitutional flexibility, and the institutional balance between the legislature and courts with the power of constitutional review. Particularly important issues such as the rights and freedoms of citizens and the basic infrastructure of the state, including the composition and powers of the most important state institutions, are usually regulated in a constitution itself. More detail, and with it legal certainty, reduces constitutional flexibility, especially if a constitution is technically difficult to amend. Less detailed documents can give courts with the power of constitutional review more leeway to shape the legal order by interpreting both the provisions of a constitution and ordinary legislation in a particular way. The Supreme Court of the United States is a good example.

A striking feature of the 2014 constitution is the amount of detail it leaves for the House of Representatives to determine. Although Egypt's 2014 constitution is not unusual in leaving much regulation of rights and freedoms to ordinary legislation, the absence of sufficient constitutional detail in this crucial area increases the threat of legislative overreach.

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<sup>27</sup> Article 152.

<sup>28</sup> Article 139.

<sup>29</sup> Article 201.

<sup>30</sup> Article 165.

<sup>31</sup> Article 200.

<sup>32</sup> See, e.g., Section 199(5) of the 1996 South African constitution, which states: "The security services [which include the defense force, the police service and any intelligence service established in terms of the constitution] must act, and must teach and require their members to act, in accordance with the constitution and the law, including customary international law and international agreements binding on the Republic."



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 Representatives<sup>33</sup> and the President;<sup>34</sup> conditions for declaring a state of emergency;<sup>35</sup> the mandate of local administrators; the selection of governors;<sup>36</sup> access to the SCC;<sup>37</sup> definition of crimes under the jurisdiction of the Military Court;<sup>38</sup> and the responsibilities and powers of the National Council for Human Rights.<sup>39</sup> 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.<sup>40</sup> 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,<sup>41</sup> the requirement that laws regulating rights and freedoms be passed by a two-thirds majority of the House of Representatives,<sup>42</sup> the special emphasis placed on the duty of police authorities to respect human rights and fundamental freedoms,<sup>43</sup> and the absolute bar on constitutional amendments that reduce the level of protection for citizens.<sup>44</sup>

Yet the constitution leaves important gaps in the protection of citizens. These include the right to life, the right to administrative justice, and a provision that clearly states the conditions under which citizens can lose their civil and political rights. The lack of a robust limitation clause and serious concerns with respect to the protection of rights and freedoms during states of emergency and in military trials of civilians also raise considerable doubts about the enforcement of key rights protections.

A robust human rights regime is an important constitutional safeguard against a majority's abuse of its democratic power. A culture of government accountability also is essential to

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<sup>33</sup> Article 102.

<sup>34</sup> Article 141.

<sup>35</sup> Article 154.

<sup>36</sup> Article 179.

<sup>37</sup> Article 192.

<sup>38</sup> Article 204.

<sup>39</sup> Articles 214.

<sup>40</sup> Article 121.

<sup>41</sup> Articles 18, 19, 21, and 23.

<sup>42</sup> Article 121.

<sup>43</sup> Article 206.

<sup>44</sup> Article 226.

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 even in times of crisis. The recent arrests of regime critics, including those publicly advocating a "no" vote in the referendum and an increasing number of journalists, cast doubt on authorities' will to implement the human rights protections enshrined in the constitution. Serious security threats may require state regulation to safeguard the safety of citizens. But basic rights and freedoms, particularly those that protect the life and bodily integrity of citizens and their democratic participation in the political process, must remain intact even in difficult times. Acts of terrorism should not be used as justification to erode the rights and freedoms of peaceful citizens, media outlets, or civil society.

The Carter Center urges the House of Representatives to form a special legislative committee or permanent independent law commission to continuously review existing Egyptian laws and regulations with a view to their compatibility with constitutionally guaranteed rights and freedoms.

Most importantly, Egypt must develop a culture of human rights protection that transcends its deep religious and political divides.

### **3.1 General Clauses: Application, Interpretation, and Limitation of Rights and Freedoms**

#### **3.1.1 Application**

An application clause defines who must respect human rights provisions and who they protect. In most cases, all legislative, executive, and judicial authorities on all levels of government are bound to uphold rights and freedoms and all natural persons are protected by them. As noted above, the 2014 constitution does not explicitly bind all public authorities to uphold constitutional rights. The drafters also did not comprehensively address the degree of human rights protection afforded to legal entities (not individuals) and in cases that do not directly involve the state.

Many systems today expand certain protections to legal entities such as companies, associations, churches, trade unions, or political parties. Businesses might enjoy constitutional protection of their property, churches a right to religious freedom, and trade unions or political parties certain employment rights. Courts must decide, however, whether companies, for example, enjoy freedom of speech, the right to contribute money to election campaigns, or access to information held by the state, or whether NGOs have a right to the confidentiality of their correspondence. The 2014 constitution entitles some legal entities, such as scientific research institutions,<sup>45</sup> newspapers,<sup>46</sup> associations,<sup>47</sup> and professional syndicates,<sup>48</sup> to specific institutional rights. Al-Azhar<sup>49</sup> and the Christian and Jewish communities in Egypt<sup>50</sup> are also granted a special constitutional status. It is unclear, however, whether any of these entities enjoy rights and freedoms not specifically mentioned in the constitution. Most constitutions

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<sup>45</sup> Article 23.

<sup>46</sup> Article 70.

<sup>47</sup> Article 75.

<sup>48</sup> Article 77.

<sup>49</sup> Article 7.

<sup>50</sup> Article 3.

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.”<sup>51</sup>

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 enterprises<sup>52</sup> and the right to strike peacefully,<sup>53</sup> and children the right to family care,<sup>54</sup> but does not explicitly bind private parties to uphold constitutional rights. Some constitutions declare human rights directly applicable in these and similar relationships<sup>55</sup> while others only call for the interpretation and development of the private law in light of constitutional values, which include human rights and freedoms, on a case-by-case basis.<sup>56</sup>

### 3.1.2 Interpretation

Constitutional rights and freedoms are not easily applied in everyday administrative and judicial practice. Interpretation clauses provide a conceptual framework to guide the judiciary and administration’s translation of the bill of rights into meaningful legal practice. Courts, in particular, are responsible for upholding the values that underlie an open and democratic society; fostering core principles such as human dignity, equality and freedom; promoting the spirit and objectives of a bill of rights; interpreting laws and administrative decisions so as to ensure rights and freedoms; and considering international law and comparative foreign law when deciding national human rights cases.<sup>57</sup>

The Carter Center strongly recommends that key interpretative principles be added to the section on rights and freedoms in the 2014 Constitution. The Preamble provides support for the interpretation of rights and freedoms in its references to humanity, happiness, freedom, human dignity, social justice, equality and non-discrimination, democracy, political pluralism, the peaceful rotation of power, and the Universal Declaration of Human Rights.

### 3.1.3 Limitation

All constitutions acknowledge that laws must be passed to regulate citizens’ exercise of rights and freedoms. Effective human rights protection is a question of how to properly limit the state’s power to do so. A general limitation clause allows the legislature to pass such laws in the public interest but makes them subject to certain conditions. The Egyptian constitution

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<sup>51</sup> Similar provisions are included in the constitutions of South Africa and Namibia, among others.

<sup>52</sup> Article 42.

<sup>53</sup> Article 15.

<sup>54</sup> Article 80.

<sup>55</sup> See section 8(2) of the 1996 South African constitution.

<sup>56</sup> This approach (radiating effect of rights and freedoms) is found in Germany.

<sup>57</sup> Articles 19 to 21 of the 2010 constitution of Kenya are a good example of interpretative clauses that guide courts in the application of rights granted in the constitution. Article 20 (3): “In applying a provision of the Bill of Rights, a court shall— (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and Rights and fundamental freedoms. (b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom”; Article 20 (4): “In interpreting the Bill of Rights, a court, tribunal or other authority shall promote— (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.” Article 20 (5): “In applying any right under Article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles— (a) it is the responsibility of the state to show that the resources are not available; (b) in allocating resources, the state shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and (c) the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

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’),<sup>58</sup> freedom of belief (‘absolute’),<sup>59</sup> the right to peaceful private assembly,<sup>60</sup> and the right to litigate in court.<sup>61</sup> 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, and access to courts. These rights should not be subject to any limitation by the state.

Many constitutional guarantees that appear robust are in fact subject to significant legislative regulation. The confidentiality of communications, for example, is declared inviolable, but limitations can be imposed for a specified period of time by a reasoned court order.<sup>62</sup> The right to form political parties by notification, as regulated by law, is limited in Article 74 by prohibiting religious parties or parties that discriminate on the basis of gender, origin, sectarian considerations, or geographic location, or participate in activities that are hostile to democratic principles, secretive, or of a military or quasi-military nature.

Other ‘absolute’ rights are abridged by provisions within the constitution itself. Article 64 guarantees absolute freedom of belief, but the freedom to practice religious rituals and establish places of worship may be regulated by law for members of Abrahamic faiths and is not clearly protected for others. Similarly, the right to publish one’s opinion, which also seems absolute (Article 65), may be subject to penalties for the incitement of violence, discrimination between citizens, or violations of personal honor (Article 67). The ‘absolute’ right to publicly express an opinion is limited further by a broad provision that empowers the Supreme Council for the Regulation of Media to ensure media compliance with “national security needs as stated in the law” (Article 211).

#### *Protection of the ‘Essence’ of Rights and Freedoms*

Given that most rights are not guaranteed in absolute terms, the essential content clause in Article 92 will govern how and to what extent they may be limited. However, courts everywhere have struggled to define the ‘essence’ of a particular right or freedom.<sup>63</sup> However the courts define ‘essence’, it is likely to protect only a limited area. Most aspects of the right or freedom will be regarded as non-essential. This unspecific language could grant the legislature nearly absolute discretion to restrict rights and freedoms.

For these reasons, the essential content rule plays no practical role in its country of origin, Germany,<sup>64</sup> and was discarded only three years after its adoption in South Africa.<sup>65</sup> Practically all effective national or international systems of human rights protection instead rely on

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<sup>58</sup> Article 51.

<sup>59</sup> Article 64.

<sup>60</sup> Article 73.

<sup>61</sup> Article 97.

<sup>62</sup> Article 57.

<sup>63</sup> Ruling on the death penalty, South Africa’s Constitutional Court even had difficulty identifying the ‘essence’ of the right to life (*The State v Makwanyane and others*, Constitutional Court of South Africa, Case No. CCT 3/94).

<sup>64</sup> Article 19(2) of the German Basic Law.

<sup>65</sup> Section 33(1)(ii)(b) of the 1993 constitution of South Africa.

proportionality analysis. This method, discussed by the Committee of 50 but not included in the final draft, balances on a case-by-case basis the state's need to regulate certain rights or freedoms with citizens' interest in preserving them intact. A proportionality test provides a step-by-step checklist for the legislature or public officials when considering laws or administrative decisions that might impinge on constitutionally guaranteed rights and freedoms. It gives judges, in turn, a coherent constitutional framework to guide their decisions and opens space for nuanced solutions. While some systems combine proportionality analysis with a special protection of the essential content of rights and freedoms, the former is far stronger.<sup>66</sup> It is also more compatible with the spirit of the constitution's rights provisions than the use of vague explanations such as national security, health, or morals to justify restrictive legislation.

The most common components of a proportionality test, which courts usually apply to both legislation and administrative decisions, are 1) that the state pursues a legitimate public aim; 2) that it chooses an approach that is capable of achieving this aim; 3) that it impairs the right in question as little as possible; and 4) that the positive effects of the measure for society outweigh its negative impact on the right or freedom of the affected citizen(s).<sup>67</sup>

The Carter Center strongly recommends the addition of a proportionality test to Article 92.

### **3.1.4 The Majority Requirement in Article 121**

Article 121 requires the House of Representatives to pass any legislation regulating the rights and freedoms contained in the 2014 constitution with a two-thirds majority of its members. The expansion of the bill of rights, while well intentioned, subjects a greater number of issues to this higher threshold. Enhancing rights and freedoms through constitutional amendment is no easier: the same two-thirds threshold is required to put proposed amendments to a public referendum.<sup>68</sup>

This strong procedural safeguard was included in the 2014 constitution with the aim of strengthening the protection of rights and freedoms. In practice, however, a two-thirds majority is not likely to be reached on controversial issues unless the legislature is of one opinion. By requiring a two-thirds majority on all legislation affecting human rights, Article 121 pressures dissenting minorities to rubberstamp problematic legislation in order to move the process forward or, alternatively, creates legislative deadlock. Political pluralism, as envisaged by the Preamble, will only develop if differences of opinion can exist and thrive in the legislature.

The Carter Center suggests removing the procedural requirement that laws regulating rights and freedoms be passed in the House of Representatives by a two-thirds majority of its members (Article 121). The addition of a proportionality test, discussed above, to the limitation clause (Article 92) could be a more effective tool to protect against overly restrictive legislation.

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<sup>66</sup> Article 49 of the Tunisian constitution of 2014 presents a combined approach, referencing the 'essence' of rights and freedoms while also stating: "These limitations can only be put in place where necessary in a civil democratic state, with the aim of protecting the rights of others or based on the requirements of public order, national defense, public health, or public morals. Proportionality between these limitations and their motives must be respected. Judicial authorities shall ensure that rights and freedoms are protected from all violations." Section 24 of the 2010 constitution of Kenya is another example of a combined approach.

<sup>67</sup> Many constitutions establish additional conditions with respect to legislation, such as the requirement that the law in question be of general application (rather than one that is designed to regulate an individual case) and that the constitutional right or freedom that the legislator wants to limit is expressly identified in the law. These rules are an expression of the principle of equality and foster transparency with respect to the limitation of rights and freedoms.

<sup>68</sup> Article 226.

### **3.1.5 International Human Rights**

The Committee of 50 made a commendable effort to bolster the status of international human rights law in the 2014 constitution. Article 93, a new provision, declares that the state is bound by international human rights agreements, covenants, and conventions ratified by the country. These instruments have the force of law once they are concluded by the president, duly approved by the House of Representatives, and published in the Official Gazette.<sup>69</sup> The committee also introduced human rights considerations to the Preamble, which enjoys full constitutional status<sup>70</sup> and could guide courts in the interpretation of rights and freedoms. The text now stresses Egypt's contribution to the drafting of the Universal Declaration of Human Rights (UDHR) and asserts that the 2014 constitution is consistent with its provisions.

The 1971 and 2012 constitutions gave international treaties the force of law<sup>71</sup> but did not specifically address Egypt's international human rights obligations. The Carter Center welcomes the 2014 constitution's language binding Egypt to international law as expressed in Article 93. It still stops short, though, of recognizing the supremacy of international law, including international human rights agreements, over national law. This would have marked a true paradigm shift, demonstrating Egyptian authorities' commitment to upholding the internationally recognized human rights protections to which they have already agreed.

Egypt is a party to most international human rights treaties but courts have only occasionally invoked instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in order to provide remedies for plaintiffs. The 2014 constitution gives courts an incentive to make wider use of international human rights instruments to interpret constitutional rights and freedoms, as well as ordinary laws that affect human rights.

### **3.1.6 Human Rights and States of Emergency**

Article 154 allows the President of the Republic, after consultation with the Cabinet, to declare a state of emergency for a specified period of time that may not exceed three months. The House of Representatives must approve this decision within seven days by a majority of its members. In lieu of a referendum,<sup>72</sup> which would have been very difficult to conduct in a genuine state of emergency, the constitution allows for the House of Representatives to approve a single extension of not more than three months with approval by two-thirds majority. Importantly, Article 154 secures the involvement of the House of Representatives and limits the duration of a state of emergency to a maximum of six months.<sup>73</sup> This provision compares favorably with the 1971 constitution, which allowed for the indefinite renewal of a state of emergency.<sup>74</sup> In practice, a state of emergency was in effect from 1967 until May 2012 except for a brief break in 1980-81.

Despite these improvements, the constitution does not specify reasons that justify declaring a state of emergency. The text also does not elaborate on the status of rights and freedoms once a state of emergency is in effect, leaving this to regulation by ordinary law.

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<sup>69</sup> Articles 151 and 225.

<sup>70</sup> Article 227.

<sup>71</sup> Article 151 of the 1971 constitution; Article 154 of the 2012 constitution.

<sup>72</sup> Article 148 of the 2012 constitution required a referendum to extend a state of emergency.

<sup>73</sup> Article 80 of the 2014 constitution of Tunisia also secures the involvement of the Constitutional Court: "After the lapse of a 30-day period as of the implementation of the [emergency] measures, and at any time after this, the Constitutional Court may, by request of the president of the Chamber of the People's Deputies or 30 of its members, examine whether the state of emergency may continue."

<sup>74</sup> Article 148 of the 1971 constitution.

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.<sup>75</sup> 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

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<sup>75</sup>Other 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.<sup>76</sup>

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. It has in the past been viewed by some as too tightly controlled by Egypt's governing authorities.<sup>77</sup> The Carter Center strongly recommends the following measures to develop a culture of human rights protection and build citizens' trust in constitutionally established rights and freedoms:

- Consideration of a constitutional amendment that delineates the composition, duties, and most important powers of the NCHR and other independent councils, rather than leaving them to ordinary legislation;
- Restoration of the reporting powers of independent councils and the duty of the House of Representatives to address any shortcomings within a prescribed period of time;
- Establishment of a provision requiring all public authorities to monitor the status of human rights protection in their respective areas of competence and report their findings to the NCHR at regular intervals.

#### *Scrutiny of Draft Legislation*

Article 190 gives the State Council a role in drafting and scrutinizing legislation.<sup>78</sup> The protection of rights and freedoms should be a particularly important focus of this work.

In addition to judicial scrutiny of bills and decrees, The Carter Center suggests the creation of a permanent committee in the House of Representatives charged with the review of every legislative proposal with respect to potential human rights concerns. Similar bodies exist in the legislatures of many countries, including the United Kingdom, Canada, and the Philippines. Every piece of legislation that limits rights and freedoms also should identify the specific provisions of the constitution that are affected and provide justifications for the measures in question.

#### *Access to Courts*

Article 97 provides citizens with a general right to access courts. The provision is complemented by Article 99, which declares a crime any violation of personal freedom, the sanctity of private life, or any other right or freedom guaranteed by the constitution. Affected parties have the right to bring a criminal action against the perpetrator. The Carter Center

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<sup>76</sup> Article 201 of the 2012 constitution; Article 184 of the Committee of 10's draft amendments.

<sup>77</sup> Most recently, the NCHR was criticized for the public version of its report on the violent dispersal of the Rabaa Al-Adaweya and Nahda sit-ins in August 2013. The report primarily placed blame on a minority of armed anti-regime protesters inside the camp and criticized security forces for failing to stop killings, but not for killing protesters themselves. It did not mention the army and estimated the total number of deaths at 632, significantly fewer than the more than 1000 estimated by human rights groups.

<sup>78</sup> This involvement of judges in legislation resembles the role of the Conseil constitutionnel and Conseil d'Etat in the legislative process under the French constitution of 1958.



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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> This process of abstract judicial review often falls within the exclusive jurisdiction of a constitutional court or tribunal. Access is usually limited to specific executive officials or number of legislators.<sup>82</sup> Abstract constitutional review is an important tool for the minority to raise constitutional concerns and can lead to more compromise in the legislative process.

The Carter Center recommends that provisions be added allowing for abstract judicial review.<sup>83</sup> Members of the House of Representatives could also be enabled to challenge the validity of the annual budget law if spending targets for certain socioeconomic entitlements are not met, or to dispute the constitutionality of a state of emergency.

### **3.1.8 Socioeconomic Rights**

In the weeks before the January referendum, proponents of the 2014 constitution emphasized the generous socioeconomic rights in the document. The desire to make constitutional guarantees to improve living conditions is laudable and consistent with constitutional traditions in the region. However, the inclusion of socioeconomic entitlements can become a collection of unfulfilled promises if the state fails to deliver. Constitutions should provide incentives and establish enforceable mechanisms that can fulfill core human needs such as food, housing, water, health care, electricity, and education. They should also require

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<sup>79</sup> See, for example, section 38 of the 1996 constitution of South Africa.

<sup>80</sup> Parties given leave to file their case with the SCC must do so within three months.

<sup>81</sup> Article 120 of the Tunisian constitution of 2014 gives the President, Prime Minister, or 30 members of the Chamber of the People's Deputies the right to request that the Constitutional Court review the constitutionality of draft laws.

<sup>82</sup> In France, the president, prime minister, presidents of the National Assembly or Senate, or 60 members of the National Assembly or Senate may bring the action (Article 61 of the 1958 constitution); in Germany, applications for abstract review may be brought by the federal government, a state government, or 25% of the members of the federal legislature (Article 93 of the 1949 Basic Law); in South Africa, depending on whether a national law or provincial legislation is challenged, applications can be made by the president, the premier of a province, one third of the members of the National Assembly, or 20 percent of the members of a provincial legislature (sections 78, 80, 121 and 122 of the 1996 constitution).

<sup>83</sup> Article 121.

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).<sup>84</sup> These are very ambitious targets given the poor state of health care and education in many parts of Egypt. The Committee of 50 believed that tying the efforts of the government to a fixed minimum would prompt better delivery of key services. Article 236, which requires the state to set up and implement a plan for comprehensive economic and urban development in specific underprivileged parts of the country, likewise was intended to mandate more government attention.

There will be considerable political pressure to meet the budgetary targets, but this does not guarantee that the required amounts will be set aside for the designated purposes. The Constitution also does not state whether any of the provisions that provide citizens with socioeconomic rights or other entitlements are subject to trial in court. Moreover, there is no judicial mechanism for enforcement if the state fails to live up to its spending obligations.

One alternative to secure compliance with Articles 18, 19, 21, and 22 would be allowing members of the House of Representatives to challenge the constitutionality of the annual budget law if the relevant percentages of the GNP are not met.

Given limited socioeconomic resources, the state should be obligated to gradually improve the situation in certain policy areas, such as by developing a comprehensive plan to eradicate illiteracy.<sup>85</sup> Case law from countries like South Africa suggests that courts can be involved in monitoring a government's efforts at improving delivery of specific services. Legal standing could be limited to civil society organizations with a proven interest in a given policy area. The South African experience shows that giving courts the authority to review government plans with respect to socioeconomic needs must not jeopardize executive and legislative discretion. Judicial respect for the decisions of government leaves sufficient space for legislators to prioritize their efforts and pursue certain socioeconomic strategies for a given period of time without undue intervention by the courts. Ineffective and arbitrary governments, however, will be held to account by the legal process and without the need for revolutionary intervention.

### **3.1.9 Rights with Particular Relevance for Democracy**

Entitlements that help protect the democratic process and foster accountable government are of particular importance in any constitution. These include freedom of association, the right to form, join, and participate in the activities of political parties, freedom of assembly, freedom of expression, and freedom of the press. They are critical for Egypt to fulfill the Preamble's promises of political pluralism, the peaceful rotation of power, and the realization of a modern democratic state.

#### *Freedom of Association*

Article 20 of the Universal Declaration of Human Rights and Article 22 of the International Covenant on Civil and Political Rights establish the right to freedom of association and

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<sup>84</sup> Article 238 defers achievement of the full quota in these areas to the 2016/2017 fiscal year.

<sup>85</sup> Article 25.

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

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,<sup>87</sup> 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 grounds or if ordinary legislation can establish additional reasons for banning organizations that are not expressly mentioned in the constitution.

The Carter Center recommends that legislation in this area refrain from broad provisions that place additional restrictions on freedom of association. Additional regulation by law should be limited to administrative details or clarification of the grounds for banning organizations -- such as the intent to overthrow the constitutional order of the nation.

A second issue is whether authorities must be notified in all cases of the formation of an association or foundation. Notification is necessary if organizations wish to acquire a legal personality. Requiring notification by associations that do not desire legal personality is an unnecessary limitation. The acquisition of a legal personality, if desired, can be adequately regulated by rules of civil procedures and involve a neutral court registry.

The regulation of freedom of association is an important reflection of the balance between civil society and the state. The Center therefore urges that the freedom of civil society to organize itself be limited only if the state can show that a restrictive measure is really required to achieve a legitimate public aim. Further, the Center recommends removing the requirement of notification if private law can adequately address problems arising from the activities of organizations without legal personality (such as the individual liability of members for the debt of their organization).<sup>88</sup>

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<sup>86</sup> U.N., 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(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."

<sup>87</sup> This ban was omitted from the Committee of 10's original draft (Article 55) and the 2012 constitution (Article 51).

<sup>88</sup> Secret organizations are banned by the 2014 constitution, but associations or foundations that choose to operate without legal personality and without notifying the authorities of their formation might do so openly. 'Secret' should not be interpreted as 'without notification' of the relevant authority and should be limited to activities that aim to undermine the state and its institutions. A legitimate reason for the application of public law would be a statute regulating the dissolution of military or paramilitary organizations.

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 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.<sup>89</sup> 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.<sup>90</sup>

In light of the fledgling culture of political pluralism in Egypt, The Carter Center strongly recommends that the state take following steps to foster the growth of parties:

- Keep the requirements for notifying authorities of the formation of a new political party as simple as possible;
- Define terms such as ‘democratic principles’ and ‘secretive’ in a way that supports the role of political parties in a democracy;
- Define organizations as political parties only if they have the clear intention of participating in the electoral process;
- Place dissolution proceedings under the jurisdiction of the SCC, taking into account the detrimental effect of banning political parties; and
- Subject the reasons for dissolving a political party to strict judicial scrutiny and deem them sufficient only if the party’s program or activities undermine fundamental constitutional principles.

### *Freedom of Assembly*

The controversial Protest Law enacted on Nov. 24, 2013 and used to legitimize the arrests of many opposition activists has sparked significant debate in Egypt.<sup>91</sup> This law contradicts Egypt’s international commitments to freedom of assembly as established in Article 20 of the Universal Declaration of Human Rights.<sup>92</sup> The constitution grants citizens the right in Article 73 to organize public meetings, marches, demonstrations, and other peaceful protests with prior notification of authorities as long as they are unarmed. Peaceful private assemblies can be held without prior notification and enjoy express protection from surveillance by security or intelligence agencies.

The wording of Article 73 provides sufficient protection for freedom of assembly. However, the absence of a robust limitation clause could make it difficult to strike a reasonable balance between the right of citizens to voice their opinions publicly in the streets and the state’s prerogative to maintain order and protect the interests of citizens affected by public

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<sup>89</sup> Article 51 of the 2012 constitution.

<sup>90</sup> Article 74.

<sup>91</sup> Presidential Decree – Law No. 107 of 2013.

<sup>92</sup> U.N., 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."

assemblies. Police officials will have to decide how to deal with assemblies once notified<sup>93</sup> and security forces on the streets will have to determine how to interact with participants.<sup>94</sup> Courts may have to develop legal principles to guide both sides and inform the practical application of the law.

The Carter Center is concerned that a number of provisions in the Protest Law (Law 107 of 2013) may lead to unnecessary limits on freedom of assembly. Article 7 of the law, for example, allows the banning of public meetings, processions, or protests if citizens' interests are affected or road traffic is obstructed. Any large assembly, however peaceful, has negative consequences for people and traffic. Organizers are also required to notify the police of participants' demands and mottos that will be used.<sup>95</sup> Moreover, the law allows for a list of 'specified safe areas' in which assemblies may not take place and designates others in each governorate for spontaneous assemblies. It is not clear whether these will be in locations visible to the public.<sup>96</sup> Importantly, security forces will have to decide what tactics and level of force to employ when dispersing a peaceful or mostly peaceful assembly.<sup>97</sup> Finally, the courts will be responsible for determining proportionate penalties for violations of the Protest Law.

Freedom of assembly is especially critical during electoral campaigns. Political rallies should enjoy special protection given their direct connection to the democratic process.

#### *Freedom of Expression and Freedom of the Press*

Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) establishes the right of all individuals to freedom of expression and to share information through media of any kind.<sup>98</sup>

While Article 65 grants all individuals the right to express their opinion through any means, there are in fact substantial limitations on artistic, literary, and intellectual works (Article 67) as well as on newspapers, television and radio broadcast stations, online newspapers, and other media outlets (Articles 70 and 71). 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', all reasons given for prosecuting public forms of expression.<sup>99</sup> 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".<sup>100</sup> These wide powers undermine the broad rights guaranteed in Article 65 and could result in the arbitrary limitation of freedom of expression.

The current framework provides strong protection for expression in the private sphere, but employs vague standards to limit public free speech. In light of the state's historical control over the media, The Carter Center strongly recommends that media outlets be regulated by

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<sup>93</sup> Article 8, Law 107 of 2013.

<sup>94</sup> Articles 11, 12, and 13, Law 107 of 2013.

<sup>95</sup> Article 8 No. 3, Law 107 of 2013.

<sup>96</sup> Article 15, Law 107 of 2013.

<sup>97</sup> Articles 12 and 13, Law 107 of 2013.

<sup>98</sup> U.N., 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."

<sup>99</sup> Article 67.

<sup>100</sup> Article 211.

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 purports to guarantee basic rights and freedoms, but gives the legislature unfettered authority to enact counterterrorism measures of any kind. It is doubtful that the limited safeguards provided by Articles 92 (protecting the essential content of rights and freedoms) and 93 (giving international human rights instruments the status of law) will apply. The Carter Center expresses deep concern about Article 237 and urges its repeal. While it is in place, the Center recommends that legislative measures be strictly proportionate to the perceived threat, and that rights and freedoms closely linked to the democratic process be restricted as little as possible.

#### **3.1.10 Religion**

Provisions addressing religion were among the most criticized elements of the 2012 Constitution. The removal of controversial language in the 2014 draft was a manifestation of Egypt’s political polarization and the struggle between religious and secular concepts of society. The Committee of 50 removed the consultative role of Al-Azhar in the interpretation of legislation pertaining to Islamic Shari’a,<sup>101</sup> references to Quran, Sunna, *fiqh*, and authoritative sources of Sunni doctrine,<sup>102</sup> and the use of principle sources of Shari’a as a controlling element in the interpretation and exercise of rights and freedoms.<sup>103</sup> This decisive shift back to the pre-2012 regime is underscored by the Preamble, which affirms the principles of Shari’a as the main source of legislation<sup>104</sup> but places the interpretation of these principles in the hands of the SCC.<sup>105</sup>

Critics have voiced concern with respect to Article 3, which acknowledges Christian and Jewish religious principles as the main source of legislation for questions of personal status and internal religious affairs for these communities, and for the selection of spiritual leaders. Article 64, which privileges the followers of Abrahamic religions with respect to the freedom to conduct religious rituals and establish places of worship, has also been criticized.

International law establishes the right to freedom from discrimination on the basis of religion and equality of all citizens before the law.<sup>106</sup> The ICCPR further establishes the freedom of belief, including the right to manifest that belief in religious practice. The special status given to Muslims, Christians, and Jews appears to contradict Egypt’s international commitments.<sup>107</sup> Other constitutional provisions seem to counterbalance this constitutional bias, however, and

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<sup>101</sup> Article 4 of the 2012 constitution.

<sup>102</sup> Article 219 of the 2012 constitution.

<sup>103</sup> Articles 81 and 4 of the 2012 constitution.

<sup>104</sup> As in Article 2.

<sup>105</sup> “We are drafting a constitution that affirms the principles of Islamic Shari’a as the main source of legislation and that the reference for the interpretation of such principles lies in the body of relevant Supreme Constitutional Court rulings.”

<sup>106</sup> U.N., ICCPR, Art. 26.; ICCPR, Art. 2(1); ACHPR, Art. 2; ACHR, Art. 1; ECHR Art. 14; CIS, Art. 20.

<sup>107</sup> U.N., ICCPR, Art. 18(1): “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

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.<sup>108</sup> 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. Given Egypt’s history, the Center recommends banning the use of military trials for civilians even in states of emergency, unless there are strict limits and conditions defined to ensure independent trials, due process, and transparency. At a minimum, the Center recommends that details of the crimes that trigger the jurisdiction of the Military Court be clearly defined in the constitution rather than left to legislation.

### **3.1.12 Additional Rights**

Despite a substantial increase in the provisions on rights and freedoms in the 2014 constitution, two conspicuous gaps remain. The right to life, considered the most sacred human right in many societies, was not included for fear that such a provision would render

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<sup>108</sup> UNHRC, General Comment 13, para. 4; UNHRC, Concluding Observations on the Democratic Republic of the Congo, (2006) para. 21; UNHRC, Felix Kulov v. Kyrgyzstan, Communication No. 1369/2005 (2010) para. 8.6



the death penalty unconstitutional. While this may or may not be the case,<sup>109</sup> omitting the right to life will have negative repercussions in other highly sensitive areas. The use of lethal force by police and security forces, for example, should be limited to cases of grave and immediate danger to the life or physical safety of other citizens, or serious threat to the existence of the state and its institutions.

A second gap concerns the loss of civil and political rights. Articles 102, 141, and 164 allude to this possibility, but nowhere does the text set out the conditions under which it might occur. A number of laws declare that citizens forfeit civil and/or political rights when convicted of certain crimes,<sup>110</sup> but these statutes lack a constitutional basis. Under international law, the loss of civil and political rights should be reserved for the most serious criminal offenses or other subversive activities,<sup>111</sup> limited in duration, and not regulated by the legislature.

A third gap is the absence of citizens' right to administrative justice. The constitution states that the people are the sole source of authority and that the aim is the creation of a just state (Preamble); there is a correlation between power and responsibilities (Article 5); the state is based on the rule of law (Articles 1 and 94); and the president shall care for the interests of the people (Article 139). The Carter Center strongly recommends adding to these provisions a constitutional right to just administrative action, which sets out important substantive and procedural rights of citizens when interacting with public authorities.<sup>112</sup>

#### 4. Institutional Structure

##### *Overview*

The 2014 constitution marks a shift back to a stronger executive. In sum, Egypt's new institutional framework can be characterized as a semi-presidential system in which the President exercises considerable powers and dominates the executive branch, but in which the House of Representatives retains meaningful influence through its legislative function and involvement in key questions such as states of emergency and declarations of war. However, the exercise of this authority and the achievement of institutional balance between the executive and legislative branches of government will depend on the development of an open and critical political culture in the House of Representatives. Even with an assertive legislature, the system is unbalanced by the extraordinary influence and independence of the judicial branch and the privileged status of the Armed Forces. Overall, the 2014 constitution does not provide a strong framework for a civilian government or an even balance of powers between the executive, legislative, and judicial branches.

##### *Presidential Powers*

The president is directly elected by the people and exercises a number of substantial powers, though often in conjunction with the Cabinet or subject to approval by the House of

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<sup>109</sup> See, for example, the nuanced analysis of the death penalty in *The State v Makwanyane and others*, Constitutional Court of South Africa, Case No. CCT 3/94.

<sup>110</sup> Article 25, Criminal Law No. 58 of 1937; Article 2, Law on the Exercise of Political Rights No. 73 of 1956; Article 9, Law on the Indictment of Presidents of the Republic and Ministers No. 247 of 1956.

<sup>111</sup> Article 18 of the 1949 German constitution requires citizens who lose civil or political rights to have abused specific rights and freedoms to fight the country's constitutional order

<sup>112</sup> South Africa provides an excellent model for such a provision, which would bolster a culture of justification on the part of public administration and reinforce the principles of proportionality and procedural fairness. Section 33 of the 1996 constitution of South Africa declares: "1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. 2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. 3) National legislation must be enacted to give effect to these rights, and must a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and c. promote an efficient administration."

Representatives. He is head of state and head of the executive branch of government;<sup>113</sup> may dismiss the government if supported by the majority of the House of Representatives;<sup>114</sup> presides over meetings of the Cabinet if in attendance;<sup>115</sup> jointly with the Cabinet determines and oversees the implementation of general state policy;<sup>116</sup> represents the state in foreign relations, concludes international treaties, and ratifies these after approval by the House of Representatives;<sup>117</sup> is Supreme Commander of the Armed Forces and can declare war after consultation with the National Defense Council and approval by a two-thirds majority of the House of Representatives;<sup>118</sup> appoints and dismisses civil and military employees as well as political representatives, and accredits foreign political dignitaries;<sup>119</sup> may ask the House of Representatives to approve a state of emergency, in consultation with the Cabinet;<sup>120</sup> can issue pardons after consultation with the Cabinet;<sup>121</sup> and may call for emergency sessions of the House of Representatives and issue decrees that enjoy the force of law in urgent matters if the House of Representatives is not in session.<sup>122</sup>

Three further powers stand out. First, under Article 157, the president may call for a referendum on any matter that involves the supreme interests of the state. The 1958 French constitution includes a similar provision whose application suggests that this can be an effective tool to pursue executive policy and even initiate constitutional amendment.<sup>123</sup>

Second, the constitution grants the president a veto over draft legislation that the House of Representatives can overcome only with a two-thirds majority of its members.<sup>124</sup>

Third, as under previous regimes, the president may appoint a number of members of the House of Representatives. Under the 1971 constitution, the president could appoint up to ten members, of a total not less than 359.<sup>125</sup> The size of the House of the Representatives was increased to 450 members in the 2014 constitution with up to five percent (or 22 members) appointed by the president.<sup>126</sup> Consequently, the share of appointed members has nearly doubled. The ability to appoint up to five percent of the body's members provides the president with considerable influence on the legislative process and, possibly, the appointment of the prime minister. Article 102 does not tie these nominations to any substantive criteria and is a breach of the separation of powers principle.

The prime minister and the Cabinet will play a lesser role unless the president is forced to choose a prime minister from the majority party or coalition in the House of Representatives. This would happen if the president's own nominee failed to find majority support in the legislature and could lead to sharing of executive authority by a president and prime minister affiliated with different political parties or coalitions.<sup>127</sup> However, the president retains substantial influence even under these conditions. He also nominates the ministers of defense, interior, foreign affairs, and justice in consultation with the prime minister and, in the case of

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<sup>113</sup> Article 139.

<sup>114</sup> Article 147.

<sup>115</sup> Article 149.

<sup>116</sup> Article 150.

<sup>117</sup> Article 151.

<sup>118</sup> Article 152.

<sup>119</sup> Article 153.

<sup>120</sup> Article 154.

<sup>121</sup> Article 155.

<sup>122</sup> Article 157.

<sup>123</sup> The provision was recently amended to limit the power of the French president and allow members of the National Assembly to put issues to a referendum.

<sup>124</sup> Article 123.

<sup>125</sup> Article 87 of the 1971 constitution.

<sup>126</sup> Article 102.

<sup>127</sup> This is similar to the French principle of *cohabitation*, which has occurred three times since 1986.

defense, the SCAF.<sup>128</sup> Whether a divided executive ever occurs in practice will depend on the emergence of a diverse party system. However, the difference in term lengths between the president (four years) and the House of Representatives (five years), as well as the possibility of an early dissolution of the House and indictment or recall of the President, suggest that it is possible.

This framework provides certain meaningful checks and balances but is unlikely to result in balanced constitutional practice given the extraordinary status that the president traditionally enjoys. The veto power, in particular, gives the president substantial leverage. The Committee of 50 sensed that the country was seeking a strong figure to lead Egypt out of crisis and therefore the constitution is only a slight modification of the former presidential system, despite its history of poor results. Nevertheless, change could take place in the future if interested parties work towards the development of a culture of critical political discourse and press for government accountability.

#### *House of Representatives*

The House of Representatives is the only national legislative body. Presidential decrees are limited to urgent measures and subject to procedural limitations.<sup>129</sup> Regulations, issued by the prime minister, should only be used to secure the implementation of laws.<sup>130</sup> However, the House of Representatives should consider delineating the regulatory authority of the executive more clearly in order to achieve institutional balance.

Under Article 137, the president may only dissolve the House of Representatives by a reasoned decision and not for the same reason twice in a row. Dissolution also requires approval by referendum. The House of Representatives is also able to withdraw confidence from both the prime minister and the president.<sup>131</sup> This is a new mechanism and a welcome check on executive power. Unfortunately, the option to recall the president is not without risks. The decision of the House must be confirmed in a referendum called by the prime minister. And, the House of Representatives faces dissolution if the majority of voters sides with the president. Interestingly, the same is not true if the president tries to dissolve the House: a negative outcome of that referendum does not affect the position of the president and is therefore politically less dangerous.<sup>132</sup> The House of Representatives can also bring a motion of no confidence in the prime minister, deputy prime ministers, or members of the Cabinet and their deputies. If the House passes a vote of no confidence in a Cabinet member with whom the government has “declared its solidarity” prior to the vote, the whole Cabinet must step down.<sup>133</sup> Consent of the House of Representatives also is required for a number of other important decisions such as the ratification of international treaties,<sup>134</sup> declarations of war and deployment of troops outside Egypt’s borders (two-thirds majority),<sup>135</sup> and the declaration of states of emergency (two-thirds majority).<sup>136</sup>

#### *Minority Rights in the House of Representatives*

Drafters missed an important opportunity to bolster the rights of minority parties in the House of Representatives. The polarization of Egypt’s current political landscape and banning of the Muslim Brotherhood could result in the majority in the House being aligned with the

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<sup>128</sup> Article 146.

<sup>129</sup> Article 156.

<sup>130</sup> Article 170.

<sup>131</sup> However, according to Article 161 the House is asked only to give its confidence to the prime minister and not to the president.

<sup>132</sup> Article 137.

<sup>133</sup> Article 131.

<sup>134</sup> Article 151.

<sup>135</sup> Article 152.

<sup>136</sup> Article 154.

executive for some time to come. The constitutional rights of minority parties or even single representatives to voice criticism, scrutinize the exercise of executive power, and question the constitutionality of legislation are crucial under these circumstances.

The constitution includes certain positions that establish minority rights:

- Extraordinary meetings of the House of Representatives to discuss urgent issues may be held at the request of 10 percent of its members;<sup>137</sup>
- One-third of the members may request that the speaker of the House of Representatives or his deputies be relieved of their office;<sup>138</sup>
- Closed sessions of the House may be requested by 20 percent of its members;<sup>139</sup>
- Bills that are supported by at least 10 percent of House members automatically move to the committee stage of the legislative process, while bills presented by single members require permission by a special screening committee;<sup>140</sup>
- Every member of the House may direct questions or interrogations at the prime minister, deputy prime ministers, or members of the Cabinet and their deputies;<sup>141</sup>
- Following an interrogation, at least 10 percent of its members may request that the House withdraw confidence in the prime minister, deputy prime ministers, or members of the Cabinet and their deputies;<sup>142</sup>
- At least 20 members of the House may request the discussion of a public issue for the purpose of clarifying the government's position on it and may submit recommendations to the prime minister, deputy prime ministers, or members of the Cabinet and their deputies;<sup>143</sup> and
- Members of the House may submit early day motions or urgent statements to the Prime Minister, Deputy Prime Ministers, or members of the Cabinet and their deputies with respect to urgent matters of public importance.<sup>144</sup>

Despite these provisions with respect to the rights of single representatives or smaller political parties to question the executive branch, key gaps remain that limit the ability of the House of Representatives – and the minority in particular – to exercise oversight of the executive branch. These should be considered in future amendments of the constitution.

Three points are worth particular emphasis. First, the president is not subject to questioning by the legislature and can only be indicted<sup>145</sup> or recalled<sup>146</sup> under the 2014 constitution. This is in line with the traditional division of powers in presidential systems but a major disadvantage in comparison to parliamentary forms of government.

Second, committees of investigation, vested with considerable authority under Article 135, are limited to finding facts on matters of public interest or investigating the activities of administrative bodies, public agencies, or public projects. The provision suggests that a minority in the House of Representatives will not be able to form committees without majority support<sup>147</sup> and that policies, actions, and decisions of the president, prime minister, or Cabinet members are not necessarily subject to such investigation. The Carter Center

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<sup>137</sup> Article 116.

<sup>138</sup> Article 117.

<sup>139</sup> Article 120.

<sup>140</sup> Article 122.

<sup>141</sup> Article 129 and 130.

<sup>142</sup> Article 131.

<sup>143</sup> Articles 132 and 133.

<sup>144</sup> Article 134.

<sup>145</sup> Article 159.

<sup>146</sup> Article 161.

<sup>147</sup> Article 121.

recommends that activities and decisions of the prime minister and the Cabinet be added to the scope of inquiries allowed under Article 135.

Third, in many constitutions, a powerful right of the parliamentary minority is the ability to apply for abstract judicial review if there are serious concerns about the constitutional validity of bills and/or laws.<sup>148</sup> The Carter Center recommends consideration of abstract judicial review by the SCC on application of one-third of House members in order to enhance the rights of minority parties in the House of Representatives and ensure the accountability of the executive.

#### *Women in the Legislature*

Article 11 of the 2014 constitution obliges the state to promote “appropriate representation” of women in the House of Representatives.<sup>149</sup> The Carter Center welcomes this provision given that women have been underrepresented in Egyptian politics in past decades and in the most recent constitutional revision process.<sup>150</sup> However, it does not guarantee the passage of specific legislation or define “appropriate”. The current language is vague and could possibly be interpreted in the future so as to restrict women’s representation. The Center recommends the inclusion of provisions ensuring that a minimum of 30 percent of seats in the House of Representatives are held by women. This could be achieved through the use of quotas, through measures to promote the increased participation of female independent candidates, or through amendments to the electoral system that ensure women are elected (e.g. the use of zippered party lists).

#### *Judiciary*

As noted, the constitution grants the judiciary a very powerful position and emphasizes judicial independence in numerous provisions.<sup>151</sup> The SCC, in particular, is protected from the legislative and executive branches of government. It selects its own members and determines its own size.<sup>152</sup> The SCC also enjoys an independent budget, which is subject to legislative scrutiny only via a single line item in the general state budget.<sup>153</sup> These highly unusual arrangements reflect the influence judges were able to exert on the drafting process.

#### *Armed Forces*

The armed forces are the decisive component of Egypt’s institutional infrastructure. The Preamble underscores the importance of the armed forces by speaking of a “strong bond between the Egyptian people and their national army” and stating that “the people’s will was defended by their army.”<sup>154</sup> The minister of defense, commander in chief of the armed forces,

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<sup>148</sup> The introduction of this possibility in France by amendment of Article 61 of the 1958 constitution, for example, opened the door to more vibrant and critically important jurisprudence with respect to the protection of rights and freedoms.

<sup>149</sup> UNHRC, General Comment No. 28 (68): Equality of rights between men and women (Article 3), para. 3: “The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”; U.N., CEDAW Committee, General Recommendation No. 23, para. 15: “While removal of de jure barriers is necessary, it is not sufficient... The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life... State parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles that guarantee equality to all citizens.”

<sup>150</sup> A quota introduced in 2009 brought women’s representation in parliament to its highest level in Egyptian history (12 percent). After the overthrow of President Mubarak in 2011, the transitional government abolished the quota and the proportion of female representatives fell to 2 percent.

<sup>151</sup> Articles 94 and 184-186.

<sup>152</sup> Article 193.

<sup>153</sup> Article 191.

<sup>154</sup> This is a reference to the military’s perceived support for public protests in January 2011 and June/July 2013, in what the Constitution calls the “January 25 – June 30 Revolution.”

is appointed by the prime minister from the ranks of the officer corps<sup>155</sup> and requires SCAF approval. His appointment will remain in force for two presidential terms, or eight years, following promulgation of the constitution, insulating him from executive oversight.<sup>156</sup> SCAF is given an influential constitutional role but is not regulated by the constitution and is mentioned only twice in the entire text.<sup>157</sup> This suggests that the SCAF will retain its privileged extra-constitutional status under the new regime.<sup>158</sup> In contrast, the Supreme Police Council, the functional parallel to SCAF, is regulated in Article 207.

The National Security Council is deemed part of the armed forces (Branch IV)<sup>159</sup> and composed of the president, prime minister, members of the Cabinet, speaker of the House of Representatives, chief of the General Intelligence Service, and chairperson of the Committee for Defense and National Security in the House of Representatives. It is responsible for undertaking the necessary measures to address internal and external threats. This provision suggests that the Armed Forces can be deployed in a wide range of undefined internal crises.

The budget of the armed forces is determined by the National Defense Council, a predominantly executive body and structurally part of the armed forces (Branch II). Military spending will be included in the general state budget as a single line item. The House of Representatives, though involved, will probably not be in a position to meaningfully debate military expenditure.<sup>160</sup> The National Defense Council is also responsible for looking into “methods of ensuring the safety and security of the country”,<sup>161</sup> a phrase that again suggests that the armed forces can be used in internal crisis situations, and must be consulted in all legislative matters that affect the Armed Forces.<sup>162</sup>

#### *National Councils, Autonomous Organizations, and Control Agencies*

Chapter 11 of the 2014 constitution identifies a number of independent national councils<sup>163</sup> and autonomous organizations and oversight agencies<sup>164</sup> that will hopefully promote transparency and accountability in key areas of public administration and secure the effective enforcement of rights and freedoms as well as the rights of women, children, and disabled persons. The Carter Center welcomes the fact that autonomous organizations and oversight agencies enjoy substantial reporting powers<sup>165</sup> and that their chief executives are appointed by the president subject to approval by the House of Representatives.<sup>166</sup> The constitutional rules that set out the specific powers of the Central Auditing Organization,<sup>167</sup> the Central Bank,<sup>168</sup> and the Egyptian Financial Supervisory Authority<sup>169</sup> are nevertheless fairly limited. Because of the importance of regulating the financial sector, promoting transparency, and fighting corruption, The Carter Center urges the House of Representatives to conduct a comprehensive

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<sup>155</sup> Article 201.

<sup>156</sup> Article 234.

<sup>157</sup> Articles 152 and 234.

<sup>158</sup> On Feb. 27, 2014, President Adly Mansour decreed that the president would no longer head the SCAF, further reducing civilian oversight of the armed forces. The minister of defense, a member of the SCAF as dictated by the constitution, will now head the council.

<sup>159</sup> Article 205.

<sup>160</sup> The House of Representatives is involved in reviewing military spending through its speaker as well as the chairpersons of the Committee for Planning and Budgeting and the Committee for Defense and National Security.

<sup>161</sup> Article 203.

<sup>162</sup> Article 203.

<sup>163</sup> Article 214.

<sup>164</sup> Articles 215-221.

<sup>165</sup> Article 217.

<sup>166</sup> Article 216.

<sup>167</sup> Article 219.

<sup>168</sup> Article 220.

<sup>169</sup> Article 221.

review of the existing legislative framework to ensure the effective functioning and sufficient funding of these bodies.

### *Local Administration*

Local administration is the most basic building block of democracy and accountable local administration can enhance the democratic legitimacy of public administration. Decentralization can also lead to significant improvements in the provision of services in key areas such as health, education, utilities, and social services. The inclusion of Article 236, which envisages the creation and implementation of a comprehensive economic and urban development plan for underdeveloped areas, reflects considerable pressure to improve the socioeconomic situation of many communities.

The existing system of municipal administration is set to remain in place for a transitional period of not more than five years.<sup>170</sup> Articles 175 to 183 do not contain much detail, however, about the system that will replace current structures. Most of these provisions require extensive regulation by law. This includes the way in which governors and heads of other local administrative units are to be appointed or elected.<sup>171</sup> The constitution commits to transferring administrative, financial, and economic resources from the central government to local administrative units and is meant to be accompanied by more local autonomy in the management of public facilities.<sup>172</sup> The vision is one of administrative decentralization rather than devolution of power. Local councils can follow up on the implementation of development plans and scrutinize the performance of executive authorities through proposals, questions, motions, and interrogations, but will not exercise legislative or supervisory functions. They can withdraw confidence from the heads of local units<sup>173</sup> but their governors do not enjoy any defined powers under the constitution.<sup>174</sup>

The Carter Center strongly recommends reviewing the approach to local administration in the 2014 constitution in order to expand the many positive effects of local democracy. This could be achieved without a constitutional mandate.

## **5. Amending the Constitution**

Article 226 sets out the procedure for amendments of the 2014 constitution. First, the president or one-fifth of the House of Representatives proposes an amendment. The House then has 30 days to accept or reject the request in whole or in part, and an additional 60 days to discuss its merits and decide whether to put a proposal to a referendum. The text suggests that the House itself cannot change proposals made by the president or one-fifth of its members. This creates a static amendment process, compounded by the fact that the same change may not be proposed again until the following legislative term. The House of Representatives should be an institution where legislative ideas, including possible constitutional reform, can be discussed with minimal limitations. Preventing the House from discussing proposed amendments means narrowing unnecessarily the prospects for a deliberative political process.

Article 226 prohibits any amendment that reduces the level of constitutional protection for rights and freedoms. While a commendable safeguard, the judiciary can strike down statutes it deems in violation of the constitution. The SCC is thus the ultimate arbiter of human rights

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<sup>170</sup> Article 242.

<sup>171</sup> Article 179.

<sup>172</sup> Article 176.

<sup>173</sup> Article 180.

<sup>174</sup> Article 179.

protection.<sup>175</sup> A preferable approach is to require absolute protection for a limited number of core values.<sup>176</sup>

The Carter Center recommends reviewing the circumstances under which the high hurdle of a referendum is required. Given the complexities of constitutional law, the difficulty of providing a clear explanation to the public in preparation for a referendum, and the inherent risk of attempts to manipulate public opinion, legislative action may be a more appropriate tool for future reform.

## 6. Conclusions and Recommendations

Despite the procedural difficulty of amending the constitution, it is important that Egyptians subject it to further scrutiny in order to strengthen prospects for democratic governance. In a spirit of respect and good will, The Carter Center offers the following recommendations for possible constitutional amendments in the hope that Egyptians will work together to build a common vision of the future:

- (1) ***Responsibility to uphold the constitution.*** Constitutional provisions should be considered to bind public authorities at all levels of government, including judges and the armed forces, to uphold the constitution.
- (2) ***Stronger protection of fundamental rights and freedoms.*** New provisions should be considered to protect core rights, including but not limited to the right to life, human dignity, freedom from torture, and the right to a fair trial. Consideration also should be given to the inclusion of the principle of proportionality as means of regulating rights and freedoms. A proportionality test provides courts a coherent framework to guide their rulings on the constitutionality of legislation and administrative decisions, including that 1) the state pursues a legitimate public aim; 2) chooses an approach capable of achieving this aim; 3) that it impairs the right in question as little as possible; and 4) that the positive effects for society outweigh the negative impact on a right or freedom. The current requirement of a two-thirds majority of the members of the House of Representatives to pass laws regarding fundamental rights might prove difficult in practice. Steps also should be taken to strengthen the independence and powers of the National Council for Human Rights to make it a more effective champion of rights and freedoms. Consideration should be given to defining the composition and powers of the council in the constitution, requiring public authorities to monitor and regularly report on the status of human rights protection in their areas of competence, and restoring the duty of the House of Representatives to address shortcomings within a prescribed period.
- (3) ***Ensuring press freedom.*** The Center recommends that efforts be made to securing greater media freedoms, including the consideration of amendments that clearly define the authority of the Supreme Council for the Regulation of the Media so as to prevent its overreach and rescind the requirement of newspapers to notify the government before publication. Any limitations on media freedoms should be subject to proportionality analysis.

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<sup>175</sup> The United States is a good example of the consequences. The U.S. Constitution is very difficult to amend in practice, which gives the U.S. Supreme Court, through its power of interpretation and judicial review of statutes, enormous authority in shaping constitutional reality. The power of the German Federal Constitutional Court is similarly absolute, short of revolution or a complete overhaul of the country's constitutional framework, where human dignity is affected. Article 1 of the 1949 German constitution, which is practically identical to Article 51 of the 2014 constitution in Egypt, cannot be amended under any circumstances and is not subject to limitations

<sup>176</sup> Germany has adopted this approach for human dignity.



- (4) ***Limitation of states of emergency and military trials.*** Authorities should take steps to protect against the abuse of states of emergency, including consideration of an amendment that would more clearly specify reasons to justify a state of emergency, define the measures that may be imposed, and guard certain rights and freedoms from being restricted when one is in effect. Given Egypt's history, the Center recommends banning the use of military trials for civilians, even in states of emergency, unless strict limits and conditions are defined to ensure independent trials, due process, and transparency.
- (5) ***Civilian oversight of the armed forces.*** Civilian authority over the military is an essential feature of democratic societies. To this end, it is important that Egyptians consider amendments to make the armed forces subject to the authority of elected civilian bodies and to regulate the competencies of the Supreme Council of the Armed Forces (SCAF). To ensure greater transparency and accountability, amendments should be considered to enable the House of Representatives to discuss the armed forces' budget and details of military expenditure included in the annual budget. In addition, provisions should be considered to ensure that the Military Court does not have jurisdiction over civilians.
- (6) ***Access to the Supreme Constitutional Court.*** Stronger protection of key rights could be ensured by allowing citizens to have a constitutional right to access the Supreme Constitutional Court once they have exhausted all other legal remedies. Provisions could be added to allow legislators and the executive to challenge directly in court the constitutional validity of a legislative proposal, decision, or law (abstract judicial 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, measures to promote the increased participation of female independent candidates, or amendments to the electoral system that ensure women are elected (e.g. the use of zippered party lists).
- (9) ***Stronger local democracy.*** Provisions should be considered to grant locally elected representatives greater legislative authority and resources to develop local government under the supervision of the central government.
- (10) ***Ongoing legislative review.*** As a means to promote regular review, a special legislative committee or permanent independent law commission should be convened to continuously review Egyptian laws and regulations with a view to their compatibility with constitutionally guaranteed rights and freedoms.
- (11) ***Simplification of the constitutional amendment process.*** Going forward, consideration should be given to removing the requirement of a referendum for all

constitutional amendments (Article 226) in order to enable a simpler path to constitutional reform.

The promulgation of the constitution on January 18 marked the first formal step to an elected civilian government. Article 230 initially placed the first election of the House of Representatives before the first election of the president. However, the provision determining the sequence of elections was changed in the final days of drafting such that approved final text of Article 230 does not prescribe a particular sequence. After consulting with political parties and regime stakeholders, Interim President Adly Mansour announced on January 26 that presidential elections would be held first, followed by parliamentary elections. This suits many Egyptians' desire to have a powerful executive to lead the country through this period of uncertainty and instability. It also will likely enable the candidate who is elected president to build a strong coalition for parliamentary elections. While this approach will help state institutions consolidate control, it is likely to weaken the development of pluralism.

The central challenge to a meaningful democratic transition in Egypt has been to ensure the meaningful inclusion of all segments of society. The exclusion of secularists from the final stages of the 2012 constitutional drafting process and of Islamists sympathetic to the deposed regime from the 2013 process left large numbers of citizens alienated from politics. The widespread arrests of both secular and Islamist critics since July 2013 have added to the disillusionment of many Egyptians who revolted against the Mubarak regime in 2011, notably youth.

In order to achieve the democratic state to which the constitution aspires, Egypt requires reconciliation and broad societal consensus on a new social contract that balances conflicting religious and secular visions of the country's future. This process will take much more time than was allocated to the Committee of 50.

The Carter Center encourages all citizens of Egypt to thoroughly assess how the 2014 constitution works in practice and to initiate an inclusive process to examine potential constitutional change, as well as issues of reconciliation and transitional justice. A sustained national debate about the future of the country should focus on the development of a coherent constitutional vision. Dialogue is particularly needed with respect to the more effective protection of human rights, transparent and accountable exercise of public authority, and development of an open and inclusive political process that limits the unchecked influence of powerful stakeholders such as the judiciary and the armed forces.