



## **EISA Witnessing Mission Constitutional Referendum in the Arab Republic of Egypt**

### **Preliminary Statement**

**17 January 2014**

#### **1. Introduction.**

On 14 and 15 January 2014, Egyptians returned to the polls to vote in the third constitutional referendum in three years after the 25 January 2011 revolution. The process and context of drafting and adoption of these different constitutions have been deeply polarised along the lines of support for either a liberal or a conservative society. Since the 25 January 2011 revolution, Egypt's trajectory to democratic rule has been marked by political and legal uncertainties, including the election of a President in 2012 before a constitution was put in place to define the boundaries of his powers. Thereafter 2012 constitution drafting and adoption process was largely seen as a non-inclusive process that left some segments of society dissatisfied. In the same way the 2013 constitution drafting process has been perceived as exclusive of other segments of the society.

EISA notes that the 2014 referendum took place within a context characterised by escalating tensions between the supporters and opponents of the interim regime and the previous regime, leading to unrest and protests. Within the context of an unconstitutional change of government, EISA recognises the urgent need for Egypt to return to a constitutional order. The people of Egypt have been faced with tremendous political and economic instability over the past three years, hence the need to carve a clear path to democracy and stability. To this end, a constitutional referendum is a necessary and critical step in the transition process.

The EISA Witnessing Mission is led by His Excellency, Honourable Cassam Uteem, the former President of Mauritius, who also led the EISA witnessing mission to the presidential elections in 2012. The Deputy Mission Leader is EISA's Executive Director, Mr Denis Kadima. The Mission is comprised of seven medium term witnesses and nine short term witnesses drawn from civil society from the following countries: Democratic Republic of Congo, Madagascar, Mozambique, Nigeria, South Africa, South Sudan, Sudan, Sierra Leone, Tunisia and Zimbabwe. EISA witnesses were deployed in Alexandria, Aswan, Cairo, Fayoum, Gizza, Matruh and Qualiubiya.

The Mission's assessment of the referendum is guided by the Egyptian legal framework governing the referendum, the African Charter on Democracy, Elections and Governance, the African Union Declaration of the Principles Governing Democratic Elections in Africa and the Declaration of Principles on International Election Observation and the Principles for Election Management, Monitoring and Observation (PEMMO).

As part of its methodology, the Mission consulted stakeholders in Cairo and areas of deployment. Through these consultations it gathered information on the pre-voting phase of the process for which EISA witnesses were not yet on the ground. On voting days, EISA Witnesses equipped with computer tablets visited 153 polling stations. The use of the tablets enabled real time transmission of information from the field to the mission headquarters based in Cairo.

#### **2. Content of the draft constitution**

The content of the 2013 draft constitution has drawn different reactions as some view it as an improvement on the 2012 constitution while others regard it as not substantively different from previous constitutions.

The Mission notes that the draft constitution entrenches fundamental rights and freedoms and basic socio-economic rights. It also recognises gender equality and prohibits violence against women<sup>1</sup>. The draft constitution also recognises the rights of minority groups such as the Nubians and Christians<sup>2</sup>. The Mission welcomes the inclusion of a provision for the establishment of a permanent election management body. The draft constitution is however silent on the electoral system and it further entrenches the autonomy of the army without adequate civil control. In this regard, it is important to note that an electoral system is an important constitutional issue as it prescribes the principles guiding the formation of the government. Civilian control over the military is one of the indicators of a democratic state as enshrined in article 14.1 of the African Charter of Democracy, Elections and Governance<sup>3</sup>. Furthermore, the Mission deplors the jurisdiction granted to the military courts over civilians.

A constitution is the fundamental legal instrument of the land by which institutions of state are established and the powers of these institutions defined. This fundamental law also sets out the broad principles that guide politics and society. The 2013 draft constitution, in several instances, fails to provide key principles on essential issues by deferring them to legislations. By international practice, legislations are guided by the principles enshrined in the constitution. The Mission therefore finds this an unsatisfactory approach to the legal architecture of the country.

### **3. Legal framework governing the constitutional referendum**

The legal framework governing the constitutional referendum is guided by the 8 July 2013 Constitutional Declaration (Article 30), as well as Law 73 of 1956 Regulating the Exercise of Political Rights and its amendments. Law 73 has been amended several times with the most recent amendment taking place less than a week before the January 2014 referendum. The last amendment of the law provided the opportunity for voters to cast their ballot outside the governorates where they reside. The last minute amendments of the law placed further demands on the operational and logistical preparations of the Higher Elections Commission (HEC) for the referendum.

### **4. Context of the referendum**

The 2014 referendum took place within the context of the forced removal of President Mohammed Morsi from power. The EISA Mission notes that the ousting of Egypt's first democratically elected President was effected on the basis of the discontent of a segment of the society that perceived the policies pursued by the Islamist-led government as a reversal of the gains of the 25 January 2011 revolution. The events of July 2013 further complicated the political scenario with violent protests against the institutions of State and its representatives. On the other hand, the State also adopted a heavy handed approach to the protesters and the opposition. The EISA Mission is aware of the growing trend of a winner-takes-all approach to politics in which different authorities in power seek to protect their own interests and those of their constituents.

The 2013 draft constitution was written within a context of constrained rights and freedom of Egyptians to freely express their opinion, to assemble and associate. The protest law that was passed in November 2013, the arrests of journalists and civil society activists and the continued clamp down on public protests during the period of the drafting of the constitution and the period preceding the holding of the referendum are indicators of these constraints to rights and freedoms.

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<sup>1</sup> Article 11 gives much clearer language on equality of the sexes compared to the 2012 and 1971 constitutions

<sup>2</sup> Articles 236 and 50 provides Nubians with the right to return to lands they were displaced from decades ago, addresses the issue of food sovereignty, acknowledgement of cultural diversity and preservation of national heritage. Article 3 and 235 provides Christians with the constitutional right to their own personal status law and promise that the parliament will write a law on church renovation.

<sup>3</sup> Chapter 6, article 14.1 of the Charter provides that '*State Parties shall strengthen and institutionalize constitutional civilian control over the armed and security forces to ensure the consolidation of democracy and constitutional order*'.

The drafting of the constitution which was done by two committees respectively – the expert Committee of 10 and the Committee of 50, both appointed by the interim authority– was the result of a ‘top-down’ approach in which the level of popular participation was limited. These committees were not seen as broadly representative of all interest groups in society. While the constitution drafting process reflected a relatively improved inclusion of vulnerable and minority groups such as women, Christians and Nubians in the Committee of 50, the Mission notes the complete exclusion and eventual banning of the Muslim Brotherhood. A democratic constitution making process is founded on the principles of inclusivity and participation, to guarantee its legitimacy and durability.

## **5. The Campaigns**

Following the declaration of the date of the referendum, the campaigns towards the referendum were largely skewed to the advantage of the supporters of the draft constitution. The Mission further notes that within this context, the campaigns were largely focused on support for the current regime as opposed to support for the actual content of the constitution. Public awareness on the content of the constitution received insufficient coverage.

The EISA Mission learned that political parties were not granted accreditation to follow the voting procedures. In its consultation with civil society groups, the Mission was also informed of the HEC’s denial of accreditation to citizen groups that were in opposition to the draft constitution. To maximise participation, political parties and citizen observers are legitimate stakeholders that should be granted access to witness all phases of the referendum in order to enhance public confidence. In its role, the HEC should independently use its mandate in an impartial and neutral manner<sup>4</sup> to ensure the exercise of the right to participate in the referendum process by all citizens.

## **6. Referendum Voting Days**

Operational and logistical preparations for voting day were impacted by the timeframe for preparation and the continuous review of the Law on Political Rights. In compliance with the last amendment of the Law in which the Interim President eased the voting procedures to allow voters to cast their votes in Governorates where they are non-residents, the HEC established 71 special polling centres. These special centres were equipped with laptops used for the verification of voter eligibility with an SMS verification system as a backup for situations where the laptops went offline. On the first day of voting, these stations had long queues that proved to be hard to manage in some instances. This was addressed by the creation of 62 additional special stations on the second day of voting. Out of the 153 polling stations visited by EISA witnesses, 11 were special polling stations. The Mission commends the HEC for the efforts put in place to make this system work.

There was deployment of heavy security presence on voting days at the polling stations due to the prevailing context of security concerns. In some cases, armed security personnel were present inside polling stations contrary to the prescribed distance of 200 meters.

As in its previous assessment of elections in Egypt, the EISA Mission reiterates the need for standardised procedures in the conduct of elections and referenda. These procedures were largely left to the discretion of judges at each polling station, thus leading to inconsistent application of the law.

On the closing and counting procedures, EISA witnesses noted that there was inconsistency in the reconciliation of ballots before the count to ensure that there is a tally between the number of votes cast and number of voters that turned up to vote. The announcement and display of the results at the polling stations after the count was also not consistently done, contrary to the provisions of HEC’s Resolution no 1 of 2014.

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<sup>4</sup>The mandate and duties of the Higher Elections Commission (HEC) are prescribed in Article 3(f) of Law 73 of 1956 on the Law for the Exercise of Political Rights

The national aggregation process was not open to witnesses. Similarly EISA witnesses in Gizza and Qualiubiya were denied access to the District General Committees. It is important to note that the transparency of the results management system in an electoral or referendum process is central to its credibility.

The Mission wishes to highlight other observations:

- The secrecy of the ballot was largely compromised for a number of reasons, including the small size of classrooms and the inappropriate layout of the station. Voters also appeared to be unaware of the importance of the secrecy of the ballot.
- The number of voters allocated per polling station ranged between 3000 and 6000. In comparison to the size of the rooms and the number of polling officials, effective management of the process was made difficult.
- Compared to previous processes, there was low participation of young people
- Citizen observers were present in only 4% of the stations visited by EISA witnesses. This attests to the limited ownership of the process by the citizenry.

The challenges identified above should be addressed by the permanent election management body provided for in the draft constitution.

## **7. Recommendations**

The EISA mission urges the current government to undertake a national reconciliation effort as an integral part of the transition process as this is central to the success and sustainability of the transition process.

As provided in the draft constitution, an electoral law that makes provision for an electoral system should be drafted and adopted before the next elections. The electoral law should be drafted through a consensual and inclusive process taking into account the interests and needs of all segments of the population including women and minority groups.

## **8. Conclusion**

The 14-15 January 2014 referendum was not merely a vote on a draft constitution. It was also widely seen as a plebiscite on the post-Morsi transition with the perception that a “Yes” vote would give legitimacy to the interim authorities to pursue the implementation of the transition roadmap while a “No” vote or a substantially low voter turnout resulting from a boycott of the referendum would be interpreted as the rejection of the transition programme.

In its assessment of the context and the conduct of the referendum the EISA Mission has come to the conclusion that while the technical conduct of the referendum by the HEC was largely carried out in an acceptable manner, the context prevailing before the referendum was unnecessarily restrictive of the fundamental freedoms of groups opposed to the draft constitution.

It is the hope of the EISA Witnessing Mission that the yet-to-be-elected Egyptian parliament will take upon itself the duty of enhancing the aspects of the constitution which require consensus building among Egyptians. The Mission urges all Egyptians to embark on a process of national reconciliation and to bring to an end the winner-takes-all political culture that has locked the Egyptian democratic transition in a vicious circle.

**About EISA**

*Formed in 1996, the Electoral Institute for Sustainable democracy in Africa (EISA) has established itself as a leading player in the field of elections and democracy in Africa. EISA has evolved from an election-focused NGO working in the Southern Africa region into a more diversified organisation working throughout the continent with national, regional, Pan-African and global partners. The Institute's work covers not only election assistance and observation but also other Democracy & Governance fields like political party development, election conflict management, legislative strengthening, the African Peer Review Mechanism and local governance and decentralisation. With its headquarters in Johannesburg (South Africa), EISA has current and past field offices in countries including Angola, Burundi, Chad, Côte d'Ivoire, Democratic Republic of Congo, Kenya, Madagascar, Mozambique, Sudan and Zimbabwe, a reflection of its broader geographical mandate.*

*EISA has been present in Egypt since November 2011 and deployed witnesses during the parliamentary and presidential elections that were held between November 2011 and June 2012 and to the December 2012 constitutional referendum.*

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