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EGYPT: Constitution 2014 – Religious freedom analysis

1. Summary

The Egyptian constitutional referendum took place in January 2014 and resulted in the overwhelming acceptance of a new constitution, which had been drafted in the aftermath of the ousting of President Morsi after one year in power. This briefing looks at the newly accepted constitution¹ and the political circumstances surrounding it, and gives recommendations to Egypt's interim leaders as they continue to implement the transitional roadmap.

2. Constitutional referendum

The constitutional referendum took place on 14-15 January 2014, with Egyptians abroad having voted overwhelmingly in favour of the constitution on 12 January.

The political climate in Egypt leading up to the referendum was heavily in favour of acceptance of the constitution; while voters were in theory free to hold opinions against the constitution, the wide-ranging campaign for a 'yes' vote spread across private and state media. Those in Egypt who attempted to campaign for a boycott or a 'no' vote were demonised, threatened, and in some cases detained. Leaders from across Egypt's political spectrum encouraged citizens both to partake in their civic duty and to vote 'yes', with Al-Azhar Grand Imam el-Tayeb also voicing his support. Senior church leaders encouraged the Coptic community to vote in favour of the constitution, reflecting their appreciation of having been included in this drafting process.

International observers cast doubt over the fairness of the ballot itself; Democracy International noted that the heavy security presence and the layout of polling stations "could have jeopardized voters' ability to cast a ballot in secret".²

The interim government had hoped for a higher turnout than in the 2012 referendum, in order to legitimise further the removal of President Morsi on 3 July 2013 and the creation of a transitional roadmap. The constitution was passed with 98.1% of the vote. Turnout was indeed higher (38.6% versus 32.9% in 2012), despite the Muslim Brotherhood's campaign for a boycott of the vote.

Though the political climate surrounding the referendum was not impartial, a high turnout does demonstrate Egyptians' frustration with the current instability, and their desire for stability and economic progress.

¹ Translations of the 2014 constitution are taken from the translation prepared by International IDEA (www.idea.int) at http://www.atlanticcouncil.org/images/publications/20131206EgyptConstitution_Dec.pdf.pdf
Translations of the 2012 constitution are taken from the translation published by the *Egypt Independent* at <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>

² Democracy International, 'PRESS RELEASE: Findings of DI Egyptian Referendum Observation Mission', 17 January 2014 <http://democracyinternational.com/news/press-release-findings-di-egyptian-referendum-observation-mission>

3. Constitutional analysis

The 2014 constitution was drafted by a 50-member panel drawn from across Egyptian society, which was considerably more representative than the panel which drafted the 2012 constitution. Indeed, the 2012 drafting process was marred by walkouts by liberals, secularists and Copts; and the resulting Islamist-leaning document was heavily criticised for not protecting the rights of women or religious minorities, not protecting the freedoms sought in the 25 January Revolution, allowing military trials for civilians and instating Al-Azhar³ as the institution with authority to define the principles of shari'a.

By contrast, the panel chosen to draft the new constitution was much more representative, though the Muslim Brotherhood's rejection of the entire process with the interim government ensured their non-participation.

However, Islamist views were still represented in the drafting process. The Salafi movement was willing to negotiate during the transitional process, and the Salafi presence in the drafting committee mitigated against the tendency towards secularism, a consequence of the widespread disapproval at the excesses of Morsi's Islamist presidency. Since August 2013 Morsi has been criticised for not having done enough to re-stimulate the economy, having concentrated power into the hands of like-minded Islamists, having 'brotherhoodised' vital institutions by placing party members in key positions, and having alienated moderate Muslims, the Coptic community and other minority communities.

Some groups have lauded the 2014 constitution for its provisions for freedom of religion or belief (FoRB). CSW has a more cautious assessment. While there has been some progress, with the most controversial articles restricting FoRB contained in the old constitution having been removed or significantly edited in the new one, there remains enough ambiguity in key articles to allow discrimination to continue, unless there is a concerted will to tackle longstanding discriminatory policies and practices.

3.1 Freedom of religion or belief

Article 64 deals explicitly with freedom of belief:

Freedom of belief is absolute.

The freedom of practicing religious rituals and establishing places of worship for the followers of revealed religions is a right organized by law.

There has been minimal change to this article from the 2012 constitution. Provisions for religious freedom remain restricted to followers of the so-called 'heavenly' or 'revealed' religions, namely Christianity, Islam, and Judaism. However, the first clause of Article 64 makes clear that freedom of belief is absolute ('preserved'/'protected' in the 2012 constitution). There are still no guarantees for Shi'as, Sufis, Baha'is, atheists, and other communities – meaning that freedom of belief is not absolute in practice. There is also ambiguity over whether freedom of religious practice is restricted to followers of the 'heavenly' religions. An attempt to unify legislation on the building of houses of worship failed in 2011; it is therefore likely that followers of religions other than Islam will continue to face restrictions when attempting to build or maintain places of worship, until this legislation is finalised.

³ Al-Azhar (in Cairo, Egypt) is the most senior seat of religious matters, jurisprudence and learning in Sunni Islam.

In both the Preamble and Article 93, explicit reference to the Universal Declaration of Human Rights and other international covenants demonstrates a willingness to be held to account to these documents.

We are drafting a Constitution that paves the way to the future for us, and which is in line with the Universal Declaration of Human Rights, which we took part in the drafting of and approved.

- Preamble

The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances.

- Article 93

Such references were entirely absent from the 2012 constitution, and reflect a commitment (at least theoretically) to human rights principles. Furthermore, these articles can serve as a basis for ongoing international accountability and advocacy relating to violations of a wide range of human rights.

Article 3 has been retained unchanged, giving the Christian and Jewish communities sovereignty over personal and religious matters.

The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders.

- Article 3

Several articles address punitive measures that have often been used against religious minority communities. Article 40 forbids the confiscation of property, which can guard against the seizure of church land and the demands of payment for its return. Article 92 protects the rights and freedoms of individual citizens. Article 99 ensures that 'any assault on the personal freedoms or sanctity of the life of citizens...is a crime with no statute of limitations' and that 'just compensation' will be awarded to 'those who have been assaulted'. Through this article the state is effectively committed to protecting minority communities from sectarian attacks.

3.2 Equality and non-discrimination

The 2014 constitution makes commitments to equality, non-discrimination, and equal opportunity in several articles, and even binds the state to establishing an independent commission to 'eliminate all forms of discrimination'. These provisions are certainly sufficient to ensure the full participation of every Egyptian in public life, regardless of religion, ethnicity or gender.

We are drafting a Constitution that achieves equality between us in rights and duties with no discrimination.

- Preamble

The state ensures equal opportunity for all citizens without discrimination.

- Article 9

The state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.

- Article 11

Public posts are a right for citizens on the basis of merit, with no favoritism or mediation.

- Article 14

Dignity is a right for every person that may not be infringed upon. The state shall respect, guarantee, and protect it.

- Article 51

Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason.

Discrimination and incitement to hate are crimes punishable by law.

The state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose.

- Article 53

However, the question of implementation remains, and is addressed in Section 3.6.

3.3 The role of Islam

The role of Islam was a key point of conflict during both constitutional drafting processes. Widely publicised walkouts by Copts, secularists, and liberals marred the 2012 constitutional drafting process, leaving an Islamist-dominated drafting committee to define the role of Islam in Egyptian society, the place and interpretation of shari'a, and the role of Al-Azhar in relation to these.

3.3.1 Islam as the religion of the state

The 2014 constitution retains Article 2 in unchanged form.

Islam is the religion of the state.

The principles of Islamic Sharia are the principle source of legislation.

- Article 2

With Islam defined as the religion of the state, the burden is on the state to ensure that rights and freedoms are extended to citizens who do not adhere to the state religion. The need for making such provision for non-adherents is outlined in Paragraphs 9 and 10 of General Comment No. 22 on Article 18 of the International Covenant on Civil and Political Rights (ICCPR, UN Doc. HRI/GEN/1/Rev.1 at 35 (1994)).

The fact that a religion is recognized as a state religion...shall not result in any impairment of the enjoyment of any of the rights under the [ICCPR], including articles 18⁴ and 27⁵, nor in any discrimination against adherents to other religions or non-believers.

⁴ 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.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

- Paragraph 9, General Comment No. 22, Article 18

If a set of beliefs is treated as official ideology in constitutions...this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

- Paragraph 10, General Comment No. 22, Article 18

Given the provisions contained in international covenants and agreements, and Egypt's stated commitment to upholding these principles, the role of Islam as 'religion of the state' should in no way restrict freedom of religion or belief for followers of other religions and non-religious Egyptians.

3.3.2 Principles of Islamic shari'a

Article 219 proved to be one of the most controversial articles in the 2012 constitution. Critics were concerned that a conservative definition of the 'principles of Islamic Shari'a' could open the way for the laws of Islamic shari'a to become the principle source of legislation, potentially laying the foundation for more conservative interpretations of Article 2.

The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.

- Article 219 (2012 constitution)

Article 219 has been removed from the 2014 constitution. In order for the Salafis to agree to the removal of the article, an articulation of how shari'a will be interpreted, giving the authority of interpretation to the Supreme Constitutional Court, had to be included in the Preamble:

We are drafting a Constitution that affirms that the principles of Islamic Sharia are the principle source of legislation, and that the reference for interpretation thereof is the relevant texts in the collected rulings of the Supreme Constitutional Court.

- Preamble

Furthermore, Article 4⁶ of the 2012 constitution obliged Al-Azhar scholars to be consulted in matters pertaining to Islamic law. When taken together, Articles 4 and 219 would have restricted interpretation of shari'a to Al-Azhar, the authority on doctrine, teaching and practice in Sunni Islam.

The removal of Articles 4 and 219 should be lauded, and the separation of executive, legislative and judicial bodies maintained to ensure that the state does not influence the interpretation of Shari'a principles to achieve its own ends.

Article 219's detractors included representatives of Al-Azhar itself. The Al-Azhar representative in the constitutional drafting committee, Mohamed Abdel Salam, voiced his opposition to Article 219, claiming

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

- Article 18, International Covenant on Civil and Political Rights

⁵ In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

- Article 27, ICCPR

⁶ Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law. - Article 4, 2012 constitution

that "...some imams in the last period have highly distorted the image of Islam and all should know that Islam rejects a religious state."⁷

3.3.3 Al-Azhar

The State shall ensure sufficient funds for Al-Azhar to achieve its objectives.

- Article 4

Al-Azhar is an independent scientific Islamic institution, with exclusive competence over its own affairs... The state shall provide enough financial allocations to achieve its purposes.

- Article 7

The 2014 constitution maintains a privileged place for Al-Azhar, ensuring that the institution receives funds from the state to achieve its purposes, including 'preaching Islam and disseminating the religious sciences and the Arabic languages in Egypt and the world'. Given the constitutional commitment to international law, the onus remains on state authorities to ensure non-discrimination, and that Al Azhar's privileged position does not impinge upon the right of religious minorities to full freedom of religion and belief. In particular, action must be taken proactively to ensure that the privileged status of one religious system does not result in continued discrimination against people of other systems of belief.

3.4 Towards privileges for Copts

Coptic representatives participated in the walkout of the 2012 constitutional drafting process, with the acting Coptic pope Bishop Pachomius saying, "The ongoing process within the Constituent Assembly will not guarantee a constitution that will provide national consensus or that reflects the identity of Egypt".⁸ Coptic representatives remained in the 2013 Constituent Assembly, and several articles provide specific provisions for the Coptic community.

[Election of local councils:] ...one quarter of the seats are allocated to youth under 35 years old, one quarter is allocated for women, workers and farmers are represented by no less than 50 percent of the total number of seats, and these percentages include a proper representation of Christians and people with disability.

- Article 180

In its first legislative term after this Constitution comes into effect, the House of Representatives shall issue a law to organize building and renovating churches, guaranteeing Christians the freedom to practice their religious rituals.

- Article 235

The state grants youth, Christians, persons with disability and expatriate Egyptians appropriate representation in the first House of Representatives to be elected after this Constitution is adopted, in the manner specified by law.

- Article 244

⁷ Ahram Online, 'Nour Party: Azhar to have final say on Islamic Sharia in constitution', 15 September 2013 <http://english.ahram.org/NewsContentPrint/1/0/81656/Egypt/0/Nour-Party-Azhar-to-have-final-say-on-Islamic-Shar.aspx>

⁸ Ahram Online, 'Egypt's churches withdraw from Constituent Assembly', 17 November 2012 <http://english.ahram.org/NewsContent/1/64/58411/Egypt/Politics-/Egyp-t-s-churches-withdraw-from-Constituent-Assembly.aspx>

However, the presence of articles privileging Copts also illustrates the inconsistency in the application of freedom of religion or belief in Article 64, and various articles outlining equality and non-discrimination. Specific, Christian-focused articles demonstrate the gulf between Sunni Muslims and Christians on the one hand, and Christians and other religious minorities on the other. A privileged status for Christians does not address the root problem for freedom of religion or belief, though Articles 180, 235, and 244 will ensure increased ease of building churches, and better representation in roles of public office. However, freedom of belief as 'absolute' (Article 64) should assure members of all faith communities of the freedom to practise their faith in public and in private, alone or in community with others, and includes the freedom to build and maintain houses of worship.

Furthermore, representation is offered to Christians in the House of Representatives, but not in the executive or judicial branches of government. This seems a haphazard provision, as well as being discriminatory in giving representation to Christians and not to other minorities.

3.5 Removed articles

Several other articles from the 2012 constitution were edited or removed during the drafting process for the 2014 constitution. Article 4 pertained to Al-Azhar scholars and their consultation on matters pertaining to Islamic law. Article 11 had the following sentence removed: 'The state shall safeguard ethics, public morality and public order, and foster a high level of education and of religious and patriotic values...' Such a clause, promoting the state as guardian of ethics and morality, could have led to the creation of a moral police, as in Iran, and its removal is welcomed.

Furthermore, Article 44 of the 2012 constitution⁹ has been removed. This was a possible precursor to a wider blasphemy law, and its removal is welcomed.

Other clauses which were removed from the Preamble made explicit the relationship and responsibility between Egypt and other Islamic countries. Another positive removal is that of Article 212, giving the Church control over its own finances, instead of their regulation by a state authority.¹⁰

3.6 Implementation

In the 2014 constitution, provisions for freedom of religion or belief are maintained with minor improvements. However, the lack of religious freedom in Egypt in the past has been caused not by a lack of constitutional provision, but rather by i) a lack of implementation, ii) an absence of the political will needed to combat longstanding systemic and social violations of religious freedom and iii) official indifference at best and complicity at worst in discrimination and even violence, which in turn feeds into and even validates societal hostility. As such, provisions for absolute freedom of belief (Article 64), equality and non-discrimination (Articles 9, 11, 14, 51 and 53), ring hollow unless accompanied by explicit commitments to implement these provisions, and to combat discriminatory social and structural barriers.

To this end, CSW welcomes the commitment outlined in Article 53 to establish an independent commission to eliminate all forms of discrimination. The independent commission must be representative, ensuring that it combats discrimination in all forms against every group that has been demonised by Egyptian society, including atheists and Shi'as.

⁹ Insult or abuse of all religious messengers and prophets shall be prohibited. - Article 44, 2012 constitution

¹⁰ The High Authority for Endowment Affairs regulates, supervises and monitors public and private endowments, ensures their adherence to sensible administrative and economic standards, and raises awareness about endowments in society. - Article 212, 2012 constitution, removed

4. Political roadmap

The new constitution represents the first stage of the political roadmap put in place after President Morsi's removal from power. In the original roadmap, parliamentary elections were to follow, with presidential elections coming later. However, the implementation of a new constitution annuls all previous constitutional decrees issued by Interim President Adly Mansour, who can now decide whether the presidential or parliamentary elections will take place first.

With the resounding approval of the new constitution, the army chief General Abdel Fattah al-Sisi looks ever more likely to run for president, although the third anniversary of the 25 January 2011 Revolution came and went without the expected announcement to that end.

5. Conclusion

While provisions for religious freedom in the 2014 constitution improve slightly on the 2012 constitution drafted during President Morsi's tenure, these provisions, and the explicit commitments to non-discrimination, must be accompanied by the political will to enforce them, to combat discrimination and incitement to hate speech effectively, to ensure full freedom of religion and belief for all and to draft legislation to achieve this.

As Father Nicolas Lhernould, Vicar General of the Archdiocese of the Catholic Church in Tunis, said in relation to Tunisia's widely lauded new constitution, drafted concurrently with Egypt's political transitions, "A formula is never absolute; it is its application that counts."¹¹ He added that "the situation of religious minorities, and their development, is an important indicator of the quality of a democratic framework."

6. Recommendations to the interim government

- Commend the drafters of the 2014 constitution for its improvement on the 2012 constitution;
- Call on the interim government to implement the provisions for freedom of religion and belief (Article 64), in particular:
 - The establishment of an independent commission to eliminate all forms of discrimination, including on the basis of religion or belief (Article 53);
 - Absolute freedom of belief for all (Article 64);
 - The drafting of legislation to govern the construction and repair of houses of worship.
- To counter years of official propaganda that has contributed to societal hostility, the interim government should consider public education programmes encouraging the recognition of the civil rights for all Egyptians, regardless of religion, colour or gender, and consider adding similar civic education messages to the national curriculum;
- Urge the interim government to encourage and foster the separation of civilian government and the military;

¹¹ *Christian Today Australia*, 'Tunisian constitution finds no place for Sharia', 21 January 2014
<http://au.christiantoday.com/article/tunisian-constitution-finds-no-place-for-sharia/16738.htm>

- Urge the interim government to encourage more open electoral and referendum processes in future, especially in parliamentary and presidential elections;
- Urge the interim government to encourage (and not suppress) the participation of political opposition groups and individuals who renounce or do not espouse violence (Articles 53, 65, 72 and 87),¹² and to encourage recognition of the right to freedom of speech, thought, opinion (Article 65) including that this right is also held by the opposition;
- Urge the interim authorities to ease restrictions on independent journalists and media, in order to allow for the development of a healthy civil society.

¹² The state guarantees the safety, neutrality and fairness of referendum and election procedures. The use of public funds, government agencies, public facilities, places of worship, business sector establishments and non-governmental organizations and institutions for political purposes and electioneering is forbidden. - Article 87, 2014 constitution