



EISA TECHNICAL ASSESSMENT MISSION TO THE 2012 CONSTITUTIONAL REFERENDUM IN THE ARAB REPUBLIC OF EGYPT

PRELIMINARY STATEMENT

24 December 2012

1. Executive summary

The political context in Egypt has been deeply polarised and marked by legal and constitutional uncertainty since the decision to hold the 2012 presidential elections in Egypt before the adoption of a constitution setting out the powers of the President to be elected and the balance of powers between the executive, the legislative and the judiciary. Furthermore, the path to the 2012 constitutional referendum in Egypt has been characterised by controversies, violent protests and political power struggles. The constitutional declaration by President Mohamed Morsi on 22 November 2012 and the call for the referendum were met with street protests that highlighted the polarised political context. Two isolated and conflicting camps have emerged: the Islamist political forces that support the President and the draft constitution, and the secularist, leftist and liberal political forces named the National Salvation Front, opposing the draft constitution.

The drafting process and the content of the draft constitution have been the subject of controversy over the past months. A section of society opposed to the draft constitution have argued that it contains certain provisions that limit the rights of women, minorities and children, allows military trials of civilians and may result in some political power given to religious figures and institutions. On the other hand, supporters of the draft constitution have argued that it will entrench the tenets of Islam in Egypt, achieve democracy and bring about the much needed stability. The opposition forces had earlier called for a boycott of the referendum but changed their call just days before the first polling day, urging citizens to turn out and vote 'no'.

The Electoral Institute for Sustainable Democracy in Africa (EISA) has been in the Arab Republic of Egypt since November 2011 witnessing all the phases of the parliamentary elections as well as the presidential elections. In its final statement on the 2012 presidential elections in Egypt, EISA drew attention to the possibility of a constitutional deadlock based on the fact that the powers of the newly elected President were yet to be defined and the parliament had been dissolved at the time of the presidential elections:

There remain a number of crucial political and constitutional issues that challenge the mandate of the people given to the President-elect through this election. Namely, the

absence of a constitution and a parliament, and the temporary devolution of legislative and key executive powers to the SCAF through the supplementary Constitutional Declaration issued on the second day of the election. The Mission therefore expresses its hope that the people of Egypt, under the leadership of the president-elect, will work constructively towards an inclusive and transparent constitution drafting process.¹

EISA recognises the fact that as a constitution drafting process is a key element of the democratisation process, it should have been an all inclusive and consensus-based process to ensure that the fundamental law of the land enjoys the support of the large majority of the population. On the other hand, the Institute notes that several key provisions in the constitution will only be implemented after a substantial law making process is carried out. While the lawmaking process can be seen as another chance for pro-government forces to consolidate their positions, this can also offer an opportunity to the opponents of the constitution to meaningfully influence the legal framework, provided that they are well organised and win seats in the new national assembly. More importantly, the law-making phase offers an opportunity for more interaction among parliamentarians from across the political divide with a view to shaping the country's constitutional and legal framework in a consensual manner. Therefore, in recognition of the fact that the passage of the constitution is not the end of the political process but the beginning of a new phase of Egypt's democratic development, an EISA Technical Assessment Mission was deployed to the constitutional referendum that took place on 15 and 22 December 2012. The deployment of this Mission builds on the Institute's assessment and documentation of the transition process which it commenced in November 2011 as well as the sharing of best international electoral and democratic practices.

The late accreditation granted to international witnessing groups by the Egyptian electoral authorities limited the EISA Mission's ability to follow all the phases of the referendum process. Nevertheless, the EISA Mission was able to witness the polling days of the referendum and meet with key stakeholders. 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, the Declaration of Principles on International Election Observation and the Principles for Election Management, Monitoring and Observation (PEMMO) served as the basis for the Mission's assessment of the constitutional referendum.

EISA's preliminary assessment is that though the referendum was conducted within a context of political polarisation, Egyptians were largely able to freely go to the polls to express their will. However, the current polarisation in the country is likely to adversely impact on the socio-political environment that emerges from the referendum unless Egyptian political leaders shift towards more consensual politics.

After witnessing both phases, the Mission stayed in the country to witness the finalisation and announcement of results. Notwithstanding the shortcomings outlined above, the EISA Mission reached the conclusion that Egyptians were given an opportunity to express their will

¹ EISA EWM's statement on the post-election phase-28 June 2012, <http://www.eisa.org.za/PDF/egy2012eom15.pdf>

on the draft constitution through the ballot on 15 and 22 December 2012. However the pre-voting atmosphere was characterised by tense political polarisation and violence.

2. Mission Composition

Under the leadership of Ms Iona Tip, the Operations Director of EISA, the Mission consisted of 13 witnesses drawn from the following African countries: Côte d'Ivoire, Democratic Republic of Congo, Mozambique, Nigeria, South Africa and Tunisia.

3. Mission Methodology

In place of a fully-fledged observation Mission, EISA deployed a technical assessment Mission adopting a short term assessment methodology. Due to the late accreditation granted to international witnesses, the Mission's assessment of the referendum was limited to the polling phase of the process.

Members of the Mission arrived in Egypt on 12 December 2012 and remained on the ground until 27 December 2012. Prior to its deployment, the Mission received a briefing on 13 December 2012 covering, *inter alia*, the political context in Egypt, the constitution-making process, the content of the draft referendum and the legal framework for the conduct of the referendum. The Mission deployed seven (7) teams to 11 governorates namely, Alexandria, Assiut, Aswan, Cairo (three teams) and Sharquia during the first phase of the process. During the second phase of the process, EISA witnesses were again deployed in seven (7) teams to Fayoum, Giza, Ismailia, Menoufia, Qaliubia, and Suez Governorates.

On polling days, the EISA teams visited a total of 178 polling stations across 11 governorates where the teams witnessed the opening of the poll, the voting and counting processes at the polling stations and the aggregation processes in selected District General Committees. To ensure real time transmission of data collected in the field on election days, the technical assessment teams were equipped with innovative handheld computer tablets.

4. Preliminary Findings

After considering relevant legislation and documentation, briefings by electoral stakeholders during both phases of the referendum, media reports, direct observations made by its different teams deployed on the ground, and basing its findings and recommendations on guidelines contained in the aforementioned instruments, the EISA Mission has made the following preliminary findings:

4.1. Background and political context

The political environment ahead of the constitutional referendum was worsened by a number of reasons. Firstly several non-Islamists members of the Constituent Assembly withdrew in protest to some articles of the draft constitution as well as what they termed the Islamists' domination of the Assembly. Secondly, on 22 November 2012 the President of the Republic issued a constitutional declaration granting him legislative powers not subject to any judicial review. Thirdly on 2 December 2012, protesters blocked judges from entering the building of the Supreme Constitutional Court to hear lawsuits challenging the constitutionality of the

composition of the Constituent Assembly and the election of the Shura Council. Therefore, the Mission regrettably notes that the drafting of the constitution was not conducted through a consensual process and that the sentiments about the content of the draft constitution have been split down the same political lines of supporters of the president and the opposition. Weeks of deep polarisation have occasionally and regrettably led to deadly clashes in the country resulting in the President ordering the temporary deployment of the army to protect the polls.

The Mission notes that the political environment after the first phase of the referendum remained tense and there were reports of violence in Alexandria in which 62 people were reported injured² on the eve of the second phase of the polling. The Mission also noted the massive deployment of military and police personnel in the streets of major cities where EISA witnesses were deployed during this period. EISA witnesses also observed the campaigns by political parties in the period between both phases.

4.2. Legal framework governing the constitutional referendum

The 2012 constitutional referendum was governed by a set of laws and regulations, the most significant being: the Constitutional Declaration of 30 March 2011 and its decrees and amendments issued by the SCAF and the Law No73 of 1956 on the Exercise of Political Rights and its amendments. The Mission notes that the legal framework in Egypt guarantees basic rights and freedoms including the right to vote in elections and referenda. It also provides for the conduct of regular elections and referenda managed by an electoral authority.

According to Article 3 of the Law No73, referenda in Egypt are conducted under the supervision of the Higher Elections Commission (HEC). The HEC is composed of members drawn from the judiciary namely:

- The Head of Cairo's Court of Appeals, who chairs the commission,
- The two most senior heads of the Court of Cassation,
- The two most senior heads of the State Council, and
- The two most senior heads of the Court of Appeals, next to the head of the Court of Appeals.

The HEC is responsible for the conduct of the entire process, including the database of eligible voters, appeals to the process, investigation of any complaints or allegations and announcing the final results. The disagreements and controversies that preceded the referendum also impacted on the work of the judiciary, such as some judges and prosecutors declining to supervise the referendum, thus compelling the HEC to conduct the polls in two phases.

The Mission noted that the conduct of the polls in two phases, with a week in-between, could have impacted on the outcome of the process. Even though the HEC did not publicly announce the results of the first phase, as the information was in the public domain it could have affected the way in which voters voted in the second phase.

² *The Egyptian Gazette*, 23 December 2012

4.3. Polling day findings

4.3.1. Opening of the poll

The Mission notes that 57% of the polling stations visited by EISA teams opened slightly later than the official opening time, with most of these stations opening about half an hour late. It was also noted that independent witnesses (citizens' groups and international groups) and polling agents were granted access to witness the opening procedures; this was an improvement on the presidential elections. The Mission further notes that the opening procedures were conducted largely in a transparent manner and in compliance with the stipulated procedures.

4.3.2. Ballot and election materials

Election materials were in adequate supply throughout the day in all the polling stations visited by EISA teams. The Mission notes that there were inconsistencies in the sealing of ballot boxes as some boxes had the incomplete number of seals ranging from two to three seals, despite the provision of four seals per box by the Commission.

The Mission was also alerted to the fact that the design of the ballot used for out of country voting was different from the design of the ballot for in-country voting. The in-country ballot had the circle for 'Agree' on the right side (blue) and the 'Disagree' (brown) on the left side while the design was the other way around for out of country voting; this had the potential to mislead some voters.

4.3.3. Polling stations

Polling stations were located in neutral public places, mainly at schools. The Mission also noted that voters were aware of their allocated polling stations as there were few cases of voters being turned away from polling stations where they were not allocated.

29% of polling stations by EISA witness teams were inaccessible to the aged, expectant mothers and persons with disability as they were located upstairs. Furthermore, the Mission noted that stations were heavily crowded as the average number of voters allocated per polling station in the places visited was 4428. Some polling stations were located in cramped spaces such as classrooms, which made it difficult to lay out the stations in a manner that guaranteed the secrecy of the ballot and for easy flow of voters. This was the case in 13% of the stations visited.

4.3.4. Polling staff

The Mission noted that there was no standard number of polling staff on duty on both days of polling. The number of staff on duty ranged from three to eight in the polling stations visited. In some stations it was noted that polling officials had to take on dual responsibilities of issuing ballot papers and verifying the identity of voters, this contributed to some of the irregularities observed in the process as officials were overwhelmed. Regardless of these challenges, the Mission noted that polling officials conducted the process with a good level of familiarity with the process.

As was the case in previous elections, the Mission noted that polling officials were not easily identifiable.

4.3.5. Security personnel, political party representatives and independent witnesses

The presence of security personnel was noted in all polling centres visited. The Mission also noted the efforts of security personnel to maintain order at the polling centres. However, during the first phase, there were few instances where local journalists were denied access to polling centres by security officials.

The EISA Mission also noted the presence of citizen witnesses at some of the polling stations visited. In some polling stations, citizen witnesses were seen assisting polling officials in the conduct of the process. The Mission notes that this contradicts the principle of non-interference that guides the role of independent witnesses.

EISA witnesses noted the presence of political party representatives in a few polling stations visited. Witnesses however encountered a few instances where party agent attempted to influence the decision of voters and in some other cases, campaign materials were placed within the parameters of the polling centres.

It was also observed that the National Council for Human Rights (NCHR) granted the same form of accreditation to both citizen witnesses and political parties. This made it difficult to differentiate these groups of people at the polling stations.

4.3.6. Voter's roll

The Mission was informed that the voter register was revised up until 30 November 2012. It was also noted that a disaggregated copy of the voters' roll for each polling station was available in all the polling stations visited by EISA witnesses. There were a few cases of voters who showed up without their ID cards who were rightly not permitted to vote.

4.3.7. Voting process

The Mission noted that the process was conducted in compliance with stipulated procedures in most of the stations visited. Voters were able to freely express their will without overt intimidation or coercion.

The Mission however noted some inconsistencies with the voting procedures such as the checking of voters for indelible ink before issuing the ballot. There were observed irregularities in the application of indelible ink after casting the ballot in most of the polling stations visited. Specifically, in many polling stations, the application of indelible ink was left to the discretion of voters and the application was done inconsistently with the regulation that requires voters to ink the index finger after voting before leaving the polling station.

It was also noted that in some stations, the ballot was issued without the official stamp of the Electoral Commission or the signature of the Judge. The official stamp is a necessary precaution against unauthorised ballots being placed in the ballot boxes.

4.3.8. Closing of the poll

The large number of voters allocated to each polling station and the conduct of polling on one day resulted in long queues at stations, thus necessitating a four hour extension of polling hours on the both days of polling. EISA witnesses also visited a few polling stations where the Presiding Judges were not aware of the extension of polling hours. As a result of early closing, the result of the voting was invalidated in one polling station after the first phase. The outcome of the complaints and appeal process from the both phases of the process is yet to be determined.

The Mission notes that the closing procedures were conducted in compliance with the stipulated regulations.

4.3.9. Counting and aggregation of results

EISA witnesses were granted access to the polling stations and aggregation centres to witness the counting and aggregation processes. Citizen witnesses and party representatives were also granted access to the counting and aggregation processes.

The Mission noted that overall the counting process was conducted in a transparent manner. However, the stipulated procedures were not complied with in some stations, specifically with regard to the reconciliation of used and unused ballot, as it was noted that this procedure was not conducted in some polling stations.

The Mission was particularly pleased to note that one of its recommendations from the previous election on the announcement and posting of results at polling stations has been adopted and became a procedure in the referendum. The decision of the Supreme Electoral Commission to announce and post the results at the polling stations and aggregation centres is a marked improvement on the previous electoral processes. While the Mission noted that this contributed to the transparency of the counting and aggregation processes, it also draws attention to the noncompliance with this procedure at some aggregation centres during both phases of the referendum.

5. Recommendations

In view of its observations, the Mission makes the following recommendations:

- Considering the challenge of overcrowded polling stations experienced during the referendum, best practice suggests that no more than a thousand voters should be allocated to a polling station. In the absence of increased numbers of polling stations, there is a need to hold polling over two days and reduce the number of voters allocated per polling station in future referenda.
- Considering the responsibilities required of polling staff at polling stations, there is a need to allocate a standard number of polling staff to each station to ensure that procedures are consistently applied across all stations.
- In line with international best practices, it is important that the design and content of the ballot paper for all phases of an electoral process is the same to avoid misleading

voters. The Mission therefore recommends that the ballot for in-country and out of country voting in future elections and referenda should be the same.

- In view of the level of discretion exercised by polling officials, there is a need for training of polling officials. Furthermore the training of polling officials should also emphasise the need to apply counting procedures uniformly especially the reconciliation of ballots.
- The EISA Mission calls on the Egyptian authorities to provide early accreditation to international witnessing group to enable them undertake a comprehensive assessment of the electoral process, including the deployment of long-term witnesses.
- The Mission recommends that political party agents and citizen witnesses should be accredited and provided with different forms of identification to make it easy for voters to differentiate them from other officials at polling stations.
- While citizen witnessing groups have a vital role to play in contributing to the credibility of the electoral process, their role should be guided by the principle of non-interference. To address the contradictions observed in the role played by citizen witnesses during the referendum, it is important that citizen witnesses are trained to enable them understand their roles and responsibilities in the electoral process.

7. Conclusion

Based on its findings during the two phases of the referendum and the guidelines enshrined in the African Charter on Democracy, Elections and Governance, the African Union Declaration on the Principles Governing Democratic Elections in Africa, the Declaration of Principles on International Election Observation and Code of Conduct for International Observers, and the Principles for Election Management, Monitoring and Observation (PEMMO), the EISA Technical Assessment Mission is of the opinion that the constitutional referendum held on 15 and 22 December 2012 was largely conducted in a manner which allowed the people of Egypt to express their opinion on the draft constitution in spite of the lack of consensus on the drafting process, the polarisation ahead of the polls and the pre-voting violence.

The EISA Mission urges election stakeholders in Egypt to get any disputes over the referendum redressed through legal means.

Regardless of the referendum outcome, EISA notes that the adoption of a new constitution worldwide is not the end of the road in a democratic transition, but often marks a new beginning and an opportunity to put in place processes that lead to a favourable outcome for all citizens. This can also be the case in Egypt if political and social leaders seize the opportunity to perfect the Constitution through amendments where necessary or in the course of subsequent law-making by Parliament. All of this may only happen if Egyptians start working toward building trust across the political spectrum and social and religious divides.

The EISA Mission therefore calls on the Government, opposition leaders and people of Egypt to seek national conciliation through dialogue and consensus building to address the political polarisation in the country.

A final report will provide an in-depth analysis of the Mission's observations, findings and recommendations.

The Mission, once more, extends gratitude to the Egyptian people and other national electoral stakeholders, for their hospitality and willingness to meet with the Mission. EISA is thankful to HEC for accrediting the Electoral Institute the opportunity to witness such a defining moment in the political history of contemporary Egypt.

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 NGO servicing Southern Africa 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, 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's website: www.eisa.org.za