

ARTICLE 19

Egypt: Protecting Freedom of
Expression and Freedom of
Information in the New Constitution

2012

Policy Brief

Executive Summary

The new Constitution of Egypt is on the verge of being drafted. In order to support the forthcoming work of the drafters, ARTICLE 19 has produced a comprehensive policy brief outlining how the new Constitution should protect the right to freedom of expression and freedom of information.

The brief is based on international legal standards on freedom of expression, including the decisions of international and regional human rights courts as well as the authoritative interpretation of international human rights law by the UN Human Rights Committee, regional mechanisms and other bodies, such as the Special Rapporteur on Freedom of Opinion and Expression. The brief also lists specific examples of constitutional provisions in a range of other countries. ARTICLE 19 hopes that international and regional standards and comparative examples indicating the best practices of states on the protection of the right to freedom of expression and freedom of information shall provide a useful source of reference and inspiration for drafters of the new Egyptian Constitution.

More specifically, ARTICLE 19 believes that the new Egyptian Constitution must contain a substantive chapter or section devoted to the protection of human rights, in the form of a Bill or Charter of Rights or equivalent. Such protection of human rights should be at the heart of the new Constitution. It is of paramount importance that the new Constitution states that all international treaties ratified by Egypt, customary international law and general international law have legal force in Egypt, and that the core international human rights treaties which Egypt has ratified are applicable and binding in domestic law.

ARTICLE 19 also strongly urges the drafters to ensure that the new Constitution defines freedom of expression broadly to include the right to seek, receive and impart information and ideas, and to cover all types of expression and modes of communication. The Constitution should grant this right to every person and should explicitly require that all limitations to the right to freedom of expression strictly meet the three-part test set by international law.

The brief makes a whole range of specific recommendations for the protection of the right to freedom of expression and freedom of information, including the access to information, and details how the new Constitution should protect freedom of media and freedom of expression through Information and Communication Technologies (ICTs), and suggests mechanisms for enforcement of rights.

Crucially, ARTICLE 19 calls on the Egyptian Government to ensure that the process of drafting the new Egyptian Constitution is genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a real sense of ownership over the final text.

ARTICLE 19 hopes to continue to be engaged in assisting the Constitution Drafting Committee and Egyptian stakeholders to formulate the best possible constitutional framework for the Egyptian people, one to meet the state's international obligations but also serve to make human rights protection and promotion part of daily life and social consciousness in the country.

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About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this policy brief further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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Summary of Recommendations

- The protection of human rights should be at the heart of the new Egyptian Constitution, which should include a substantive chapter or section on human rights protection (such as Bill or Charter of rights).
- The new Constitution should state that all international treaties ratified by Egypt, customary international law and general international law have legal force in Egypt; that the core international human rights treaties which Egypt has ratified, including the ICCPR, the CRC, the CRPD and ACHPR, are applicable and binding in domestic law.
- There should be no reference to religion or religious law in the new Constitution. If it is necessary to refer to religion or religious values, such a reference should: (1) only be in the Preamble; (2) not refer to any particular religion (e.g. Islam); and (3) refer to religion in a neutral way and as a support for human rights.
- The new Constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to grant this right to every person.
- The new Constitution should indicate that there may be restrictions imposed on freedom of expression if these are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.
- The right to hold opinions without restriction should be specifically protected within the new Constitution.
- The new Constitution should protect freedom of information and access to information held by or on behalf of a public body, as well as access to information held by private persons necessary to enforce a right.
- The new Constitution should state that access to information should be granted unless: (a) disclosure would cause serious harm to a protected interest; and (b) this harm outweighs the public interest in accessing the information.
- The new Constitution should provide explicit protection for freedom of the media and specifically protect the following elements of media freedom:
 - There should be no prior censorship;
 - There should be no licensing or registration system for the print media;
 - There should be no licensing of individual journalists or entry requirements for practising the profession;
 - The independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be guaranteed;
 - The right of journalists to protect their confidential sources of information should be guaranteed;
 - Journalists should be free to associate in professional bodies of their choice.

- The new Constitution should state that all forms of expression and the means of their dissemination, including expression through ICTs – or on the Internet, electronic or other such information dissemination systems – is protected by the right to freedom of expression.
- The new Constitution should also provide that any restrictions on such ICTs, including Internet service providers, must meet the requirements for permissible limitations on freedom of expression as already indicated.
- The new Constitution should make the constitutional guarantees of freedom of expression and freedom of information directly enforceable against state as well as non-state or private actors. These guarantees should take precedence over domestic legislation that is incompatible to the extent of that incompatibility.
- Consideration should be given to a constitutional provision explicitly incorporating rights guaranteed in international treaties, such as the ICCPR, into Egyptian law.
- All Egyptian state organs – the Legislature, Executive and Judiciary – should properly implement the new Constitution through legislation, policies, judicial decisions and practices. The Egyptian Government must also ensure compliance with the new Constitution through publicity through all media, awareness campaigns, expansion of judicial education programmes and other means.
- The process of drafting the new Egyptian Constitution must be genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a real sense of ownership over the final text.
- The Egyptian judiciary should be trained in the judicial practice and implementation of human rights law, including Egypt's international human rights obligations.
- The Egyptian government needs to “bring human rights home” into the domestic legal order and establish and embed a “human rights culture” in society so that rights are not alien, but familiar entitlements for its individual members. This requires human rights education for the public.
- NGOs, intergovernmental organisations and the media should monitor the compliance of Egypt's state organs and public bodies with the new Constitution as well as its international human rights obligations.

Introduction

1. Egypt, the country where the protests of the Arab Awakening reached their pinnacle in Tahrir Square, is presently at a critical stage of its democratic transition. It is also at a crucial moment of its constitutional history and approach to the protection of human rights, including freedom of expression and freedom of information. This is because Egypt stands at the beginning of the process of writing a new constitution. This new constitutional settlement will provide the basic legal framework for how Egypt will be governed and how fundamental rights will be guaranteed.
2. ARTICLE 19 believes that the future Egyptian Constitution must contain a substantial chapter/s or section devoted to the protection of human rights. This is not only because most constitutions do contain such rights protections or because the so-called Arab Spring of 2010/11 was itself sparked by the lack of freedom of speech and political freedoms (as well as poor living conditions, corruption and high food inflation). It is also because Egypt's new and future leaders should be best placed to deliver on the promise of human rights, which can be done by ensuring there are proper constitutional guarantees protections, amongst other things. Rather like the non-discriminatory Constitution of South Africa 1996, which contains a chapter on the Bill of Rights, the new Constitution of Egypt should spell a break with past abuses and repression, allow the Egyptian people to express and unite around fundamental values, and mark a radically positive change in direction in the actual protection of human rights in Egypt. It should also bring a sense of legitimacy to the post-dictatorship state organs of government. Thus, the "powerful symbolism" of an Egyptian Constitution containing a substantive chapter or section on human rights protection "would establish an arena not just for law, but would also be a definition of what is, and what is not, legitimate politics."¹
3. This policy brief is intended to support and stimulate the debate around the new Egyptian Constitution and, in particular its provisions on the right to freedom of expression and freedom of information by outlining key issues that should be considered by the Constitution Drafting Committee. It also provides an analysis of relevant international and comparative constitutional law on these subjects. In doing so, it draws on international human rights law, including the decisions of international and regional human rights courts as well as the authoritative interpretation of international human rights law by the UN Human Rights Committee and the Special Rapporteur on Freedom of Opinion and Expression. It also highlights specific examples of constitutional provisions in a range of other countries.
4. ARTICLE 19 also wishes to stress the need for transparency, broader society participation and deliberations in the drafting process of the Constitution as pre-requisite for success of the final text. The experience of such processes from other countries that have recently undergone a democratic transition or constitutional overhaul, such as South Africa or Kenya, shows that public participation in the drafting process was necessary for the democratic legitimacy of the final text itself. Such participatory processes allow the input from citizens, but also promote public interest in the text and consolidate democratic institutions. As noted by the political scientist, Muna Ndulo:

A constitution should be the product of the integration of ideas from all the major stakeholders in a country (i.e., all political parties both within and outside parliament, organized civil society and individuals in the society)... A constitution perceived as having been imposed on a large segment of the population or having been adopted through the manipulation of the process by some of the stakeholders is unlikely to gain sufficient popularity or legitimacy to endure the test of time.²

5. ARTICLE 19 therefore strongly recommends that the Constitution Drafting Committee ensure that the drafting of the Egyptian Constitution is genuinely participatory and encompasses all groups in society, including women and minorities. It should also be transparent so that there is a genuine sense of public ownership over the final text.
6. The process of the Constitution drafting shall be, obviously, not conducted in isolation from other needed efforts that the Egyptian Government must undertake in the transition to democracy. The Government needs to “bring human rights home” into the domestic legal order and establish and embed a “human rights culture” in society so that rights are not alien, but familiar entitlements for its individual members. This requires human rights education for the public as well as state administration. In particular, the Egyptian judiciary should be trained in the judicial practice and implementation of human rights law, including Egypt’s international human rights obligations. Importantly, NGOs, intergovernmental organisations and the media should be able to monitor the compliance of Egypt’s state organs and public bodies with the new Constitution as well as its international human rights obligations.
7. The policy brief proceeds as follows. The next part makes the case for the protection of human rights, generally and specifically freedom of expression and freedom of information, through constitutional entrenchment. The brief then highlights relevant provisions of international and regional human rights law on freedom of expression and freedom of information and then proceeds to reflect on some constitutional examples which protect these rights in various ways. The subsequent parts examine the way in which any new Constitution for Egypt should deal with the following: the scope and limits of the rights at stake; freedom of information; freedom of the media; freedom of expression and ICTs; and the enforcement of rights. At the end of each section there will be some recommendations which we urge the drafters of the new Constitution to carefully consider and follow in the next phase of the democratic transition of Egypt.

The Constitutional Entrenchment of Human Rights

The 1971 Constitution of Egypt

8. On 13 February 2011, Egypt military command suspended the country's 1971 Constitution.³ Pending the adoption of a new constitution, the existing laws, including codes and decrees, remain in effect even though they may not be enforced as under the pre-Revolution government.
9. It is important to acknowledge the existence of constitutional protections for “fundamental freedoms and human rights” in the 1971 Constitution. That text contained provisions for the protection of free speech (Article 47), freedom of the press (Article 48), freedom of assembly (Article 54) and freedom of association (Article 55), amongst many others. However, the practice of the Mubarak regime curtailing civil and political rights – through for example, repressive laws on elections, political participation and activities, the media, labour unions – meant that the 1971 Constitution had little meaning in terms of protecting human rights. Thus, the 1971 constitutional framework was not implemented and did not serve to curb the worst excesses of the previous regime.
10. This “disjuncture” – the protection of rights in the constitution, on the one hand, and repressive laws, on the other – was “a result of the stranglehold of the executive on the rubber-stamp legislature”.⁴ This meant that laws were adopted by the legislature that abusively relied upon phrases qualifying rights in the 1971 Constitution such as “according to the law” and “as provided by the law”. For example, Article 5 of the 1971 Constitution stated, “citizens have the right to establish political parties *according to the law.*” Meanwhile, the substantive legislation that governed elections, the Political Parties Law 44/1977, allowed the regime to tightly control the political playing field. The result was that rights were highly restricted and Egyptians found it difficult to challenge the constitutionality of repressive legislation.⁵
11. It is crucial that the new Egyptian Constitution properly protects human rights according to international standards and its provisions are, in turn, properly implemented through legislation, policies, judicial decisions and practices.

Arguments for the protection of human rights in the new Constitution

12. This policy brief is built on the premise that the constitutional entrenchment of human rights – including freedom of expression – guarantees is a valuable means of ensuring their realisation.⁶ The incorporation of protections for civil liberties, usually through a bill of rights, has been a feature of constitutional settlements at least since the Magna Carta of 1215 and is to be found most notably in the Constitution of the United States of 1787 and the French Declaration of the Rights of a Man and Citizen (*Déclaration des droits de l'Homme et du Citoyen*) of 1787. Following the Second World War, Japan, Germany and Italy incorporated human rights protection into their constitutions, and

shortly thereafter, numerous states escaping colonial rule inherited constitutional bills of rights as part of their legacy. After the end of the Cold War, many newly emerged or transformed states of Central and Eastern Europe adopted bills of rights out of a desire to distinguish themselves from the arbitrariness of communist rule. Although not all constitutions guarantee individual human rights, recent constitutions such those as Kenya (2010), Bolivia (2009), Cameroon (2008), Ecuador (2008), Nepal (2007) and Montenegro (2007), have included human rights guarantees, although to varying degrees of protection and not always as part of a specially designated bill of rights. It is significant to note that Egypt's Provisional Constitution of 30 March 2011 and the Libyan Constitutional Declaration of 3 August 2010 protect a number of rights and freedoms, albeit in limited way.

13. ARTICLE 19 submits that there are four principal arguments in favour of the argument that the new Egyptian Constitution should properly protect of human rights, such as freedom of expression and freedom of information, through a formal section on human rights protection (such section can be titled charter, declaration or bill of rights or equivalent).
14. *First*, the constitutional protection of human rights in specific section or chapter would **contribute to the overall “culture of liberty” within Egypt.**⁷ “Effective constitutional human rights protection” depends “on the existence of a constitutional culture appropriate for ensuring that [the bills of rights is] received and implemented in constructive ways.⁸ Following the adoption of a new Constitution, including a bill of rights, the Egyptian government would need to invest energy and resources to ensure that such a “culture of liberty” is nurtured. For example, the Canadian federal and provincial governments undertook many activities to strengthen this sense of liberty following the adoption of the Constitution Act of 1982 containing the Canadian Charter of Rights and Freedoms. These included the amendment of statutes to ensure compliance with the Charter, publicity through popular journals and electronic media, affirmative action programmes and expansion of judicial education programmes recognising issues of systemic discrimination and judicial bias with respect to minority groups.⁹
15. *Second*, the constitutional protection of human rights would **enable the Egyptian judiciary to respond to the inevitable limitations of the new legislature’s capacity to protect the rights of all members of society.** Members of Egypt’s new legislature, as representatives of the people, will be naturally inclined to respond to individuals and groups who vocalise their concerns and apply the most insistent pressure. Furthermore, as in other states, the legislature is almost certainly going to be impeded by the dominance of the executive branch, the sway of party politics and the influence of the bureaucracy. Constitutional protections therefore would allow Egypt’s courts to check the oppressive exercise of political power and in doing so to assert their legitimate role in the tripartite balance of power. The role of a “vigilant, active and independent judiciary is critical for ensuring that ‘paper’ rights in a constitution are interpreted purposively and applied fairly”.¹⁰ The Egyptian judiciary therefore needs to be willing and able to engage with constitutionalised rights and Egypt’s international legal obligations, and should be well trained for this purpose. In addition, however, disadvantaged and marginalised groups should have meaningful access to the courts to ensure that constitutional litigation is focused on the most needed areas. Constitutional review on human rights grounds and coupled with parallel political efforts then may

really serve to empower individuals and groups in Egypt who lack the abilities or resources to compete in the political arena.¹¹

16. The ability of the courts to provide a viable and effective alternative forum to the legislature depends significantly upon the perceived relevance of the constitution and particular formulation of rights concerned. In contrast to Kenya's post-colonial Bill of Rights, which was drafted summarily by the British Colonial Office and officials in the Kenyan Attorney General's office without any consideration of Kenyan politics, culture or society, the new Constitution of Kenya had a high degree of input from civil society and was based on Kenyan society. On this basis, ensuring that the interests of society are carefully incorporated into Egypt's Constitution must be a basic priority of the drafters.
17. *Third*, the constitutional protection of human rights would **facilitate the Egyptian people's own understanding of the message of human rights**. Referring to constitutional bills of rights, Harold Laski wrote that they are "quite undoubtedly, a check upon possible excess in the government of the day. They warn us that certain popular powers have had to be fought for, and may have to be fought for again. The solemnity they embody serves to set the people on their guard. It acts as a rallying point in the State for all who care deeply or the ideals of freedom".¹² Formal acceptance of treaty obligations and international standards has significant normative and symbolic value, but they will never be sufficient. Such obligations and standards need to be appropriately translated or "brought home" into the domestic legal order as well as embedded within the society so that there is a "human rights culture" in society in which rights are not alien, but familiar entitlements for its individual members. Therefore "the involvement of society at large – not just lawyers and governing elites – is required to foster a sense of ownership of the constitutional protection of human rights and help assure its acceptance, relevance and effectiveness."¹³
18. *Fourth* and finally, the constitutional protection of human rights, through a substantive section or chapter, would also **serve to consolidate Egypt's human rights commitment and desire to comply with international law and confirm this to the international community**. This is particularly important at this time, as post-revolution Egyptian institutions begin to seek – as they are expected to – the kind of credibility and legitimacy on democracy, rule of law and human rights issues that eluded the previous regime. Egypt's organs of state should care about their international reputation, and such on-going external scrutiny depends largely on the monitoring of NGOs, intergovernmental organisations and the media.

Arguments for the specific constitutional protection of freedom of expression and freedom of information

19. In addition to the reasons cited above for constitutional protections of human rights in general, ARTICLE 19 strongly recommends the adoption of specific constitutional provisions and legislation on the right to freedom of expression and the freedom of information in Egypt for several, overlapping reasons.
20. *First*, Egypt's own **human rights record compels enhanced legal protection of these rights as constitutional rights**. In this context, it would be difficult to ignore the

background to the revolutionary context that has prompted the drafting of the new Constitution to take place at all – a history of repression, censorship and corruption which sparked the demands of many of Egyptian protestors for free speech and against corruption. A number of human rights organisations – including ARTICLE 19, Human Rights Watch, Amnesty International and FIDH – expressed their long-standing and deep concerns about the protection of freedom of expression and media freedom in Egypt prior to the Egyptian Revolution.

21. In 2009, ARTICLE 19 highlighted the following concerns about freedom of expression in Egypt in advance of the country's Universal Periodic Review at the Human Rights Council:

- (a) Use of the criminal law to restrict freedom of expression.
- (b) The absence of protection for the right to information.
- (c) A highly restrictive system of media regulation.
- (d) Restrictions on the freedom of association, particularly as pertains to NGOs.
- (e) Restrictions on the right to peaceful assembly.

Our concerns are based on Egypt's obligations under international law, including the *International Covenant on Civil and Political Rights* (ICCPR), which Egypt ratified on 14 January 1982, and the *African Charter on Human and Peoples' Rights*, which Egypt ratified on 20 March 1984. Key concerns are the prevalence of unduly vague and harsh restrictions on the rights to expression, association and assembly, unwarranted limitations on media freedom, the absence of practical guarantees for the right to information and excessive scope for government interference with the media.¹⁴

22. Our concerns are based on Egypt's obligations under international law, including the International Covenant on Civil and Political Rights (ICCPR), which Egypt ratified on 14 January 1982, and the African Charter on Human and Peoples' Rights, which Egypt ratified on 20 March 1984. Key concerns are the prevalence of unduly vague and harsh restrictions on the rights to expression, association and assembly, unwarranted limitations on media freedom, the absence of practical guarantees for the right to information and excessive scope for government interference with the media.

23. At this stage, it must be emphasised that the provisions of the interim Constitution of Egypt offer very general and vague guarantees, fail to protect the right to freedom of expression comprehensively and do not protect freedom of information at all. It states:

Interim Constitution of Egypt, 2011

Article 12

Freedom of opinion is guaranteed, and every person has the right to express his opinion and publish it spoken, written, photographed, or other form of expression within the law. Personal criticism and constructive criticism are a guarantee for the safety of national development.

Article 13

Freedom of the press, printing, publication and media are guaranteed, and censorship is forbidden, as are giving ultimatums and stopping or cancelling publication from an administrative channel. Exception may be made in the case of emergency or time of war, allowing limited censorship of newspapers, publication and media on matters related to general safety or the purposes of national security, all according to the law.

24. Therefore, whilst the reforms that Egypt has seen to date since the Revolution deliver a certain momentum to the democratic transition, in substance they barely begin to

address the legitimate human rights grievances of the Egyptian people, particularly in the areas of free speech, media freedom and access to information. Meaningful reform needs to be “root-and-branch start” with the Constitution.

25. *Second*, and relatedly, **freedom of expression and freedom of information are also crucial to democracy and the enjoyment of other rights**. The importance of freedom of expression was particularly emphasised by the Inter-American Court of Human Rights, which stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.¹⁵

26. If people are not free to say what they want, to disseminate information and express their opinion on matters of political interest, and to receive information and ideas from a variety of sources, then they will not be able to cast an informed vote or to participate in governance in other ways. The right to freedom of expression and freedom of information are also key in any system for protecting and promoting the enjoyment of all other human rights – whether civil or political rights, or economic, social and cultural rights. It is important to highlight that human rights violations thrive in a climate of secrecy while freedom of expression helps combat violations by empowering journalists and others, notably civil society organisations, to investigate and report on violations and by opening up government institutions to public scrutiny. Freedom of expression also has a wider importance in its own right: the idea that everyone should be able to speak their mind freely on matters of concern to them is central to human dignity. A person who is not free to speak his or her mind is not truly free. In this sense, the right to freedom of expression extends beyond the political arena and finds its roots in people as social beings, relating and interacting at a multiplicity of levels through their ability to express themselves. Freedom of information fulfils an important social function, recognising that individuals not only have a right to speak, but that society at large also has a right to listen to what others have to say. In other words, freedom of information encompasses a broad guarantee of the free flow of information and ideas in society. The protection of the individual right to request information and a legal framework for proactive disclosure are unsurprisingly vital tools against corruption, one of the clearest enemies of the Egyptian Revolution.¹⁶ At the same time, freedom of expression and the related right of freedom of information are not absolute and may be restricted under a limited range of circumstances, as indicated in the next part.
27. *Third*, **as a matter of international law, Egypt is obliged to implement these rights**. Article 19 of the Universal Declaration of Human Rights and the corresponding provision of the International Covenant on Civil and Political Rights (ICCPR) protect these rights. Egypt signed the ICCPR on 4 August 1967 and ratified it on 14 January 1982. As a result of ratifying the ICCPR, the state of Egypt is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national implementing measures including legislation and judicial decisions.¹⁷ It is argued that one of the most effective ways of ensuring the legal implementation of these rights is through their constitutional recognition and

protection. New constitutional provisions on the rights to freedom of expression and freedom of information would begin to address the gap between Egypt's domestic laws, on the one hand, and its international obligations on the other.

28. Whilst the relevance of international, regional and comparative approaches and interpretation of freedom of expression and freedom of information will be explored in further detail below, it is important to emphasise here that the international community has long recognised that freedom of information is a fundamental human right that is crucial to the protection of other rights. As the UN General Assembly indicated at its first session in 1946: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated".¹⁸ Furthermore, the UN Human Rights Committee has ruled that freedom of expression includes the right of persons to access government held information.¹⁹
29. **Fourth, the inclusion of the right to freedom of expression and freedom of information in Egypt's new Constitution is also supported by international and regional human rights standards** – most notably the African and Arab human rights systems, as well as – from a comparative experience - the European and Inter-American systems of human rights protection.
30. **Fifth, and finally, the adoption of constitutional legal protection for freedom of information would allow Egypt to join the international community of states in which most states with constitutions include protections for the right to freedom of expression and freedom of information** within those texts. Whilst free speech provisions in constitutions have been extremely common since the First Amendment of the US Constitution, constitutional provisions of freedom of information have been less common. However, at present, more than ninety states have adopted constitutional provisions, legislation or national regulation on freedom of information. Furthermore, a growing number of inter-governmental bodies, such as the World Bank²⁰ and the Asian Development Bank,²¹ have also adopted freedom of information policies. The collection of states that has adopted freedom of information legislation encompasses states as diverse as Angola (2002),²² Chile (2008)²³ and Sweden (1766).²⁴ It also includes states in the Middle East and North Africa (MENA) region such as Jordan (2007).²⁵ Bills on freedom of information have been debated in Lebanon, the Palestinian territories, Kuwait, Yemen, Morocco and Bahrain.²⁶ In 2011, Tunisia became only the second Arab country to actually adopt legislation on freedom of information, as noted above. Yet this legislation is severely limited. Constitutional protection of freedom of information would mean a higher status for the right and compel a new Egyptian government to adopt comprehensive freedom of information legislation.

The place of religion in the new Constitution

31. ARTICLE 19 recognises that Article 2 of the 1971 Constitution stated: "Islam is the religion of the state... and the principles of Islamic jurisprudence are the principal source of legislation" and that this exact phrasing has been used in the Interim Constitutional Declaration. In the opinion of ARTICLE 19, however, there should be no mention of Islam, Islamic or Sharia law or jurisprudence in the new Constitution for Egypt. There should also be no mention of god or religion. This view is based on a concern about the protection of women, religious minorities (e.g., Coptic Christians) and

non-believers, whose rights may well continue to be threatened under a new constitutional settlement with reference to Islamic or Sharia law or jurisprudence. Egypt should be a state that respects the human rights of all, and this should be reinforced through the constitution that should be ideally secular and committed to “civil” rather than religious values.

32. However, if the drafters of the new Constitution deem it absolutely necessary to refer to religious principles in the text, we argue that such a reference be confined to the preamble of the new Constitution only and be a neutral phrase which does not refer to any particular religion or faith. The Preamble of the new Constitution could, for example, indicate that the text “draws inspiration from the cultural, religious and humanist inheritance of Egypt, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for the rule of law”.

Recommendations:

- **The process of drafting the new Constitution must be genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a real sense of ownership over the final text.**
- **The Egyptian judiciary should be trained in the judicial practice and implementation of human rights law, including Egypt’s international human rights obligations.**
- **The Egyptian government needs to “bring human rights home” into the domestic legal order and establish and embed a “human rights culture” in society so that rights are not alien, but familiar entitlements for its individual members. This requires human rights education for the masses.**
- **NGOs, intergovernmental organisations and the media should monitor the compliance of Egypt’s state organs and public bodies with the new Constitution as well as its international human rights obligations.**
- **There should be no reference to religion or religious law in the new Constitution. If it is necessary to refer to religion or religious values in the new Constitution, it should: (1) only be in the Preamble; (2) not refer to any particular religion (*e.g.*, Islam); and (3) refer to religion in a neutral way and as a support for human rights as to be guaranteed by the Constitution and protected under international human rights law.**

International and Regional Human Rights Law on Freedom of Expression and Freedom of Information

International law

International Covenant on Civil and Political Rights

33. The right to freedom of expression and freedom of information are protected by a number of international human rights instruments that bind states, including Egypt, and others within the Middle East and North Africa region. Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.²⁷

34. The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are regarded as having acquired legal force as customary international law.²⁸ The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. As of 20 January 2012, the ICCPR has 167 states party, required to respect its provisions and implement its framework at the national level.²⁹ Article 19 ICCPR guarantees freedom of expression and freedom of information as follows:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

35. As acknowledged above, Egypt – like the majority of states in the region – has ratified and is bound to implement into domestic law the provisions of the ICCPR.³⁰

36. As recently expressly confirmed by the Human Rights Committee, Article 19(2) embraces a right of access to information held by public bodies.³¹

Other international instruments

37. In addition, a number of other international human rights instruments protect freedom of expression and freedom of information. The Convention on the Rights of Persons with Disabilities of 2006 (CRPD)³² which has been ratified by 109 States parties, including Egypt (which ratified on 14 April 2008), includes a justifiably detailed provision on freedom of expression and freedom of information. Article 21 of the CRPD states:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) Recognizing and promoting the use of sign languages.

38. The Convention on the Rights of the Child (CRC)³³ which has been ratified by 193 States parties, including Egypt (which ratified on 6 July 1990), protects the freedom of expression and freedom of information of children in similar terms to Article 19 of the ICCPR. Article 13 of the CRC states:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

39. Egypt has also ratified the UN Convention Against Corruption (UNCAC) (on 25 February 2005), which clearly requires states to ensure that the public has effective access to information.³⁴

Regional instruments

African Union

40. Egypt is also a member of the African Union,³⁵ and signatory to the principal human rights instrument for the African continent: the African Charter on Human and Peoples' Rights (ACHPR).³⁶ Article 9 of the ACHPR guarantees freedom of expression in the following terms:
1. Every individual shall have the right to receive information.
 2. Every individual shall have the right to express and disseminate his opinions within the law.
41. The Declaration of Principles on Freedom of Expression in Africa (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002,³⁷ in Article II also affirms that
1. No one shall be subject to arbitrary interference with his or her freedom of expression.
 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.
42. Article XII of the African Declaration, which deals with the protection of reputation, stipulates:
1. States should ensure that their laws relating to defamation conform to the following standards:
 - o No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
 - o Public figures shall be required to tolerate a greater degree of criticism; and
 - o Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
 2. Privacy laws shall not inhibit the dissemination of information of public interest.
43. Similarly, in Article XIII, on criminal measures, the African Declaration mandates states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society. It also further affirms that freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.
44. The African Declaration also extensively addresses the right to access to information. In Part IV, the Declaration mandates that public bodies hold information not for themselves but as custodians of the public good and that everyone has a right to access this information, subject only to clearly defined rules established by law. The African Declaration further specifies the right to information principles in following terms:
- everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;

- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.
45. In terms of regional standards, it is notable that the African Platform on Access to Information, recently developed by groups across Africa, including ARTICLE 19, has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.³⁸ These principles provide guidance to African states on the right to freedom of information, including the importance of battling corruption, protecting whistleblowers, promoting unhindered access to Information Communication Technologies and access to electoral information.

League of Arab States

46. The Arab Charter on Human Rights (Arab Charter), which was adopted by the Council of the League of Arab States in 2004, purports to affirm the principles of the UDHR and ICCPR, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Charter and the Cairo Declaration on Human Rights in Islam.³⁹ Although the Arab Charter provides less robust protections for certain fundamental rights, Article 32 of the Revised Arab Charter protects freedom of expression in the following terms:
1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
 2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.
47. In addition, Article 42 protects the right to scientific and artistic research and creative activity, and the right to take part in cultural life. Importantly, Article 24 now guarantees the right to political participation, including the freedom to pursue political activity, to form and join associations with others and to freedom of assembly.⁴⁰ It is significant that even this controversial text protects in express terms the rights to freedom of expression and freedom of information.

Other regional standards

48. From a comparative perspective, the drafters should consider the protection provided to the right to freedom of expression and freedom of information by other regional human rights instruments, such as the American Convention on Human Rights and the European Convention on Human Rights. The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although these are not directly binding on Egypt, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.

49. Article 13 of the **American Convention on Human Rights (ACHR)**⁴¹ protects freedom of expression in the following terms.
1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 1. respect for the rights or reputations of others; or
 2. the protection of national security, public order, or public health or morals.
 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.
50. Setting a landmark global precedent, the Inter-American Court of Human Rights held in 2006 that the general guarantee of freedom of expression contained in Article 13 of the ACHR protects freedom of information held by public bodies.⁴²
51. Article 10 of the **European Convention on Human Rights (ECHR)**⁴³ protects freedom of expression. It is binding on all 47 Members of the Council of Europe who are obliged to give effect to the ECHR in their domestic legal orders. It states:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

52. The European Court of Human Rights (European Court) has built up over the years a rich and instructive jurisprudence under Article 10 of the ECHR. The European Court has elaborated on the importance of freedom of expression on numerous occasions, stating in a seminal judgment:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".⁴⁴

53. The European Court has also consistently emphasised the "pre-eminent role of the press in a state governed by the rule of law." The media as a whole merit special protection in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'".⁴⁵
54. In 2009, the European Court recognised that when public bodies already hold information that is needed for public debate, the refusal to provide it to those who are seeking it is a violation of the right to freedom of expression and information as protected by Article 10 of the ECHR.⁴⁶
55. The Council of Europe also adopted, in June 2009, **the Convention on Access to Official Documents**, the first regional treaty devoted to access to documents.⁴⁷
56. Within the EU, Article 11 of the **EU Charter of Fundamental Rights**,⁴⁸ which has binding legal effect equal to that of the EU Treaties, protects the freedom of expression and freedom of information in the following terms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The freedom and pluralism of the media shall be respected.

57. The forgoing discussion of international and regional human rights law indicates that on the right to freedom of expression and freedom of information there is a wealth of treaty law, which is formally binding on states, as well as an increasing amount of "soft law" which is formally not binding, but has persuasive value. The most important international treaty law on the issue of freedom of expression and freedom of information – for Egypt and all other states - is Article 19 of the ICCPR, and this must provide the minimum framework for the new Egyptian Constitution's provisions on these rights.

Recommendations:

- **The protection of human rights should be at the heart of the new Egyptian Constitution, which should include a strong section or chapter on human rights protection (such as a declaration, charter or bill of rights or equivalent).**

- The new Constitution should state that all international treaties ratified by Egypt, customary international law and general international law have legal force in Egypt; that the core international human rights treaties which Egypt has ratified, including the ICCPR, the CRC, the CRPD and ACHPR, are applicable and binding in domestic law.
- All Egyptian state organs – the Legislature, Executive and Judiciary – should properly implement such a new Constitution through legislation, policies, judicial decisions and practices. The Egyptian Government must also ensure compliance with the new Constitution through publicity through all media, awareness campaigns, expansion of judicial education programmes and other means.
- The process of drafting the new Constitution must be genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a genuine sense of ownership over the final text.

Comparative Constitutional Examples

58. ARTICLE 19 urges the Constitution Drafting Committee to draw on the best practices from around the world to ensure that the final text of the Constitution is not only in line with international standards but also includes the progressive protection of the right to freedom of expression and freedom of information. Comparative constitutional law examples are provided for several reasons. *First*, they often demonstrate how states recognise their international obligations in practice. *Second*, constitutions do not set out in detail every single obligation, rather they provide a framework for more detailed elaboration of rights by courts and other actors, and comparative guidance indicates what issues other states have found important and what they have not. *Third*, comparative constitutional materials provide the drafters of the new Egyptian Constitution with suggestions as to how they may translate human rights principles into concrete drafting language. Finally, comparative constitutional law provides examples of how states often provide greater protection than is required in international law.
59. The recent Constitution of Kenya, which was promulgated on 27 August 2010, is the most recent of a constitution which reflects an attempt to protection freedom of expression and freedom of information in a comprehensive manner. It was welcomed by international figures after a highly participatory drafting process, which brought together a broad array of stakeholders and civil society organisations.⁴⁹ It has relatively elaborate – and broadly progressive – provisions on freedom of expression, media freedom and access to information.

The Constitution of Kenya, 2010

Article 33. Freedom of expression

- (1) Every person has the right to freedom of expression which includes –
- a. Freedom to seek, receive or impart information or ideas;
 - b. Freedom of artistic creativity; and
 - c. Academic freedom and freedom of scientific research.
- (2) The right to freedom of expression does not extend to –
- a. Propaganda for war;
 - b. Incitement to violence;
 - c. Hate speech; or
 - d. Advocacy of hatred that –
 - i. Constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - ii. Is based on any ground of discrimination specified or contemplated in Article 27(4).
- (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 34. Freedom of the Media

- (1) Freedom and independence of electronic media, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).
- (2) The State shall not –

- a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
 - b. Penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –
- a. Are necessary to regulate the airwaves and other forms of signal distribution; and
 - b. Are independent of control by government, political interests or commercial interests.
- (4) All State-owned media shall –
- a. Be free to determine independently the editorial content of their broadcasts or other communications;
 - b. Be impartial; and
 - c. Afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that provides for the establishment, which shall
- a. Be independent of control by the government, political interests or commercial interests;
 - b. Reflect the interests of all sections of the society; and
 - c. Set media standards and regulate and monitor compliance with those standards.
60. Perhaps the most comprehensive and highly praised of all modern constitutions is the South African Constitution which includes a section entitled “Bill of Rights”, detailing the protection of freedom of expression including freedom of information. It has generated particularly positive jurisprudence, specifically on social and economic rights.

Constitution of South Africa (Bill of Rights), 1996

Article 16. Freedom of expression

- (1) Everyone has the right to freedom of expression, which includes
- a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to
- a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

61. The Canadian Charter of Rights and Freedoms of 1982, which has also been interpreted progressively and has been valuable in improving the protection of minorities in Canada, includes only a brief guarantee to freedom of expression.

The Constitution Act of Canada (Charter of Rights and Freedoms), 1982

Article 2. Fundamental Freedoms

Everyone has the following fundamental freedoms:

- a. freedom of conscience and religion;

- b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - c. freedom of peaceful assembly; and
 - d. freedom of association.
62. Turning to the Arab world, the currently in force interim constitutional text of Libya⁵⁰ contains protections on freedom of expression. However, this text should not be followed as a model by the drafters of the new Egyptian Constitution because it is extremely limited from the perspective of human rights standards, including international law under the ICCPR. The provisions of the interim text of Libya offer very general and vague guarantees, fail to protect the right to freedom of expression comprehensively and do not protect freedom of information at all.

Draft Constitutional Charter for the Transitional Stage of Libya, 2011

ARTICLE 14

The state shall ensure the freedom of opinion, individual and collective expression, the freedom of scientific research, the freedom of communication, the freedom of press, media, printing and publication as well as the freedom of movement, peaceful assembly, demonstration and sit-in in line with the law.

63. Out of the other Arab constitutions, three may be highlighted: Morocco, Iraq and Jordan.
64. In a referendum on 1 July 2011, the Moroccan people voted in favour of adopting a new Constitution. The former Constitution, adopted in 1996, affirmed the right to freedom of expression at Article 9(b).⁵¹ The 2011 Constitution improves upon Article 9(b), containing a number of provisions related to freedom of expression and information. Article 25 of the 2011 Constitution protects the right to freedom of expression as follows:

Freedom of thought, opinion and expression are guaranteed in all its forms. Freedom of creation, publication and exhibition in literary and artistic and scientific and technical research is guaranteed.

65. At Article 28, the Constitution of Morocco provides also for the protection of freedom of the press. This includes guarantees against prior censorship, and “encourages” independence of the press. However, limitations may be placed on these rights “as provided by law.” ARTICLE 19 notes that this provision on limitation does not comply with Article 19(3) of the ICCPR, which requires restrictions on the right to freedom of expression to be provided by law, to pursue a legitimate aim, and to comply with the principles of necessity and proportionality.
66. The protections in the constitutions of Iraq, from 2005, and Jordan, from 1952, are very limited in their express protections. Notably, the Jordanian Constitution emphasises extensive possibilities for restricting the media. These texts should also not be relied on as models by the drafters of the new Egyptian Constitution.

Constitution of Iraq, 2005

Article 36

The State shall guarantee in way that does not violate public order and morality:

- (a) freedom of expression using all means.
- (b) freedom of press, printing, advertisement, media and publication.

- (c) Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

Constitution of Jordan, 1952

Article 15. Rights and Duties of Jordanians

- (i) The State shall guarantee freedom of opinion. Every Jordanian shall be free to express his opinion by speech, in writing, or by means of photographic representation and other forms of expression, provided that such does not violate the law.
- (ii) Freedom of the press and publications shall be ensured within the limits of the law.
- (iii) Newspapers shall not be suspended from publication nor shall their permits be revoked except in accordance with the provisions of the law.
- (iv) In the event of the declaration of martial law or a state of emergency, a limited censorship on newspapers, publications, books and broadcasts in matters affecting public safety and national defence may be imposed by law.
- (v) Control of the resources of newspaper shall be regulated by law.

67. Turkey's laws and practices present a number of severe problems from a freedom of expression and right to information perspective. Notably, Article 301 of the Turkish Penal Code notoriously outlaws denigration of the Turkish Nation. The Turkish Constitution protects freedom of expression in detailed terms, as well as freedom of the press and freedom of information. However, it is problematic from an international human rights standpoint given the very broad list of grounds for permissible restrictions under Article 26(2) which include "the indivisible integrity of the State".

Constitution of Turkey, 1982

Article 26 Freedom of Expression and Dissemination of Thought

- (1) Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.
- (2) The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.
- (3) The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.

68. In Europe, the 2000 Constitution of Finland demonstrates a positive example of protections for freedom of expression and the right of access to information in the same provision. It clearly envisages more detailed legal provisions to implement these rights.

Constitution of Finland, 2000

Article 12. Freedom of expression and right of access to information

Everyone has the right to freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and communications without prior prevention by anyone. More detailed provisions on the exercise of freedom of expression are laid down by an Act. Provisions on restrictions relating to

pictorial programmes that are necessary for the protection of children may be laid down in an Act. Documents and recordings in the possession of the public are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.

69. Following the Cold War, a number of former Communist states adopted constitutions which formally identified freedom of expression and freedom of information as protected rights.

Constitution of Slovenia, 1991

Article 39. Freedom of Expression

Freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive and disseminate information and opinions.

Except in such cases as are provided for by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law.

70. From the Americas, the recent constitutions of Mexico and Colombia include entrenched protections of both freedom of expression and freedom of information.

Constitution of Mexico, 2005

Article 6

Free speech shall be restricted neither judicially nor administratively, but when it represents an attack to public morality or individual rights as well as when it produces a criminal offence or disturbs the public order; the right to information shall be enforced by the state

Constitution of Colombia, 1991

Article 20

Every individual is guaranteed the freedom to express and diffuse his/her thoughts and opinions, to transmit and receive information that is true and impartial, and to establish mass media communications media.

The mass media are free and have a social responsibility. The right of rectification under equitable conditions is guaranteed. There will be no censorship.

71. Turning to Asia, although the Constitution of India does not provide an express protection for freedom of information, the Indian Supreme Court has held that the access to information held by public bodies is implicit in the protection the Constitution accords to free speech and expression.⁵²

Constitution of India, 1950

Article 19

- (1) All citizens have the right –
 - a. Freedom of speech and expression.

72. The Thai Constitution of 2007 protects freedom of expression and freedom of the press, as well as freedom of information.

Constitution of Thailand, 2007

Section 45. Freedom of Expression of Individual and Press

A person shall enjoy the liberty to express his opinion, make speech, write, print, publicise, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public.

Section 56. Rights to Information and Petition

A person shall have the right to receive and to get access to public information in possession of a government agency, State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.

The Scope and Limits of Freedom of Expression and Freedom of Information

Scope of freedom of expression and freedom of information

73. This section highlights some important aspects of the right to freedom of expression and freedom of information which members of the Constitution Drafting Committee need to consider when drafting the state's new constitution.
74. **First, that freedom of expression and freedom of information are human rights and therefore are applicable to all human beings, not only citizens.** Under international law, Article 19 of the UDHR states that, “[e]veryone has the right to freedom of opinion and expression”, and Article 19 of the ICCPR similarly applies to everyone. Furthermore, Article 2 of the ICCPR requires states to ensure respect for the rights guaranteed by it for all persons “within its territory and subject to its jurisdiction”, without distinction of any kind, including on the basis of national origin. Therefore, the rights contained in the ICCPR, including under Article 19, apply to all persons physically within the territory of the state, as well as to persons under its jurisdiction (e.g., on a state-owned vessel or on a piece of territory which is under the effective control of the state although not belonging to it).
75. **Second, international law, and most constitutions, protects the right to hold opinions as well as expression generally.** Unlike the right to freedom of expression and freedom of information, the right to hold opinions is an absolute right under international law, in recognition of the illegitimacy of the state trying to either prohibit certain opinions or to force individuals to adopt certain opinions. Article 19 of the ICCPR protects all forms of opinion. General Comment No 34 of the Human Rights Committee states:
9. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.⁵³ The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or impairment of the opinions they may hold, constitutes a violation of article 19, paragraph 1.⁵⁴
10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.⁵⁵ Freedom to express one's opinion necessarily includes freedom not to express one's opinion.
76. **Third, the scope of the right to freedom of expression is very broad and extends to almost everything intended to convey meaning.** Article 19 of the ICCPR refers to “information and ideas of *all* kinds”. In one of its earliest and oft-cited cases, the European Court of Human Rights determined that material deemed by the national courts to be obscene was protected by the right to freedom of expression. The Court stated:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.⁵⁶

77. **Fourth, international law and most constitutional systems define the modes of expression covered by freedom of expression and freedom of information broadly.** Article 19 covers “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice” (emphasis added). The Human Rights Committee has recently affirmed that these words require a very broad interpretation. It has stated:

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.⁵⁷ It includes political discourse,⁵⁸ commentary on one’s own⁵⁹ and on public affairs,⁶⁰ canvassing,⁶¹ discussion of human rights,⁶² journalism,⁶³ cultural and artistic expression,⁶⁴ teaching,⁶⁵ and religious discourse.⁶⁶ It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive,⁶⁷ although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.⁶⁸ Means of expression include books, newspapers,⁶⁹ pamphlets,⁷⁰ posters, banners,⁷¹ dress and legal submissions.⁷² They include all forms of audio-visual as well as electronic and internet-based modes of expression.⁷³

Permissible limitations on freedom of expression and freedom of information

78. While the right to freedom of expression and freedom of information is a fundamental human right, it is not guaranteed in absolute terms. It is recalled that Article 19(3) of the ICCPR permits the right to be restricted in the following terms:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

79. Thus, restrictions on the right to freedom of expression and freedom of information must be strictly and narrowly tailored and may not put into jeopardy the right itself. In order to determine whether a restriction is sufficiently narrowly tailored, the criteria of Article

19(3) of the ICCPR need to be applied. Any restrictions on freedom of expression or freedom of information must: *first be prescribed by law; second, pursue a legitimate aim*, such as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and *third, be necessary to secure the legitimate aim and meet the test of proportionality*.⁷⁴

80. It is important to note that this same test is incorporated in all regional human rights treaties⁷⁵ and applied by international and regional human rights bodies.⁷⁶

Provided by law

81. Article 19(3) requires that restrictions on the right to freedom of expression and freedom of information must be prescribed by law. This requires a normative assessment; to be characterised as a law, a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.⁷⁷ Ambiguous, vague or overly broad restrictions on freedom of expression or freedom of information which fail to set the exact scope of their application are therefore impermissible under Article 19(3).
82. General Comment No 34 further provides that for the purpose of Article 19(3) a law may not confer unfettered discretion for restricting freedom of expression on those charged with executing that law.⁷⁸ Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The requirement that the law be sufficiently precise for this purpose is closely related to the requirements of necessity and proportionality. It ensures that restrictions on freedom of expression are only employed for legitimate protective objectives and limits the opportunity to manipulate those restrictions for other purposes.
83. Practically all of the states in the Middle East region only allow restrictions that are provided by law. Article 13 of the Lebanese Constitution is typical, providing:
- The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association are guaranteed within the limits established by law.
84. The “provided by law” part of the test for restrictions also means that laws should not grant authorities excessively broad discretionary powers to limit expression. This would again undermine one of the main purposes of this limitation on restrictions. The UN Human Rights Committee has repeatedly expressed concern about excessive official discretion in the context of media regulation. For example, in 2000, it expressed concern, “about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.”⁷⁹ National courts have expressed the same concerns.⁸⁰

Legitimate aim

85. Interferences with the right to freedom of expression must pursue a legitimate protective aim as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order, or protect public health and morals. As such, it would be impermissible to

prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government.⁸¹ Nor would it be permissible to achieve such illegitimate objectives through a reliance on Article 19(3) that is merely pre-textual. Where a State does limit freedom of expression, the burden is on that state to show a direct or immediate connection between that expression and the legitimate ground for the restriction.

86. General Comment No 34 also notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Whether characterised as treason laws, official secrets laws or sedition laws they must conform to the strict requirements of Article 19(3). General Comment No 34 provides further guidance on laws that restrict expression with the purported purpose of protecting morals. Such purposes must be based on principles not deriving exclusively from a single tradition but rather must be understood in the light of the universality of human rights and the principle of non-discrimination.⁸² It would therefore be incompatible with the ICCPR, for example, to privilege one particular religious view or historical perspective.
87. In the context of national security, the **Johannesburg Principles on National Security, Freedom of Expression and Access to Information**⁸³ (Johannesburg Principles), a set of international standards developed by ARTICLE 19 and international freedom of expression experts, are instructive on restrictions on freedom of expression that seek to protect national security. Principle 2 of the Johannesburg Principles states that restrictions sought to be justified on the ground of national security are illegitimate unless their genuine purpose and demonstrable effect is to protect the country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. The restriction cannot be a pretext for protecting the government from embarrassment or exposure of wrongdoing, to conceal information about the functioning of its public institutions, or to entrench a particular ideology. Principle 15 states that a person may not be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Necessity

88. States party to the ICCPR are obliged to ensure that legitimate restrictions on the right to freedom of expression are necessary and proportionate. This part of the test is the most critical element and the basis upon which the vast majority of international and national cases are decided. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.
89. General Comment No 34 states that generic bans on the operation of certain websites and systems are never proportionate and are therefore incompatible with Article 19(3).

90. Different constitutions use different terms to describe this part of the test, As noted above, the ICCPR and regional treaties normally permit only restrictions which are ‘necessary’ or ‘necessary in a democratic society’, while national constitutions use a range of terms including ‘reasonably justifiable in a democratic society’, ‘reasonably required in a democratic society’ and various other related combinations. The advantage of adding ‘in a democratic society’ to the test is that it incorporates by reference the full range of democratic values, ensuring that the analysis of what is necessary is based on these democratic values. What may be considered necessary in a dictatorship may not pass muster in a democracy.
91. Courts around the world have elaborated on the specific requirements of this test. Three distinct elements can be discerned. *First*, the measures taken must be carefully designed to meet the objective in question. They should not be arbitrary, unfair or irrational.⁸⁴ If a government cannot provide any evidence to show that a particular interference with freedom of expression is necessary, the restriction will fail on this ground.⁸⁵ While States may, and should, protect various public and private interests, measures taken by them must be carefully designed so that they are effective in protecting those interests. It is a very serious matter to restrict a fundamental right and, when considering doing so, States are bound to reflect carefully on the various options open to them.⁸⁶
92. *Second*, the interference should be designed to impair the right to freedom of expression “as little as possible”.⁸⁷ If there are various options to protect a legitimate interest, then the one which least restricts the protected right must be selected.⁸⁸ In applying this rule, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But, subject only to such practical limits, restrictions must not be overbroad.
93. *Third*, there must be proportionality between the harm caused by the measures taken to restrict freedom of expression and the benefits to the legitimate aim.⁸⁹ In particular, the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction that provided limited protection to reputation but which seriously undermined freedom of expression, for example, would not pass muster.⁹⁰ Democratic societies depend on the free flow of information and ideas and it is only when the overall public interest is served by restricting that flow that such a restriction can be justified. This implies that, for a restriction to be justified, its benefits must outweigh its costs.

Comparative Constitutional examples

94. There are a number of positive examples of constitutions that provide for a regime of limitations on fundamental rights and freedoms. The South African Bill of Rights provides a clear and helpful example to the drafters of the new Egyptian Constitution. It reflects principles of proportionality and necessity in a democratic society, but also indicates that such a society is based on notions of “human dignity, equality and freedom”, which are important interpretive tools for the judiciary.

Constitution of South Africa (Bill of Rights), 1996 Article 36. Limitation of Rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

95. The Polish Constitution of 1997 includes a good example of a clause on the limitation of rights, which reflects the principles of legality, legitimacy of aims and necessity.

Constitution of Poland, 1997

Article 31

1. Freedom of the person shall receive legal protection.
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

96. Although the Canadian Charter of Rights and Freedoms provision on limitations on rights is brief, it adequately reflects international human rights law.

The Constitution Act of Canada (Charter of Rights and Freedoms), 1982

Article 1.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

97. The Kenyan Constitution of 2010 contains a particularly detailed provision on the limitation of rights and fundamental freedoms, which is overall positive. However, ARTICLE 19 has serious reservations about the way in which the equality provisions of the Kenyan constitution may be qualified for Muslim law before certain courts. It is our opinion that the new Egyptian Constitution should not follow this path, but should remain a completely secular text which protects the rights of all Egyptians, including women, equally. We also do not approve of the fact that there may be a limit on the “application of the rights” to members of the armed forces and the police.

The Constitution of Kenya, 2010

Article 24. Limitation of Rights and Fundamental Freedoms

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) The nature of the right or fundamental freedom;
 - (b) The importance of the purpose of the limitation;
 - (c) The nature and extent of the limitation

- (d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom –
- (a) In the case of a provision enacted or amended on or after effective date, is not valid unless legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation
 - (b) Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - (c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
- (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
- (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.
- (5) Despite (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service –
- (a) Article 31 – Privacy;
 - (b) Article 36 – Freedom of association;
 - (c) Article 37 – Assembly, demonstration, picketing and petition;
 - (d) Article 41 – Labour relations;
 - (e) Article 43 – Economic and social rights; and
 - (f) Article 49 – Rights of arrested persons.
98. The principle of secularism is emphasised by the provision on the restriction of rights in Constitution of Turkey, which stipulates that any limitations on rights must also meet the requirements of the “democratic order” and proportionality.

Constitution of Turkey, 1982

Article 13 Restriction on Fundamental Rights and Freedoms

Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.

Recommendations:

- **The new Egyptian Constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to grant this right to every person.**
- **It should indicate that there may be restrictions imposed on freedom of expression if these are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.**
- **The right to hold opinions without restriction should be specifically protected within the new Constitution.**

Freedom of Information

The right of access to information

99. The scope of Article 19 of the ICCPR (which binds the state authorities of Egypt as a matter of international law to implement into domestic law those rights contained therein) encompasses freedom of information, or the right of access to information. Freedom of information or the right to receive and have access to information is the “flip side” of the right to freedom of expression or the right to impart information. But freedom of information is also a right of the public at large. It therefore guarantees a collective right of the public to receive information others wish to pass on to them.
100. While the UN Human Rights Committee has recently affirmed that Article 19 of the ICCPR protects the right of access to information (or “freedom of information” as we call the right in this policy paper), as well as freedom of expression, international authorities – namely the special mandates or international mechanisms on freedom of expression of the international (UN) and regional human rights systems – have recognised this through Joint Declarations for many years.⁹¹ In their 2004 statement, these international authorities stated:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

101. They elaborated on their position in their 2006 Joint Declaration, which highlights that exceptions to the principle of maximum disclosure of information should be subject to the “harm” and “public interest” tests as indicated below:
- Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.
 - International public bodies and inter-governmental organisations should adopt binding policies recognising the public’s right to access the information they hold. Such policies should provide for the proactive disclosure of key information, as well as the right to receive information upon request.
 - Exceptions to the right of access should be set out clearly in these policies and access should be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.
 - Individuals should have the right to submit a complaint to an independent body alleging a failure properly to apply an information disclosure policy, and that body should have the power to consider such complaints and to provide redress where warranted.
102. The UN Special Rapporteur on Freedom of Opinion and Expression has stressed the importance of access to information in numerous reports over the years,⁹² and in doing so has reflected upon *The Public’s Right to Know: Principles on Freedom of Information Legislation*, principles drawn up by ARTICLE 19 in 1999.⁹³

103. Beyond the global human rights framework, as mentioned above, the UNCAC clearly requires Egypt to ensure that the public has effective access to information. Finally, as indicated above, more than ninety states – from Angola (2002),⁹⁴ Chile (2008)⁹⁵ and Sweden (1766)⁹⁶ to Jordan (2007)⁹⁷ – have adopted constitutional provisions, legislation or national regulation on freedom of information to date. Bills on freedom of information have been debated in many other states, including in the Middle East and North African region, such as Lebanon, the Palestinian territories, Kuwait, Yemen, Morocco and Bahrain.⁹⁸
104. In terms of its scope, freedom of information should be broadly construed. “Information” includes “records held by public body, regardless of the form in which the information is stored, its source and the date of production”.⁹⁹ The scope of “public bodies” is broad and includes “all branches of State (the executive, legislative and judicial branches), as well as other public or governmental bodies, at whatever level – national, regional or local – who are in the position to engage the responsibility” of Egypt.¹⁰⁰ Furthermore, the scope of public bodies also includes “other entities when such entities are carrying out public functions”.¹⁰¹ Furthermore, taken together with Article 25 of the Covenant (on the participation in public affairs), the right of access to information includes a right whereby the media has access to information on public affairs, and the right of the general public to receive media output.”¹⁰²
105. In the authoritative judgment of the UN Human Rights Committee has emphasised:
- To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every to ensure, easy, prompt effective and practical access to such information. States should parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.¹⁰³ The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.
106. Other provisions of the ICCPR also address the right of access to information. The Human Rights Committee has indicated that Article 17 of the ICCPR on the protection of privacy means that “every individual should have the right to ascertain in an intelligible form, whether, and, if so, what personal data is stored in automatic data files, and for what purposes”.¹⁰⁴ Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right have his or her records rectified. In this connection, pursuant to Article 10 of the ICCPR (on the right to liberty), a prisoner does not lose the entitlement to access to his medical records.¹⁰⁵ Under Article 27 (on minority protection), a State party’s decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.¹⁰⁶ More generally, under Article 2 on the general obligations under the

ICCPR, “persons should be in receipt of information regarding their Covenant rights in general”.¹⁰⁷

Comparative Constitutional examples

107. The constitutions of Kenya and South Africa protect the right of access to information expressly and in a reasonably comprehensive way. They provide positive models for the drafters of the Egyptian constitution to follow.

Constitution of Kenya, 2010

Article 35

(1) Every citizen has the right of access to -

a. Information held by the State; and
b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

Constitution of South Africa (Bill of Rights), 1996

Article 32. Access to Information

1. Everyone has the right of access to

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

108. Sweden provides the oldest, and one of the strongest, constitutional protections of the right to information. The core of the principle, dating from the 1766 Constitution of Sweden, is that all government documents are public in the absence of a statute that expressly regulates otherwise. The Instrument of Government, one of the four fundamental and constitutional laws of Sweden, guarantees freedom of information in Chapter II, on Fundamental Rights and Freedoms, Article 1(2).

The Instrument of Government, Constitution of Sweden,

Article 1, Chapter II

Everyone shall be guaranteed the following rights and freedoms in his or her relations with public institutions:

...

(2) freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.

109. It is interesting to observe that another Scandinavian country, Norway, goes further and highlights within the constitutional framework the “responsibility” of the state to act to ensure that there is an atmosphere of transparency.

Constitution of Norway 1814, as amended in 2004

Article 100

...

Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.

110. The 2011 Constitution of Morocco includes a rather more restricted provision on the right of access to information.

Constitution of Morocco 2011

Article 27

The citizens have the right to access information held by public authorities, institutions and elected bodies with a public service mission. The right to information can only be restricted by law, in order to protect all aspects of national defense, internal and external state of security, and the privacy of individuals as well as in order to prevent the infringement of rights and freedoms enshrined in this Constitution and to protect sources and areas specifically determined by law.

Here, ARTICLE 19 points out that Article 27 of the Morocco Constitution does not comply with international standards in several respects. Only citizens can claim rights under Article 27, rather than all persons, and only elected public institutions are subject to the obligation to provide access to information, excluding unelected bodies and private entities that exercise public duties.

111. The Constitution of Bulgaria also includes more restricted provision on the right of access to information.

Constitution of Bulgaria 1991 (as amended)

Article 41

(1) Everyone shall be entitled to seek, obtain and disseminate information...

(2) Everyone shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

112. Beyond Europe, the right of access to information is protected in more simple terms in the constitutions of Mexico and Colombia. These minimal approaches should not provide the basis for the new Constitution of Egypt, which should flesh out the right of access to information in more detailed terms.

Constitution of Mexico of 1917 as amended in 2005

Article 6

Free speech shall be restricted neither judicially nor administratively, but when it represents an attack to public morality or individual rights as well as when it produces a criminal offence or disturbs the public order; the right to information shall be enforced by the state.

Constitution of Colombia 1991

Article 74

Every person has a right to access to public documents in cases established by law.

113. In Asia, although India has a vibrant debate concerning the right to information, there is no explicit provision on this right within the constitution. The Indian Supreme Court has however established in several decisions that the individual's right to information is based on two fundamental rights guaranteed by the Indian Constitution of 1949, namely the freedom of expression (Article 19(1)) and the right to life (Article 21).¹⁰⁸
114. The Pakistani Constitution, on the other hand, since 2010 does contain an express right of access to information.

Constitution of Pakistan of 1973, as amended in 2010

Article 19 A

Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.

115. The constitutions of the Philippines and Thailand also include a right to information in the following terms.

Constitution of Philippines of 1987

Article 3(7)

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Constitution of Thailand, 2007

Section 56. Rights to Information and Petition

A person shall have the right to receive and to get access to public information in possession of a government agency, State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.

Recommendations:

- **The new Egyptian Constitution should protect freedom of information and access to information held by or on behalf of a public body, as well as access to information held by private persons necessary to enforce a right.**
- **The new Constitution should state that access to information should be granted unless: (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.**

Freedom of Media

116. While the right to freedom of expression and freedom of information are rights for all individuals, journalists and media organisations are clearly more reliant on these rights than ordinary people. This is because of the very nature of the work of journalists in practicing journalism which involves expression and relies on quality information. Furthermore, the media play a crucial role in any democracy. International and regional authorities and courts have frequently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”¹⁰⁹

117. In July 2011, the UN Human Rights Committee in General Comment No 34 recognised that a “free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.”¹¹⁰ International law embraces a right whereby the media may receive information on the basis of which it can carry out its function.¹¹¹ The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.¹¹² The public also has a corresponding right to receive media output.¹¹³

118. The European Court of Human Rights has delivered on numerous occasions such statements as the following:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is the very core of the concept of a democratic society.¹¹⁴

119. Similarly, the Inter-American Court of Human Rights for its part has stated:

It is the mass media that make the exercise of freedom of expression a reality.¹¹⁵

120. It is the duty of the media to report on all matters of public interest, whether they relate to the functioning of democracy or to other matters. The European Court of Human Rights has stated:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.¹¹⁶

121. Apart from benefitting democracy, freedom of the press also serves to enhance the protection of social and economic rights, as noted by the Nobel Laureate Amartya Sen. He has noted:

In the terrible history of famines in the World, no substantial famine has ever occurred in any independent and democratic country with a free press ... While India

[where he grew up] continued to have famines under British rule right up to independence, they disappeared suddenly with the establishment of multi-party democracy and a free press.¹¹⁷

122. There are a number of principles that apply to ensure genuine freedom of the media and media users. Two of the most important are: *first*, states should take particular care to encourage an independent and diverse media in order to ensure that the rights of all media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas are protected; and *second*, states should ensure that public broadcasting services operate in an independent manner.¹¹⁸ In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.
123. A number of explicit guarantees are needed in the Constitution to ensure that that freedom of the media is protected as a whole. Such statements can be found in the constitutions of numerous countries around the world (see the comparative constitutional examples below). However, in order to strengthen freedom of the media, an explicit constitutional guarantee of the following constituent elements would be of great value
- there should be no prior censorship;
 - any bodies with regulatory powers over the media, including governing bodies of the public media, should be independent from political, economic or other undue influences;
 - the right of journalists to protect their confidential sources should be guaranteed;
 - there should be no licensing of print media outlets;
 - there should be no licensing of individual journalists, whether print, broadcasting or online; and
 - journalists should be guaranteed the right to associate freely.
124. The following sections deal with these issues in more detail.

No prior censorship

125. No person or media outlet shall have to ask the permission of a state body before publishing. This means that no media – whether a newspaper, television or radio programme, online publication or any form of publication – should be required to submit to a state censorship body prior to dissemination. This is a fundamental tenet of international law that is reflected in many constitutions as well as in international human rights treaties. Notably, Article 13(2) of the ACHR states:

The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship.

126. The European Court of Human Rights has stated that “the dangers inherent in prior restraints are such that they call for the most careful scrutiny.”¹¹⁹

Independence of media bodies

127. In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently from government control. This helps safeguard the media's role on matters of public interest. It follows that any bodies with regulatory or governing powers over either public or private broadcasters should be independent and protected against political interference. This relates to two main types of institutions: bodies which license broadcasters and governing boards of public media outlets.

128. The need for regulatory bodies to be independent is recognised in international law. A Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression stated:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.¹²⁰

129. Regional bodies, including the African Commission on Human and Peoples' Rights, and the Council of Europe¹²¹ have also made it clear that the independence of the regulatory authorities is fundamentally important for a free media.

130. It is recalled that the Declaration of Principles on Freedom of Expression in Africa includes the statement of principle:

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.¹²²

131. Furthermore, the Declaration of Principles on Freedom of Expression in Africa also emphasises the importance for independence of public broadcasters. It states at Principle VI:

State and government controlled broadcasters should be transformed into public services broadcasters accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed.

132. A whole Recommendation of the Committee of Ministers of the Council of Europe provides for the independence of public broadcasters.¹²³ This states, among other things: "The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy."¹²⁴

Protection of sources

133. Journalists routinely depend on contacts outside the media for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order

to stimulate public debate or expose wrongdoing. In many cases, anonymity is the precondition upon which the information is provided to the journalist by the source; this may be motivated by fear of repercussions which might adversely affect their job security or even physical safety.

134. In recognition of the importance of this flow of information, both national and international courts have recognised that the media enjoy a special privilege allowing them not to reveal confidential sources of information unless certain stringent conditions are met.
135. In the seminal case of *Goodwin v UK*, the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his freedom of expression. In its decision, the Court emphasised the importance of affording safeguards to the press generally and of protecting journalists' sources, in particular. It held:

Protection of sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.¹²⁵

136. The European Court of Human Rights emphatically reinforced this view in the 2010 decision of *Sanoma Uitgevers BV v Netherlands* and detailed the procedural safeguards in cases where sources are ordered by the courts to be disclosed.

88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.

89. The Court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources...

90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources "the full picture should be before the court" was highlighted in one of the earliest cases of this nature to be considered by the Convention bodies... The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.

91. The Court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the Court's view, that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.

92. Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources... In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk ...¹²⁶

137. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights also states:

Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.¹²⁷

138. The African Commission's Declaration on Principles on Freedom of Expression in Africa also states:

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and disclosure has been ordered by a court, after a full hearing.¹²⁸

139. The Council of Europe has issued an entire Recommendation on the protection of journalists' sources.¹²⁹

Licensing and registration

140. It is well-established in international law that any licensing requirement for the print media, or for journalists as individuals, is incompatible with freedom of expression, although licensing of the broadcast media or cinema businesses may be legitimate.

141. The African Commission on Human and Peoples' Rights sees licensing requirements as a restriction on entry into the profession and it has stated, in its **Declaration of Principles on Freedom of Expression in Africa**:

The right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions.¹³⁰

142. In relation to journalists, the Inter-American Court of Human Rights held in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*¹³¹ that a licensing requirement for all journalists effected through compulsory membership of a professional association constituted a violation of the right to freedom of expression. The Court accepted that ensuring "the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles" was a legitimate aim. However, the Court also observed that public order depends in many ways on respect for freedom of expression. While it agreed that many other professions are regulated through entry requirements, such as law or medicine, it pointed out that journalism is a fundamentally different activity.

Journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "colegio". The argument that a law on the compulsory licensing of journalists does not differ from similar legislation application to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom to "seek, receive and impart information and ideas of all kinds ... either orally, in writing or in print ..." The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law or medicine – that is to say, the things that lawyers or physicians do – is not an activity specifically guaranteed by the Convention.¹³²

143. Following the Inter-American Court's judgment, the Inter-American Commission on Human Rights has issued a Declaration stating:

Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.¹³³

Print media

144. Purely technical registration systems, pursuant to which print media outlets are required to provide certain information to the authorities, may be legitimate but only if they allow no discretion to the authorities to refuse registration. In this case, registration is not used as a mechanism of censorship but rather as a source of information on ownership. The UN, OAS and OSCE special mandates on freedom of expression, in a Joint Declaration issued in 2003, stated:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.¹³⁴

145. The UN's Human Rights Committee has frequently expressed concern about registration or licensing systems for the print media.¹³⁵ Most recently, in the case of *Kungurov v Uzbekistan*, the Committee for the first time decided that there had been a violation of the right to freedom of association in conjunction with freedom of expression in a case concerning NGO registration. The Committee examined whether the refusal to register the NGO amounted to a restriction of Kungurov's freedom of association and freedom of expression, and whether any such restrictions were justified. It held that the substantive and technical requirements of Uzbekistan's law constituted *de facto* restrictions on Kungurov's rights which did not meet the conditions of Article 22 paragraph 2 of the ICCPR. In particular, the Committee considered that the state authorities had not advanced any argument as to why such restrictions would be necessary. Taking account of the "severe consequences of the denial of state registration of 'Democracy and Rights' for the author's right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Uzbekistan", the Committee decided that such a denial was in violation of Article 22 of the ICCPR. It also decided that the registration procedure did not allow Kungurov to practice his right to freedom of expression and held that the authorities of Uzbekistan had "not made any attempt to address the author's specific claims nor has it advanced arguments as to the compatibility of the requirements ... with any of the criteria listed in article 19, paragraph 3, of the Covenant", namely that restrictions should be provide by law and necessary (a) for the respect of rights and reputation of others or (b) for the protection of national security or public order (*ordre public*), or public health or morals. The Committee therefore concluded that there had been a violation of Kungurov's rights under Article 22, paragraph 1 of the ICCPR, "read alone and in conjunction with article 19, paragraph 2 of the Covenant".¹³⁶
146. The European Court of Human Rights has similarly warned of abusive registration laws. In *Gaweda v Poland*, it criticised a law that allowed registration to be refused if the proposed name of the publication was "inconsistent with the real state of affairs".¹³⁷ The Court held that it is not a permissible function of registration systems to impose requirements relating to the names of publications. In particular, "to require a title of a magazine that it embody truthful information is ... inappropriate from the standpoint of freedom of the press."¹³⁸

Freedom of association

147. The right of freedom of association is a human right recognised in the UDHR and the ICCPR and numerous other international and regional human rights instruments.¹³⁹ Article 20 of the UDHR provides:

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

148. The right to freedom of association is enshrined in Article 22 of the ICCPR which states:

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

149. The right to freedom of association may be subject to similar restrictions as the right to freedom of expression. Any interferences with the right therefore have to pass the strict three part test outlined in relation to freedom of expression earlier.
150. Freedom of association is of particular importance to journalists as a means through which to strengthen their independence and professionalism. Through an association journalists can be empowered to criticise the authorities, and they are also more likely to fight for editorial independence in the media.
151. International and regional authorities, courts and tribunals have fleshed out the scope of freedom of association. In *Wilson and National Union of Journalists v UK*, a case involving the de-recognition of a trade union at a national newspaper which resulted in the collapse of existing collective bargaining agreements, the European Court delivered a strong ruling stating that trade union activism is at the core of the right to freedom of association.¹⁴⁰ The case followed an earlier decision in which it was established that states have a strong positive obligation to ensure that the actions of a private, non-state employer do not infringe upon the right to freedom of expression.¹⁴¹
152. The Court has repeatedly stressed that the right to freedom of association means that no one can be forced to join an association. The Inter-American Court has held that while compulsory membership in a professional association may be acceptable in the case of lawyers or doctors, similar requirements cannot be placed on journalists without violating the right to freedom of expression.¹⁴²

Comparative Constitutional examples

153. The following examples offer various constitutional methods of protecting freedom of the media. The Kenyan Constitution of 2010 is elaborate and presents a positive example.

The Constitution of Kenya, 2010

Article 34. Freedom of the Media

- (1) Freedom and independence of electronic media, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).
- (2) The State shall not –
 - a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
 - b. Penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –
 - a. Are necessary to regulate the airwaves and other forms of signal distribution; and
 - b. Are independent of control by government, political interests or commercial interests.
- (4) All State-owned media shall –

- a. Be free to determine independently the editorial content of their broadcasts or other communications;
 - b. Be impartial; and
 - c. Afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that provides for the establishment, which shall
- a. Be independent of control by the government, political interests or commercial interests;
 - b. Reflect the interests of all sections of the society; and
 - c. Set media standards and regulate and monitor compliance with those standards.

154. Yet most of the constitutional provisions on protecting freedom of the media are rather brief, including the South African and Canadian examples.

Constitution of South Africa (Bill of Rights), 1996

Article 16. Freedom of expression

- (1) Everyone has the right to freedom of expression, which includes
- (a) freedom of the press and other media;

The Constitution Act of Canada (Charter of Rights and Freedoms), 1982

Article 2. Fundamental Freedoms

Everyone has the following fundamental freedoms:

...

- a. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

155. It is interesting that the interim constitutional texts of Egypt and Libya both protect freedom of the media.

Interim Constitution of Egypt, 2011

Article 13

Freedom of the press, printing, publication and media are guaranteed, and censorship is forbidden, as are giving ultimatums and stopping or cancelling publication from an administrative channel. Exception may be made in the case of emergency or time of war, allowing limited censorship of newspapers, publication and media on matters related to general safety or the purposes of national security, all according to the law.

Draft Constitutional Charter for the Transitional Stage of Libya, 2011

ARTICLE 14

The state shall ensure the freedom of opinion, individual and collective expression, the freedom of scientific research, the freedom of communication, the freedom of press, media, printing and publication as well as the freedom of movement, peaceful assembly, demonstration and sit-in in line with the law.

156. We also see freedom of the media protected constitutionally elsewhere in the Arab world, albeit in rather brief terms.

Constitution of Iraq, 2005

Article 38

The State shall guarantee in way that does not violate public order and morality:

- (a) ...
- (b) freedom of press, printing, advertisement, media and publication.

Constitution of Jordan, 1952

Article 15. Rights and Duties of Jordanians

- (i) ...
- (ii) Freedom of the press and publications shall be ensured within the limits of the law.
- (iii) Newspapers shall not be suspended from publication nor shall their permits be revoked except in accordance with the provisions of the law.
- (iv) In the event of the declaration of martial law or a state of emergency, a limited censorship on newspapers, publications, books and broadcasts in matters affecting public safety and national defence may be imposed by law.
- (v) Control of the resources of newspaper shall be regulated by law.

157. Turkey’s laws and practices present a number of severe problems from a freedom of expression and right to information perspective. Notably, Article 301 of the Turkish Penal Code notoriously outlaws denigration of the Turkish Nation. Yet, the Turkish Constitution protects freedom of expression in detailed terms, as well as freedom of the press and freedom of information. However, it is problematic from an international human rights standpoint given the very broad list of grounds for permissible restrictions under Article 26(2) which include “the indivisible integrity of the State”.

Constitution of Turkey, 1982

Article 28 Freedom of the Press

The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee. The state shall take the necessary measures to ensure freedom of the press and freedom of information.

Article 31 Right to Use Media Other Than the Press Owned by Public Corporations

- (1) Individuals and political parties have the right to use mass media and means of communication other than the press owned by public corporations. The conditions and procedures for such use shall be regulated by law.
- (2) The law shall not impose restrictions preventing the public from receiving information or forming ideas and opinions through these media, or preventing public opinion from being freely formed, on the grounds other than national security, public order, public morals, or the protection of public health.

158. It is interesting to note that the Constitution of Columbia highlights the media’s freedom as well as *social* responsibility.

Constitution of Colombia, 1991

Article 20

...
The mass media are free and have a social responsibility. The right of rectification under equitable conditions is guaranteed. There will be no censorship.

159. The Thai Constitution of 2007 protects freedom of the press.

Constitution of Thailand, 2007

Section 45. Freedom of Expression of Individual and Press

A person shall enjoy the liberty to express his opinion, make speech, write, print, publicise, and make expression by other means. The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other

person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public.

160. The Portuguese Constitution does provide a relatively positive precedent because it offers a detailed and comprehensive conception of what protection of freedom of the press means. It includes protection of journalists' right to information and freedom to establish media outlets, indicates that the state has the responsibility to ensure public service media, and also emphasises the independence of the public service media.

Constitution of Portugal of 1974

Article 38. Freedom of the Press and Mass Media

- (1) Freedom of the press is safeguarded.
- (2) Freedom of the press includes:
 - a. The freedom of expression and creativeness for journalists and literary collaborators as well as a role for the former in giving editorial direction to the concerned mass media, save where the latter belong to the State or have a doctrinal or denominational character;
 - b. The journalists' right of access to the sources of information, protection of their professional independence and secrecy, and election of editorial councils, in accordance with the law;
 - c. The right to start newspapers and any other publication regardless of any prior administrative authorization, deposit, or qualification.
- (3) The law ensures, in a general way, disclosure of the ownership and forms of financing of the mass media.
- (4) The State ensures the freedom and independence of the mass media against the political and economic powers; it imposes the principle of specialty with respect to companies that own general information media; it treats and support the latter in a non-discriminatory fashion and prevents their concentration, notably through multiple or inter-locking financial interests.
- (5) The State ensures the existence and the operation of a public service of radio and television.
- (6) The structure and the operation of the media that remain within the public sector ensure their independence against the Government, the administration, and other public bodies; it also ensures that the different lines of opinion may be expressed and confronted.
- (7) Radio and television stations may operate only where a license to that effect has been delivered pursuant to a public competition held in accordance with the law.

Recommendations:

- **The new Constitution should provide explicit protection for freedom of the media and specifically protect the following elements of media freedom:**
 - **There should be no prior censorship.**
 - **There should be no licensing or registration system for the print media.**
 - **There should be no licensing of individual journalists or entry requirements for practising the profession.**
 - **The independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be guaranteed.**
 - **The right of journalists to protect their confidential sources of information should be guaranteed.**
 - **Journalists should be free to associate in professional bodies of their choice.**

Freedom of Expression and ICTs

161. This section of this analysis examines the issue of freedom of expression and information and communication technologies (ICTs), such as the Internet and mobile based electronic information dissemination systems. However, ARTICLE 19 has drafted a separate analysis on the appropriate legal framework for the protection of freedom of expression and ICTs. This section therefore deals only with the *constitutional* protection of freedom of expression through ICTs.
162. ARTICLE 19 recalls that the Human Rights Committee in its recent General Comment has recommended that states pay due attention to the changing media environment, particularly “the extent to which developments in ICTs have substantially changed communication practices around the world”. It noted that: “there is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries.” In this changing situation, “states parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto”¹⁴³ as well as ensure that regulatory systems take account of the differences between the print and broadcast sectors and the Internet, while also noting the manner in which various media converge.¹⁴⁴
163. There are several important dimensions to highlight with respect to the Internet. *First* and importantly, as indicated above, Article 19(2) of the ICCPR applies to all forms of expression and the means of their dissemination, including expression on the Internet.¹⁴⁵ This is understandable as the Internet presents a forum for both the expression of and access to information and ideas.
164. *Second*, any restrictions on Internet-based, electronic or other such information dissemination systems, including Internet Service Providers must meet the requirements of Article 19(3) of the ICCPR. They must therefore meet the regime for permissible exceptions as indicated above. For instance, the requirement that any restrictions must be narrowly tailored and content-specific means that it would be impermissible to shut down a website or liquidate an Internet Service Provider when it would be possible to achieve a protective objective by isolating and removing the offending content. The Committee has emphasised this point in its recent General Comment stating:
43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.¹⁴⁶
165. In June 2011, the four international special mandates on freedom of expression from the UN and regional human rights systems (Inter-American, European and African)¹⁴⁷ issued a Joint Declaration on Freedom of Expression and the Internet in consultation

with ARTICLE 19.¹⁴⁸ Amongst other things, this joint declaration affirms the application of freedom of expression rights to the Internet and emphasises that the imposition of criminal liability for expression-related offenses must take into account the overall public interest in protecting both expression and the forum in which it is made.¹⁴⁹

166. The UN Special Rapporteur has recently stated that the Internet has “become an indispensable tool for realizing a range of human rights.”¹⁵⁰

167. The mandate-holder has also on numerous occasions indicated his views on the relationship between the Internet and freedom of expression.¹⁵¹ He has emphasised that in relation to restrictions on content on the Internet, as well as meeting the three-part cumulative test:

any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.¹⁵²

Comparative Constitutional examples

168. In terms of comparative examples, the parliament of Estonia passed legislation in 2000 declaring Internet access a basic human right.¹⁵³ The constitutional council of France effectively declared Internet access a fundamental right in 2009, and the constitutional court of Costa Rica reached a similar decision in 2010.¹⁵⁴ Finland passed a decree in 2009 stating that every Internet connection needs to have a speed of at least one Megabit per second (broadband level).¹⁵⁵ According to a March 2010 BBC survey, 79% of those interviewed in 26 countries believe that Internet access is a fundamental human right.¹⁵⁶

169. Whilst there are no express constitutional provisions protecting freedom of expression and freedom of information on the Internet, there are a number of legal developments towards the recognition of access to the Internet as a fundamental right. It is speculated that Internet access will be protected in future constitutions as a human right. Given the paucity in protection of freedom of expression and restrictions on Internet speech in Egypt over recent years, it would be perfectly appropriate and justifiable for the drafters of the Egyptian Constitution to include the exercise of the right of freedom of expression and freedom of information through the Internet as a constitutionally protected right.

Recommendations:

- **The new Egyptian Constitution should state that all forms of expression and the means of their dissemination, including expression through ICTs – or on the Internet, electronic or other such information dissemination systems – is protected by the right to freedom of expression.**
- **It should also provide that any restrictions on such ICTs, including Internet Service Providers, must meet the requirements for permissible limitations on freedom of expression, as already indicated.**

Enforcing Rights

The domestic status of international human rights law

170. International human rights law places a direct obligation on states to give effect to the rights contained in international human rights treaties. Notably, Article 2 of the ICCPR provides:

[E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

171. In many countries, this obligation is discharged, in part, by providing for the direct enforceability of international law in the domestic legal order.

172. There are different ways of ensuring this. In some countries, international treaties are enforceable in domestic courts. In others, international law may “inform” the interpretation of domestic law, or some form of implementing legislation may be necessary to give effect to treaty rights. The Human Rights Committee has acknowledged that all of these approaches are valid so long as they result in the effective implementation of rights. It has, however, expressed the strong preference that states should seek to make the rights granted in the ICCPR directly enforceable in the domestic legal system. In General Comment No 31, the Committee stated:

Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that the Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.¹⁵⁷

Effective Remedies for Violations

173. International law requires states to ensure that individuals whose rights have been breached have an adequate remedy and, if necessary, access to a court or tribunal. Article 2(3) of the ICCPR states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of a judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

174. This means that states must put in place appropriate judicial and administrative mechanisms to address claims of violations of rights. Such mechanisms should be easily accessible. The most straightforward way of providing remedies for violations of rights is through the normal judicial system. The ordinary courts should have jurisdiction to hear claims of violations; it should not be necessary to refer to a special constitutional court or tribunal. The UN Human Rights Committee has however stressed that the establishment of an independent administrative body to investigate violations may be of particular importance.

Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.¹⁵⁸

175. Individuals whose rights have been violated should be provided with an effective remedy. The Human Rights Committee has noted that this generally entails “appropriate compensation” and that where appropriate reparations can involve “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”¹⁵⁹ The underlying principle is that the remedy must be “effective.”

176. Finally, it is important that individuals are able to obtain a remedy for any violation of their rights, whether that violation is committed by the state or its agents or by private individuals.¹⁶⁰ If a state fails to ensure that remedies are available for violations of rights by a private actor, that failure in itself may constitute a violation of the rights concerned.¹⁶¹

Comparative Constitutional examples

177. A number of constitutions make international treaties part of domestic law. Perhaps the most far reaching is the Dutch Constitution, whilst the French and Czech constitutions also allow treaties or agreements which the states have ratified to be part of domestic law and prevail over primary legislation.

Constitution of the Netherlands of 1989

Article 93

Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Constitution of France of 1958

Article 55

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

Constitution of the Czech Republic of 1993

Article 10

Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.

178. The Slovak Constitution is more qualified in the sense that only international human rights treaties which provide a higher level of protection prevail over domestic law.

Constitution of Slovakia of 1992

Article 11. Human Rights

International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties.

179. While international treaties are not automatically part of domestic law in South Africa, the South African Constitution does offer a positive example from a human rights perspective because it actually *requires* courts, tribunals and forums to consider international law as well as values based on dignity, equality and freedom in the interpretation of the Bill of Rights.

Constitution of South Africa (Bill of Rights), 1996

Article 39. Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

180. In terms of the domestic enforcement of rights, the following are the enforcement provisions of the South African and Canadian Constitutions. It is interesting to note that the focus is very much on judicially determined remedies, and this is to be expected given that such remedies would be triggered in a case of violation. Yet the range of such remedies is not specified: they simply need to provide “appropriate relief” or “remedy as the court considers appropriate and just in the circumstances”.

Constitution of South Africa (Bill of Rights), 1996

Article 38. Enforcement of Rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

The Constitution Act of Canada (Charter of Rights and Freedoms), 1982

Article 24

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

181. The Turkish Constitution acknowledges damages that may need to be paid by the state as a type of remedy.

Constitution of Turkey, 1982

Article 40. Protection of Fundamental Rights and Freedoms

(1) Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.

(2) The State, is obliged to indicate in its transactions, the legal remedies and authorities the persons concerned should apply and their time limits.

(3) Damages incurred by any person through unlawful treatment by holders of public office shall be compensated for by the state. The state reserves the right of recourse to the official responsible.

Recommendations:

- **The new Egyptian Constitution should make the constitutional guarantees of freedom of expression and freedom of information directly enforceable against state as well as non-state or private actors. These guarantees should take precedence over domestic legislation that is incompatible with it to the extent of that incompatibility.**
- **Consideration should be given to a constitutional provision explicitly incorporating rights guaranteed in international treaties into Egyptian law.**

Conclusions

182. The preceding review and comparative examples demonstrate that international, regional and comparative approaches to the right to freedom of expression and freedom of information may provide a rich source of inspiration for the drafters of the new Egyptian Constitution. It is important to remember that notwithstanding positive trends in the protection of these rights at the national level (particularly in states such as Kenya, South Africa and Canada) it is international human rights law, particularly the ICCPR and other texts which Egypt has previously ratified, that is binding and which Egypt's state authorities are already bound to implement in domestic law. Egypt's legitimacy as a member of the international community depends on the extent to which its state authorities can demonstrate that it meets the requirements of the rule of law, including the international rule of law. In that sense, the drafting of the new Constitution – including the rights and freedoms set therein, such as the freedom of expression and freedom of information – is a test for the Egypt's Constitution Drafting Committee.
183. ARTICLE 19 hopes to continue to be engaged in assisting the Constitution Drafting Committee and Egyptian stakeholders to formulate the best possible constitutional framework for the Egyptian people, one that will fulfil the aspirations of the Arab Awakening that began there and meet the state's international obligations, but also serve to make human rights protection and promotion part of daily life and social consciousness in the country.

¹See Martin Chanock, "A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate" in P Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: OUP, 1999) at 394.

²Muna Ndulo, "The Democratic State in Africa: The Challenges for Institution Building", 16 *National Black Law Journal*, 70 (1998-1999) 88-92.

³Adopted 11 September 1971, amended 1980, 2005, 2007.

⁴Tamir Moustafa, *Drafting Egypt's Constitution: Can a New Legal Framework Revive A Flawed Transition* Brookings Doha Center – Stanford Project on Arab Transitions, March 2012.

⁵Ibid.

⁶See, generally, P Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: OUP, 1999).

⁷R Dworkin, *A Bill of Rights for Britain* (London: Chatto, 1990), p 10 - 11.

⁸M Darrow and P Alston *supra* note 6 at p 486.

⁹R Penner, "The Canadian Experience with the Charter of Rights", [1996] *Public Law* 114 -115.

¹⁰*Supra* note 6, p 488.

¹¹As the Canadian experience under the Charter of Rights and Freedoms has shown on gender equality issues in particular.

¹²H Laski, *Liberty and the Modern State* (1948) at p75, quoted in Alston, *supra* note 6 at p 493.

¹³*Supra* note 6, p 494.

¹⁴ARTICLE 19 and Justice Initiative, Submission on Egypt to the Human Rights Council 2 September 2009, <http://www.article19.org/resources.php/resource/713/en/egypt:-article-19-and-the-justice-initiative-submission-to-the-un-universal-periodic-review>.

¹⁵*Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29, American Convention on Human Rights) Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No 5 (1985).

¹⁶We note that Egypt ranked a 98 out of 178 states in Transparency International's 2010 Global Corruption Index with a score of 4.3 out of 10 (0 indicating very clean and 10 highly corrupt). Transparency International, Corruption Perceptions Index 2010, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

¹⁷Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

¹⁸UN GA Res 59/1 14 December 1946.

¹⁹*Toktakunov v Kyrgyzstan*, Communication No. 1470/2006, CCPR/C/101/D/1470/2006, 21 April 2011.

²⁰World Bank, Information Disclosure Policy, 1 July 2010, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742_20100603084843/Rendered/PDF/548730Access011y0Statement01Final1.pdf.

²¹See the Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information, March 2005, <http://www.adb.org/Documents/Policies/PCP/default.asp?p=disclose>.

²²Law on Access to Administrative Documents, No. 11/02, 2002.

²³Law No 20.285 on Access to Information published in Official Gazette on 20 August 2008.

²⁴The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.

²⁵Law 47 of 2007 on Access to Information.

²⁶Said Almadhoun, Status of Freedom of Information Legislation in the Arab World, February 2010; available at <http://right2info.org/resources/publications/Overview%20of%20FOI%20legislation%20in%20the%20Arab%20World%20-%20SA%20-%202002-06-2010.doc/view>.

²⁷UN General Assembly Resolution 217A(III), adopted 10 December 1948.

²⁸*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980) (US Circuit Court of Appeals).

²⁹Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

³⁰For ICCPR ratifications, see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. The majority of states in the Middle East and North African region have ratified the ICCPR, the exceptions being the United Arab Emirates, Qatar, Saudi Arabia, Oman and Palestine. While these states are not formally bound by the terms of the ICCPR as a matter of treaty law, Article 19 of the ICCPR is reflective of customary international law.

³¹Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, See paras 18-19.

³²Adopted 13 December 2006, Entry into force 3 May 2008.

³³Adopted 20 November 1989, Entry into force 2 September 1990.

³⁴Article 13, UNCAC, UN GA Resolution 58/4, 31 October 2003.

³⁵For the list of member states, see http://www.au.int/en/member_states/countryprofiles.

³⁶Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

³⁷Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

³⁸Adopted September 2011, see: <http://www.pacaia.org/images/pdf/apai%20final.pdf>.

³⁹League of Arab States, Arab Charter on Human Rights, May 22, 2004. Entered into force March 15, 2008.

⁴⁰*Ibid.*

⁴¹American Convention on Human Rights, adopted on 22 November 1969, in force 18 July 1978. As of 20 January 2012, 24 of the OAS' 35 member states had ratified the ACHR.

⁴²In *Claude Reyes et al v Chile*, the Inter-America Court stated that Article 13 of the ACHR “encompasses the right of individuals to receive ... information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised in the Convention, the State may limit the access to it in the particular case.” This remains an extremely important decision and showed the Inter-American Court leading the way for other regional human rights courts on the recognition of the right to information. *Claude Reyes et al v Chile* Judgement of the Inter-American Court of Human Rights of 19 September 2006 Series C.

⁴³European Convention on Human Rights, adopted 4 November 1950, in force 3 September 1953.

⁴⁴*Handyside v. United Kingdom*, Application No 5493/72, judgment of 7 December 1976, Series A no 24, 1 EHRR 737.

⁴⁵*Thorgeirsen v Iceland*, 25 June 1992, Application No 13778, para 63.

⁴⁶*Társaság a Szabadságjogokért v. Hungary*, Application No 37374/05 14 April 2009.

⁴⁷As of 20 January 2012, the Convention on Access to Official Documents has been ratified by 3 states (Norway, Sweden and Hungary) and signed by 11. It requires 10 ratifications to come into legal effect.

⁴⁸EU Charter of Fundamental Rights (2000/C 364/01).

⁴⁹“Clinton, Experts Laud Kenya Constitution Reform Process”, 8 December 2009, <http://www.america.gov/st/democracyhr-english/2009/December/200912081350591EJrehsiF6.330073e-02.html?CP.rss=true>.

⁵⁰For the unofficial English Translation of the Draft Constitutional Charter for the Transitional Stage of Libya, contact the ARTICLE 19 Law Programme.

⁵¹Constitution of the Kingdom of Morocco, adopted on 13 September 1996 available at <http://www.pogar.org/publications/other/constitutions/mrc-constitution-96-e.pdf>.

⁵²*S P Gupta v President of India* [1982] AIR (SC) 149, p. 234. See also *State of Uttar Pradesh v Raj Narain and Others*, (1975) 4 SCC 428 and *Indian Express Newspapers (Bombay) Pvt. Ltd. v India*, (1985) 1 SCC 641.

⁵³Communication No 550/93, *Faurisson v France*, Views adopted on 8 November 1996.

⁵⁴See Communication No 157/1983, *Mpaka-Nsusu v Zaire*, Views adopted on 26 March 1986; No 414/1996, *Mika Miha v Equatorial Guinea*, Views adopted on 8 July 1994.

⁵⁵See Communication No 878/1999, *Kang v Republic of Korea*, Views adopted on 15 July 2003.

⁵⁶*Handyside v United Kingdom*, Application No 5493/72, European Court of Human Rights, judgment of 7 December 1976 para 49.

⁵⁷See Communications Nos 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.

⁵⁸See Communication No 414/1990, *Mika Miha v Equatorial Guinea*.

⁵⁹See Communication No 1189/2003, *Fernando v Sri Lanka*, Views adopted on 31 March 2005.

⁶⁰See Communication No 1157/2003, *Coleman v Australia*, Views adopted on 17 July 2006.

⁶¹Concluding observations on Japan (CCPR/C/JPN/CO/5).

⁶²See Communication No 1022/2001, *Velichkin v Belarus*, Views adopted on 20 October 2005.

⁶³See Communication No 1334/2004, *Mavlonov and Sa'di v Uzbekistan*, Views adopted on 19 March 2009.

⁶⁴See Communication No 926/2000, *Shin v Republic of Korea*, Views adopted on 16 March 2004.

⁶⁵See Communication No 736/97, *Ross v Canada*, Views adopted on 18 October 2000.

⁶⁶*Ibid.*

⁶⁷*Ibid.*

⁶⁸See Communication No 926/2000, *Shin v Republic of Korea*.

⁶⁹See Communication No 1341/2005, *Zundel v Canada*, Views adopted on 20 March 2007.

⁷⁰See Communication No 1009/2001, *Shchetoko et al. v Belarus*, Views adopted on 11 July 2006.

⁷¹See Communication No 412/1990, *Kivenmaa v Finland*, Views adopted on 31 March 1994.

⁷²See Communication No 1189/2003, *Fernando v Sri Lanka*.

⁷³*Supra* note 42.

⁷⁴See Communication No 1022/2001, *Velichin v Belarus*, Views adopted on 20 October 2005.

⁷⁵For example, see Article 13(2) of the ACHR or Article 10(2) of the ECHR.

⁷⁶See, for example, the European Court of Human Rights in the case of *The Sunday Times v UK*, Application No 6538/7426, Judgment of April 1979, para 45.

⁷⁷*Leonardus J.M. de Groot v The Netherlands*, No. 578/1994, CCPR/C/54/D/578/1994 (1995).

⁷⁸*Ibid.*

⁷⁹Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para 21. See also its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para 23.

⁸⁰See *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983) 31 O.R. (2d) 583 (Ont. H.C.), where the Ontario High Court struck down a law giving film censors wide powers to approve or deny films.

⁸¹Concluding observations of the Human Rights Committee on the Syrian Arab Republic CCPR/CO/84/SYR.

⁸²*Supra* note 42, para 32.

⁸³Adopted on 1 October 1995. These Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996.

⁸⁴See *R. v. Oakes* (1986), 1 SCR 103, pp. 138-139 (Supreme Court of Canada).

⁸⁵See, for example, *Autronic v Switzerland* (22 May 1990, Application No. 12726/87, European Court of Human Rights) where the respondent State argued it needed to restrict the availability of satellite dishes in order to protect confidential satellite communications but could not provide any evidence that these signals could be picked up with ordinary satellite dishes.

⁸⁶For example, in *Observer and Guardian v the United Kingdom*, note 47, the European Court of Human Rights found a violation of the newspapers' right to freedom of expression because the respondent government could have pursued other, less intrusive options and still have achieved the same result.

⁸⁷*R. v. Big M Drug Mart Ltd.*, note 99, p. 352 (Supreme Court of Canada).

⁸⁸See the judgment of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 26, para. 46.

⁸⁹*Supra* note 94.

⁹⁰See, for example, *Open Door Counselling and Dublin Woman Well Centre and Others v. Ireland*, 29 October 1992, Application No. 1423/88 and 142335/88 (European Court of Human Rights), para 73.

⁹¹See Joint Declaration of UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, 20 December 2006 <http://www.article19.org/data/files/pdfs/igo-documents/four-mandates-dec-2006.pdf>; and Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004 <http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2004.pdf>.

⁹²See for instance: A/HRC/14/23 (paras.30 – 39) A/HRC/7/14 (paras.21 – 31); E/CN.4/2005/64 (paras 36 – 44) E/CN.4/2004/62 (paras 34 – 64); E/CN.4/2000/63 (paras 42 – 44; Annex II: The Public's Right to Know: Principles on Freedom of Information Legislation).

⁹³ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999).

⁹⁴Law on Access to Administrative Documents, No 11/02, 2002.

⁹⁵Law No 20.285 on Access to Information published in Official Gazette on 20 August 2008.

⁹⁶The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.

⁹⁷Law 47 of 2007 on Access to Information.

⁹⁸*Supra* note 37.

⁹⁹*Supra* note 42, para 18.

¹⁰⁰*Ibid*, para 7.

¹⁰¹*Ibid*, para 18.

¹⁰²*Ibid*, para 18.

¹⁰³Concluding Observations on Azerbaijan (CCPR/C/79/Add. 38 (1994)).

¹⁰⁴Human Rights Committee, General Comment No 16, 08/04/1988 .

¹⁰⁵See Communication No 726/1996, *Zheludkov v Ukraine*, Views adopted on 29 October 2002.

¹⁰⁶See Communication No 145/2006, *Poma v Peru*, Views adopted on 27 March 2009.

¹⁰⁷Human Rights Committee, General Comment No 31 CCPR/C/21/Rev.1/Add.13.

¹⁰⁸The relevant cases of the Supreme Court are *Bennett Coleman & Co. v Union of India*, AIR 1973 SC 783, dissenting judgment of Justice KK Matthew in particular; *State of UP v Raj Narain*, AIR 1975 SC 865.

¹⁰⁹*Thorgeisen v Iceland*, Application No 13778/88 judgment of 25 June 1992 of the European Court of Human Rights at 63.

¹¹⁰Human Rights Committee, General Comment 34, para 13. See also Communication No 1128/2002, *Marques v Angola*, Views adopted on 29 March 2005.

¹¹¹See Communication No 633/95, *Gauthier v Canada*.

¹¹²See Committee's General Comment No 25 (1996) on Article 25 (Participation in public affairs and the right to vote) para 25, Official Records of the General Assembly, Fifty-first Session, Supplement No 40 vol I (A/51/40 (Vol I)), annex V.

¹¹³See Communication No 1334/2004, *Mavlanov and Sa'di v Uzbekistan*.

¹¹⁴*Castells v Spain*, Application No 11798/85 judgment of the European Court of Human Rights of 24 April 1992, para 43.

¹¹⁵*Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para 34.

¹¹⁶See *Castells v Spain*, *Ibid* at 43; *The Observer v Guardian v UK*, Application No 13585/88 judgment of European Court of Human Rights of 24 October 1991 para 59; *The Sunday Times v UK (II)*, Application No 13166/87 judgment of European Court of Human Rights of 26 November 1991 at para 65.

¹¹⁷Amartya Sen "Democracy as a Universal Value" *Journal of Democracy* (1999) 10.AmartyaSen, *Development as Freedom* (New York: Anchor Books, 1999).

¹¹⁸Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

¹¹⁹*The Observer v Guardian v UK*, Application No 13585/88 judgment of European Court of Human Rights of 24 October 1991 at para 60.

¹²⁰Joint Declaration of 18 December 2003; available at <http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

¹²¹See for instance the Committee of Ministers Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector Recommendation No R (2000) 23, adopted 20 December 2000.

¹²²Adopted by the African Commission on Human and Peoples' Rights at its 32nd session 17-23 October 2002.

¹²³ Recommendation No R (96) 10 of the Committee of Ministers of the Council of Europe to Member States on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.

¹²⁴ *Ibid.*, Principle 1.

¹²⁵ *Goodwin v UK Application* No 17488/90 judgment of the European Court of Human Rights of 27 March 1996.

¹²⁶ *Sanoma Uitgevers BV v Netherlands*, Application No 38224/03 judgment of the Grand Chamber of the European Court of Human Rights of 14 September 2010.

¹²⁷ Inter-American Declaration Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

¹²⁸ *Ibid.*

¹²⁹ Recommendation No R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted 8 March 2000.

¹³⁰ *Ibid.*, Principle X(2).

¹³¹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 American Convention on Human Rights) *Ibid* note 26.

¹³² *Ibid.*, paras 71-72.

¹³³ Inter-American Declaration of Principles of Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th session, 19 October 2000.

¹³⁴ *Supra* note 131.

¹³⁵ See also Concluding Observations on Lesotho's Initial Report, 8 April 1999, CCPR/C/79/Add.106 para 23; Concluding Observations on Cambodia's Initial Report, 27 July 1999, CCPR/C/79/Add.108, para 18.

¹³⁶ Communication No 1479/2006 *Kungurov v Uzbekistan*, CCPR/C/102/D/1478/2006, 2 September 2011.

¹³⁷ *Gaweda v Poland*, Application No 26229/95 judgment of 14 March 2002, para 43.

¹³⁸ *Ibid.*, para 47.

¹³⁹ See Article 11 of the ECHR, Article 16 ACHR and Article 10 of the ACHPR. See also the African Commission's Declaration of Principles on Freedom of Expression in Africa, Principle X.

¹⁴⁰ Application Nos 30668/96, 30671/96, 30678/96, Judgment of the European Court of Human Rights of 2 July 2002

¹⁴¹ *Young, James and Webster v the UK Application* Nos 7601/76, 7806/77, 13 August 1981, para 49.

¹⁴² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 American Convention on Human Rights) *Ibid* note 26.

¹⁴³ *Supra* note 42, para 15.

¹⁴⁴ *Ibid.*, para 39.

¹⁴⁵ *Ibid.*, para 12.

¹⁴⁶ Concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR). See General Comment para 43.

¹⁴⁷ The United Nations Special Rapporteur on Freedom of Opinion and Expression, Frank LaRue; the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the Organization of American States, Catalina Botero Marino; the Organization for Security and Cooperation in Europe Representative on Freedom of the Media, Dunja Mijatović; and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, Faith Pansy Tlakula.

¹⁴⁸ Joint Declaration on Freedom of Expression and the Internet (1 June 2011); available at <http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf>.

¹⁴⁹ Paragraph 1(a) and 4(b).

¹⁵⁰ Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Frank La Rue, 16 May 2011 A/HRC/17/27 A/HRC/14/23/Add.2.

¹⁵¹ A/HRC/17/27 A/HRC/14/23/Add.2 (paras 9 – 10); A/HRC/7/14 (paras 29- 31, Internet governance); A/HRC/4/27 (paras 38 – 43, Internet governance and digital democracy); E/CN.4/2006/55 (paras 29 – 43, Internet governance and human rights); E/CN.4/2002/75 (paras 88 - 95).

¹⁵²Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Frank La Rue, 16 May 2011 A/HRC/17/27 A/HRC/14/23/Add.2 at para 69.

¹⁵³"Internet as Human Right: This is Estonia!" 4 December 2010; available at <http://www.lithuaniantribune.com/2010/04/12/internet-as-human-right-this-is-estonia/>.

¹⁵⁴Decision 2009-580, Act furthering the diffusion and protection of creation on the Internet.

¹⁵⁵"732/2009, Decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service," (original: Liikenne- ja viestintäministeriön asetustarkoituksen mukaisen internet-yhtyedenvähimmäisnopeudestayleispalvelussa), FINLEX, 22 October 2009. Available from: <http://www.finlex.fi/en/laki/kaannokset/2009/en20090732>.

¹⁵⁶"Four in five regard Internet access as a fundamental right: global poll," BBC News, 8 March 2010. Available from: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf.

¹⁵⁷General Comment No 31 on Article 2 of the Covenant (the Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 21 April 2004, CCPR/C/74/CRP.4/Rev 6.

¹⁵⁸*Ibid.*, para 15.

¹⁵⁹*Ibid.*, para 16.

¹⁶⁰*Ibid.*, para 8.

¹⁶¹*Ibid.*