

ARTICLE 19

Egypt: Proposed amendments to the Constitution

October 2013

Legal analysis

Executive summary

In October 2013, ARTICLE 19 analysed the Draft Proposed Amendments to the Constitution, dated 20 August 2013 (Draft Constitution), in light of international standards on the right to freedom of expression and information.

An expert committee prepared the Draft Constitution pursuant to Article 28 of the Constitutional Declaration dated 8 July 2013. It is now under consideration by a 50-member assembly, which will present its own amendments in November 2013.

ARTICLE 19 welcomes that the Draft Constitution includes positive references to rights-based language throughout, including a dedicated bill of rights that sets out the right to freedom of expression and many important related rights.

However, in almost every case the scope afforded to each fundamental right, including the right to freedom of expression and information, is too narrow. At the same time, there is a lack of guidance on how rights may be legitimately restricted to protect other rights or collective interests in compliance with international law. In several instances fundamental rights are qualified in ambiguous terms that give the authorities substantial discretion and that may lead to abuse.

ARTICLE 19 calls upon the 50-member assembly to ensure that the Constitution fully protects the right to freedom of expression and information and related rights. The recommendations that should be considered by the assembly are summarised below.

Summary of recommendations

Preamble

- The preamble should stress as a priority the universality of human rights for all people, without limiting this on the basis of citizenship. This could include reference to the UDHR and other instruments such as the ICCPR and ICESCR;
- Principle 7 of the preamble should be revised to reflect that while the right to express oneself freely in public is important, private expression is also protected;
- Principles 4 – 6 should be revised to make clear that national unity and security are not a condition for the enjoyment of human rights, but that these ends can only be achieved through respect for universal human rights;
- The preamble should not make the acceptance of the Constitution, or a person's willingness to uphold it, conditional on religious faith or any other belief system.

Status of international law

- The Constitution should include a dedicated provision on the status of international law;
- International law should have primacy over internal law, with the exception of the Constitution. Internal law may not be invoked to justify violations of international law;
- The requirement that treaties infringing on "sovereignty" should be subject to referenda should be clarified, and this should not be an obstacle to the ratification of human rights instruments;
- Treaties should only be repealed, modified or suspended in the manner provided for in the treaty themselves.

Right to equality

- The right to equality should be guaranteed to all people, regardless of citizenship status.
- All of the rights in the Constitution should be guaranteed without distinction of any kind.

- The protected characteristics in Article 38 should be extended to include: national origin, race and colour, property, birth, political or other opinion, sexual orientation and gender identity.
- Article 10 and Article 11 should be removed from the Constitution because they promote harmful gender-based stereotypes. They should be replaced by a provision explicitly stating the obligation on the State to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women, as per Article 5 of CEDAW.

Freedom of Expression and Opinion

- The title to Article 48 should reference both the right to freedom of opinion and the right to freedom of expression;
- The right to freedom of expression should encompass the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers.
- Consideration should be given to specifying that the right to freedom of expression through electronic and Internet-based modes of communication.

Access to Information

- The right of access to information should be guaranteed to all people, regardless of citizenship status;
- The Constitution should provide the positive obligation on public bodies to proactively disclose information and recognise the principle of maximum disclosure;
- The right of access to information should apply to all information held by public bodies, and also to private bodies where that information is required for the exercise or protection of any rights;
- Limitations on the right of access to information must comply with Article 19(3) of the ICCPR, and limitations must be justified on the basis of the “harm” and “public” interest tests.

Peaceful Assembly

- Article 53 should protect the right to freedom of peaceful assembly, and references to “quiet” assemblies should be removed;
- The right to organise and participate in peaceful assemblies should be guaranteed;
- Article 53 should place a positive obligation on the state to facilitate the exercise of the right to freedom of peaceful assembly;
- The right to freedom of peaceful assembly should not be restricted on the basis of citizenship status;
- Restrictions on the right to freedom of peaceful assembly, including notification requirements, must comply with the three-part test under Article 22 of the ICCPR;
- The right to freedom of peaceful assembly in private does not require separate protection. The right to privacy should be protected comprehensively in a separate provision.

Limitations on rights

- The Constitution should specify which rights cannot be qualified or limited, including the right to freedom of opinion, as protected by Article 19(1) of the ICCPR.
- The Constitution should provide guidance on the limitation of rights that are not absolute, and in relation to the right to freedom of expression and information, and the right to freedom of peaceful assembly, these should comply with Article 19(3) of the ICCPR and Article 22 respectively.

Media Freedom

- 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.

Right to religion or belief

- Articles 2 and 3 should be removed. The Constitution should not establish a State religion, or privilege one religious legal system, such as Sharia, over any other. All references to any specific religious beliefs should be only symbolic and confined to the preamble.



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Introduction

In 2011, the Egyptian Supreme Council of the Armed Forces suspended the 1971 Constitution. An interim Constitution was adopted by referendum in 19 March 2011, which was followed by presidential and parliamentary elections in January and May respectively. A new Constitution (proposed by the Shura Council and boycotted by the opposition) was adopted by a referendum on 25 December 2012.

Subsequently, Egypt has experienced significant unrest. President Morsi was removed from the Presidency in July 2013 and Adly Mansour, formerly President of the Constitutional Court, installed in his place. The military and interim Mansour government has commenced the process of amending the 2012 Constitution, on the basis of a Constitutional Declaration dated 8 July 2013.

This analysis assesses the Draft Constitution by an expert committee established by President Mansour, dated 20 August 2013. The expert committee was composed of 10 members including six senior judges and four constitutional law professors, nominated by courts, educational institutions and legal bodies.

On 1 September 2013, the expert committee forwarded the Draft Constitution to a 50-person assembly (“the assembly”) for consideration. The assembly convened for the first time on 8 September 2013, and has 60 days to draft its own amendments. Their new draft will be presented in November 2013, and will return to the expert committee for review and approval before its submission to the public for debate and comments. It has been reported that the constitution may be submitted for referenda by mid-November.

The purpose of this analysis is to assess the substance of the Draft Constitution for its compliance with international standards on the right to freedom of expression. It is not the purpose of the analysis to assess the legitimacy of the political process that has led to this latest Constitutional review.

The analysis finds that the Draft Constitution has a number of positive elements. These include strong references to human rights principles in the preamble, including specific mention of the right to freedom of expression. The Draft Constitution also contains an extensive bill of rights, with protections for the right to freedom of expression and related rights.

However, there are a number of shortfalls in the Draft Constitution from a freedom of expression perspective. These include:

- The preamble fails to stress as a priority the universality of human rights for all people, and includes problematic language limiting rights, including on the basis of religious belief;
- The status of international human rights law as a matter of domestic law is unclear;
- Protections for the right to equality are too narrow, and are also contradicted by provisions that legitimise harmful gender-based stereotypes in relation to the role of women in society and the family;
- The scope of the right to freedom of expression is too narrow, and does not reflect Article 19(2) of the ICCPR.

- Separate protection for the right of access to information is qualified in ambiguous terms that may jeopardise its practical implementation;
- Protections for the right to freedom of peaceful assembly do not comply with international standards;
- The Constitution does not provide guidance on legitimate restrictions on fundamental rights with reference to the principles of (i) legality, (ii) legitimate aim, or (iii) proportionality;
- Protections for media freedom do not sufficiently establish the principles of independence and media plurality;
- Islam is granted a privileged position in the legal order that may endanger the position of religious minorities and women.

ARTICLE 19 calls on the assembly to consider the recommendations contained in the analysis and to ensure that proposed amendments comply with international human rights standards.

International and regional human rights standards

International human rights law places a responsibility upon Egypt to protect and promote the right to freedom of expression and information, and the right to freedom of peaceful assembly.

The right to freedom of expression

Freedom of expression is guaranteed in Article 19 of the Universal Declaration of Human Rights (UDHR)¹ and in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).² The ICCPR protects the right of all people to seek, receive, and impart information of any form, including political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.³ Importantly, the right protects expression that others may find deeply offensive.⁴

As recently expressly confirmed by the Human Rights Committee, Article 19(2) of the ICCPR embraces a right of access to information held by public bodies.⁵

Numerous other international instruments also protect the right to freedom of expression and information, including: the Convention on the Rights of Persons with Disabilities, at Article 21; the Convention on the Rights of the Child, at Article 13; and the UN Convention Against Corruption, at Article 13. Egypt has ratified all three instruments.

At the regional level, both the African Charter on Human and Peoples' Rights⁶ (the African Charter) and the Revised Arab Charter bind Egypt to protect the right to freedom of expression. It should be noted that the Arab Charter's protections for fundamental rights are weaker than those provided at the international level.

The Declaration of Principles on Freedom of Expression in Africa (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002,⁷ guarantees against arbitrary interferences in the right to freedom of expression in Article II.

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 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:

¹ UN General Assembly Resolution 217A(III), adopted 10 December 1948. Article 19 provides: "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." While not directly binding on States, parts of the UDHR, including Article 19, are regarded as having acquired legal force as customary international law.

² Egypt acceded to the ICCPR on 14 January 1982.

³ General Comment No. 34, HR Committee, CCPR/C/GC/34, 12 September 2011, para. 11.

⁴ *Ibid.*

⁵ Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, See paras 18-19.

⁶ At Article 9. Egypt acceded to the African Charter on 25 May 1963.

⁷ Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

- 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.

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.⁸ These principles provide guidance to African states on the right to freedom of information, including the importance of battling corruption, protecting whistleblowers, to promote unhindered access to information communication technologies, and access to electoral information.

The right to freedom of peaceful assembly

The right to freedom of peaceful assembly is guaranteed in Article 20 of the UDHR, and given legal force through Article 21 of the ICCPR, and is reflected in many other international human rights treaties.⁹

The right to freedom of peaceful assembly protects any intentional and temporary presence of a number of individuals in a private or public space for a common expressive purpose.¹⁰ This includes but is not limited to political demonstrations, inside-meetings, strike actions, pickets, processions, rallies, commemorations, and cultural or religious celebrations. The right to freedom of peaceful assembly also extends to the expression of ideas that may be considered controversial or that are “not necessarily favourably received by the government or the majority of the population”¹¹ or that “may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote.”¹²

⁸ Adopted September 2011, see: <http://www.pacaia.org/images/pdf/apai%20final.pdf>

⁹ Article 8 of the International Covenant on Economic, Social and Cultural Rights; Article 7(c) of the Convention on the Elimination of All Forms of Discrimination against Women; International Labour Organization Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise; Convention on the Rights of the Child, Article 15.

¹⁰ Based on proposals of the 2012 annual report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (“an intentional and temporary gathering in a public space for a specific purpose”, *op. cit.*, at para. 24); and the OSCE Guidelines on Freedom of Peaceful Assembly (“the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose.”)

¹¹ HR Committee, *Viktor Korneenko et al v. Belarus*, Communication No. 1274/2004, para. 7.3.

¹² By way of comparison, see: European Court of Human Rights (ECtHR), *Stankov & UMO Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95 (2001), para. 86. See also by way of comparison: ECtHR, *Hyde Park and Others v. Moldova*, Application No. 33482/06 (2009), para. 30: the prohibition on a protest on the basis that the claims of participants were “unwelcome and unfounded” was not compatible with Article 11 of the European Convention on Human Rights (ECHR).

The State is under a positive obligation to enable the exercise of the right to freedom of peaceful assembly, including the obligation to exercise a presumption in favour of the holding of assemblies.¹³ Importantly, peaceful assemblies must be protected by the State, including from private third parties such as counter demonstrators and *agents provocateurs*.¹⁴

The HR Committee¹⁵ and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association¹⁶ have both noted the interrelatedness between this right and the right to freedom of expression. The right to freedom of peaceful assembly has also been recognised as central to the right to participate in the conduct of public affairs.¹⁷ In particular, the right to freedom of peaceful assembly has been noted as particularly important for bringing attention to local issues where mass media are limited or restricted.¹⁸

Also at the regional level, the Revised Arab Charter¹⁹ and the African Charter²⁰ both protect the right to freedom of peaceful assembly.

Limitations on the right to freedom of expression and peaceful assembly

The right to freedom of expression and the right to freedom of peaceful assembly are not guaranteed in absolute terms and may be subject to narrowly tailored limitations. Limitations must comply with the three-part test under the following terms:²¹

- **Provided by law:** all limitations must “be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”²² It should be noted that limitations on the right to freedom of expression must be “provided by law”, whereas limitations on the right to freedom of peaceful assembly must be “in accordance with law”.²³
- **Legitimate aim:** all limitations must be in pursuit of a listed “legitimate aim”, namely: respect for the rights or reputations or others; the protection of national security or of public order; or the protection of public health or morals.²⁴ Additionally, the right to freedom of peaceful assembly may also be restricted to protect public safety.²⁵

¹³ The HR Committee has found that a failure by the State to produce reasons for interfering with the right to freedom of peaceful assembly is a violation of the ICCPR. E.g. *Mecheslav Gryb v. Belarus*, op. cit.; *Chebotareva v. Russia*, communication No. 1866/2009 (2012); *Belyazeka v. Belarus*, communication No. 1772/2008 (2012).

¹⁴ Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, at Article 21, para. 11. See also ECtHR, *Plattform “Ärzte für das Leben”*, Application No. 10126/82 (1988), para. 34.

¹⁵ See, for example: *Mechislaw Gryb v. Belarus*, communication No. 1316/2004 (2011), para. 9.5 and paras. 13.3 to 13.4; and General Comment No. 34, op. cit, para. 4.

¹⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27, 21 May 2012, para. 12.

¹⁷ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7, 12 July 1996, para. 25.

¹⁸ OSCE Guidelines on Freedom of Peaceful Assembly, Second Edition, section B.1.5.

¹⁹ At Article 24(6).

²⁰ At Article 11, although the term “peaceful” is absent from this provision.

²¹ The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, part I.A.2 and I.A.9, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4.

²² General Comment No. 34, op. cit.; the Siracusa Principles, *ibid.*, ECtHR, *Muller and Others v. Switzerland*, application No. 10737/84 (1988), para. 29.

²³ See: Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, p. 489. Any law regulating the right to freedom of peaceful assembly must prevent arbitrary interferences with the right and meet the requirements of legality; ECtHR, *Mkrichyan v. Armenia*, application no. 6562/03 (2007), para. 39.

²⁴ Article 19(3) ICCPR, and Article 21 ICCPR. Similarly, under the ECHR these rights may be restricted to protect national security, the prevention of disorder or crime, for the protection of health or morals, and the protection of the rights and

- Limitations to protect the **rights of others** must be constructed with care and should not be interpreted, *inter alia*, to restrict political debate.²⁶ In relation to the protection of reputation and laws on defamation, Article XII of the African Declaration outlines the following standards:
 - No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
 - Public figures shall be required to tolerate a greater degree of criticism; and
 - Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

Article XII further stipulates that privacy laws shall not inhibit the dissemination of information of public interest.

- The genuine purpose and demonstrable effect of restrictions on the basis of protecting **national security** must be to protect a 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, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.²⁷ This is reflected in Article XIII of the African Declaration.
- The State must demonstrate that any limitation to protect “**public morals**” is *essential* to the maintenance of respect for fundamental values of the community.²⁸ States are not permitted to invoke protection of “public morals” to “justify discriminatory practices”²⁹ or “to perpetuate prejudice or promote intolerance.”³⁰ International human rights bodies have also noted that concepts of morality are constantly evolving,³¹ that any limitation “must be based on principles not deriving exclusively from a single tradition”,³² and “must be understood in the light of the universality of human rights and the principle of non-discrimination.”³³
- International standards maintain that measures to protect **public health** must be “both evidence-based and proportionate to ensure respect of human rights.”³⁴
- States are under a positive obligation to promote and protect the right to freedom of expression, and to take reasonable and appropriate measures to enable demonstrations to proceed peacefully.³⁵ The threshold for prohibiting expression on the basis of protecting **public order** or public safety is high and must be evidence based, rather than premised on

freedoms of others; Article 10(2) ECHR and Article 11(2) ECHR.

²⁵ Article 21 ICCPR.

²⁶ General Comment No. 34, *op. cit.*, para. 28.

²⁷ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, ARTICLE 19 London, 1996, Principle 2.a. Also, the HR Committee held that restrictions on publicly supporting a labour dispute, including calling for a national strike, did not constitute a threat to national security; *Sohn v. Republic of Korea*, communication No. 518/1992 (1994).

²⁸ The Siracusa Principles, *op. cit.*

²⁹ *Ibid.* See also: General Comment No. 34, *op. cit.*, para. 32: Morality based limitations on rights “must be understood in the light of the universality of human rights and the principle of non-discrimination.”

³⁰ *Hertzberg et al v. Finland*, Communication No. 61/1979, individual opinion by Committee members Opsahl, Lallah and Tarnopolsky, 2 April 1982.

³¹ The Siracusa Principles, *op. cit.* See also: *Muller vs. Switzerland*, *op. cit.*, para. 35; and *Alekseyev*, *op. cit.*, at para. 82.

³² General Comment No. 34, *op. cit.*, para. 32.

³³ *Ibid.*

³⁴ Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 3 August 2011, A/66/254, para. 18.

³⁵ See, by way of comparison, ECtHR, Plattform “Ärzte für das Leben”, *op. cit.*, paras 32 and 34.

speculation.³⁶ The potential for a public order disturbance, in particular from counter-demonstrators, should not be the basis for denying the right to freedom of peaceful assembly. Less restrictive measures, such as the deployment of additional law enforcement officers, should therefore be considered. Any prior restraints of a blanket nature, especially where based on the content of expression, are almost always illegitimate.³⁷

- **Necessity and proportionality:** States must demonstrate in a “specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”³⁸ Moreover, this must be supported by evidence and should not be speculative.³⁹ The restriction must also not be overly broad and must be the least restrictive means available for achieving the protective function. Account must also be taken of the form of expression and the means of its dissemination.⁴⁰

³⁶ See, by way of comparison, ECtHR, *Barankevich v. Russia*, Application No. 10519/03, 26 July 2007, at para. 33: “mere existence of a risk is insufficient for banning [a peaceful assembly]: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes.”

³⁷ See, by way of comparison, ECtHR, *Stankov & UMO Ilinden v. Bulgaria*, *op. cit.*, para. 97: “Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.”

³⁸ General Comment No. 34, *op. cit.*, para 35; also: *Shin v. Republic of Korea*, Communication No. 926/2000, HR Committee, 16 March 2004, para. 7.3.

³⁹ See, by way of comparison, ECtHR, *Alekseyev v. Russia*, Applications nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 86.

⁴⁰ General Comment No. 34, *op. cit.*, para. 34. The same paragraph provides that particular regard should be paid to “the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”

Analysis of the Draft Amendments

The Draft Amendments to the Constitution include 198 Articles, divided across six parts, in addition to a preamble. This analysis identifies and analyses those provisions that most directly impact on the right to freedom of expression and information, and the right to freedom of peaceful assembly.

Preamble

ARTICLE 19 observes that it is positive that the Preamble is framed in rights-based language, making clear that the Constitution seeks to establish a legal order for the country premised on democratic values and the principles that underpin international human rights law.

In particular, the first paragraph references that the “path to the future” for the Egyptian people is one that will “forever enhance equity, freedom, justice, work, equality, and human dignity.” The fourth paragraph stresses further that “the people” are the source of power, and that the Egyptian people are committed to democracy and political multiplicity. It additionally stresses that each citizen has the right to “freedom, human dignity and social justice”.

The Preamble also sets out 11 principles that the “Egyptian people” declare their adherence to. It is positive that rights feature prominently, including: equality as the basis for justice, freedom and social justice, and the maintenance of citizen rights (Principle 1), the rule of law as the basis and a pillar of citizen freedom (Principle 2), the belief in justice and the independence of the judiciary (Principle 6), and the right to freedom of expression (Principle 7). It is also positive that the importance of world peace (Principle 10) and respect for the environment (Principle 11) are also emphasised.

Despite these positive features, ARTICLE 19 has a number of concerns with the Preamble.

- Firstly, the preamble does not make explicit reference to the Constitution’s role in protecting and promoting the universal human rights of all people. Instead, references to rights are fragmented across a number of provisions, and may create the misimpression of a hierarchy between certain rights and interests to the demotion or exclusion of others. An express commitment in the preamble to prioritising and treating as paramount universally recognised human rights, with reference to the UDHR, ICCPR and ICESCR, would strengthen the Constitution significantly.
- Secondly, a number the rights articulated in the preamble are reserved to “citizens”, and therefore non-citizens are potentially excluded from the enjoyment of fundamental rights that should be guaranteed regardless of nationality status.⁴¹ This language should be made more inclusive, to include all people within the territory or subject to the jurisdiction of Egypt.
- Thirdly, the reference to freedom of expression in Principle 7 is qualified in a manner that does not comply with international standards. While the positive role of open and public expression is emphasised, the qualifying phrase “instead of whispering their thoughts secretly, they voice them out loud”, may be interpreted to afford less protection to the private exchange of opinions and ideas. As the UN Special Rapporteur on freedom of opinion and expression has recently emphasised, freedom of expression cannot be ensured without respect for privacy in

⁴¹ See: ICCPR, Article 2(1); see also: HR Committee, General Comment No. 15 on the Position of Aliens under the Covenant, HRI/GEN/1/Rev.9, 1986.

communications.⁴² The qualifying phrase should be removed from the reference to the importance of freedom of expression in Principle 7.

- Fourthly, there are numerous references to the importance of national unity, security, and defence of the motherland that potentially conflict with guarantees for rights (Principles 3 – 5). For example, “national unity” is identified in Principle 3 as a pillar of the modern Egyptian state, and “tolerance, reasonability and moderation” are values that supposedly protect this pillar. However, the security of any democratic state must be based on respect for human rights and a legal environment that allows for the robust exchange of competing viewpoints. National security and public order are frequently invoked to justify human rights violations. In this context, the terms “tolerance, reasonability and moderation” may be relied upon to suppress minority and contentious viewpoints and violate the right to freedom of expression. As such, the Constitution should make clear that respect for human rights is an essential condition for the maintenance of national unity and security.
- Fifthly, the Preamble introduces the Constitution “In the Name of God, Most Gracious, Most Merciful”, and concludes that the acceptance of the Constitution is “out of a belief in God Almighty and his heavenly messages.” Reference is also made in the third paragraph of the preamble to “faith that we are part and parcel of the Arab and Muslim nations”. While it is common for constitutions in their preamble to include symbolic references to religion, it is the view of ARTICLE 19 that Constitutions should not privilege one belief system above any other or none. This is based on the concern that the right to freedom of religious belief for religious minorities (e.g. Coptic Christians) and non-believers may be threatened, and the right to equality and non-discrimination, particularly for women and girls, may be compromised. The acceptance of the principles in the constitution should not be made conditional on one particular faith or belief system. If inclusion of religious language in the preamble is regarded as absolutely essential, those references should be neutral to encompass all religions as well as those without a religion.

Recommendations:

- The Preamble should stress as a priority the universality of human rights for all people, without limiting this on the basis of citizenship. This could include reference to the UDHR and other instruments such as the ICCPR and ICESCR;
- Principle 7 of the Preamble should be revised to reflect that while the right to express oneself freely in public is important, private expression is also protected;
- Principles 4 – 6 of the Preamble should be revised to make clear that national unity and security are not a condition for the enjoyment of human rights, but that these ends can only be achieved through respect for universal human rights;
- The Preamble should not make the acceptance of the Constitution, or a person’s willingness to uphold it, conditional on religious faith or any other belief system.

Status of international law in the Constitution

In Article 126 on “foreign relations”, the President is given the power to conclude treaties, and to ratify them with the approval of the People’s Assembly. Once ratified and published, such provisions have the force of law according to the provisions of the Constitution.

⁴² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/23/40, 17 April 2013.

It is positive that treaties receive the force of law upon ratification and publication. The HR Committee has expressed a preference for the immediacy and directness of the ‘monist’ system of giving legal effect to treaty obligations.⁴³

However, Article 126 further states that “no treaty which is contrary to the provisions of the Constitution or which leads to reducing the state territories can be approved.” Moreover, any treaty “related to the rights of sovereignty” must also be affirmed by a referendum of the people.

Regarding the status of international law, ARTICLE 19 has a number of concerns.

- Firstly, the status of international law should be set out clearly in a dedicated provision, rather than requiring inferences to be drawn from the President’s foreign affairs power. This is an important point of Constitutional interpretation, and should be precisely set out.
- Secondly, it is not clear whether existing ratified and published treaties are only valid if consistent with the Constitution. While it is common for Constitutions to have primacy in domestic legal orders,⁴⁴ the Vienna Declaration on the Law of Treaties (VDLT) at Article 27 requires that States not invoke their internal law as justification for its failure to adhere to international law. The Constitution should make clear that it is to be interpreted in light of the country’s obligations under international law.
- Thirdly, the requirement that treaties related to the rights of sovereignty be subject to a referendum is ambiguous, and may create an unnecessary obstacle to the ratification of future human rights treaties. “Sovereignty” is not defined in the constitution, although Article 5 does specify that “sovereignty” belongs to the people. It is unclear what characteristics would subject a treaty to the referenda requirement.
- Fifthly, the Constitution does not specify that treaties can only be repealed, modified or suspended in the manner provided for in the treaty themselves, as per Article 42 of the VDLT.

By comparison, see, for example:

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.

Recommendations:

- The Constitution should include a dedicated provision on the status of international law;
- International law should have primacy over internal law, with the exception of the Constitution. Internal law may not be invoked to justify violations of international law;
- The requirement that treaties infringing on “sovereignty” should be subject to referenda should be clarified, and this should not be an obstacle to the ratification of human rights instruments;
- Treaties should only be repealed, modified or suspended in the manner provided for in the treaty themselves.

⁴³ HR Committee, General 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.

⁴⁴ This is the case in the Dutch, French and Czech Constitutions.

Right to equality and non-discrimination

The right to equality and non-discrimination are basic conditions for the realisation on all human rights, and are protected under Article 2(1) and Article 26 of the ICCPR.

Two provisions in the Draft Constitution concern the right to equality. Article 9, within Part One of the Constitution defining the State, provides that “the State ensures equal opportunity for all citizens without discrimination.” Article 38, which is contained within the section on “Public Rights, Freedoms and Duties”, provides that “Citizens are equal before the law. They have equal public rights and duties without discrimination between them based on sex, gender, origin, language, religion, belief, or any other reason.”

It is positive that the list of protected characteristics in Article 38 is open-ended and therefore non-exhaustive. However, a number of improvements could strengthen the provision to reflect international standards.

- Firstly, the right to equality should be guaranteed to all people, regardless of citizenship status.⁴⁵ It should also specifically protect the equal enjoyment of all of the rights contained in the Constitution without distinction of any kind (as per Article 2(1) of the ICCPR).
- Secondly, it is concerning that a number of protected characteristics are not specifically included in Article 38, despite being listed in Article 2(1) of the ICCPR. This includes national origin, race and colour, property, birth, and political or other opinion. The grounds of sexual orientation and gender identity are also not included.⁴⁶
- Thirdly, the right to equality and non-discrimination, or the exercise of any other fundamental rights, should not be made conditional on the performance of duties. Equality before the law and non-discrimination in the enjoyment of rights should be protected separately from any provision outlining duties.

Fifthly, ARTICLE 19 is concerned that several provisions in the Draft Constitution contradict the guarantees for equality in Article 38:

- Article 10, which speaks about the role of the State in “consolidating” the “moral values” of the family, may provide the basis for discriminating against women, or lesbian, gay, bisexual, trans or intersex (LGBTI) people who do not conform to prevailing gender norms associated with narrow interpretations of the term “family”.
- Article 11 states that the equal status of women and men is “without prejudice to the principles of Islamic Sharia.” Article 11 also provides that the State ensures “protection and care for motherhood and childhood”, and “the reconciliation between the duties of a woman toward her family and her work in the society”. The provision advances prejudicial stereotypes of women, limiting their role in society to motherhood, and assumes that women have heightened responsibilities to their families compared to men. No provision in the Constitution clarifies what additional duties fall upon men in relation to the family. Each aspect of Article 11 clearly violates international human rights standards on equality and non-discrimination. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) requires States not only to refrain from gender-based discrimination but also to proactively combat it. Article 5 of CEDAW obliges the State to modify social and cultural patterns of conduct to achieve “the elimination of

⁴⁵ See: ICCPR, Article 2(1); see also: HR Committee, General Comment No. 15 on the Position of Aliens under the Covenant, HRI/GEN/1/Rev.9, 1986.

⁴⁶ *Toonen v. Australia*, Communication No. 488/199, CCPR/C/50/D/488/1992 (1994). See also: *Young v Australia*, communication No. 941/2000; *X v. Columbia*, communication No. 1361/2005.

prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Moreover, Article 5 of CEDAW recognises that maternity is a “social function” and not as a social purpose of women. It recognises that the upbringing and development of children is a shared responsibility of women and of men. The obligations Article 5 places on the State should be reflected in Constitutional protections for the right to equality.

Recommendations

- The right to equality should be guaranteed to all people, regardless of citizenship status.
- All of the rights in the Constitution should be guaranteed without distinction of any kind.
- The protected characteristics in Article 38 should be extended to include: national origin, race and colour, property, birth, political or other opinion, sexual orientation and gender identity.
- Article 10 and Article 11 should be removed from the Constitution because they promote harmful gender-based stereotypes. They should be replaced by a provision explicitly stating the obligation on the State to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women, as per Article 5 of CEDAW.

The right to freedom of opinion and expression

Article 48 of the Constitution covers the right to freedom of opinion and freedom of expression under one provision. It provides:

Article 48: Freedom of Thought

Freedom of thought and opinion is guaranteed.

Every individual has the right to express an opinion and to disseminate it verbally, in writing or through illustration, or by any other means of publication and expression.

Scope of the right to freedom of opinion

ARTICLE 19 finds it positive that the right to freedom of opinion is guaranteed in unqualified terms, as under Article 19(1) of the ICCPR.⁴⁷ No law or constitutional provision should permit limitations on the right to hold an opinion under any circumstances.

Scope of the right to freedom of expression

While it is positive that the right to freedom of expression is protected to “every individual”, a number of features of the right that are included in Article 19(2) of the ICCPR are missing:

- Firstly, the right to freedom of expression relates not only to the “dissemination” of information, but encompasses the right to seek, receive, and impart information. These three aspects should be explicitly emphasised in Article 48.
- Secondly, the right to freedom of expression protects the sharing of *information and ideas of all kinds*. It is not limited to the sharing of opinions. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It even embraces expression that may be regarded as deeply offensive.
- Thirdly, the right to freedom of expression applies regardless of frontiers. Political borders should not be a barrier to the freedom of seek, receive, or impart information.

⁴⁷ General Comment No. 34, *op. cit.*, at paras 9 – 10.

- Fourthly, the right to freedom of expression should be guaranteed through any media of a person's choice. While Article 48 is open-ended in this regard, the specified list of means (verbally, in writing or through illustration) would be strengthened if it included specific reference to electronic and Internet-based modes of communication, including mobile technologies. This principle has been recognised by Constitutional bodies in France, Costa Rica and Finland, and affirmed by the HR Committee in General Comment No. 34.
- Fifthly, the title of Article 48 should reflect that the provision encompasses both the right to freedom of opinion and the right to freedom of expression. It may add clarity for the rights to be enumerated in consecutive but separate provisions.

Recommendations

- The title to Article 48 should reference both the right to freedom of opinion and the right to freedom of expression;
- The right to freedom of expression should encompass the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers.
- Consideration should be given to specifying that the right to freedom of expression through electronic and Internet-based modes of communication.

The right of access to information

It is positive that the Draft Constitution provides separate protection for the right of access to information in Article 50:

Access to information, data, statistics and documents, its disclosure from their different sources and transparent circulation is a right guaranteed by the state to all citizens, on the condition that this does not violate the sanctity of private life or the rights of others, and that it does not conflict with national security.

The law organises the rules for filing and archiving public documents, and the means to access information.

As outlined above, the right of access to information is a fundamental human right protected by Article 19 of the ICCPR.

Access to information for all

The right of access to information should be guaranteed to all people and not limited to citizens.⁴⁸ This would also make the provision consistent with the protection provided for the right to freedom of expression, which is guaranteed to “all individuals” in Article 48. It would also follow the example of positive Constitutional protections for the right of access to information in South Africa (Article 32 of the 1996 Constitution), Norway (Article 100 of the 1814 Constitution as amended in 2004), Bulgaria (Article 41 of the 1991 Constitution as amended) and Colombia (Article 74 of the 1991 Constitution).

Proactive disclosure

The Constitution should place a positive obligation on public bodies to proactively disclose to the public domain government information of public interest, and to ensure easy, prompt, effective, affordable and practical access to such information.⁴⁹ The Constitution of Kenya (2010) creates this obligation in Article 35(3), for example.

⁴⁸ See: ICCPR, Article 2(1); see also: HR Committee, General Comment No. 15 on the Position of Aliens under the Covenant, HRI/GEN/1/Rev.9, 1986.

⁴⁹ General Comment No. 34, *op. cit.*, at para. 19.

Access to information held by public bodies

It is positive that Article 50 makes clear that it is an obligation on the State to provide access to information. However, the provision should add that the right applies to any information held by a public body. In certain circumstances, the right should also apply to access information held by private bodies. In South Africa, Article 32 of the Constitution guarantees a right of access to information held by a private person “that is required for the exercise or protection of any rights”.⁵⁰

Limiting the right of access to information

While the right of access to information is not absolute, and may be limited, any restrictions must comply with Article 19(3) of the ICCPR. As outlined below, a significant weakness of the Draft Constitutional Amendments is the lack of consistency in the provision for limitations on rights. In addition to these observations, the drafters should take into account further considerations when limiting the right of access to information.

The condition in Article 50 that the right of access to information is not exercised to “violate the sanctity of private life or the rights of others, and that it does not conflict with national security” does not comply with the three-part test of Article 19(3) of the ICCPR. The provision invokes legitimate aims (the second part of the test) but does not refer to the principle of legality (the first part of the test) or the principles of necessity and proportionality (the third part of the test).

Elaborating on the three-part test, the international mandate holders on freedom of expression have stated that any exception to the principle of “maximum disclosure” (the presumption that all information is accessible, subject to a limited regime of exceptions) must be subject to the “harm” and “public interest” tests. This requires exceptions to the right of access to information to set out clearly that access to information be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing information.⁵¹ The qualification provided in Article 50 is much broader than this, and requires narrowing significantly.

Recommendations

- The right of access to information should be guaranteed to all people, regardless of citizenship status;
- The Constitution should provide the positive obligation on public bodies to proactively disclose information and recognise the principle of maximum disclosure;
- The right of access to information should apply to all information held by public bodies, and also to private bodies where that information is required for the exercise or protection of any rights;
- Limitations on the right of access to information must comply with Article 19(3) of the ICCPR, and limitations must be justified on the basis of the “harm” and “public” interest tests.

The right to freedom of peaceful assembly and of association

The right to freedom of peaceful assembly is recognised in Article 53 of the Draft Amendments:

Article 53: Freedom of Assembly

Citizens have the right to organise public meetings, processions and peaceful demonstrations. They must be unarmed and must provide notification as regulated by the law.

⁵⁰ See also, the Constitution of Kenya (2010), at Article 35(1)(b).

⁵¹ Joint Declaration (2006) 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 Special Rapporteur on Freedom of Expression; available online at: <http://www.osce.org/fom/99558?download=true>

The right to private assembly is guaranteed to citizens provided that they are quiet and unarmed without the need to prior notification. Security personnel may not attend, inspect or eavesdrop on such meetings.

This provision does not comply with international standards on the right to freedom of peaceful assembly and requires substantial revision.

Peaceful

The right to “freedom of assembly” should be reformulated as the “right to freedom of peaceful assembly,” to reflect Article 21 of the ICCPR. This encompasses the principle that assemblies should be unarmed, but also goes further to require that the intention of participants must be to act peacefully.

International standards do not require that assemblies be “quiet”, as specified under Article 53. Any restriction on sound levels at public or private assemblies must comply with three-part test of legality, legitimate aim, and necessity.

Presumption in favour of the exercise of rights

If possible, the Constitution should establish a presumption in favour of holding an assembly, which should include the freedom to organise and participate in assemblies. For a comparative perspective, see the Constitution of Romania (1991), at Article 39. The provision should also specify the State’s positive obligation to facilitate and protect public assemblies at the organisers’ preferred location and time.

The right to freedom of peaceful assembly for all people

The right to freedom of peaceful assembly should be guaranteed to all people and not limited to citizens.⁵² This would also make the provision consistent with the protection provided for the right to freedom of expression, which is guaranteed to “all individuals” in Article 48.

Notification requirements

Notification requirements restrict the right to freedom of peaceful assembly and must comply with the three-part test. Imposing a general notification requirement without limiting this by reference to the three-part test creates the potential for excessive restrictions on the right to freedom of peaceful assembly.

While notification requirements may comply with international standards, they constitute only one part of the regulatory framework required to properly protect and promote the right to freedom of peaceful assembly. A number of considerations should be taken into account before requiring notification. In many countries notification requirements are only imposed for assemblies with a large number of participants,⁵³ or are in place for marches and parades but not for static assemblies.⁵⁴ Importantly, international standards require that spontaneous assemblies should be exempt from prior-notification requirements.⁵⁵

⁵² See: ICCPR, Article 2(1); see also: HR Committee, General Comment No. 15 on the Position of Aliens under the Covenant, HRI/GEN/1/Rev.9, 1986.

⁵³ *Ibid.* Articles 3 and 12 of Moldova’s Law on Public Assemblies only requires notification where there are more than 50 participants. The Polish Law on Assemblies only requires notification on assemblies of more than 15 people; the Croatia Law on Public Assemblies only requires notification on assemblies of more than 20 people. See the Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States (2012).

⁵⁴ See, e.g. UK Public Order Act, 7 November 1986, s.11.

⁵⁵ *Ibid.* See also: 2012 annual report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, *op. cit.*, para. 29.

These regulatory considerations are complex and require setting out in detailed legislation to protect and promote the right to freedom of peaceful assembly. The constitutional provision should, instead, make clear the scope of the right and provide clear but general guidance on how the right can legitimately be restricted, in accordance with the three-part test.

Private assemblies

The purpose of the second paragraph to Article 53 is unclear. Excluding private assemblies from notification requirements is consistent with international standards, but as outlined above it is unnecessary to go into this level of detail in the Constitutional guarantee of the right. Moreover, the issue of security personnel (or any other arm of the State) interfering with the privacy rights of people in assemblies should be dealt with through comprehensive protections for the right to privacy, rather than included as an addendum to the right to freedom of peaceful assembly in private. This is because the right to privacy applies in every field of life, and is not limited to peaceful assemblies that take place in private.

Recommendations

- Article 53 should protect the right to freedom of peaceful assembly, and references to “quiet” assemblies should be removed;
- The right to organise and participate in peaceful assemblies should be guaranteed;
- Article 53 should place a positive obligation on the state to facilitate the exercise of the right to freedom of peaceful assembly;
- The right to freedom of peaceful assembly should not be restricted on the basis of citizenship status;
- Restrictions on the right to freedom of peaceful assembly, including notification requirements, must comply with the three-part test under Article 22 of the ICCPR;
- The right to freedom of peaceful assembly in private does not require separate protection. The right to privacy should be protected comprehensively in a separate provision.

Limitations on the right to freedom of expression and information, and the right to freedom of peaceful assembly

There is no provision in the Constitution that distinguishes absolute rights that may not be qualified or derogated from (as per Article 4(2) ICCPR), from rights that may, under specified circumstances, be subject to restrictions.

Article 68 of the Constitution provides in very general terms:

The rights and freedoms inherent in the citizen’s person cannot be suspended or detracted from.

No law may regulate the exercise of these rights or freedoms in a way that constrains their origin and essence.

No guidance is given to States on which rights may be limited to protect other rights or national interests, and what considerations should constrain the actions of authorities in this regard.

Any restriction on the rights to freedom of expression and the right to freedom of peaceful assembly must conform with the three-part test set out in Article 19(3) and Article 22 of the ICCPR and be (i) provided for by law, (ii) pursue a legitimate aim, i.e. the protection of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals, and (iii) be necessary and proportionate. This test is set out in detail in the international standards section above.

It is common in many Constitutions to provide a general limitations provision that applies to all of the rights contained in the chapter enumerating fundamental rights. Such provisions tend to embody the three-part test. This can be seen, for example, in the Constitution of South Africa (Bill of Rights) 1996, at Article 36:

(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.

It should also be emphasised that the prohibition of discrimination in the enjoyment of rights also applies to the limitation of rights. The Constitution must therefore avoid qualifying the three-part test as it applies to the right to freedom of expression and information by reference to a person's gender, religion, or other protected characteristic recognised under international human rights law.

Recommendations:

- The Constitution should specify which rights cannot be qualified or limited, including the right to freedom of opinion, as protected by Article 19(1) of the ICCPR.
- The Constitution should provide guidance on the limitation of rights that are not absolute, and in relation to the right to freedom of expression and information, and the right to freedom of peaceful assembly, these should comply with Article 19(3) of the ICCPR and Article 22 respectively.

Media freedom

Articles 51 and 52 of the Constitution concern freedom of the press and freedom of publication respectively.

It is positive that the Constitution protects media freedom. 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.”⁵⁶ In particular, the following features of these provisions should be retained:

- The guarantee for freedom of the press, printing, publication and mass media, including references to its independence (Article 51);
- The ban on prohibiting, closing or confiscating media outlets without a court order;
- The ban on monitoring what media outlets publish.

However, there are numerous aspects of Articles 51 and 52 that do not comply with international standards on media freedom, and the need for additional details to ensure the protections for media freedom are robust.

Two important principles that must underpin guarantees for media freedom should be more explicitly reflected in the Constitution. These are that the State should:

⁵⁶ *Thorgeisen v Iceland*, Application No 13778/88 judgment of 25 June 1992 of the European Court of Human Rights at 63.

- 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;
- Ensure that public broadcasting services operate in an independent manner.⁵⁷ 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.

Neither Article 51 nor Article 52 contains a requirement for the State to guarantee the independence and plurality of the media. Independence is referenced, but as a duty of the media rather than as a principle that the State must respect. Plurality, and the need for the media to reflect the interests of ethnic and linguistic minorities, is also excluded.

To comprehensively protect media freedom, the following aspects need to be integrated to Articles 51 and 52:

- **There should be no prior censorship**, as required by Article 13(2) of the ACHR. This means that no media entity should have to seek approval for content from any arm of the State before disseminating that information.
- **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.
- **Any duty imposed on the media, including by a regulatory body, must comply with the three-part test set out in Article 19(3) of the ICCPR.** In this regard, Article 51 contains a number of over-broad duties on the media, such as the duty to protect the private lives of citizens and the requirements of national security. The provision fails to recognise that in some circumstances, the public interest will justify infringements on privacy rights or on national security interests.
- **The right of journalists to protect their confidential sources should be guaranteed.** The African Declaration, for example, provides that media practitioners should 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.
- **There should be no licensing of print media outlets, or of individual journalists in the print, broadcasting or online sectors.** 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.⁵⁸ 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

⁵⁷ Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

⁵⁸ *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.

discretion to the authorities to refuse registration.⁵⁹ To this end, requirements of notification, such as those put forward in Article 52, may comply with international standards.

- **Journalists should be guaranteed the right to associate freely**, as per Article 22 of the ICCPR.

By way of comparison, the Kenyan Constitution (2010) is especially comprehensive and incorporates many of the principles outlined above:

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.

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.

⁵⁹ Joint Declaration of 18 December 2003; available at <http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

Freedom of religion or belief

As noted in relation to the preamble, the Constitution privileges the position of Islam in the legal order in a manner that may endanger the rights of religious minorities. These concerns are reflected in the substantive provisions on freedom of religion or belief.

This includes Article 2, which establishes Islam as the State religion, and Islamic Sharia as the principle source of legislation.

Allowance is made in Article 3 to “Christian and Jewish religious affairs”, essentially allowing their own laws to govern personal status, religious affairs and the nomination of spiritual leaders. However, other religious denominations that are present in Egypt are not expressly referenced, nor are those who identify as atheist or agnostic.

It is positive that Article 47 provides that “freedom of belief is inviolable”, and the right to practice religious rites and establish places of worship for divine religions is guaranteed in neutral terms that does not reference one religion over any other. This provision should be retained.

Recommendations

- Articles 2 and 3 should be removed. The Constitution should not establish a State religion, or privilege one religious legal system, such as Sharia, over any other. All references to any specific religious beliefs should be only symbolic and confined to the preamble.

Conclusions

ARTICLE 19 welcomes the opportunity to present the recommendations contained in this analysis to the drafters of the Constitution. As the Constitution recognises, the right to freedom of expression and information, and related rights, are fundamental. We stand ready to provide further assistance to the drafters to bring the provisions in line with international standards.

About ARTICLE 19

The ARTICLE 19 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 ARTICLE 19 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/>.

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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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