

ARTICLE 19

# Egypt: Draft Constitution (the version of December 2013)

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Legal analysis





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## Executive summary

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In January 2014, ARTICLE 19 analysed Draft Constitution of the Arab Republic of Egypt of 2 December 2013 (Draft Constitution) from the perspective of international human rights standards, in particular on freedom of expression and freedom of information.

The Draft Constitution, prepared pursuant to Article 29 of the Constitutional Declaration of 8 July 2013 by a 50-member committee, will be voted on in a referendum scheduled for 14 January 2014.

The ARTICLE 19's review comes two months after the legal analysis of an earlier version of the Draft Constitution. It builds on ARTICLE 19's broader work to promote freedom of expression and freedom of information in Egypt and in the MENA region more generally, especially since the beginning of the first wave of the Arab Awakening. It is also presented against the backdrop of an apparently deteriorating human rights situation under the military-backed government, which causes serious concern from the perspective of civil and political rights.

The purpose of the analysis is to emphasise the positive aspects of this Draft Constitution, draw out its negative features through the prism of those international human rights law standards, and present recommendations for its improvement. ARTICLE 19 raises many of the same points of concern as it did in its previous analysis of the earlier Draft Constitution.

Overall, one major flaw of the text remains its apparent adherence to the notion of citizenship as a requirement for the exercise of human rights that should be enjoyed by all. In order to address this and other problems with the Draft Constitution, ARTICLE 19 offers a series of recommendations.

### **Summary of recommendations**

1. The Constitution should, in its Preamble, omit any references to citizenship as a condition for the enjoyment of human rights;
2. The Constitution should state that the rights and freedoms - guaranteed by the Constitution - should be interpreted in line with the international human rights treaties binding on Egypt. It should also include a dedicated provision on the status of international law in the Egyptian legislation. In particular, it should state that international law should have primacy over internal law and cannot be invoked to justify a failure to adhere to international law;;
3. The Constitution should exclude reference to the "duties" of the people of Egypt in the Preamble;
4. The Constitution should ensure that provisions concerning the rights related to sovereignty does not present an obstacle to the ratification of human rights treaties;
5. The Constitution should state that treaties can only be repealed modified or suspended in the manner provided for the particular treaty itself;
6. The Constitution should protect the right to freedom of expression as encompassing the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers;

7. The Constitution should specify that freedom of expression is protected through all media, including internet-based media;
8. The Constitution should provide that any advocacy of hatred (on a ground of discrimination recognised in international law) that constitutes incitement to discrimination, hostility or violence shall be prohibited by law;
9. The Constitution should grant the right to freedom of information to all people, irrespective of citizenship status. It should also provide that state bodies should recognise the principle of maximum disclosure and have a duty to proactively disclose information in the public interest and that freedom of information applies to all information held by public bodies;
10. The Constitution should include a provision governing limitations on freedom of information which should meet the requirements of Article 19(3) of the International Covenant on Civil and Political Rights in doing so indicate that limitations must be justified on the basis of the “harm” and “public interest” tests;
11. The Constitution should not disadvantage or prejudice newspapers and media outlets which are not Egyptian;
12. The Constitution should require the state to promote pluralism, as well as independence, within a framework of self regulation for the print media, and to have in place policy and regulatory framework for the media, including internet-based media, which promotes pluralism and equality;
13. The Constitution should provide explicit protection for freedom of the media. In particular, it should 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 practicing 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;
  - Journalists should be free to associate in professional bodies of their choice.
14. The Constitution should provide that the right to equality is guaranteed to all individuals, regardless of citizenship status. It should also expressly protect the equal enjoyment of all of the rights contained in the Constitution without distinction of any kind. Further, it should encompass an equality provision which prohibits discrimination on the grounds including: national origin, property, birth, political or other opinion, sexual orientation and gender identity;
15. The Constitution should remove provisions on the family and the place of women as they may be relied upon to justify discriminatory practices, particularly against women, and replace them with a provision explicitly stating the obligation on the state to achieve the elimination of discriminatory practices and attitudes;
16. The Constitution should protect the right to organise and participate in peaceful assemblies and should impose a positive obligation on the state to promote the exercise of freedom of peaceful assembly. The right to peaceful assembly should be guaranteed irrespective of citizenship status. Any restrictions on the right to peaceful assembly should be in accordance with the three-part test under Article 22 of the the International Covenant on Civil and Political Rights;
17. The Constitution should not protect freedom of peaceful assembly in private in the same provision as freedom of peaceful assembly generally, and instead protect the right to privacy comprehensively in a separate provision;



18. The Constitution should not establish a State religion or privilege one religious legal system, such as Sharia, over any other, and remove any references to any specific religious beliefs unless they are symbolic and confined to the preamble.

# Introduction

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This ARTICLE 19 legal analysis examines the Draft Constitution of the Arab Republic of Egypt of 2 December 2013 and prepared pursuant to Article 29 of the Constitutional Declaration of 8 July 2013 (Draft Constitution) from the perspective of international human rights law and standards on freedom of expression and freedom of information.<sup>1</sup>

The Draft Constitution is intended to amend the suspended Egyptian Constitution that was signed into law by former President Mohammed Morsi barely a year ago, in December 2012, following its approval by the Constituent Assembly and in a referendum.<sup>2</sup>

This legal analysis comes two months after the legal analysis of an earlier version of the Draft Constitution, which highlighted a number of significant shortfalls in that draft and presented a set of recommendations to address those deficiencies.<sup>3</sup>

Moreover, this analysis builds on and should be seen within the context of ARTICLE 19's broader work to promote freedom of expression and freedom of information since the Egyptian revolution in January 2011, as well as in the region more generally in the wake of the first wave of the Arab Awakening.<sup>4</sup>

Since May 2012, when ARTICLE 19 presented a landmark policy brief on how freedom of expression and freedom of information should be best protected in the Egyptian Constitution in an attempt to influence the drafting of the now-suspended Constitution,<sup>5</sup> the organisation has expressed its growing concerns about developments both under the government of former President Morsi and following the military takeover of the state in July 2013 with respect to the protection of freedom of expression, freedom of information and related rights, including freedom of association and freedom of assembly.<sup>6</sup> ARTICLE 19 has issued a number of statements expressing its, often serious, concern about, amongst other things: the killings of protestors supporting former President Morsi<sup>7</sup> and the excessive use of force against

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<sup>1</sup> The unofficial translation was prepared by International IDEA, the International Institute for Democracy and  
<sup>2</sup> The Draft Constitution is presented as a "new constitutional document" in amending the suspended 2012 Constitution.

<sup>3</sup> ARTICLE 19, Egypt: Proposed amendments to the Constitution", 24 October 2013; available at <http://www.article19.org/resources.php/resource/37312/en/egypt:-proposed-amendments-to-the-constitution>

<sup>4</sup> ARTICLE 19 has been involved in consultations towards the development and adoption of a Tunisian constitution; see notably: ARTICLE 19, Tunisia's constitution should be a model to protect free expression in the region, 9 December 2013; available at <http://www.article19.org/resources.php/resource/37391/en/tunisia's-constitution-should-be-a-model-to-protect-free-expression-in-the-region#sthash.eGHGKEik.dpuf>; and ARTICLE 19, Tunisia: Civil society representatives call for the revision of articles concerning freedom of expression in the new constitution, 4 November 2013, available at <http://www.article19.org/resources.php/resource/37327/en/tunisia:-civil-society-representatives-call-for-the-revision-of-articles-concerning-freedom-of-expression-in-the-new-constitution#sthash.OrQyJHhK.dpuf>.

<sup>5</sup> ARTICLE 19, Egypt: Protecting Freedom of Expression and Freedom of Information in the New Constitution, May 2012; available at <http://www.article19.org/data/files/medialibrary/3092/12-05-09-LA-egypt.pdf>. A similar brief was produced for the drafting of the Tunisian Constitution, in April 2012; available at <http://www.article19.org/resources.php/resource/3018/en/article-19-launches-landmark-report-on-how-to-guarantee-free-expression-in-new-constitution>

<sup>6</sup> ARTICLE 19 has also examined the protection of freedom of expression and freedom of information.

<sup>7</sup> ARTICLE 19, Egypt: ARTICLE 19 condemns the killings of scores of pro-Morsi protesters while clearing peaceful sit-ins in Cairo, 14 August 2013; available at <http://www.article19.org/resources.php/resource/37204/en/egypt:-article-19-condemns-the-killings-of-scores-of-pro-morsi-protesters-while-clearing-peaceful-sit-ins-in-cairo>

demonstrators;<sup>8</sup> the maintenance of high fines as a punishment for insulting the president;<sup>9</sup> the Egyptian closure of the private television channels, the arrest of media workers and the jamming of foreign satellite channels;<sup>10</sup> the decision of the Cairo Criminal Court sentencing 43 activists, including the representatives of Egyptian and foreign NGOs, to prison sentences of between one and five years;<sup>11</sup> or proposed legislation on the right to demonstrate in public places,<sup>12</sup> another version of which was adopted later in November 2013.<sup>13</sup>

While ARTICLE 19 remains very concerned by the suppression of civil and political rights – particularly of protestors, demonstrators and political dissidents – in Egypt,<sup>14</sup> this legal analysis specifically focuses on assessing the Draft Constitution for its compliance with international human rights law and standards on freedom of expression and freedom of information. It does not recall and repeat relevant international human rights law and standards on freedom of expression and freedom of information which are set forth in ARTICLE 19's analysis of the earlier Draft Constitution.<sup>15</sup>

The purpose of the analysis is to emphasise the positive aspects of this Draft Constitution, especially in comparison with the previous draft, draw out its negative features through the prism of those international human rights law standards, and present recommendations for its improvement.

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<sup>8</sup> ARTICLE 19, Excessive use against protestors, 29 July 2013; available at <http://www.article19.org/resources.php/resource/37183/en/egypt:-excessive-use-of-force-against-protestors>

<sup>9</sup> ARTICLE 19, Egypt: Prison sentence for insulting president removed but further reform needed, 8 August 2013; available at <http://www.article19.org/resources.php/resource/37200/en/egypt:-prison-sentence-for-insulting-president-removed-but-further-reform-needed#sthash.tvQ6zIUB.dpuf>

<sup>10</sup> ARTICLE 19, Military's closure of television channels is a violation of freedom of expression and information, 8 July 2013; available at <http://www.article19.org/resources.php/resource/37153/en/egypt:-military's-closure-of-television-channels-is-violation-of-freedom-of-expression-and-information>

<sup>11</sup> ARTICLE 19, Egypt: Prison sentences against 43 activists condemned, 6 June 2013; available at <http://www.article19.org/resources.php/resource/3789/en/egypt:-prison-sentences-against-43-activists-condemned>

<sup>12</sup> ARTICLE 19, Egypt: New legislation must protect free speech, not restrict it, 25 February 2013; available at <http://www.article19.org/resources.php/resource/3622/en/egypt:-new-legislation-must-protect-free-speech,-not-restrict-it>

<sup>13</sup> Law 107 of 24 November 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations was issued by the interim president, Adly Mansour, on the basis of his legislative powers under the Constitutional Declaration of 8 July 2013. See Human Rights Watch, Egypt: Deeply Restrictive New Assembly Law, 26 November 2013; available at <http://www.hrw.org/news/2013/11/26/egypt-deeply-restrictive-new-assembly-law>

<sup>14</sup> Sarah Leah Watson, The Government Cracks Down: Egypt Shrugs, *LA Times*, 24 December 2013; available at <http://www.hrw.org/news/2013/12/24/government-cracks-down-and-egypt-shrugs>; Human Rights Watch, Egypt: No Acknowledgement or Justice for Mass Protestor Killings, 10 December 2013; Human Rights Watch, Egypt: Dangerous Message for Protestors, 7 December 2013;

<sup>15</sup> ARTICLE 19, Egypt: Proposed amendments to the Constitution, 24 October 2013; available at <http://www.article19.org/resources.php/resource/37312/en/egypt:-proposed-amendments-to-the-constitution>



# Analysis of the Draft Constitution

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The Draft Constitution encompasses two hundred and forty seven articles 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 freedom of information. There have been a number of changes from the previous Draft Constitution analysed by ARTICLE 19. However, a great many of our observations and the recommendations which flow from them reassert and emphasise earlier ones we have made with respect to an earlier draft.

## General provisions

### *Preamble*

From an international human rights perspective, ARTICLE 19 welcomes the fact that the Preamble states that the Constitution is intended to be “in line with the Universal Declaration of Human Rights” (UDHR) which it is acknowledged that Egypt took part in drafting and approved.<sup>16</sup> It is positive that the Preamble affirms the “right of people” as the “source of authority” to “make their future”,<sup>17</sup> and states that the Constitution “completes the building of a modern democratic state with a civil government”<sup>18</sup> and “maintains our freedom.”<sup>19</sup>

However, a number of fundamental problems persist in the Preamble. These problems mainly concern the way in which the Preamble’s text undermines the principle of the universality of human rights and the notion that state actors should act to secure rights.

- *First*, the Preamble still suggests that human rights are only to be enjoyed by citizens or paints a confusing picture of their scope. Despite the references to the “right of people”, the Preamble asserts that it is the entitlement of “every *citizen* ... to live in this homeland in safety and security”<sup>20</sup> and “freedom, human dignity, and social justice are a right of every *citizen*”.<sup>21</sup> Yet human rights are to be enjoyed by all people, regardless of citizenship. As the first provision of the UDHR states: “all beings are born free and equal in dignity and rights”.
- *Second*, the Preamble and the Draft Constitution more generally is overly steeped religion in privileging Islam and Islamic traditions in a way that impinges on the realisation of human rights.<sup>22</sup> While constitutions commonly contain symbolic references to the religious heritage of state and it is noted that the Preamble makes references to Moses, the Virgin Mary and Jesus,<sup>23</sup> presumably as central figures in the other “revealed religions” of Judaism and Christianity, clearly advantages Islam over other faiths. This is

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<sup>16</sup> Para 25 of the Preamble.

<sup>17</sup> Para 20 of the Preamble.

<sup>18</sup> Para 22 of the Preamble.

<sup>19</sup> Para 26 of the Preamble.

<sup>20</sup> Para 19 of the Preamble.

<sup>21</sup> Para 20 of the Preamble.

<sup>22</sup> “Islam” is referred to in paras 8 and 24 of the Preamble, and Articles 2, 7 and 50 of the main body. The Muslim world” is referred to in para 13 of the Preamble and Article 1.

<sup>23</sup> Paras 6, 7 and 8 of the Preamble.

most clearly demonstrated by the Preamble's statement that indicates that the Constitution "affirms that the principles of Islamic Sharia are the principle source of legislation".<sup>24</sup> While Sharia may provide one source of inspiration for the development of law, it should not be used to trump the protection of human rights, including freedom of expression and freedom of information. To ensure that this does not happen, the Preamble should clearly state that the rights guaranteed by the Constitution should be interpreted in a way that is compatible with the UDHR, as well as the other key international treaties which Egypt is bound to implement domestically, notably the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>25</sup> and the regional human rights treaty, the African Charter on Human and Peoples' Rights (ACHPR).<sup>26</sup>

- *Third*, the Preamble's statement that the Constitution "achieves equality between us in rights *and duties* with no discrimination" [emphasis added] is problematic.<sup>27</sup> This is because it might be used to justify limits on the responsibility of state actors – whether the police, civil servants or judges – in protecting rights, including freedom of expression and freedom of information, and their positive obligations to ensure their realisation. The Constitution should identify state actors as holding the primary burden and responsibility of securing rights' protection.

#### Recommendations:

- The Preamble should reflect the principle of the universality of human rights. It should therefore omit any references to citizenship as a condition for the enjoyment of human rights.
- It should state that the rights and freedoms guaranteed by the Constitution should be interpreted in line with the UDHR as well as other international human rights treaties binding on Egypt, notably the ICCPR, ICESCR and ACHPR.
- The reference to the "duties" of the people of Egypt in the Preamble should be removed.

#### ***Status of international law***

Article 151 (ex-Article 126) of the Draft Constitution on "foreign relations", is much the same as the previous draft, and is positive insofar as it states that treaties "shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution".

It encompasses three (unnumbered) sub-paragraphs setting forth: in

1. the President's powers to conclude treaties and to ratify treaties upon approval of the House of Representatives;
2. a requirement that treaties of "peace and alliance", and treaties "related to the rights of sovereignty" may only be ratified following approval in a referendum; and
3. a requirement that no treaty may be concluded which is contrary to the provisions of the Constitution or which leads to the concession of state territories".

All these features are all problematic:

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<sup>24</sup> Para 24 of the Preamble.

<sup>25</sup> Egypt ratified both the ICCPR 1966 and the ICESCR 1966 on 14 January 1982.

<sup>26</sup> Adopted by all members of the Organisation of African Unity, now the African Union, including Egypt on 27 June 1981.

<sup>27</sup> Para 27 of the Preamble.

- the first suggests that the status of international law depends on inferences drawn from the President's foreign relations' powers;
- given the second point, it does not define the key notion of "sovereignty" and the "related rights", this provision may be relied upon to prevent the ratification of international human rights treaties;
- the third point lacks clarity as to whether treaties already ratified by Egypt are only valid if they are consistent with the Constitution and also does not specify that treaties can only be repealed, modified or suspended in the manner provided for in the respective treaty itself.

### Recommendations:

- The Constitution should include a dedicated provision on the status of international law in the Egyptian legislation. Namely, it should state that international law has primacy over internal law and cannot be invoked to justify a failure to adhere to international law.<sup>28</sup>
- The requirement that treaties related to the rights of "sovereignty" should be clarified and, in so doing, the Constitution should ensure that this provision does not present an obstacle to the ratification of human rights treaties.
- The Constitution should state that treaties can only be repealed modified or suspended in the manner provided for the particular treaty itself.

## Freedom of expression and freedom of information

### *The right to freedom of opinion and expression*

The right to freedom of opinion and freedom of expression is provided in Article 65 (ex-Article 48) of the Draft Constitution entitled "freedom of thought." The provision is similarly short to the previous version and states:

Freedom of thought and opinion is guaranteed. All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication.

ARTICLE 19 recalls the same comments it made about the previous draft. It is positive that the right to freedom of opinion is guaranteed in unqualified terms.<sup>29</sup> It is also encouraging that freedom of expression is protected to "all individuals". However, as stated previously, a number of essential aspects of Article 19(2) of the ICCPR are absent from Article 65 of the Draft Constitution.

- *First*, freedom of expression relates not only to the "dissemination" of information, but also encompasses the right to seek, receive and impart information.
- *Second*, freedom of expression protects the sharing of information and ideas of *all kinds*, not only individuals' opinions but also such things as "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 ... commercial advertising [and] ... expression that may be regarded as deeply offensive."<sup>30</sup>

<sup>28</sup> In accordance with Article 27 of the Vienna Convention on the Law of Treaties 1969.

<sup>29</sup> See Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 11 September 2011.

<sup>30</sup> *Ibid.*, para 11.

- *Third*, freedom of expression applies regardless of frontiers.<sup>31</sup>
- *Fourth*, Article 19 of the ICCPR protects all the forms and means of the dissemination of ideas, including speech, writing and sign language, images, objects of art, as well as books, newspapers, pamphlets, posters, banners, dress, legal submissions, as well as audio-visual, electronic and internet-based media.<sup>32</sup>

It is also significant that the second paragraph of Article 53 of the Draft Constitution states “discrimination and incitement to hate are crimes punishable by law.” The provision should be more closely defined to reflect Article 20 of the ICCPR which states: “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. In particular, the provision should require that “incitement to discrimination, hostility or violence” should be prohibited, rather than the vaguer and more ambiguous notion of “hatred”. The provision should also be interpreted in line with the “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” and should apply to all grounds of discrimination recognised in international law.<sup>33</sup>

#### **Recommendations:**

- The title of Article 65 of the Draft Constitution should reference both the right to freedom of opinion and the right to freedom of expression.
- The Constitution should protect freedom of expression encompassing the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers.
- The Constitution should specify that freedom of expression is protected through all media, including internet-based media.
- The Constitution should provide that any advocacy of hatred (on a ground of discrimination recognised in international law) that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### **Freedom of information**

It is positive that Article 68 (ex Article 50) of the Draft Constitution protects the right to of “access to information and official documents.” It states:

Information, data, statistics and official documents are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency. The law shall organize rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.

State institutions shall deposit official documents with the National Library and Archives once they are no longer in use. They shall also protect them, secure them from loss or

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra note 34* at para 12.

<sup>33</sup> Rabat Plan of Action, Appendix in the Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013. ARTICLE 19 has argued for “an interpretation of Article 20(2) that provides a framework for the prohibition of incitement on all the protected grounds under international law”. See ARTICLE 19, *Policy Brief: Prohibiting incitement to discrimination, hostility or violence*, December 2012, p 21

damage, and restore and digitize them using all modern means and instruments, as per the law.

It is positive that this provision states:

- that information is said to be owned by “the people”;
- indicates that there should be legal rules governing specific penalties for the withholding of information and the providing of false information; and
- requires that state bodies archive official documents.

There are, however, a number of problematic features of this provision, similar to those associated with the earlier, admittedly different, draft version which ARTICLE 19 analysed. In sum, freedom of information is not protected in a full and comprehensive manner in accordance with international standards.

- *First*, unlike freedom of opinion and freedom of expression, Article 68 defines the right of access to information as a right for “all citizens” only and the state should only provide information to citizens.
- *Second*, the extent to which Article 68 establishes a duty on state bodies to proactively disclose to the public information in the public interest, if at all, is unclear.<sup>34</sup> The law should provide that state bodies are obliged to disclose such as information about the internal organisation of the public body, the decision-making process of the public body or financial information.
- *Third*, Article 68 still does not clarify that the right of access to information applies to any information held by a public body. *Fourth*, this provision fails to indicate the circumstances in which the right of access to information may be legitimately restricted. It is recalled that, under Article 19 of the ICCPR, the right of freedom of information may only be limited if the restriction is provided by law, justified by one of a set of legitimate aims and is necessary and proportionate.<sup>35</sup> This means that any exception to the principle of maximum disclosure of information must be subject to the “harm” and “public interest” tests. In other words, 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.<sup>36</sup>

### Recommendations:

- The Constitution should grant the right to freedom of information to all people, irrespective of citizenship status.
- The Constitution should provide that state bodies should recognise the principle of maximum disclosure and have a duty to proactively disclose information in the public interest or key information such as about the internal organisation of the public body, the decision-making process of the public body or financial information.
- The Constitution should provide that freedom of information applies to all information held by public bodies.

<sup>34</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 11 September 2011, para 19.

<sup>35</sup> *Ibid.*, para 22-36.

<sup>36</sup> 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; available at <http://www.article19.org/data/files/pdfs/igo-documents/four-mandates-dec-2006.pdf>

- The Constitution should include a provision governing limitations on freedom of information which should meet the requirements of Article 19(3) of the ICCPR and in doing so indicate that limitations must be justified on the basis of the “harm” and “public interest” tests.

## Related rights

### ***Media freedom***

Freedom of the press is covered by Article 70 (ex-51) and freedom of publication by Article 71 (ex-52), whilst independence of press institutions is covered by Article 72. Article 70 states:

Freedom of press and printing, along with paper, visual, audio and digital distribution is guaranteed. Egyptians – whether natural or legal persons, public or private – have the right to own and issue newspapers and establish visual, audio and digital media outlets.

Newspapers may be issued once notification is given as regulated by law. The law shall regulate ownership and establishment procedures for visual and radio broadcast in addition to online newspapers.

Article 71 then states:

It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way. Exception may be made for limited censorship in time of war or general mobilization.

No custodial sanction shall be imposed for crimes committed by way of publication or the public nature thereof. Punishments for crimes connected with incitement to violence or discrimination amongst citizens or impugning the honor of individuals are specified by law.

Article 72 on independence of press institutions then states:

The state shall ensure the independence of all press institutions and owned media outlets, in a way that ensures their neutrality and expressing all opinions, political and intellectual trends and social interests and guarantees equality and equal opportunity in addressing public opinion.

A major problem with Article 70 and 71 – like so many others in the Draft Constitution – is biased against non-Egyptians. Here, freedom of the press and freedom of publication, which are so connected to freedom of expression and freedom of information, are only guaranteed for *Egyptian* newspapers and publications. This would suggest that newspapers, whether print or online publications, and media outlets would have to be majority owned by Egyptian citizens in order for to operate or at least operate with the rights of a newspaper or publication that did have a majority Egyptian ownership.

Whilst it is positive that Article 71 acknowledges that incitement to violence or discrimination should be criminalised, it also suggests a bias against non-citizens. It may be viewed as positive that Article 72 promotes the independence of the press. However, it appears to do so by *obliging* “all press institutions” and “owned media outlets” to be independent and neutral, when the state should promote independence of the press by encouraging independence of

the mass media through self-regulation. In addition, the state should promote “objectivity” rather than “neutrality” as members of the press should clearly be permitted to present comment pieces preferring or advancing a political perspective or agenda. Relatedly, although independence is a goal none of the provisions contains a requirement for the state to promote pluralism in accordance with the *Camden Principles on Freedom of Expression and Equality*.<sup>37</sup>

In keeping with ARTICLE 19’s previous recommendations for the provisions on freedom of the press and media, we recommend reiterate our previous recommendations.

### **Recommendations:**

- The Constitution should not disadvantage or prejudice newspapers and media outlets which are not Egyptian.
- The Constitution should require the state to promote pluralism, as well as independence, within a framework of self regulation for the print media, and to have in place policy and regulatory framework for the media, including new media, which promotes pluralism and equality.
- The Constitution should provide explicit protection for freedom of the media and should 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 practicing 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;
  - Journalists should be free to associate in professional bodies of their choice.

### ***The right to equality and non-discrimination***

The provisions on the right to equality and non-discrimination in the Draft Constitution remains challenged by the same problematic features as the previous draft. Article 9 (ex-Article 9) provides that the “state ensures equality opportunity for all citizens without discrimination”.

The first paragraph of Article 53 (ex Article 38) then states “citizens are equal before the law, possess equal rights and public duties and, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason”. The third paragraph of the same article states that the “state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose”. It is positive that the list of grounds of discrimination is non-exhaustive, Article 53 includes “race and color” as protected grounds of discrimination whereas the previous draft Constitution did not, and there is provision for an independent commission to combat discrimination.

However, the following features fundamentally undermine the Draft Constitution’s equality provisions: the rights guaranteed therein apply only to citizens and not all people as required by international human rights law;<sup>38</sup> the list of grounds specified in Article 53 does not

<sup>37</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 11 September 2011, para 40.

See also Principle 5 of the *Camden Principles on Freedom of Expression and Equality*, April 2009

<sup>38</sup> Article 2(1) of the ICCPR; Human Rights Committee, General Comment No 15 on the Position of Aliens under



encompass national origin, property, birth, political or other opinion, sexual orientation and gender identity;<sup>39</sup> the reference to citizens' "public duties" suggesting that the enjoyment of human rights might be contingent on such duties.

Furthermore, other provisions in the Draft Constitution undercut those equality provisions on family and morality and the place of women. Article 10 on "family as the basis of society", which states that "family is the basis of society and is based on religion, morality and patriotism" and the role of the state is to "protect its cohesion and stability, and the consolidation of its values", maybe used to justify discrimination against women or members of the LGBTI community who do not conform with traditional concepts of "the family". Article 11 on the "place of women, motherhood and childhood" commits the state to protecting "women against all forms of violence, and ensure women empowerment to reconcile the duties of a woman toward her family and her work requirements". In so doing, the provision reinforces prejudicial gender stereotypes of women, assuming that they bear heightened responsibilities towards their families compared to men, and contradicts international human rights law on women's rights, particularly under the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).<sup>40</sup> This was discussed in our previous analysis of the earlier Draft Constitution.

#### **Recommendations:**

- The Constitution should provide that the right to equality is guaranteed to all individuals, regardless of citizenship status.
- The Constitution should expressly protect the equal enjoyment of all of the rights contained in the Constitution without distinction of any kind.
- The Constitution's equality provisions should be extended to expressly include: national origin, property, birth, political or other opinion, sexual orientation and gender identity.
- Articles 10 and 11 should simply removed from the Constitution because they promote harmful gender-based stereotypes and may be relied upon to justify discriminatory practices, particularly against women. They should be replaced by a provision explicitly stating the obligation on the state to achieve the elimination of practices and attitudes based on the inferiority or superiority of either of the sexes or on stereotypical ideas about the roles of women and men in society, based on Article 5 of CEDAW.

#### ***Freedom of assembly***

The right to freedom of assembly is recognised in Article 73 (ex-53) of the Draft Constitution. The provision is, for some reason, entitled "Freedom of House", although this might have been an error of translation. The provision is set out in very similar terms as the previous draft which ARTICLE 19 analysed save for the requirement that citizens are "quiet and unarmed" which is excluded from the current draft. It states:

Citizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protest, while not carrying weapons of any type, upon providing notification as regulated by law.

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the Covenant, HRI/GEN/1/Rev.9, 1986.

<sup>39</sup> *Toonen v Australia*, Communication No 488/199, CCPR/C/50/D/488/1992 (1992); *Young v Australia*, Communication No 941/2000 (2003); *X v Columbia*, Communication No 1361/2005 (2007).

<sup>40</sup> See Article 5 of CEDAW in particular. Egypt ratified CEDAW on 18 September 1981.



The right to peaceful, private meetings is guaranteed, without the need for prior notification. Security forces may not attend, monitor or eavesdrop on such gatherings (sic).

This analysis does not repeat the reflections upon international law on freedom of association but does reiterate many of our earlier recommendations.

**Recommendations:**

- The title of Article 73 should be changed to “freedom of peaceful assembly”.
- The Constitution should protect the right to organise and participate in peaceful assemblies.
- The Constitution should impose a positive obligation on the state to promote the exercise of freedom of peaceful assembly.
- The Constitution should guarantee the right to peaceful assembly irrespective of citizenship status.
- The Constitution should provide for restrictions on the right to peaceful assembly, such as prior notification requirements, which should meet the three-part test under Article 22 of the ICCPR.
- The Constitution should not protect freedom of peaceful assembly in private in the same provision as freedom of peaceful assembly generally. The right to privacy should be protected comprehensively in a separate provision.

***Freedom of religion or belief***

As noted in relation the Preamble, the Draft Constitution heavily privileges Islam in the legal order it establishes and in a way that potentially reduces the rights of religious minorities and non-believers:

- Article 2 states that “Islam is the religion of the state and Arabic is the official language” and “the principles of Islamic sharia are the principle source of legislation”;
- Article 3 goes on to indicate that “the principles of the laws of Egyptian Christians and Jews, are the main source of regulating their personal status, religious affairs and selection of spiritual leaders”.

We repeat that it is positive that Article 64 (ex-47) “freedom of belief is absolute” and establishes the freedom to practice religious rituals and establishes places of worship for the followers of “revealed religions”, presumably Christianity and Judaism. However, we make the same recommendations for the removal of Articles 2 and 3.

**Recommendations:**

- 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. Hence, Articles 2 and 3 should be removed.

# About ARTICLE 19 Law Programme

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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](mailto:legal@article19.org).

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*This analysis is wholly financed by the Swedish International Development Cooperation, Sida. Sida does not necessarily share the opinions here within expressed. ARTICLE 19 bears the sole responsibility for the content.*