



Statement on the Freedom of Expression and Information Provisions in the draft Egyptian Constitution

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This Statement is being released as the formal deadline for the referendum on the new Constitution of Egypt, 15 December 2012, is just days away. If it is approved, the new Constitution will provide the blueprint not only for the organisation of the political structure of the Egyptian State, but also for its standards on human rights and democracy. There is bitter contestation over both aspects of the draft Constitution, as well as the way it has been finalised before being put to a referendum.

The Muslim Brotherhood and Morsi supporters claim that they have the support of the people, expressed through both legislative and presidential elections, and that they therefore have the mandate to present the draft to the people for a vote, without interference from either the opposition or the courts.¹ Opposition parties, on the other hand, who had largely withdrawn from the Constituent Assembly tasked with preparing the draft Constitution some time before the draft was finalised, see this as an attempt to subvert the goals of the revolution and to turn Egypt into an Islamic State.

This fundamental rift is manifested at numerous levels, including very active demonstrations and counter-demonstrations on the streets of many Egyptian cities, which have unfortunately led to violence and even deaths. There is intense political manoeuvring and (so far futile) attempts to find a compromise. It remains very unclear

¹ On 22 November 2012, President Morsi adopted a decree which effectively ousted the jurisdiction of the courts to question any of his decisions. The decree was subsequently cancelled after talks between various parties, including the President, on 8 December.

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whether or not the referendum will go forward as planned, and advance voting by expatriates has already been postponed, apparently because diplomats posted abroad refused to collect their votes.

This Statement does not comment on the process by which the draft Constitution was prepared or the various political claims regarding its legitimacy. What it does do is provide an analysis, based on international human rights standards, of the provisions in the draft Constitution which aim to protect freedom of expression, of information and of the media.²

The analysis finds that the draft Constitution includes a number of welcome features, including positive guarantees for freedom of expression and information that are significantly in line with international standards, along with greater protection for freedom for the private media, print and broadcast. A key weakness of the draft Constitution, however, is that it fails to establish clear and specific limits regarding restrictions on freedom of expression, instead leaving this matter unclear, but probably to be decided in accordance with the Principles of Islamic Sharia. The lack of clear conditions on when freedom of expression could legitimately be restricted was a key weakness of the 1971 Constitution, which protected freedom of expression “within the limits of the law”.

Positive Guarantees

Article 45 of the draft Constitution contains the main guarantee of freedom of expression, stating that freedom of thought and opinion are guaranteed and that everyone has the right to disseminate their opinions using any means of expression. This is a strong and positive statement of the right, which includes many of the elements found in the *International Covenant on Civil and Political Rights (ICCPR)*,³ which Egypt ratified in 1982. Article 19(2) of the ICCPR, which guarantees freedom of expression, states:

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

Article 45, however, is limited to the right to disseminate or impart, and lacks the important protections of the ICCPR to ‘seek’ and ‘receive’ information and ideas. This protection for the listener (or reader or viewer) is a key element in the international system for protection of freedom of expression, which underpins key freedom of expression notions such as media diversity.

² This Statement is based on the English version of the draft Constitution provided on the website of the *Egypt Independent*, at: <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>. We note that this sort of analysis is very language dependent, and we regret any problems with our analysis based on translation.

³ Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

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Article 45 does not explicitly state that it applies to ideas “of all kinds”. Even though international law and most national constitutions do allow for restrictions on freedom of expression, for example to protect reputation or privacy, the starting point should be that all expression is protected, although some restrictions may be warranted. Article 45 also fails to mention that it applies regardless of frontiers. Both of these elements could be understood to be included in Article 45 through interpretation, but it is preferable to be as clear as possible when formulating guarantees for fundamental human rights.

Article 47 protects the right to access information, defined broadly, a right which is often referred to as the right to information. This is a very welcome guarantee of this key right, which is reflected in many more modern constitutions and has been given legal effect in some 93 States around the world. Egypt is not yet one of those States, but Article 47 goes on to indicate that the law shall regulate the rules for archiving public documents, for accessing information, for lodging complaints when access is refused, and for accountability regarding this right. Article 47 may thus be understood as creating an obligation on the State to adopt legislation giving practical effect to this right.

One weakness with Article 47 is that although it defines information clearly, it fails to make it explicit that it applies to information held by public or State authorities. It might also be improved by placing a time limit on when legislation on the right to information must be adopted. This was done in the South African Constitution, and this ensured that legislation was adopted in a reasonably timely fashion. Some other States have taken unnecessarily long to adopt legislation to give effect to constitutional guarantees of the right to information.

Articles 48 and 49 address freedom of the media. Article 48 guarantees media freedom generally in its first sentence, but then goes on to place a number of qualifications on the scope of that freedom. Thus, according to Article 48, the media shall be free and independent to “serve the community”, “express the different trends in public opinion”, “contribute to shaping and directing in accordance with the basic principles of the State and society” and “maintain rights, freedoms and public duties”. It is one thing to recognise, for example in a preamble, that media freedom will help the media express trends in public opinion, promote respect for rights and so on, and quite another to formally condition media freedom and independence on these results.

Article 49 guarantees the freedom of every Egyptian natural or legal person to publish and own (and presumably to found) all kinds of newspapers, “subject of notification”. We understand this to represent a shift away from the licensing systems for newspapers of the past, toward a technical registration system which only requires those wishing to publish a newspaper to provide certain information. This is extremely welcome and represents an important proposal for bringing Egyptian law more closely into line with international standards.

Article 49 also provides that radio, television and “digital media” shall be regulated by law. We note that this falls short of actually protecting the right of Egyptians to establish broadcasters, subject to regulation by law. Until now, private terrestrial broadcasting has been almost entirely a public monopoly in Egypt, run by the Egyptian Radio and Television Union (ERTU), although many satellite television stations have been licensed. The exclusion of private players from the airwaves in this way is not legitimate. While this provision may well be intended to bring the public monopoly to an end, it would be preferable for it to make this clear.

It is not clear what the reference to “digital media” in Article 49 refers to, but we presume it must mean Internet-based media, because the article already covers the print and broadcast media. Democracies do not impose special regulatory requirements on the establishment of Internet-based vehicles for disseminating information and ideas, even where those vehicles are analogous to traditional media.

Article 49 could be improved in two further ways. First, it could stipulate that regulation of the establishment of broadcasters through the law may only be done by a body which is independent, in the sense that it is protected against political and commercial interference, and is hence able to make decisions in the wider public interest. This is a clear standard in international law, which is also reflected in a number of better practice constitutions. Second, it could, in addition to making it clear that the public monopoly over the airwaves will be brought to an end, stipulate that the airwaves will be shared equitably among public, commercial and community broadcasters. The need for all three types of broadcasters to be allocated licences and a fair share of the overall frequency spectrum is also a clearly recognised principle of international law.

Recommendations:

- Article 45 of the draft Constitution should be expanded to protect not only the right to disseminate, but also to seek and receive information and ideas.
- Consideration should be given to making it explicit that Article 45 covers all kinds of information and ideas, and that it applies regardless of frontiers.
- It should be clear from Article 47 that it applies to information held by public authorities.
- Consideration should be given to adding a time limit in Article 47 for the adoption of legislation on the right to information.
- The conditions on the protection of media freedom and independence in Article 48 should be removed.
- Article 49 should make it clear that it protects the right of private players to establish terrestrial broadcasters, subject to legal regulation.
- The reference to regulating by law the establishment of “digital media” in Article 49 should be removed.
- Consideration should be given to adding into Article 49 stipulations that the body that regulates broadcasters shall be independent and that the airwaves

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shall be shared equitably among public, commercial and community broadcasters.

Restrictions

The issue of restrictions on freedom of expression, of information and of the media is not dealt with in a clear fashion in the draft Constitution, and this is a major weakness of the document. The main provision guaranteeing freedom of expression, Article 45, does not refer to the idea of restrictions, and yet there will inevitably be restrictions on this right, as envisaged under international law and almost all constitutions. Article 19(3) of the ICCPR states:

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

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

This sets out a clear and narrow test for restrictions on freedom of expression, which provides an appropriate balance between the need to protect this fundamental right, and society's interest in protecting certain other potentially overriding rights and interests.

Instead of a clear test for restrictions on freedom of expression, Article 81 of the draft Constitution provides that rights and freedoms pertaining to individuals "shall be practiced in a manner not conflicting with the principles pertaining to State and society included in Part I of this Constitution". Article 81 also provides that these rights and freedoms shall "not be subject to disruption or detraction" and that no law that regulates these rights and freedoms shall constrain their essence. It is not clear, however, how the different statements in this article will be reconciled.

In applying Article 81, Egyptian judges may look for guidance to Article 2 of the draft Constitution, found in Part I, which states, among other things, that the "Principles of Islamic Sharia are the principal source of legislation". Guidance as to the scope of Article 2 can be found in Article 219, which states:

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

Part I includes a total of 30 articles dealing with many different issues, all of which, according to Article 81, could be used as grounds for restricting rights.

The requirement of Article 19(3) of the ICCPR that restrictions on freedom of expression must be "provided by law" requires such restrictions to be clear and precise. The United

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Nations Human Rights Committee, the body of independent international experts tasked with interpreting and promoting implementation of the ICCPR has stated:

For the purposes of paragraph 3, a norm, to be characterized as a “law”, 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. [references omitted]⁴

It is obvious that the rules in the draft Constitution do not impose such a constraint on restrictions on freedom of expression (i.e. that they be found in clear laws). The UN Human Rights Committee has specifically ruled out as not meeting the ‘provided by law’ criterion restrictions on freedom of expression based on religious principles:

Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.⁵

The other articles in Part I, which refer to a wide range of social, political and economic principles, such as the idea of the family as the basis of society, agriculture as an essential asset of the economy and social justice as the foundation of taxation, provide an even more problematical basis for restricting rights.

Article 19(3) also only permits restrictions that serve one of the legitimate interests listed, namely the rights and reputations of others, national security, public order, and public health and morals. Once again, the very general reference in the draft Constitution to the Principles of Islamic Sharia does not meet this standard, while the range of issues covered in Part I of the draft Constitution go far beyond these interests.

Finally, and perhaps most importantly, international law requires restrictions to be necessary to protect one of the listed interests. It is clear that the Principles of Islamic Sharia do not meet this standard. To give just one very clear example, those Principles forbid questioning the core doctrines of Islam, while international law permits this. Even in the limited area of restrictions to protect morals, the UN Human Rights Committee has made it clear that restrictions cannot be derived from just one religious tradition:

The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.⁶

It is unclear how the rest of the provisions in Part I of the draft Constitution would be used as a basis for restricting freedom of expression.

⁴ General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 25.

⁵ *Ibid.*, para. 24.

⁶ *Ibid.*, para. 32.

Beyond the general problem of the lack of a clear test for restrictions on freedom and the consequent reference to Principles of Islamic Sharia to justify restrictions, the draft Constitution is also problematical in relation to the specific restrictions it imposes on freedom of expression. Article 44 rules out “insult or abuse” of religious messengers and prophets. As noted, under international law, criticism of religion and religious messengers is permitted. As the UN Human Rights Committee has stated:

Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.⁷

Article 47 limits the right to access information where this would “violate the sanctity of private life or the rights of others” or “conflict with national security”. While these are all legitimate interests to protect, the approach taken in the draft Constitution fails to conform to international standards inasmuch as it does not include a ‘necessity’ requirement. It is, for example, well established under international law that conflicts between freedom of expression or information and privacy must be settled through a balancing test, taking into account the wider public interest, and the same applies even more forcefully to national security. The way the Article 47 limitations are phrased, privacy, the rights of others and national security would always trump openness, even when on balance disclosing the information was in the greater public interest. Similarly, Article 48 refers to privacy and national security but does not incorporate a ‘necessity’ or balancing test.

Article 48 contains two further references to restrictions on media freedom. The first allows the closure of media outlets or the confiscation of media products only with a court order. This is in some ways a protection for media freedom, inasmuch as it rules out such actions without a court order. But it also fails to place any conditions on when a court order authorising these actions would be legitimate. The Constitution should allow such orders, like all State action restricting freedom of expression, only in accordance with the standards set out in Article 19(3) of the ICCPR. The second is similar, ruling out control over the media except for “specific censorship that may be imposed in times of war or public mobilization”. Limitations should be imposed on the power to impose these restrictions on media freedom, once again in line with international standards.

As a practical matter, it might make sense for the Constitution to include one test for restrictions which would apply to the Article 45 general guarantee of freedom of expression, the Article 47 guarantee of the right to information and the Article 48 guarantee of media freedom.

Recommendations:

- The draft Constitution should include a clear test for restrictions on freedom

⁷ *Ibid.*, para. 48.

of expression which is based on, or is compatible with, the test for such restrictions under international law.

- Similarly, the references to restrictions in Articles 47 and 48 should be replaced with a clear test for restrictions that is compatible with international law.
- Article 44 should be removed.