



CENTRE FOR LAW  
AND DEMOCRACY

# Entrenching RTI: An Analysis of Constitutional Protections of the Right to Information

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## An Analysis of Constitutional Protections of the Right to Information



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## **Introduction**

Many factors contributed to the Egyptian revolution of 2011 but one of the main frustrations that brought protesters out onto the streets was a lack of accountability in government. Whether it was due to experiences of corruption, the capriciousness of local officials, their inability to participate in deciding their future or simply a lack of transparency in the governing process, Egyptians felt alienated from their institutions and shut out of the processes that ruled every aspect of their day-to-day lives. In this context, it is easy to see the Egyptian revolution (as well as the wider Arab Spring) as fundamentally about people asserting control over their own destinies, and demanding a broader role in the governing process.

The right to information, or the right to access information held by public authorities, is a fundamental ingredient in accountability and democratic participation. A strong and effective right to information underpins effective citizen engagement with the mechanics of government, and it is difficult to maintain a truly participatory system without it. In order to safeguard this interest, in many States the fundamental human right to information is now recognised, either explicitly or as a result of judicial interpretation, in their constitutional bills of rights. Several other States, including Egypt, are considering including the right to information as part of an ongoing or upcoming process of constitutional drafting.

This Report examines international standards of protection in order to further understanding of the right to information, with a view to contributing to the development of better constitutional guarantees for this key right. This Report also examines and contrasts different constitutional guarantees and judicial interpretation of the right to information against the backdrop of modern and emergent understandings of the nature of this right.

The Report begins by outlining international standards and key principles regarding the right to information. It then probes in some detail examples of constitutional protections, examining the extent to which they do and do not give full effect to international standards in this area in terms of framing both positive guarantees of the right and the scope of exceptions. The Report also discusses emerging trends in terms of constitutional protection for the right to information, so as to provide decision makers with the necessary information to ensure that the protections provided by their new constitutions are on the cutting edge of human rights law.

# 1. International Standards on the Right to Information<sup>1</sup>

## 1.1 Recognition of the Right to Information

An important starting point for considering constitutional guarantees for the right to information is that this is internationally recognised as a human right. Most significantly, the right to information is recognised in Article 19 of the *Universal Declaration of Human Rights* (UDHR),<sup>2</sup> a UN General Assembly resolution, which states:

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 regardless of frontiers.

The UDHR is broadly acknowledged as the foundational statement of international law in the field of human rights. Parts of the UDHR, including Article 19, are widely understood as having matured into customary international law, with the result that they are binding on all nations. The right to freedom of expression is guaranteed in very similar terms in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> a formally binding treaty which Egypt ratified on 14 January 1982.<sup>4</sup>

Although the concept of the right to information, as currently understood, was not yet recognised when the UDHR and ICCPR were adopted, subsequent developments have led to the recognition of this right as being encompassed within the language of international guarantees of the right to freedom of expression, and specifically the rights to 'seek' and 'receive' information and ideas. This has been highlighted by the UN Special Rapporteur on Freedom of Opinion and Expression, whose mandate includes clarifying the scope of the right to freedom of expression under international law. In his 1998 Annual Report, the Special Rapporteur stated: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. ..."<sup>5</sup>

Since 1999 the three (and subsequently four) special international mandates on freedom of expression have adopted annual joint declarations on different freedom of expression issues. In 1999, the UN Special Rapporteur was joined by the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in the first such Joint Declaration, which included the following statement:

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<sup>1</sup> For a more thorough discussion of international standards of the right to information, see Mendel, Toby, *Freedom of Information: A Comparative Legal Survey* (Paris: UNESCO, 2008).

<sup>2</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

<sup>3</sup> UN General Assembly Resolution 2200A(XXI). 16 December 1966, in force 23 March 1976.

<sup>4</sup> Egypt's ratification came with a statement that their compliance would be limited to the extent to which the Covenant's provisions were compatible with Islamic law (shari'a).

<sup>5</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.<sup>6</sup>

Their 2004 Joint Declaration included a significant focus on the right to information, stating, among other things:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>7</sup>

The statement went on to elaborate in some detail on the specific content of the right.

Around the same time, declarations on freedom of expression or specifically on the right to information were adopted by all three regional systems for the protection of human rights, in the Americas, Africa and Europe. In October 2000, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression*,<sup>8</sup> the most comprehensive official document to date on freedom of expression in the Inter-American system. The Principles unequivocally recognise the right to information, stating, in paragraph 4:

Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

In 2002, the right to information was similarly recognised in the *Declaration of Principles on Freedom of Expression in Africa*,<sup>9</sup> adopted by the African Commission on Human and Peoples' Rights, at Principle IV, and in Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents,<sup>10</sup> which is devoted entirely to this issue.

Formal recognition of the right to information by international courts came a little bit later. The first such court to do so was the Inter-American Court of Human

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<sup>6</sup> 26 November 1999. Available at: <http://www.osce.org/fom/66176?page=1>.

<sup>7</sup> Adopted on 6 December 2004. Available at:

<http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.

<sup>8</sup> 108<sup>th</sup> Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>.

<sup>9</sup> 32<sup>nd</sup> Ordinary Session, 17-23 October 2002, Banjul, The Gambia. Available at:

[http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).

<sup>10</sup> 21 February 2002. It should be noted that this document focuses more on the content of the right to information than on specifically recognising it as a human right.

Rights, in the 2006 case of *Claude Reyes and Others v. Chile*.<sup>11</sup> In the case, the Court explicitly held that the right to freedom of expression, as enshrined in Article 13 of the *American Convention on Human Rights* (ACHR),<sup>12</sup> included the right to information. In spelling out the scope and nature of the right, the Court stated:

In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.<sup>13</sup>

It took a few more years but, in April 2009, the European Court of Human Rights followed suit, recognising a right to information based solely on Article 10 of the *European Convention on Human Rights* (ECHR),<sup>14</sup> which guarantees the right to freedom of expression.<sup>15</sup> Interestingly, the respondent State in the case, Hungary, did not even contest the claim that Article 10 protects the right to information, and instead limited itself to arguing that the information in question fell within the scope of the exceptions to this right (i.e. that the refusal to provide it was a legitimate restriction on freedom of expression).

The UN Human Rights Committee, the body tasked with promoting the implementation of the rights set out in the ICCPR, was relatively late to recognise clearly the right to information. However, a new General Comment on Article 19 of the ICCPR, adopted in September 2011, does just this, stating:

Article 19, paragraph 2 embraces a right of access to information held by public bodies.<sup>16</sup>

## **1.2 Standards Regarding the Right to Information**

Recognition of the right to information as a human right based on the right to freedom of expression means that the rules which apply to freedom of expression also apply to the right to information. Specific international standards regarding the right to information have also been developed by a number of authoritative

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<sup>11</sup> 19 September 2006, Series C, No. 151. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc).

<sup>12</sup> Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.

<sup>13</sup> *Claude Reyes and Others v. Chile*, note 11, para. 77.

<sup>14</sup> E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.

<sup>15</sup> *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05.

<sup>16</sup> General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

international actors. These include the standards noted above, as well as the elaboration, by the UN Special Rapporteur on Freedom of Opinion and Expression in his 2000 Annual Report, in some detail standards governing the right to information legislation (UN Standards).<sup>17</sup>

Further evidence of the core content of this right may be found in the model right to information laws which have been developed by the Organization of American States, namely their Model Inter-American Law on Access to Public Information,<sup>18</sup> and the African Union, in the form of the (still draft) Model Law for AU Member States on Access to Information.<sup>19</sup> Although there are some differences between the exact content and structure of these model laws, there are enough substantial similarities to point to the development and widespread acceptance of a particular set of better practice standards related to the right to information.

### Scope

Based on the right to freedom of expression, the right to information should be broad in scope. The Joint Declaration of the special mandates on freedom of expression contains a strong and explicit statement on maximum disclosure:

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

International standards make it clear that everyone has a right to access information. The UN Standards, as noted above, provide that “every member of the public” has a right to receive information. Similarly, Principle IV(2) of the African Declaration refers to ‘everyone’, while Principle 4 of the Inter-American Declaration refers to ‘every individual’. Principle 3 of the COE Recommendation also refers to ‘everyone’ and goes on to note specifically: “This principle should apply without discrimination on any ground, including that of national origin.”

The right should apply widely to all information and all public authorities. Principle IV(1) of the African Declaration sets out the underlying rationale for a broad definition of public authorities, stating: “Public bodies hold information not for themselves but as custodians of the public good”. The COE Recommendation defines the scope of public authorities widely to include government at the national, regional and other levels, and “natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law”. The UN Standards note: “[I]nformation’ includes all records held by a public body, regardless of the form in which it is stored”.

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<sup>17</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

<sup>18</sup> AG/RES. 2607 (XL-O/10). Available at: [http://www.oas.org/dil/AG-RES\\_2607-2010\\_eng.pdf](http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf).

<sup>19</sup> The draft is available at: <http://www.achpr.org/english/other/MODEL%20LAW%20FINAL.pdf>.

### Proactive Publication

To give practical effect to the right to information, it is not enough simply to require public authorities to accede to requests for information. Effective access for many people depends on these authorities actively publishing and disseminating key categories of information even in the absence of a request. This is reflected in a number of international statements. The UN Standards, for example, state:

Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public.

Principle IV(2) of the African Declaration supports this, stating that, “public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest”. Principle XI of the COE Recommendation also calls on every public authority, “at its own initiative and where appropriate”, to disseminate information with a view to promoting transparency of public administration, administrative efficiency and informed public participation.

### Procedures

To facilitate the right to request and receive information held by public authorities, it is important for clear procedures to be established according to which public authorities shall process requests for information. The UN Standards call for public authorities “to establish open, accessible internal systems for ensuring the public’s right to receive information”, specifically referring, in this regard, to the need for “strict time limits for the processing of requests for information”, for notice to be given for any refusal to provide access which includes “substantive written reasons for the refusal(s)” and for fees not to be “so high as to deter potential applicants and negate the intent of the law itself”. The Joint Declaration of the special mandates calls for procedures to “be simple, rapid and free or low-cost”.

The COE Recommendation contains by far the most detail on processes, establishing a number of specific standards, including the following:

- requests should be dealt with by any public authority which holds the information, on an equal basis and with a minimum of formality;
- applicants should not have to provide reasons for their requests;
- requests should be dealt with promptly and within established time limits;
- assistance should be provided to requesters “as far as possible”;
- reasons should be given for any refusal to provide access; and
- applicants should be given access in the form they prefer, either inspection of the record or provision of a copy of it (Principles V-VII).

### Exceptions

The right to information is not absolute, but it is important that the regime of exceptions to this information ensures both that all legitimate secrecy interests are protected and that the system is not so overbroad that it undermines the right.

The Inter-American Court, in the *Claude* case, specifically held that the right to information could only legitimately be limited consistently with the regime for restrictions on freedom of expression, while a similar conclusion is implicit in the jurisprudence of the European Court. According to the ACHR, which is substantially identical in this respect to the ICCPR, any limitations must meet a three-part test. This test requires restrictions to be prescribed by law, to be for the protection of an interest that is specifically recognised under international law – specifically the rights and reputations of others, national security, public order, or public health or morals – and to be necessary to protect that interest.

The UN Standards call, in a general manner, for a clear and narrow regime of exceptions:

A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.

The Joint Declaration of the special mandates elaborates in more detail on the nature of the test for restrictions on the right to information as follows:

The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.

The COE Recommendation provides a detailed elaboration of the test for restrictions, including a full list of the possible grounds for this, in Principle IV, titled “*Possible limitations to access to official documents*”, as follows:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
  - i. national security, defence and international relations;
  - ii. public safety;
  - iii. the prevention, investigation and prosecution of criminal activities;
  - iv. privacy and other legitimate private interests;
  - v. commercial and other economic interests, be they private or public;
  - vi. the equality of parties concerning court proceedings;
  - vii. nature;
  - viii. inspection, control and supervision by public authorities;
  - ix. the economic, monetary and exchange rate policies of the state;
  - x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.
3. Member states should consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

Together these documents clearly establish that information should not be withheld unless its disclosure poses a threat of harm to a protected interest. They also highlight the public interest override, namely the requirement to disclose information where this is in the overall public interest, even if this poses a risk of harm to a protected interest.

### Appeals

It is well established that any refusal by a public authority to disclose information, or any failure to deal with requests in the prescribed manner, should be subject to appeal. The Joint Declaration of the special mandates calls for a right to appeal such refusals “to an independent body with full powers to investigate and resolve such complaints”. The COE Recommendation refers to the right to appeal to a “court of law or another independent and impartial body established by law”. The African Declaration, for its part, refers to two levels of appeal, “to an independent body and/or the courts”.

### Promotional Measures

In most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, successful implementation of the right to information is dependent on changing this culture. A range of promotional measures may be needed to address the culture of secrecy and to ensure that the public is aware of the right to information and its implications.

The UN Standards recognise the need for measures both to inform the public about their right to information and “to address the problem of a culture of secrecy within Government”. The Joint Declaration of the special mandates calls on governments to “take active steps to address the culture of secrecy that still prevails in many countries within the public sector”. It also calls for steps to be taken “to promote broad public awareness of the access to information law” and more generally for “the allocation of necessary resources and attention” to ensure proper implementation of right to information laws. Principle X of the COE Recommendation includes the most detailed provisions on what it calls ‘complementary measures’, which should include measures to inform the public and to train officials.

## 2. Constitutional Approaches: Positive Guarantees

### 2.1 Recognition as a Right

The primary ingredient of a well-structured constitutional guarantee is a strong and unequivocal statement that access to information is a human right. Article 23 of the Constitution of Albania is a good example, stating:

1. The right to information is guaranteed.
2. Everyone has the right, in compliance with law, to get information about the activity of state organs, as well as of persons who exercise state functions.
3. Everybody is given the possibility to follow the meetings of collectively elected organs.<sup>20</sup>

Another example of a strong constitutional guarantee is that of Montenegro, Article 51 of which states: "Everyone shall have the right to access information held by the state authorities and organizations exercising public authority."<sup>21</sup>

In some countries, the guarantee refers more ambiguously to the notion of a freedom to access information. An example is Article 50(1) of the Constitution of Azerbaijan, which states: "Everyone is free to look for, acquire, transfer, prepare and distribute information."<sup>22</sup> Article 16 of the Swiss constitution includes a more substantial formulation, but which still allows room for interpretation:

- 1) The freedom of opinion and information is guaranteed.
- 2) All persons have the right to form, express, and disseminate their opinions freely.
- 3) All persons have the right to receive information freely, to gather it from generally accessible sources and to disseminate it.<sup>23</sup>

These guarantees could, and arguably should, be interpreted as full guarantees of the right to access information held by public authorities. However, they are not as clear and unambiguous in this regard as the guarantees quoted earlier. As such, they depend on proper interpretation by the courts, in line with international standards. For fairly obvious reasons, it is preferable to provide for more specific constitutional protection for the right to information, which is then less dependent on judicial interpretation.

In many countries, the constitution does not include specific language guaranteeing the right to information as a freestanding human right. In a growing number of these countries, courts have found a right to information based on other constitutionally protected rights. Most commonly, this right has been elaborated as an element of the right to freedom of expression. As early as 1969, the Supreme Court of Japan established in two high-profile cases the principle that *shiru kenri*

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<sup>20</sup> Approved 21 October 1998. Available at: <http://www.ipls.org/services/kusht/contents.html>.

<sup>21</sup> Adopted 19 October 2007. Available at: <http://www.unhcr.org/refworld/docid/47e11b0c2.html>.

<sup>22</sup> Adopted 12 November 1995.

<sup>23</sup> Federal Constitution of 18 April 1999. Available at: <http://www.admin.ch/ch/e/rs/101/index.html>.

(the “right to know”) is protected by the Article 21 guarantee of freedom of expression.<sup>24</sup>

In South Korea, the Constitutional Court recognised a constitutional right to information in the 1989 *Forests Survey Inspection Request case*.<sup>25</sup> The case involved a petition by a claimant in a land dispute to the effect that his family’s land had been unfairly expropriated by the State and that the regional government was denying him access to the title records he needed to prove his claim. In their decision, the Court essentially ignored the petitioner’s property rights claims and instead focused on his inability to access government records.<sup>26</sup> The Court reasoned that, since there was a constitutional guarantee for free speech, and since a free exchange of ideas is only possible when access to information is guaranteed, the right to information was included as part of that constitutional guarantee.

The Supreme Court of Canada, in the case of *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*,<sup>27</sup> similarly decided that the right to information was constitutionally protected as part of the wider right to free expression. The case had its roots in a murder trial where the presiding judge ordered a stay of proceedings due, in part, to his finding that the police had committed flagrant abuses. In response, the police ordered an internal investigation into the impugned conduct, which concluded that their officers had done nothing wrong. When the Criminal Lawyers’ Association made a request for the report of the investigation, the police refused to release it. The case eventually went to the Supreme Court of Canada, which held that the right to information was protected as part of the constitutional guarantee of freedom of expression, “where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.”<sup>28</sup>

This case illustrates a potential problem in asserting a right to information as part of the guarantee of freedom of expression, which is that this may lead to an unfortunate limitation on the right to information to instances where access to the information in question is needed for the exercise of freedom of expression. It may be noted that, at least in this case, the limitation could be traced to the specific wording of the Canadian constitutional guarantee for freedom of expression, found at Article 2(b) of the Charter of Rights and Freedoms, which states:

Everyone has the following fundamental freedoms:  
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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<sup>24</sup> See Repeta, *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3. One such case is: Supreme Court Criminal Case Reporter, Vol. 22, No. 23 (1969), p. 1490 (the “Hakata Station Film Case”).

<sup>25</sup> 1 KCCR 176, 88 Hun-Ma 22.

<sup>26</sup> The Constitutional Court of Korea, Public Release: “The first ten years of the Korean Constitutional Court” (2001), p. 132. Available at: [http://www.ccourt.go.kr/home/att\\_file/ebook/1255848884375.pdf](http://www.ccourt.go.kr/home/att_file/ebook/1255848884375.pdf).

<sup>27</sup> [2010] 1 S.C.R. 815.

<sup>28</sup> *Ibid.*, para. 5.

Where the right is guaranteed in terms more akin to those of international law, and in particular where the guarantee refers to the right to 'seek' and/or 'receive', as well as to impart, information and ideas, it may be easier for courts to deduce a broad right to information.

Courts have also founded a right to information on other constitutionally protected human rights. Argentina's Supreme Court of Justice held that the State was under an obligation of transparency based on the constitutional establishment of the country as a republic, which created a presumption of official accountability.<sup>29</sup> In India, the Supreme Court has made several statements grounding the right to information in freedom of expression,<sup>30</sup> but it has also held that the right to information flows from the right to life:

Right to Know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.<sup>31</sup> [Article 21 guarantees the right to life]

These cases illustrate the nexus between the right to information and other human rights, as well as the importance of the right to information to the actualisation of these other rights. Once again, however, these bases for the right to information are limited in nature to cases where access to information is specifically required for the exercise of the other (dominant) right. As a result, the most effective way to ensure constitutional protection for the right to information is to establish this right as a separate, freestanding right which is not dependent or derivative of other rights.

## **2.2 Scope**

A second major feature of effective constitutional protection for the right to information is that the guarantee should be broadly applicable. According to international standards, this means that the law should apply to all information held by any public authority. A good statement of this type is found in Article 61(1) of the Constitution of Poland:

A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they

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<sup>29</sup> *Acordada de la Corte Suprema de Justicia de la Nación No. 1/2004 Exp. 315/2004 Adm. Gral.* Available (in Spanish) at: [http://www.right2info.org/resources/publications/case-pdfs/argentina\\_acordada-de-la-corte-suprema-de-justicia-de-la-nacion-no.-1-2004-exp.-315-2004-adm.-gral](http://www.right2info.org/resources/publications/case-pdfs/argentina_acordada-de-la-corte-suprema-de-justicia-de-la-nacion-no.-1-2004-exp.-315-2004-adm.-gral).

<sup>30</sup> See *S.P. Gupta v. President of India and Ors (Gupta)*, 1981 Supp SCC 87; *Dinesh Trivedi, Union of India v. AS & Soacnioatthieorn for Democratic Reforms*, [2002] INSC 244 (2 May 2002); and *People's Union of Civil Liberties (P.U.C.L.) & Anr v. Union of India and Anr*, [2003] INSC 173 (13 March 2003).

<sup>31</sup> *Reliance Petrochemicals Ltd., v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Others*, 1988 (004) SCC 0592 SC, para. 3.

perform the duties of public authorities and manage communal assets or property of the State Treasury.<sup>32</sup>

Note that the right is applied to all “organs of public authority”, defined broadly. This does not limit the right to information to organs of the State, *per se*, but extends it to private institutions which perform a public function (such as water treatment or power generation) or which manage public assets. One area where the Polish Constitution is perhaps not quite as extensive as international standards is in relation to private bodies which receive substantial public funding, albeit just to the extent of that funding. In other words, if a private company receives a government grant, the management and expenditure of that grant should be open to public scrutiny.

Another good example of a broad guarantee is Article 6 of the Mexican Constitution, which reads, in part:

The right to information is guaranteed by the state.

Regarding the exercise of the right to information, the federal government, the states, and the federal district, within their respective jurisdictions, shall be governed by the following principles and guidelines:

...

III. Everyone, without the need to demonstrate an interest or justify their use, shall have free access to public information, [as well as] to their personal information along with the possibility of correcting it.<sup>33</sup>

The fact that the right to access information does not depend on any interest or justification is important, since it touches on a fundamental principle. The exercise of a human right, namely the right to information, should not be dependent on the underlying motivation for the exercise of that right, and requesters should not be required to provide reasons for their requests.

Some constitutions attach problematic qualifiers to the scope of the right, such as this caveat found at Article 34(1) of the Constitution of Moldova:

Having access to any information of public interest is everybody's right that may not be curtailed.<sup>34</sup>

According to international standards, the right to information should extend to all information held by public authorities, without being limited to information deemed to be in the public interest. Furthermore, such a limitation opens up the door to officials refusing requests on the basis of what they happen to think is a matter of public interest. Experience in many countries demonstrates that officials are not

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<sup>32</sup> Adopted 2 April 1997. Available at:

[http://www.poland.pl/info/information\\_about\\_poland/constitution.htm](http://www.poland.pl/info/information_about_poland/constitution.htm).

<sup>33</sup> 1917 Federal Constitution. Unofficial translation by CLD. Available (in Spanish) at:

<http://pdba.georgetown.edu/Constitutions/Mexico/vigente.html>.

<sup>34</sup> Adopted 29 July 1994. Available at: <http://confinder.richmond.edu/admin/docs/moldova3.pdf>.

necessarily able to make objective determinations about what is and what is not in the public interest.

A restriction that limits access to administrative records, such as is found in Article 267(2)(a) of the Constitution of Cape Verde, is similarly problematical, since the right should apply to all information held by public authorities.<sup>35</sup> The large majority of right to information laws apply to information provided to public authorities by private third parties, such as tender documents, which may not be considered to be administrative records. Once again, a further problem is that the power of officials to decide whether or not a document is an administrative record could be abused.

Article 39(2) of the Constitution of Slovenia restricts information according to the requester's need:

Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well-founded legal interest under law.<sup>36</sup>

This is similar to the formulation found at Article 37 of the Constitution of Malawi:

Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.<sup>37</sup>

These guarantees do not conform to international standards, according to which individuals have a legitimate interest in any information held by a public authority. Indeed, if the right were restricted in this way, it would be of limited use to journalists and others who might wish to expose corruption or other problems, but who could not claim a specific legal interest in the information in question. Progressive courts might get around this by interpreting any interest in accessing information as part of the exercise of a legal right, namely the right to information.

Universality also means that there should be no limits as to who enjoys the right to information. Article 19.3 of the Constitution of Eritrea is an example of a common problem in this respect:

Every citizen shall have the right of access to information.<sup>38</sup>

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<sup>35</sup> 1992 Constitution. Available at: [http://web.parliament.go.th/parcy/sapa\\_db/cons\\_doc/constitutions/data/Cape%20Verde/Cape%20Verde.htm](http://web.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Cape%20Verde/Cape%20Verde.htm).

<sup>36</sup> Adopted 23 December 1991, revised 20 June 2006. Translation available at: [http://www.servat.unibe.ch/icl/si00000\\_.html](http://www.servat.unibe.ch/icl/si00000_.html).

<sup>37</sup> Adopted 16 May 1994. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=9197>.

<sup>38</sup> Adopted 23 May 2007. Translation available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_126648.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_126648.pdf).

International standards mandate that the right to information should extend to everyone (including non-citizen residents, foreigners, incorporated entities and so on), rather than just to citizens.

Under international law, the right to information applies broadly and this should be reflected constitutionally. The guarantee should apply to all public authorities and to private bodies that are undertaking public functions, to all information held by these authorities and to everyone, including legal entities.

### **2.3 Personal Information**

Several constitutions include special clauses relating to access to personal information, as well as a right to correct this information where it is inaccurate or incomplete. Such clauses are useful, although at the same time the right to access personal information should be covered as part of a general right to information provision. In other words, special protection for the specific right to access personal information is not strictly necessary in a well-crafted constitution.

However, the reverse is not true. In other words, a right to access personal information is not sufficient by itself to guarantee the wider right to information, which obviously goes far beyond just personal information in terms of scope. Some constitutions are limited in scope to rights to access personal information. An example is the Venezuelan Constitution, Article 28 of which states:

Anyone has the right of access to the information and data concerning him or her or his or her goods which are contained in official or private records, with such exceptions as may be established by law, as well as what use is being made of the same and the purpose thereof, and to petition the court of competent competence for the updating, correction or destruction of any records that are erroneous or unlawfully 'affect the petitioner's right. He or she may, as well, access documents of any nature containing information of interest to communities or group of persons. The foregoing is without prejudice to the confidentiality of sources from which information is received by journalist, or secrecy in other professions as may be determined by law.<sup>39</sup>

By focusing on the right to access personal information, this provision fails to protect fully the right to information. The limited statement at the end allowing for access to information of interest to communities or groups does not encompass the full scope of the right to information.

## **3. The Right to Information: Narrow Exceptions**

Under international law, the right to information may legitimately be subject to certain restrictions or exceptions. However, as noted above, such restrictions must

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<sup>39</sup> Constitution of the Bolivarian Republic of Venezuela, adopted 1999. Official translation available at: [http://www.analitica.com/bitbliblioteca/venezuela/constitucion\\_ingles.pdf](http://www.analitica.com/bitbliblioteca/venezuela/constitucion_ingles.pdf).

conform to the three-part test under international law for restrictions on freedom of expression more generally. In order to promote proper respect for the right to information, these exceptions should be set out as narrowly as possible. Once again, we can look to Article 6 of the Mexican Constitution for a good statement of this principle:

I. All information in the possession of any authority, entity, organ or organism at the federal, state or municipal level, is public and can only be withheld temporarily for the sake of the public interest according to the law. In the interpretation of this right, the principle of maximum disclosure should prevail.<sup>40</sup>

It is notable that the Mexican Constitution enumerates the idea that exceptions to the right to information should be temporary. Once release of the information would no longer be harmful to a protected interest, it should be disclosed. In many countries, this principle is reflected in law by overall time limits on the confidentiality of information, for example of 20 or 30 years, which may only be extended in special cases.

The only legitimate grounds for restricting freedom of expression under international law are the rights and reputations of others, national security, public order, and public health and morals. As applied specifically to the right to information, international standards suggest that information may only be withheld where its disclosure would cause harm to one of the following protected interests: national security, international relations, public health and safety, law enforcement and the administration of justice, the preservation of legal privilege, personal privacy, legitimate commercial interests, the ability of the government to manage the economy, conservation of the environment, or legitimate policy making by public authorities.

In most countries, the specific interests protected by exceptions to the right to information are defined by legislation, but these lists are also set out in some constitutions. Thus, Article 51 of the Constitution of Montenegro allows limitations on the right to information only to protect “life; public health; morality and privacy; carrying of criminal proceedings; security and defence of Montenegro; foreign, monetary and economic policy.”<sup>41</sup> This formula touches all the necessary bases, providing an exhaustive constitutional definition of the scope of the regime of exceptions, thereby preventing governments from imposing unnecessary exceptions which undercut the right to information.

Another good example of this is Article 61(3) of the Constitution of Poland, which refers to the protection of the “freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.”<sup>42</sup> The Greek Constitution is another good example, notable in its emphasis on the limited

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<sup>40</sup> Note 33.

<sup>41</sup> Note 21.

<sup>42</sup> Note 32.

nature of exceptions, which, according to Article 5A, may only be imposed for purposes of protecting “national security, of combating crime or of protecting rights and interests of third parties.”<sup>43</sup> Similarly, Article 56 of the Constitution of Thailand only allows for restrictions on the right to information to protect the “security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.”<sup>44</sup>

The approach taken in the Romanian Constitution, Article 31(3) of which only allows for exceptions to protect “young people or national security”,<sup>45</sup> may be superficially appealing, due to its apparently very limited scope. However, this goes too far, inasmuch as it fails to protect interests such as private commercial interests, law enforcement and international relations. This is simply not realistic. For example, it would not allow the Romanian authorities to refuse to disclose the identities of police informants (unless they happened to be young people). In practice, this information is exempt in Romania by virtue of Article 12(1)(e) of *Law 544/12 October 2001 on Free Access to Public Information*. This establishes an unfortunate tension between a practical law and unduly limiting constitutional rules. It would, as a result, be preferable to leave out the list of protected interests altogether, or to extend it to cover all interests that need protection.

Some countries use unfortunately vague language to describe the sorts of interests which would justify withholding information. The Norwegian constitution is a good example of this problem, with Article 100 allowing for restrictions to protect “the right to privacy or other weighty considerations.”<sup>46</sup>

It should be stressed that the list of legitimate grounds upon which exceptions may be based, mentioned at the beginning of this chapter, is exhaustive. It is, therefore, illegitimate for constitutions to allow for information to be withheld to protect other interests. The exception in the Constitution of Papua New Guinea for “geological or geophysical information and data concerning wells and ore bodies” is one example of an illegitimate exception.<sup>47</sup> Another, more puzzling example, is the Zimbabwean exception for “parental discipline”.<sup>48</sup>

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<sup>43</sup> Constitution of Greece, revised 27 May 2008. Official translation available at: <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agliko.pdf>.

<sup>44</sup> 2007 Constitution, approved by referendum on 19 August 2007. available at: <http://www.asianlii.org/th/legis/const/2007/>.

<sup>45</sup> Adopted 21 November 1991, revised 29 October 2003. Available at: <http://www.cdep.ro/pls/dic/site.page?id=371>.

<sup>46</sup> Constitution of the Kingdom of Norway, adopted 17 May 1814. Available at: <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>.

<sup>47</sup> Constitution of the Independent State of Papua New Guinea, Consolidated to amendment No. 22, Article 51(1)(j). Available at: <http://www.igr.gov.pg/constitution.pdf>.

<sup>48</sup> Constitution of Zimbabwe, Order 1979 (S.I. 1979/1600 of the United Kingdom), revised 30 October 2007, Article 20(1). Available at: <http://aceproject.org/ero-en/regions/africa/ZW/zimbabwe-constitution-of-zimbabwe-2008-1>.

Under international law, exceptions must not only protect legitimate interests, but they must also be necessary. As noted above, this has been interpreted to mean that exceptions apply only where disclosure of the information would cause harm to the protected interest. This makes sense since, if no harm would ensue from disclosure, there is no need to keep the information confidential. The necessity requirement under international law is also understood as imposing a public interest override on exceptions, whereby if the larger public interest would be served, information should still be disclosed, even if some harm would be caused to a protected interest. This flows from the proportionality element of the necessity part of the test for restrictions on freedom of expression, which rules out restrictions that disproportionately limit the right.

In some countries, the constitution simply repeats the standards of international law. Thus, Article 21(1)(f) of the Constitution of Ghana permits such limitations on the right to information “as are necessary in a democratic society”.<sup>49</sup> Other constitutions use other terms. Thus, Article 51 of the Constitution of Montenegro refers to the idea that limitations must be “in the interest of” the protection of one of the interests listed. This is potentially problematical inasmuch as it fails to specify the need for harm to a protected interest, though this may be inherent in the phrase “in the interest of”. Article 5A(1) of the Constitution of Greece is an example of a strong standard here, allowing exceptions only where these are “absolutely necessary and justified”.<sup>50</sup>

## **4. Emerging Trends**

### **4.1 More Detailed Protections**

Most explicit constitutional provisions on the right to information are rather minimalistic in nature, leaving most aspects of the right to be defined by legislation. For example, as mentioned in the previous chapter, many constitutional protections include only very general rules on exceptions to the right of access. Perhaps the most dramatic exception to this is Sweden, where the entirety of its right to information law is considered to be part of the Constitution. Chapter 2 of the Freedom of the Press Act, entitled “On the Public Nature of Official Documents”, is effectively the Swedish right to information law.<sup>51</sup> The Freedom of the Press Act, in turn, is one of four founding constitutional documents in Sweden.

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<sup>49</sup> Constitution of the Republic of Ghana, 1992. Available at: [http://www.judicial.gov.gh/constitution/chapter/chap\\_5.htm](http://www.judicial.gov.gh/constitution/chapter/chap_5.htm).

<sup>50</sup> Constitution of Greece, revised 27 May 2008. Official translation available at: <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>51</sup> Available at: [http://www.servat.unibe.ch/icl/sw03000\\_.html](http://www.servat.unibe.ch/icl/sw03000_.html).

Another very detailed set of constitutional protections for the right to information is found in the Mexican Constitution, based on amendments adopted in 2007. The new Article 6 of the Constitution provides as follows:

The right to information is guaranteed by the state.

Regarding the exercise of the right to information, the federal government, the states, and the federal district, within their respective jurisdictions, shall be governed by the following principles and guidelines:

I. All information in the possession of any authority, entity, organ or organism at the federal, state or municipal level, is public and can only be withheld temporarily for the sake of the public interest according to the law. In the interpretation of this right, the principle of maximum disclosure should prevail

II. Information which contains private or personal data will be protected according to the exceptions contained in the laws.

III. Everyone, without the need to demonstrate an interest or justify their use, shall have free access to public information, [as well as] to their personal information along with the possibility of correcting it

IV. Mechanisms will be established for access to information and procedures for expedited review.

These procedures shall be conducted before organs or bodies that are specialised and impartial, with autonomy in their operations, management and decision-making.

V. The subjects of these obligations shall preserve the documents in administrative archives and publish and update through the electronic means available, complete and current information on their performance indicators and the exercise of public resources.

VI. The laws shall determine the manner in which the entities that are the subject of these obligations shall make public information on public resources delivered to individuals or corporations.

VII. Failure to comply with the provisions on access to public information shall be punished in the manner provided by law.<sup>52</sup>

This passage touches on several ideas that are central to the right to information. These include the establishment of proper procedures for ensuring access, a right to review denials before a specialised independent agency, proper document management, the need for a regime for proactive publication, the right to access information for free,<sup>53</sup> and the sanctioning of conduct that in any way violates the right to information. All of these are in line with international standards.

It is noteworthy that these provisions articulate broad principles, rather than specific mechanisms. This is critical, since international standards on the right to information continue to evolve and develop. As a result, it would be impractical to spell out precise mechanisms for access in a constitution, because constitutions are often very difficult to amend. Fifteen years ago, it would have been difficult to conceive of the important role online disclosure plays in giving effect to the right to

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<sup>52</sup> Note 33.

<sup>53</sup> Article 2(5) of the Constitution of Peru, adopted on 29 December 1993, also provides for access to information to be provided 'at cost'. Available in English at: [http://www.congreso.gob.pe/\\_ingles/CONSTITUTION\\_29\\_08\\_08.pdf](http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf).

information. Today, in many countries, the Internet is the primary vehicle for proactive publication, and a central mechanism for receiving and responding to information requests. By setting out broad principles, such as the need to sanction breaches of the right to information and to ensure proper management of information, the Mexican Constitution avoids the pitfalls of elaborating on specific mechanisms, while still providing robust and detailed protection for the right to information. Given the increasing importance of the right to information, evolving standards suggest that where new constitutions are being drafted, it would be better to entrench the right as comprehensively and expansively as possible.

Perhaps the most important single aspect of these guarantees, over and beyond the rules found in most constitutional protections for the right to information, are the guarantees for the independence of the oversight body, such as an information commission or commissioner. In many countries, there is already constitutionally protection for the independence of certain oversight bodies. For example, the Constitution of Ireland protects the independence of the Comptroller and Auditor General,<sup>54</sup> while the Constitution of Estonia establishes an independent Legal Chancellor to review the conduct of the government.<sup>55</sup> Given the critical importance of an oversight body in ensuring government accountability, there are strong reasons in support of providing constitutional protection for their independence.

Another interesting innovation, found in the South African and Uganda constitutional guarantees for the right to information, is the obligation on the authorities to adopt a law giving effect to the right within a set period of time. Thus, Article 32(2) of the 1996 Constitution of South Africa states:

2. National Legislation must be enacted to give effect to [the right to information], and may provide for reasonable measures to alleviate the administrative and financial burden on the state.<sup>56</sup>

Pursuant to Schedule 6, item 23 of the Constitution, such enabling legislation must be adopted within three years.<sup>57</sup>

## **4.2 Expanding the Right to Privately Held Data**

An emerging trend is to extend the right to information to certain types of privately held information. It has long been accepted that right to information laws should apply to private institutions that receive public funds or perform a public function,

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<sup>54</sup> Constitution of Ireland, enacted 1 July 1937, amended 24 June 2004, Article 33. Available at: <http://www.constitution.ie/reports/ConstitutionofIreland.pdf>.

<sup>55</sup> Constitution of the Republic of Estonia, approved 28 June 1992, s. 139-145. Official translation available at: <http://www.president.ee/en/republic-of-estonia/the-constitution/index.html>.

<sup>56</sup> Constitution of the Republic of South Africa, 1996. Available at: <http://www.info.gov.za/documents/constitution/1996/index.htm>.

<sup>57</sup> See also Article 41(2) of the 1995 Constitution of Uganda. Available at: [http://www.ugandaembassy.com/Constitution\\_of\\_Uganda.pdf](http://www.ugandaembassy.com/Constitution_of_Uganda.pdf).

on the basis that they are effectively acting in a public capacity. The Constitution of South Africa was the first to take this further, applying to 'purely' private bodies in Section 32:

1. Everyone has the right of access to –
  - a) any information that is held by the State; and
  - b) any information that is held by another person and that is required for the exercise or protection of any rights.<sup>58</sup>

A similar statement is found in Article 35 of Kenya's Constitution:

- (1) Every citizen has the right to access to
  - (a) information held by the State; and
  - (b) information held by another person and that is required for the exercise or protection of any right or fundamental freedom.<sup>59</sup>

Article 45 of Slovakia's Constitution also appears to expand the scope of information that could potentially be available upon request to privately held information related to the environment:

Everyone has the right to timely and complete information about the state of the environment and the causes and consequences of its condition.<sup>60</sup>

It would be premature to describe these provisions as representing established international standards. However, as understanding of the right to information has evolved, there is an unmistakable trend towards increased openness. It is undeniable that private actors hold much information of interest and importance for citizens, and every country has a growing body of sectoral laws – for example in the areas of the environment or health and safety – that impose openness obligations on private bodies. The wider constitutional provisions noted above could be understood simply as giving wider effect to this trend. Although these provisions are not yet sufficiently broadly accepted to have shifted the goalposts in terms of international better practices, they represent a positive example for countries to follow.

## 5. Conclusion

There is no single set of "magic words" which can be said to represent the proper way for constitutions to provide protection for the right to information. At the same time, this analysis demonstrates that there are concrete better practices which help ensure that fundamental aspects of the right to information receive adequate constitutional protection. These include, first and foremost, a strong statement affirming a freestanding universal right of access to all information in the hands of

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<sup>58</sup> Note 56.

<sup>59</sup> Revised 2010. Available at:

<http://www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf>

<sup>60</sup> Adopted 1 September 1992. Available at: [http://www.servat.unibe.ch/icl/lo00000\\_.html](http://www.servat.unibe.ch/icl/lo00000_.html).

public authorities, defined broadly to include private organisations that perform a public function or receive public funds. In addition, the constitution should place clear limits on the permissible scope of exceptions to the right to information. One approach is to include an exhaustive list of those interests which might justify a refusal to provide information, although as the examples cited above demonstrate, this can also be problematical. At a minimum, constitutional provisions should make it clear that information can only be withheld if disclosure would pose a risk of harm to a protected interest, and if this harm outweighs the overall public interest in disclosure.

Countries that are drafting constitutional provisions for the right to information should also consider providing for the independence of the oversight body. Independence is important if such a body is to be able to act authoritatively and appropriately to require public authorities to comply with their obligations of transparency. Other important principles regarding the right to information which could be included in a constitutional guarantee include: the principle of maximum access; the need for the establishment of rapid and low-cost mechanisms for processing requests for information; the need for rules on proper information management; the responsibility of public authorities to publish as much information proactively as possible; and the need to sanction conduct that violates the right to information.

The events of the Arab Spring, watched with jubilation both inside and outside the Arab world, were viewed in some corners with a distinct sense of foreboding. China, for example, took immediate steps to prevent its people from informing themselves about the events in Tunisia and Egypt. The cause of this apprehension was obvious: if it can happen in the Arab world, it might also happen in China. The Chinese leadership is right to be afraid, as is any government that continues to deny its people fundamental rights. The Arab Spring demonstrated the power of popular frustration, of the potential energy that can be unleashed by a people who feel their government is secretive and unaccountable.

If there is a universal lesson to be taken from the Arab Spring, it is that governments should never feel that they are beyond the reach of their people. A part of that understanding must be to entrench government accountability, and the right to information lies at the core of the notion of accountability. This Report, comparing and contrasting different approaches at both the international and national levels, highlights the main principles that underlie strong constitutional protection for the right to information. It is hoped that these standards will help guide post-revolutionary societies as they seek to craft more accountable systems of government.

# Model Constitutional Guarantee of the Right to Information

## 1. *Proposed Constitutional Guarantee*

1. Everyone has the right to access all information held by public authorities, defined broadly to include all branches and levels of government, bodies which are created by the constitution or by law, bodies which are owned or controlled by other public authorities, and bodies which are substantially funded by other public authorities or which perform a public function, to the extent of that funding or function.
2. This right applies to all recorded information, regardless of the form in which it is held.
3. Public authorities shall give effect to this right both by publishing information of wide public interest on a proactive basis and by putting in place effective mechanisms for responding to requests for information which are rapid and impose minimal costs on requesters.
4. The right to access information may only be restricted as necessary to prevent harm to the following interests:
  - a. national security;
  - b. good relations with other States or inter-governmental bodies;
  - c. public health and safety;
  - d. law enforcement and the administration of justice;
  - e. personal privacy;
  - f. legitimate commercial and other economic interests;
  - g. the ability of the government to manage the economy;
  - h. conservation of the environment; or
  - i. legitimate policy making and operations of public authorities;provided that this applies only where the likely harm from disclosure of the information outweighs the general public interest in disclosure.
5. The Office of the Information Commission shall be established by law as an independent administrative oversight body responsible for promoting and protecting the right to information, and for hearing appeals from individuals claiming that public authorities have violated their right to information.
6. Legislation giving effect to the right to information and the mechanisms and procedures set out in this section shall be adopted and come into force within six months **[or such other timeframe as may be deemed reasonable]** of the effective date of this Constitution.

## **2. Explanation**

The first sub-section establishes the main part of the constitutional guarantee. In line with international standards, it applies to everyone, not just to citizens. It also applies broadly to all public authorities, again consistent with international law. It thus defines the term 'public authority' to include not only all bodies which are by nature public, but also private bodies which stand in the position of public bodies, for example because they are established, controlled or funded by public bodies or because they undertake public functions. In the latter two cases, their designation as public authorities is limited to the extent of their public funding or function. Thus, a private body that, as part of its operations, ran an airport might be considered to be a public authority in relation to its running of the airport but not in relation to its other functions.

In some countries, the right of access extends beyond public authorities and private bodies deemed to be public authorities to include purely private bodies. In such cases, the extent of access is normally limited, for example in the case of South Africa to information that is needed for the protection or exercise of a right. The proposed constitutional guarantee does not create a right of access to information held by private bodies.

The second sub-section indicates that the right covers all information which is held in a recorded form, regardless of what that form might be. Right to information laws in some countries provide a non-exclusive list of the specific forms which are covered – such as videos, electronic information, physical documents and so on. This approach was not taken in the proposed constitutional guarantee, among other things because it was not deemed to be necessary and also to keep it reasonably short.

The third sub-section describes the two main modalities by which information shall be made accessible, namely through proactive publication and through requests. The scope of the former has been left rather general. This is both because it is difficult to get more specific in the context of a constitutional guarantee and so as to avoid providing a fixed, and hence limited, list of documents subject to proactive publication, which could be expected to become dated over time. Three key qualities are imposed on request systems, namely that they be effective, rapid and low-cost.

The fourth sub-section sets out the permissible scope of restrictions on the right of access. It incorporates the harm test and public interest override that are well established under international law. It incorporates a 'necessity' requirement, which is also an established feature of international law. The list of interests which might justify non-disclosure of information are drawn from international law and better practice by countries that have adopted right to information laws. In some cases, the description of the interest is rather general; examples include 'national security', 'personal privacy' and 'legitimate policy making and operations of public

authorities'. It is difficult to define these interests briefly and with clarity and, at the end of the day, it was felt that this is a matter which should be left to legislation and/or the courts.

The fifth sub-section provides for the establishment of an independent Information Commission. The proposed constitutional guarantee stipulates a Commission, based on the plurality of international practice, but a Commissioner (i.e. a single individual) would be equally appropriate. The experience of countries around the world has demonstrated the overriding importance, in terms of successful implementation of right to information legislation, of having such an oversight body. This is also reflected in the constitutional practice of a number of countries. This body is given the dual roles of hearing complaints about breaches of the right to information and of general promotion and protection of the right. This is, once again, consistent with better international practice.

The proposed constitutional guarantee does not set out the specific modalities by which the independence of the Commission will be protected, in particular by stipulating how members shall be appointed. This could be done through legislation, be done separately in the constitution for this Commission, or be linked to systems described elsewhere in the constitution for protecting the independence of these sorts of bodies. The best approach will depend on the specific situation in each country.

Finally, the sixth sub-section requires the adoption of legislation to give effect to this right within a set timeframe (six months is proposed but it is recognised that this may not be realistic or appropriate in every country and context). This is to avoid the situation, present in all too many countries, where constitutional guarantees remain largely theoretical due to the absence of implementing legislation.