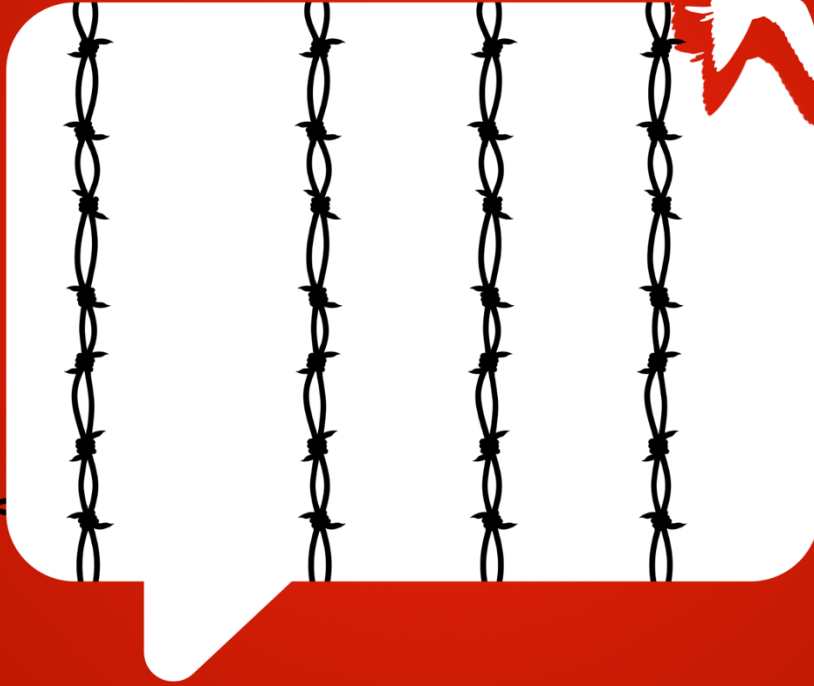




U.G. LAW

المجموعة المتحدة للقانون



# AGAINST THE CONSTITUTION

Study on the Legal Provisions penalizing  
Freedom of Expression and their alternatives

**Summary and Recommendations**

Supported By



Embassy  
of the Federal Republic of Germany  
Cairo

# **Against the Constitution**

**Study on the legal provisions penalizing  
freedom of expression and their Alternatives**

**Summary of the Study and Recommendations**

**Research Supervisor**

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## Introduction

This summary serves as an unofficial translation of the Study that spans one hundred seventy pages, documenting and analyzing the legal restrictions on the freedom of expression through writing and publication. The Study was funded by the U.G. Law in partnership with the Federal Foreign Office of the Republic of Germany, with the primary aim of presenting it to the Board of Trustees of the Egyptian National Dialogue to be used in the discussions of the Human Rights and Public Freedoms Committee, the National Council for Human Rights, and the Human Rights Committees of the Egyptian Parliament and the Senate, as well as the Human Rights Committees Journalists' Syndicate to assist in the improvement of the legislative environment governing the penal regulations of freedom of expression, primarily through writing and publication.

This Study could be regarded as merely the beginning of a more comprehensive and expansive analysis of the legal status of freedom of expression in Egypt following the adoption of the 2014 Constitution. Whereby it is a continuation to the work of two previous studies published by the U.G. Law the first titled "The Guillotine and the Pit"<sup>1</sup> discussing the freedom of expression in Egypt from 2003 to 2004, and the second titled "On the Edge"<sup>2</sup> discussing the freedom of expression from 2004 to 2007. Such an undertaking requires significant effort, a diverse team, extended time, and a large budget.

Since the 1980s, many discussions have revolved around freedom of expression in writing and restrictions on it. Egyptian human rights organizations have made commendable efforts to create legal spaces that allow expression through writing to flourish more freely. Over the years, these organizations have achieved significant breakthroughs in the punitive framework of Egypt; prior to the January 2011 Revolution, penalties of imprisonment were removed from certain offenses of defamation and slander. Additionally, Public Prosecution has become the responsible party to prove defamation claims or assisting the accused in substantiating them in cases involving public officials, among other advancements.

However, following the adoption of the 2014 Constitution, which amended the 2012 Constitution after the 30 June Revolution in 2013, a fundamental issue arose within the Egyptian criminal legislation. Where many penal provisions became constitutionally flawed; since the new Egyptian Constitution has broadened human rights and the freedoms of opinion and expression to an unprecedented level, rendering much of the pre-existing penal legislation inconsistent with its provisions.

Regrettably, some penal laws enacted after the adoption of the 2014 Constitution contain inherent constitutional defects, raising questions about the reasons for these deliberate violations of constitutional texts.

According to the adoption of the National Human Rights Strategy (the "**Strategy**") as a foundational document within the National Dialogue by the Board of Trustees, the Human Rights Committee is committed to develop action plans to implement the objectives outlined therein.

The Strategy outlines three pathways to achieve its objectives, one of which, and perhaps the most important, is the **legislative development pathway**. The Strategy acknowledges that the law enforcement, alongside the establishment of the necessary mechanisms to achieve and ensure compliance with these laws, is crucial for achieving its goals. It is also essential for

strengthening the rule of law. It is important to note that one of the key legislative objectives related to the subject of this study is **"Enhancing legislation that guarantee the right to exercise freedom of expression and addressing any violations within the framework of the Constitution and the Laws governing this right, as well as the periodic review of such laws to ensure the continued protection of this right in accordance with the Constitution and Egypt's international obligations."**

This Study, originally published in Arabic, is divided into five main chapters, in addition to an executive summary that includes a brief overview of the study's main findings and recommendations, along with two annexes containing the principles established by the Egyptian Court of Cassation regarding crimes related to expression.

The first chapter provides a brief overview of the political and economic situation that affects freedom of expression. The second chapter covers the right to freedom of expression in the Egyptian Constitution, the rulings of the Supreme Constitutional Court, and international treaties, which, under the Constitution, have become an integral part of national legislation. Furthermore, the third chapter presents examples of penal provisions related to expression, clarifying their legislative development since their enactment in the Penal Code in the mid-18th century until today. It also examines legislative provisions issued after the adoption of the 2014 Constitution that are in clear violation of its provisions. The fourth chapter discusses precedents of the Economic Court and the Court of Cassation regarding legal provisions related to expression and analyzes them. In the fifth chapter, the study presents alternative legal provisions to the current ones, making them more aligned with the Constitution without altering their general structure.

### **Key Findings from the Study's Chapters**

The first chapter provides an overall image of the challenges facing freedom of expression in Egypt. The press and media have experienced several ups and downs following the January 2011 Revolution, which initially sparked enthusiasm and hope for a secure future free from restrictions or dangers. During this exceptional democratic movement, there was a marked increase in the number of newspapers, and more significantly, an unprecedented rise in distribution rates, fueled by the broader space for writing and journalistic coverage. This democratic momentum wasn't limited to the press; television channels saw unprecedented diversity, and political talk shows multiplied. The public witnessed new faces and personalities who had long been barred from media appearances. The political landscape was further enriched by the formation of numerous political parties with diverse agendas, all striving to open new channels of communication with society.

However, this period of liberalization was short-lived. Attempts by the political Islamist movement to seize power led to them securing a majority of parliamentary seats and the election of Mohamed Morsi as President. Morsi soon began to make decisions and implement policies that expanded his powers and shielded his decisions from opposition. Consequently, society experienced a retreat from the freedom gained after the revolution. Laws and decrees imposing restrictions on freedoms resurfaced, persisting to this day.

Annual reports issued by various international organizations concerned with human rights in general, and freedom of speech and expression in particular, reveal that Egypt consistently ranks at the bottom of classification and evaluation lists, often categorized as either an authoritarian or non-free state. According to the Rule of Law Index, Egypt ranked 136 out of 142 countries and came 140 out of 142 in the Index of Constraints on Government Powers. It ranked 102 in the Corruption Index and was at the very bottom of the list in the Open Government Index (transparency), ranking 140. In the Basic Rights Index, it also ranked 140, while it ranked 112th in the Order and Security Index. Regarding the Regulatory Enforcement Index, Egypt ranked 133 out of 142 countries, 130 in the Civil Justice Index, and finally, it ranked 111th in the Criminal Justice Index.

Furthermore, Egypt ranked 170 out of 180 countries in the Press Freedom Index issued by Reporters Without Borders. In the Democracy Index for 2023, published by the Economist Intelligence Unit, Egypt ranked 127 out of 167 countries and was classified as one of the authoritarian states. It also ranked 108 out of 180 countries in the Corruption Perceptions Index.

The first chapter outlines the legislative and professional challenges that have faced publication and expression, stating that "despite the 2014 Constitution, amended from the 2012 Constitution, enshrining numerous freedoms and recognizing human rights and International Treaties as part of national legislation, along with the Presidential decree to repeal the extension of the Emergency Law and the launch of the Strategy—which included a specific section on freedom of speech and expression—and the initiation of the National Dialogue, which discussed several issues related to freedom of press and media, particularly laws regarding access to information and the amendment of laws that impose imprisonment for crimes related to publication, the same period witnessed the enactment of several laws. Among these laws were the laws regulating freedom of press and media, namely Laws No. 178, 179, and 180 of 2018, as well as anti-terrorism laws and others that included provisions imposing censorship and restrictions on journalistic and media work, granting the Supreme Council for Media Regulation a primary role in monitoring newspapers and websites and blocking many of them.

Additionally, these laws expanded the penalties for crimes related to publication contradicting constitutional provisions, which led many journalists and media professionals to practice self-censorship on their work and writings, significantly limiting the available margin of freedom and democracy.

Moreover, the press and media have faced ongoing attempts to monopolize the public domain to control the content published, whether through newspapers, television channels, or radio stations. The media business witnessed several mergers, most importantly the acquisition by UNI Broadcast, which garnered control over more than five newspapers, fifteen television channels, and five radio stations. UNI Broadcast also owns three companies specializing in drama and film production and distribution—Synergy, Synergy Films, and Media Club—along with three companies specializing in advertising and public relations, and two companies in sports marketing, in addition to the online streaming platform (“Watch It”).

An additional major challenge was the wages and income of journalists, whose wages are considerably lower compared to other professions. Many media outlets engaged in long negotiations with the Journalists’ Syndicate to adhere to the minimum wage requirements applied to workers in the public and private sector. This led many skilled journalists and media professionals to either work in privately owned television channels producing and presenting

news programs or talk shows, which offer significantly higher salaries than newspapers, and/or content creation on social media platforms like TikTok, YouTube, and other applications, which can be quite lucrative if the content gains a high number of views.

The economic situation has cast a shadow over media outlets, as the cost of production and sustaining printed newspapers has significantly risen. Moreover, the widespread use of social media platforms, news applications, and the increased prices of newspapers have led to a decline in public interest in purchasing print newspapers. This, in turn, caused many newspapers to cease publication, with some disappearing entirely or limiting their operations to their online platforms. The remaining newspapers greatly reduced production costs, either by decreasing the number of printed copies or by laying off many employees.

The second chapter of the Study showcases a different constitutional scope that creates a protective framework for the freedom of expression in the hope that it may flourish. After reviewing the constitutional status of freedom of expression from the 1923 Constitution to the 2014 Constitution, as well as the rulings of the Constitutional Court, the second chapter has reached several key conclusions:

1. The constitutions of Egypt have historically had relatively short lifespans. The 1923 Constitution, Egypt's first comprehensive constitution, lasted for only seven years before it was abolished by King Fuad during the government of Ismail Sidky Pasha, replacing it with a constitution of his own making in 1930. Even after the 1923 Constitution was reinstated on December 12, 1935, following a notable popular struggle in which dozens of Egyptians lost their lives, it remained in effect for less than twelve years before being abolished by the constitutional declaration issued on February 10, 1953.

Similarly, the 1956 Constitution lasted for only two years, while the 1964 Constitution remained in effect for approximately seven years or less. Thus, the longest-lived constitution in Egypt's history was the 1971 Constitution, which remained in force for nearly forty years.

Considering that a constitution, as established in the general principles of constitutional law, is defined as "a set of fundamental principles governing the structure of government within a state, the powers and responsibilities of each branch of government, the mechanisms of checks and balances between them, and the rights and duties between the state and its citizens," the frequent changes in Egypt's constitutions are a clear indicator of the state's political instability. This instability has impeded Egypt's ability to develop a mature and enduring constitutional framework to ensure that governmental authorities adhere to its provisions

2. Regardless of whether the constitution was drafted by an elected or appointed constituent assembly or a group of experts, its annulment is not a difficult process as it often occurs in a manner that gives the impression that its annulment is a popular demand.

Apart from the 1923 Constitution, there have been no widespread movements questioning the reasons for annulling the constitution. While there have certainly been scattered voices expressing concern and disapproval, we have not witnessed a large-scale public movement opposing the abolition of a constitution that the people themselves had approved. This may be attributed to the public's belief that the constitution, in practice, holds little relevance in Egypt; however, this is a separate matter.

3. Most of Egypt's successive constitutions were either granted by the king, enacted by the decision of a revolutionary leader, or decreed by the president, with the exception of the constitutions issued in 1971, 2012, and 2014. However, even these last two constitutions did not escape suspension, deviation, or the addition of unilateral constitutional declarations.

4. Freedom of expression, as explicitly stated in Egyptian constitutions, has always been limited by the requirement that it must be exercised within the boundaries of the law. Additionally, the 2012 Constitution introduced a specific restriction on freedom of expression in Article 46, which explicitly prohibited any criticism of prophets and messengers. This provision effectively shuts an important area of religious discourse, as it did not merely prohibit defamation or insult toward prophets, but broadly bans any discussion or critique of them. Further restrictions were also placed, particularly concerning Al-Azhar and other religious institutions.

5. The 2014 Constitution is considered as the only constitution to guarantee absolute freedom of thought and opinion without restrictions. It also introduced a unique provision in Article 71, prohibiting the imposition of any custodial sentence for crimes committed through publishing or public dissemination. Additionally, for the first time, Article 93 stipulated that international human rights treaties and covenants ratified by Egypt have the force of law. This provision is distinct from the general practice in previous Egyptian constitutions, which recognized international treaties as part of domestic legislation once ratified and published.

6. The right to access and disseminate information, which is essential for the freedom of expression, opinion, speech, and the press, was not a priority in Egyptian constitutions from 1923 to 2012. However, it is worth noting that the 1971 Constitution has partially acknowledged this right, limiting it to journalists and stipulating that it must be exercised within the limits of the law.

7. Both the 2012 and 2014 Constitutions recognize the right to access information as a guaranteed right. Outlining in detail what the laws regulating this right should address, to prevent the legislator from undermining this vital human right. These constitutions are thus considered among the best Egyptian constitutions in solidifying the existence of this right and placing restrictions on the legislator to prevent stripping this right of its essence.

This chapter also discusses several fundamental principles adopted by the Constitutional Court regarding freedom of expression:

**First Principle:** The first principle is that the constitution is considered a progressive document, emerging from the broad horizons of development. Its fabric must harmonize with the spirit of the times, ensuring progress in a particular phase, and should be adhered to as long it does not contradict the provisions contained within the constitution itself<sup>3</sup>. A constitution does not operate in a vacuum, nor does it merely regulate rules that can only be altered through amendments in accordance with prescribed procedures. Rather, it is a living, progressive document that seeks to develop society within a specific environment, framed by the rule of law.<sup>4</sup>

**Second Principle:** The foundational principle of constitutional provisions is that they must be interpreted as a cohesive whole. The meanings derived from them should be interconnected, avoiding any inconsistency or contradiction. Moreover, these provisions function within an organic unity, forming a coherent and harmonious framework. This ensures that each provision

has a distinct meaning, independent from yet not isolated from the others. Collectively, they construct the structure that reflects the will of the people, aimed at developing their political, economic, and social interests.

It is important to note that this principle, established by the Supreme Constitutional Court under the 1971 Constitution, became a binding constitutional mandate in the 2014 Constitution. Article 227 explicitly states that "the Constitution, including its preamble and all its provisions, forms an interconnected and indivisible whole, and its provisions are complementary within a coherent organic unity.

**Third Principle:** Constitutional provisions must be clear and explicit, ensuring that their intentions are evident. The Constitution is a progressive document, not bound by past concepts, but rather embodies principles shaped by the people's will, aimed at fostering change and facilitating development<sup>5</sup>. Accordingly, constitutional provisions must be drafted in a manner that facilitates their understanding in light of values aimed at political and economic liberation of both the nation and its people. Constitutional provisions should be clear enough to prevent their manipulation or subjugation to any specific ideology that might conflict with the collective aims for progress. The Constitution should not obstruct such aims but rather support and safeguard them.<sup>6</sup>

**Fourth Principle:** Constitutional provisions should aim to protect individual freedom and ensure its expansion into broader horizons, serving as a safeguard against the abuse or deviation of power. This is a key guarantee for the realization of the people's will, particularly in establishing a system of governance, a system of governance that is not dominated by the authority of a single entity. Instead, the Constitution should ensure a democratic distribution of power among various branches of government, fostering balance and mutual oversight. The system should be adaptable to development, committed to the will of the people, and accountable to the public. It must enhance the capabilities of the people while setting firm limits to prevent encroachments on their established rights and fundamental freedoms, with sanctions imposed for any violations of these principles.<sup>7</sup>

**Fifth Principle:** The 2014 Constitution is the most progressive constitutional document in safeguarding the rights of assembly and freedom of speech and expression, and the rights that stem from these freedoms. Therefore, its interpretation must be progressive and consistent with international human rights conventions, far beyond the interpretations of previous constitutions.

**Sixth Principle:** Public rights and freedoms, with freedom of speech at their core, hold constitutional authority that supersedes ordinary legislation. Should the legislator, in enacting laws, undermines this constitutional authority by restricting a freedom that the Constitution has granted as absolute, or by nullifying or diminishing a freedom under the guise of regulation, such legislative action would be tainted by unconstitutionality.

**Seventh Principle:** Freedom of speech and expression is essential to the right to assemble, and freedom of the press serves as a safeguard for freedom of expression. The protection of free speech and the press cannot be sufficiently guaranteed without some form of assembly. The right to form associations is an extension of the right to assemble, which is one of the highest forms of free speech. Thus, the court links all forms of freedom of expression, facilitating their defense as a unified, interconnected whole.

**Eighth Principle:** Those who defend their opinions and beliefs often resort to exaggeration. For freedom of speech to thrive, a certain degree of exaggeration must be tolerated. It is not justifiable to suppress the circulation of ideas simply because they are deemed as exaggerated.

With regards to the legal status of international treaties within the Egyptian legal system, the study cites the Constitutional Court's ruling, which states, "According to Article 227 of the 2014 Egyptian Constitution, all constitutional provisions are interconnected and form a cohesive whole, with no separation between them. The preamble of the Constitution highlights the elevated status of human rights and fundamental freedoms<sup>8</sup>.

Given that international human rights treaties have, by virtue of Article 93, become part of the national legal framework, this chapter examines the guarantees of freedom of speech and expression as articulated in the International Covenant on Civil and Political Rights ("ICCPR"). It specifically analyzes Article 19 of the Covenant and its interpretation by the Special Rapporteur, while also discussing the right to reputation as a limitation on freedom of expression according to the ICCPR.

Furthermore, it explores Article 18 of the ICCPR, which underscores the connection between freedom of expression and freedom of belief, stating that "it is established that freedom of expression allows individuals to express their religious beliefs. In this way, freedom of expression is the foundational freedom from which many other rights are derived. It is the true gateway for exercising other rights, such as the right to criticize, freedom of the press, freedom of publication, academic freedom, literary, artistic, and cultural creativity, the right to assemble for consultation and the exchange of ideas, and the right to petition public authorities."

The Study emphasizes the interdependence between freedom of expression and freedom of belief, showcasing that the essence of freedom of belief lies in the ability to choose and practice faith without coercion. Without the freedom to practice religious belief, the ability to follow and pass down religious teachings to generations would be incomplete.

The Study also analyses General Comment No. 11 (1983) from the Human Rights Committee, concerning the prohibition of war propaganda and incitement of national, racial, and religious hatred (Article 20) of the ICCPR. The Committee concluded that "the required prohibition is entirely consistent with the right to freedom of expression as outlined in Article 19, which entails special duties and responsibilities in its practice."

It should be noted that Article 20(2) is "directed against any propaganda of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, whether such propaganda has domestic or external objectives for the state in question." The Committee further emphasized that for Article 20 to be fully effective, "there must be a law that clearly stipulates that such propaganda or advocacy, as described in the article, is contrary to public policy and further prescribes appropriate penalties in the event of violation."

Additionally, in General Comment No. 22 (1993), the Human Rights Committee clarified that "in accordance with Article 20 of the ICCPR, the manifestation of religion or belief may not constitute propaganda for war or incitement to national, racial, or religious hatred that incites discrimination, hostility, or violence."

The third chapter of the Study analyses 35 articles from the Penal Code and other laws related to freedom of speech and expression in general. It resorts to and discusses their primary drafting

upon the issuance of the Penal Code, the amendments made to them, and the reasoning behind these amendments. Regarding the Penal Code, the Study concludes with three main observations about the penal framework within the Egyptian Penal Code:

**Observation One:** In the period following the July 1952 Revolution and after the constitutional declaration issued by General Mohamed Naguib on June 18, 1953, the legislator deliberately tampered with the Penal Code. Several provisions were added, others were removed, and certain articles were rephrased in a manner that distorted their original purpose, shifting them toward malicious aims.

**Observation Two:** Every amendment made to the Penal Code has historically been linked to restricting freedom of expression through writing, perceiving it as a threat to stability or to mislead public consciousness. This confirms that the idea of suppressing freedom through law is deeply rooted in the national criminal legislator's mindset. This can be traced back to the inception of the Penal Code, it grew and flourished after the July 1952 revolution and has continued to serve any ruling system that seeks to employ it.

**Observation Three:** Some amendments to the Penal Code were purely technical and resulted from pressure from both Egyptian and international human rights organizations. For example, changes were made to replace the punishment of life with hard labor with that of aggravated imprisonment. Similarly, revisions were made following interpretations by the Supreme Constitutional Court concerning the legality of certain crimes and punishments.

For instance, Article 174 of the Penal Code was amended by removing phrases such as "or to disdain or despise it" and "advocating or using any other illegal means." These changes were made under Law No. 147 of 2006 to amend a provision that originally restricted freedom of expression through writing and which, in principle, should have been completely abolished.

The fourth chapter of the study examines the application of rulings by the Economic Courts and the Court of Cassation concerning the freedom of expression through writing. It first addresses the discretion of criminal judges in forming their convictions and identifies six key points that must be considered when evaluating the position of a criminal judge in cases before them, considering that legal provisions are often vague and imprecise. These key points are as follows:

1. **Judicial Authority:** A criminal judge, up to the level of the Court of Cassation, cannot establish new legal rules. The most they can do is interpret the law, ensuring that the interpretation considers the meanings of the words and is guided by the legislator's intent and the principles of justice. The rules, principles, and interpretations reached by the Court of Cassation are not binding on lower courts.

This contrasts with the Supreme Constitutional Court, whose rulings carry binding power and are published in the Official Gazette.

2. **Judicial Freedom:** A criminal judge has the freedom to form their conviction in the case, in accordance with Article 302 of the Code of Criminal Procedure, which states: "The judge shall rule in the case according to the conviction formed in his mind with complete freedom. However, he shall not base his ruling on any evidence that was not presented to him in the hearing."

3. **Evidence-Based Judgment:** A criminal judge has the freedom to form their conviction in a case, as stipulated by Article 302 of the Criminal Procedure Code, which states: "The judge shall rule in the case according to the conviction formed with complete discretion. However, they may not base their judgment on any evidence that was not presented in the court session."<sup>9</sup>
4. **Weight of Evidence:** While the criminal judge is entitled to rule in the case based on the conviction they have formed, as per the previous article, this freedom is subject to two additional limitations. The first is that the judgment cannot be based on any evidence not presented during the court session. The second constraint is that the judgment must be founded and based on concrete facts. The court, in a ruling, stated: "In criminal matters, the essential consideration is concrete facts, not mere assumptions or abstract hypotheses<sup>10</sup>."
5. **Interpretation of Testimony:** Furthermore, "It is not required that each piece of evidence relied upon in the judgment independently proves every detail of the case. In criminal cases, evidence is interconnected, each piece complementing the other, and collectively forming the court's conviction. Therefore, evidence should not be viewed or analyzed in isolation, but rather as a whole, sufficient to lead to a judgment and produce in the court's mind a sense of assurance in its conclusion<sup>11</sup>
6. The assessment of the connection between crimes that are inseparable is left to the discretion of the court of first instance." The court has clarified this in its ruling, stating that "where crimes are interconnected in such a way that they cannot be separated, as defined by the legislator in Article 32(2) of the Penal Code as follows: 'if several crimes are committed with a single purpose and are so interconnected that they cannot be separated, they shall be regarded as one single crime, and the penalty for the most serious of those crimes shall be applied.'

This section concludes by asserting, "It is evident that the criminal judge plays a crucial role in existence of a criminal offense, verifying its essential elements, or determining the interconnection between crimes. This discretion, when combined with legal provisions that contain vague and imprecise wording, can significantly harm the defendant."

After analyzing the freedom of the criminal judge in matters of evidence, the Study, in chapter four, explores the jurisdiction of the Economic Court — which is the court responsible for adjudicating crimes related to expression on social media and internet applications—specifically on freedom of expression.<sup>12</sup>

The Study notes that it is important to observe that the rulings of the Economic Court affirm the following:

1. **Discretion in Accepting Evidence:** Courts have the discretion to accept any incriminating evidence against the defendant, relying on their discretion to form their convictions; thus, investigation reports are admissible, and testimonies from individuals unknown to the court and not heard by it are also admissible.

2. **Witness Testimony:** The court has the discretion to accept or refuse a witness's testimony based on its own assessment. If the defendant requests to hear a witness and notifies the court, and if the witness is brought at the defendant's expense, it is within the court's authority to accept hearing the testimony or decline doing so, without prejudice to the validity of its ruling.
3. **The Defense of Incompatibility of the Charges with the Constitution - Constitutional Objections:** Despite the significance of this objection regarding the unconstitutionality of some of the penal code provisions in general, the court has the right to disregard these objections without providing reasoning or discussing the contested legal provision. The court may regard it as a matter of substantive debate rather than a fundamental defense.
4. **Article 71 of the Constitution:** The provision in Article 71 of the Constitution, prohibiting imposition of imprisonment for offenses committed through publication or public exposure, applies exclusively to crimes perpetrated by newspapers and media outlets, and journalists through publication and does not extend to other individuals.
5. **Re-Trial for the Same Act:** An individual may be subject to re-trial for the same offence before two different courts. This happens if the court that initially adjudicated the case lacked jurisdiction to impose a penalty for the severe interpretation of the offence and could not amend the classification and description of said offence.  
  
Thus, an individual may face re-trial before a higher court for the severe interpretation of an offence, especially if the first court ruled on the less severe interpretation. Whereby, an individual may be prosecuted for an offence before the court of misdemeanor, and then face re-trial for the same offence before the criminal court.
6. **Criminal Conspiracy:** The court may infer a criminal conspiracy from mere circumstantial evidence—though circumstantial evidence is not conclusive, the accumulation of multiple pieces of circumstantial evidence may be considered as evidence. This implies the possibility of convicting the accused based on the strength of circumstantial evidence.
7. **Contradictory Testimonies:** Even contradictions in the testimonies of prosecution witnesses do not affect the validity and integrity of those testimonies, provided that the trial court has the authority and discretion to decide the testimonies it deems appropriate.

This chapter also displays the Court of Cassation's standpoint with regards to freedom of expression my means publication and writing, stating, "In general, it can be said that the Court of Cassation grants broad discretion to the judge in establishing the crime and deducing its elements, provides a wide scope for not pursuing the defense of the defendant in general."<sup>13</sup>

The Study further notes the Court of Cassation's approach—after reviewing more than 700 of its rulings—are highly conservative. The Court interprets legal provisions in a strict and narrow manner and grants significant discretion to the trial judge in criminal cases. The

court often employs phrases as they appear in the text without interpretation, using terms such as "disturbance of public order" without determining the meaning and scope of "disturbance". The court considers the state and government as one entity, viewing the dissemination of information criticizing the government abroad as, in fact, criticism of the state itself, ultimately constituting a form of terrorism.

Additionally, the court refrains from expressing its views on the constitutionality of the legal provisions presented to it and adjudicates appeals based on them. When it interprets certain constitutional provisions, its interpretations have been divergent; for instance, the court stated that the offenses related to publication from for which imprisonment was abolished by Law No. 180 of 2018 pertain specifically to the journalist's work, excluding other crimes committed by means of publication. This interpretation is incorrect of the constitutional provision and the law it sought to interpret.

Chapter four outlines 68 principles and approaches of the Court of Cassation regarding freedom of expression in writing, leaving those interested in further details to refer to the rulings and specifics in Appendices 1 and 2 of the Study.

Chapter five of this Study proposes alternative legal drafting for certain provisions of the Penal Code and others, delineating the characteristics of the Egyptian punitive system concerning the freedoms of expression by means of publication with several fundamental features:

**First Characteristic:** Regardless of the prevailing constitutional system, the Egyptian legislator fears freedom of expression and views it as inherently threatening to the stability of the State.

**Second Characteristic:** As a result of this exaggerated fear of freedoms of expression, the Egyptian legislator consistently attempts, as clarified in chapter three of this study, to circumvent constitutional provisions and restrict freedoms of expression as much as possible. This is achieved through two primary methods:

1. **Excessive penalties:** The legislator tends to impose excessively harsh penalties, transforming retribution from a mere deterrent into a tool for vengeance.
2. **Vague General Terms:** The use of ambiguous and elastic phrases enables the application to evade the strictness of the penal code in proving the crime, thereby facilitating various methods of suppressing freedom of expression.

### **Third Characteristic: Exploitation of the Slow Procedures for Constitutional Appeals**

The legislator exploits the slow procedures of appealing against the constitutionality of legal provisions to circumvent them. On one hand, a harmed party from the application of a legal provision cannot directly resort to constitutional court; instead, they must request the court before which they are being tried to permit them to file a constitutional challenge, or the court itself must refer the legal provision being challenged to the constitutional court. These attempts do not always succeed for various reasons. On the other hand, the law governing the constitutional court does not specify a timeframe within which the court must rule on a constitutional case once referred to it; this process may take many years before it is addressed.

Furthermore, when the trial court decides to suspend the case before it and refers the legal provision to the constitutional court for, this does not obligate it to release the defendant if they are in custody; they remain in their current situation until the constitutional case is resolved, which may take longer than the duration they would serve in prison as a sentenced individual rather than as a pre-trial detainee.

Consequently, many lawyers—especially if the defendant is in custody—refrain from filing constitutional challenges, attempting instead to interpret the legal text broadly to assist their clients.

The Study outlines twelve fundamental principles that can guide the proposal of more consistent legal amendments in line with constitutional provisions, as follows:

1. **First Principle:** The penalty must be proportional to the severity of the criminalized offences. The constitutional court has stated, "The legitimacy of the penalty is contingent upon its proportionality to the offences that the legislator has criminalized or prohibited. If the penalty is not proportional to the severity of the criminalized offences, it loses its justification for existence, constituting an infringement on personal freedom protected by Article 41 of the Constitution."<sup>14</sup>
2. **Second Principle:** Acts punishable by criminal law must be clearly defined; otherwise, they are deemed unconstitutional. The Supreme Constitutional Court has asserted that "Penal laws require that the degree of certainty and precision and the standards mandated by the Constitution be more evident in these laws than in any other legislation. This is due to the fact that penal laws impose the most severe and consequential restrictions on personal liberty. Consequently, and in order to safeguard this liberty, the conduct criminalized by these laws must be delineated with such precision as to prevent any potential confusion with lawful acts. These laws must be explicit and unambiguous in clearly specifying the narrow boundaries of their prohibitions. Any ambiguity or vagueness in their provisions would prevent those subjects to the law from having a clear understanding of the exact conduct they are required to avoid."<sup>15</sup>
3. **Third Principle:** No custodial penalties should be imposed for crimes related to the public dissemination of artistic, literary, or intellectual works, in accordance with the provisions of Article 76, Paragraph 2 of the Constitution.
4. **Fourth Principle:** No custodial penalties should be imposed for crimes committed through publication or public expression, applying Article 71, Paragraph 2 of the Constitution.
5. **Fifth Principle:** Defamation laws must align with the principles of human rights enshrined in the International Covenant on Civil and Political Rights and other human rights treaties to which Egypt is a party, in accordance with Article 93 of the Constitution<sup>16</sup>.
6. **Sixth Principle:** The right to freedom of expression must not serve to harm the reputation of others by subjecting them to campaigns that violate their right to privacy

or impinge upon their honor and reputation<sup>17</sup>. A careful reading of Article 17 of the International Covenant on Civil and Political Rights reveals that the right to reputation was specifically established to protect individuals against the state. These international legal provisions require public authorities to refrain from engaging in unlawful campaigns that harm citizens. A review of Article 12 of the Universal Declaration of Human Rights and Article 17 of the ICCPR shows that states are obligated to ensure that reputation enjoys the "protection of the law." Accordingly, it is evident that each state must enact legislation enabling citizens to take legal measures when state agencies or officials, or any other entities, undermine their reputation through organized defamation campaigns.<sup>18</sup>

7. **Seventh Principle:** The burden of proof must not be shifted onto the defendant; rather, it rests with the claimant, who is liable to prove their claim, including the fault of the defendant.
8. **Eighth Principle:** Laws should not penalize opinions; the law should not determine which opinions are valid and which are false, but rather allow citizens to hold their own views freely.
9. **Ninth Principle:** Individuals should not be held liable for transmitting or reproducing defamatory material, cartoons, images, or other materials originating from third parties, provided that such content is part of a discussion on a matter of public interest and the individual does not claim ownership of the content. It should be clear that the content originates from someone else.
10. **Tenth Principle:** Publishers, printers, distributors of newspapers, or internet service providers should not be held accountable for the content they print or distribute. To assert otherwise would compel printers and distributors to act as censors of the opinions published in the newspapers and magazines they handle and would require service providers to monitor the content posted by users. This would represent an extreme form of censorship.<sup>19</sup>
11. **Eleventh Principle:** Any legislation prohibiting blasphemy or religious defamation must not restrict freedom of expression. Thus, its provisions should be precise and narrowly defined, avoiding broad interpretations that could inhibit public discussions regarding religions or beliefs.<sup>20</sup>

## Recommendations

The Study concludes with several key recommendations, preceded by a report of several findings.

It stated that it is necessary to acknowledge that certain forces within the political system recognize a problem with freedom of expression, and that this issue lies not within the texts of the Egyptian Constitution but rather in many provisions of criminal legislation. This has become evident in the National Human Rights Strategy and the working groups established through the National Dialogue.

It was also stated that many criminal laws were enacted prior to the adoption of the 2014 Constitution; thus, their unconstitutionality is an inherent issue. Nevertheless, even the laws enacted after the implementation of the 2014 Constitution clearly contravene its provisions and principles, rendering their unconstitutionality intrinsic rather than incidental. Had these laws been presented to the Constitutional Court under different circumstances, they would have been annulled for their unconstitutionality.

The Study asserted that amending one or more provisions of the Penal Code or other laws would not create the desired impact. Egyptian criminal legislation does not solely pertain to the Anti-Terrorism Law or the Terrorist Entities Law; it also encompasses various provisions across multiple laws.

Additionally, the regulations governing preliminary investigations conducted by the Public Prosecution and the rules regarding pretrial detention must be reconsidered. In other words, there is a need for a thorough re-evaluation and restructuring of the legal provision imposing custodial penalties on individuals, whether in the form of substantive punitive provisions or provisional judicial decisions, to ensure compliance with the Constitution.

Based on these facts, the Study recommended the following:

1. The state should implement the objectives outlined in the National Human Rights Strategy concerning freedom of expression, which include:
  - (i) Enacting a law regulating the right to access official information, data, and statistics and their dissemination.
  - (ii) Promoting a climate and culture of pluralism and diversity of opinions and views on various public issues.
  - (iii) Continuing efforts to protect journalists and media personnel while performing their duties, in accordance with the Constitution and relevant laws.
  - (iv) Strengthening the right to freedom of expression and addressing any violations within the framework of the Constitution and relevant laws, with periodic reviews to ensure compliance with the Constitution and Egypt's international obligations.

- (v) Issuing a comprehensive code of conduct for all media fields, including digital media and social networks, to ensure that freedom of expression is exercised without infringing on the rights of others, and benefiting from international experiences in line with the Constitution and Egypt's international obligations.
  - (vi) Raising public awareness about the importance of freedom of expression and conducting training for journalists and media practitioners on the limits of this freedom and the forms of its abuse.
2. The National Council for Human Rights, in cooperation with serious and independent human rights organizations, should form a research group to review all legislation containing punitive provisions to assess their compliance with the 2014 Constitution and the international treaties to which Egypt is a party. These treaties, under the Constitution, are part of Egyptian law. The results of this research should be discussed with Parliament and the relevant authorities.
  3. The Supreme Judicial Council, as the body responsible for judicial affairs, should organize training programs for judges to identify instances of unconstitutionality in the penal provisions they apply in the cases before them and refer them to the Supreme Constitutional Court.
  4. The National Dialogue Board of Trustees should hold multiple sessions to discuss penal provisions related to freedom of expression and propose mutually agreed amendments or new interpretations, submitting these proposals to Parliament and the Supreme Judicial Council as soon as possible.
  5. The Egyptian Bar Association and independent civil society organizations should organize training courses for lawyers at all levels to help them identify unconstitutional aspects of penal provisions in the cases they handle, and how to challenge them by drafting constitutional objections.
  6. The Supreme Judicial Council, the Bar Association, and criminal law departments should provide interpretations of penal provisions that impose custodial sentences for expression, ensuring their application is as narrowly limited as possible. These new legal interpretations should be distributed to judges and lawyers to improve the handling of such provisions.
  7. The Bar Association's Freedom Committee and its branches in courts of appeal circuits should cooperate extensively with human rights organizations and the Journalists Syndicate's Freedom Committee to provide swift, professional, and specialized legal support to all victims of freedom of expression violations.
  8. Human rights organizations should publish an annual report on the state of freedom of expression in Egypt, ensuring it is balanced, professional, and non-political, as an important reference for studying the progress or decline of these freedoms in Egypt.