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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**The Right to Information in Egypt  
and Prospects of Renegotiating a New Social Order**

**A Thesis Submitted to the**

**Department of Law**

**In partial fulfillment of the requirements for the  
LL.M. Degree in International and Comparative Law**

**By**

**Farida Mohamed Ahmed Ibrahim**

**February 2017**

The American University in Cairo  
School of Global Affairs and Public Policy

The RIGHT TO INFORMATION IN EGYPT  
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A Thesis Submitted by

*Farida Mohamed Ahmed Ibrahim*

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## DEDICATION

This thesis is dedicated to the millions of vulnerable Egyptians in the Nile Valley who have been continuously excluded, discriminated against and deprived of their opportunities for empowerment.

## ACKNOWLEDGMENTS

First and foremost, I thank God for granting me the capability and strength to complete my research project successfully. I would sincerely like to thank my thesis supervisor, Professor Hani Sayed, for all his assistance, thoughtful guidance, and critical comments. I do, and will always, owe him a lot for all that I have learned from him. I would like also to express my gratitude to my committee member, Professor Usha Natarajan, for her brilliant comments and suggestions. Her support and advice have been invaluable. I am also very thankful to Diana Van Bogaert for her ongoing support and assistance during my study in the LL.M. program, and most recently for reading my thesis.

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The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

The RIGHT TO INFORMATION IN EGYPT  
AND PROSPECTS OF RENEGOTIATING A NEW SOCIAL ORDER

Farida Mohamed Ahmed Ibrahim

Supervised by Professor Hani Sayed

ABSTRACT

The right to information is the public's right to know through having access to public information held by state bodies. Recognized as a cornerstone in transparent, participatory and open democracies, the right to information is increasingly perceived today as an emerging human right on the international level. While this right is conceptualized in a range of different contexts, the thesis focuses on its conceptualization as a force for socio-economic change for disadvantaged groups. The thesis's goal is to study the instrumental capacity of this right in empowering the public to access state-held information pertinent to their socio-economic rights. In this regard, the thesis views the right to information as an inclusionary tool that is capable of spurring inclusion for individuals excluded from the ambits of both: public participation and social justice. For exploring this, the thesis examines the advocacy role played by civil society groups in furthering this instrumental capacity. In particular, the thesis presents a focused account on the Egyptian case. While Egypt has recently adopted its constitutional provision on access to information, doubts arise on Egyptian citizens' genuine ability to access information held by state bodies. The politico-economic environment, long term culture of bureaucratic secrecy, and legal framework do not provide promising outcomes on access to public information. Within the particular context of the Egyptian case, this thesis questions the extent to which civil society in Egypt is capable of instrumentally employing the political opportunity offered by the constitutional entitlement to information access for pressuring public authorities to disclose information. Through four lawsuits brought by civil society groups in Egypt, the thesis argues that the right to information has instrumentally provided civil society actors with new domains of mobilization for furthering the realization of social and economic rights, and ultimately, for renegotiating a new social order lining the relationship between the Egyptian state and its citizens.

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## **I. Introduction**

In the age of information, access to information lies at the heart of transparent, accountable and open democracies.<sup>1</sup> Initially incorporated into international human rights instruments as a supplement to freedoms of expression and association, the right to information has been lately conceptualized as an emerging human right in the developing global movement promoting access to information. This global movement has been simultaneously driven by concerns regarding the decrease in accountability in the public sector, and has thus been adopted as a monitoring tool over the functioning of post–World War II governments.<sup>2</sup> In recent years, the right to information has been increasingly incorporated into constitutions and national legislations of many countries, for purpose of providing people with access to information related to the functioning of their governments. In the last two decades, the number of countries that have passed right to information laws has risen significantly from approximately 13 to over 95 countries,<sup>2</sup> leading to a "global explosion of freedom of information laws."<sup>3</sup>

In addition to governmental accountability, freedom of information has been recently conceived as a force for socio-economic change, especially for disadvantaged groups. This has gone parallel to international recognition of its instrumental capacity in empowering citizens to access information about government's functioning, and thus enabling them to hold their governments accountable, particularly in domains relevant to their socio-economic rights. As an inclusionary tool, the right to information has become then viewed as capable of spurring inclusion for individuals excluded from the ambits of public participation and social justice. In relation thereto, comparative examples reveal the potential for an advocacy role played by civil society groups in furthering this instrumental capacity, by stimulating politics of inclusion pertinent to the realization of socio-economic rights.

While Egypt has been part of the global trend and adopted its constitutional provision on the access to information, doubts arise on Egyptian citizens' genuine ability to access information held by governmental bodies. This is due to an

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<sup>1</sup> Toby Mendel, *Freedom Of Information: A Comparative Legal Survey*, (Second Edition, UNESCO, Paris, 2008).

<sup>2</sup> Anupama Dokeniya, *The Right to information As A Tool For Community Empowerment*, in THE WORLD BANK LEGAL REVIEW, VOLUME5: FOSTERING DEVELOPMENT THROUGH OPPORTUNITY, INCLUSION AND EQUITY, 599-613, November 2013.

<sup>3</sup> John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Expansion of Freedom of Information Laws*, 58 Administrative Law Review 85, 85-130, (2006).



exclusionary politico-economic environment coupled with the long term culture of bureaucratic secrecy. The legal framework, further, does not provide promising outcomes on access to information due to the absence of a freedom of information law, and the wide array of secrecy legislation embedded in this framework.

Within the particular context of the Egyptian case, this thesis questions the extent to which civil society in Egypt is capable of instrumentally employing access to information as a leverage tool for furthering the realization of social and economic rights in Egypt. The thesis explores this in a twofold manner: first, by studying the right to information's capacity for promoting transparency and accountability on the part of the Egyptian government; and second, by examining likelihood of its serving as a novel point of resistance for civil society groups.

The thesis assesses the instrumental capacity of information access in Egypt, particularly by examining civil society's involvement in pressuring public authorities to disclose information in spite of the restrictive politico-economic-legal environment. The thesis, then, explores the prospects of this right in renegotiating a new social order lining the relationship between the Egyptian state and its citizens marginalized by socio-economic imbalances.

The thesis, for this purpose, examines the political opportunity offered by the constitutional entitlement to information access, and how it has been employed by civil society groups in Egypt to advocate for socio-economic rights in lawsuits brought before courts. The thesis argues that civil society's political engagement, through employing the instrumental capacity of access to information, has been successful in offering new domains of mobilization and protest to the Egyptian state's dispositions towards socio-economic imbalances.

This subject brings insights on the prospects of these protest domains in the aftermath of the 2011 uprising. This period bears relevance in examining the specific implications of establishing access to information in the 2012 constitution, and subsequently in the 2014 constitution, by exploring its application in lawsuits brought by civil society groups in Egypt. The critical political turmoil and economic crisis in Egypt since the 2011 uprising also shed light on the significance of the research question during this period specifically, with its relevance on the promised realization of socio-economic demands.

This thesis is divided in to three chapters. Chapter one describes how freedom of information is connected to politics of inclusion especially for individuals excluded

from both: the public sphere and socio-economic policies. Chapter two focuses on access to information in the Egyptian case, exploring its underlying politico-economic and legal environment, and how it serves its exclusionary ideology. Finally, Chapter three evaluates the right to information as an advocacy tool by civil society for mobilization, and argues that civil society groups in Egypt have strategically reacted to the underlying political and economic governance scheme and legal regulation of access to information through lawsuits relevant to social justice advocacy.

## II. Freedom of Information and the Politics of Inclusion

The right to information,<sup>4</sup> also known as freedom of information or access to information,<sup>5</sup> is defined as the public's right to *know* through having access to public information held by state bodies.<sup>6</sup> Accessing information about the functioning of governments has specifically arisen in the era of post–World War II as part of the growing global wave of democratization.<sup>7</sup> Due to the political underpinning of the postwar period, the right to information was portrayed in distinctly political terms with the spread of democratic forms of government calling for transparency.<sup>8</sup> As a result, access to information was considered as a democratic right of citizenry to know and be informed about what their governments are doing.

Concurrent to this global wave, the right to information was incorporated into international human rights conventions. An early reference to the right to information in an international instrument was in Article 19 of the Universal Declaration of Human Rights, referring to freedom of expression as encompassing the freedom to

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<sup>4</sup> The Human Rights Committee in its General Comment No. 34 defines information, for purpose of public sharing, as "all records held by a public body, regardless of the form in which the information is stored, its source and the date of production." Human Rights Committee, General Comment No 34: Freedoms of opinion and expression (art. 19), 12 September 2011, CCPR/C/GC/34; 19 IHRR 303 (2012).

<sup>5</sup> It has been argued that "right to information" encompasses the policies, practices, laws and procedures that guarantee openness in the conduct of public affairs, while "freedom of information" refers to the human right to access publicly held information and the corresponding duty on public authorities to secure such access. See UNDP, Bureau For Development Policy- Democratic Governance Group, RIGHT TO INFORMATION: PRACTICAL GUIDANCE NOTE, (July 2004).

<sup>6</sup> The thesis focuses on right to access information possessed by public bodies only. It thus excludes recent developments in comparative practices in extending freedom of information to information held by private bodies. These include freedom of information laws in Latin American countries, for example Argentina. Public bodies shall include, for the purpose of this thesis, state owned enterprises, entities essentially controlled or financed by the state, and private entities performing public functions. I refer here for more clarification to the criteria put down by ARTICLE19, the international human rights organisation with a specific mandate on the promotion of freedom of expression and information, according to which, "the definition of public body should focus on the *type* of service provided rather than on *formal designations*. To this end, it should include all branches and levels of government. . . and private bodies which carry out public functions." See Article19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, 5 (1999), available at <http://www.article19.org/pdfs/standards/righttoknow>.

<sup>7</sup> Dokeniya, *supra* note 2, at 599.

<sup>8</sup> With the rise of the "administrative state" in the twentieth century, the size of government everywhere has grown rampantly, and that's why calls for government openness and accountability increased. See Craig L. LaMay, et. al., *Breathing Life into Freedom of Information Laws: The Challenges of Implementation in the Democratizing World* 12, (The Center for International Media Assistance Working Paper, page No 12, 2013). John M. Ackerman & Irma E. Sandoval-Ballesteros also point out to the novelty of the concept of freedom of information on the global level and connect it with the rise of the administrative state developed in the 20<sup>th</sup> century. They suggest, in this regard, that freedom of information has developed old struggles for freedoms of opinion and press in the age of the administrative state to become the right of the public to participate in government decision-making. See Ackerman and Sandoval-Ballesteros, *supra* note 3.

“seek, receive and impart information and ideas.”<sup>9</sup> Gradually, the principle of access to information became embedded in the body of international human rights law, most importantly in the International Covenant on Civil and Political Rights (ICCPR), however, still as a complement to freedom of expression. Article 19 of the Covenant provides that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>10</sup> The principle has become, subsequently, also protected by several regional human rights instruments.<sup>11</sup>

Where the right to information has been recognised by international human rights instruments as falling within the scope of the right to freedom of expression, the principle has been over the years been conceptualized in a range of different contexts. These include the contexts of the right to life, the right to privacy<sup>12</sup>, the right to a healthy environment,<sup>13</sup> and the right to a fair trial.<sup>14</sup>

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<sup>9</sup> Article 19 of the universal declaration provides that, “Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers” Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.unhchr.ch/udhr/lang/eng.pdf>. Recognising the right to access information as a human right was also declared by the UN General Assembly in its first session held in 1946, stating that, “Freedom of information is a fundamental human right and ... the touch-stone of all the freedoms to which the United Nations is consecrated” ,G.A. Res.59 (I), at 95, U.N. Doc. A/64 (Dec. 14, 1946).

<sup>10</sup> The International Covenant for Civil and Political Rights art.19, Mar. 23, 1979, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. An authoritative interpretation of Article 19 of the Covenant was provided in 2011 by the UN Human Rights Committee in General Comment No 34. According to the Committee, Article 19 of the ICCPR encompasses specifically the right to access publicly held information. See Human Rights Committee, General Comment No 34, *supra* note 4. It is worth noting that international recognition of the right to information was made earlier also by the UN Special Rapporteur on Freedom of Opinion and Expression in 1998, by stating clearly that Article 19 of the ICCPR 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.” See 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.

<sup>11</sup> These include, for example, Article 10 of the European Convention on Human Rights and Fundamental Freedoms 1950, ETS 5 (ECHR); Article 13 of the American Convention on Human Rights 1969, 1144 UNTS 123 (ACHR); and Article 9 of the African Charter on Human and Peoples’ Rights 1981, OAU CAB/LEG/67/3rev.5; 1520 UNTS 217; 21 ILM 58 (1982).

<sup>12</sup> Evolving case law pertaining to the right to privacy and the right to life, both protected by international human rights treaties, has been linking these rights to the right to information. Court decisions tend in this regard to put positive obligations on governments to make information connected with these rights available. Most jurisprudence related to these issues is found in decisions delivered by the European Court of Human Rights. Examples of these decisions include: *Osman v United Kingdom* 1998-VIII, 29 EHRR 245, and *Golder v United Kingdom* A 18 (1978), 1 EHRR 524.

<sup>13</sup> For example, the right to access information on environmental matters constitutes today an integral instrument in environmental protection. This human right is a subject regulated today by international instruments, for instance, the Rio Declaration on Environment and Development of 1992 provides

These conceptualizations have been increasingly viewed as promoting latest developments in the global trend to recognize access to government-held information as a human right.<sup>15</sup> The development of a human right to information was first recognised by the first opinion of its kind from an international human rights tribunal delivered by the Inter-American Court on Human Rights in 2006.<sup>16</sup> This was followed in 2009 with the adoption of the first ever international convention on access to information through the Convention on Access to Official Documents.<sup>17</sup>

However, one of the more recent conceptualizations that has been increasingly pinned to this devolving human right is related to its instrumental capacity in providing incentives for inclusiveness.<sup>18</sup> A paradigm shift in the way the right to

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individuals with the right to access to information on hazardous materials and activities in their communities. Also, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention. UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the Environment for Europe process on 25 June 1998, and entered into force 30 October 2001, available at: <http://www.unece.org/env/pp/treatytext.htm>.

<sup>14</sup> Legal scholar and the former judge of the International Court of Justice Christopher Weeramantry explained that the right to a fair trial forms the basis for a right to information, by stating that the right to a fair trial is "dependent on information relating to the charges against the accused and the evidence on which they are based" See Christopher Gregory Weeramantry, *Access to Information: A New Human Right. The Right to Know*, 4 ASIAN Y.B. OF INT'L LAW 99, 101 (1994). The interdependent relationship between these two rights has been later recognised by the European Court of Human Rights in *McGinley and Egan v United Kingdom* and by the Inter-American Court of Human Rights in *Claude Reyes v Chile*. See Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 (1), Human Rights Law Review, (2013).

<sup>15</sup> In the early 1990s, Justice Christopher Weeramantry wrote on the evolving recognition of access to information as an international human right. According to Weeramantry, right to information satisfies requirements of authoritative international law sources. Most specifically, he referred to the fact that the right has been set in international agreements, recognised by an increasing number of judicial decisions and in writings of publicists. Most interestingly, is his reference to the fact that as the right has been recently incorporated into the constitutions and legislative systems of a host of countries, this makes it also a part of customary international law. See *Id.*

<sup>16</sup> The court ruled that "[T]he right to freedom of thought and expression includes the protection of the right of access to state-held information." in *Claude Reyes et al. v. Chile*, Inter-Am. Ct. H. R. (ser. C) No. 151, 77 (Sept. 19, 2006)-- 19/2006, IACtHR Series C 151 (2006). Following the decision of the Inter-American Court of Human Rights, the European Court of Human Rights began also to shift to recognize the right to information as part of the right to freedom of expression. Its landmark decision in this regard was delivered in 2009 in *Társaság a Szabadságjogokért v. Hungary*. See for this Application No 37374/05, Merits, 14 April 2009.

<sup>17</sup> Council of Europe Convention on Access to Official Documents, 18. VI. 2009, CETS 205.

<sup>18</sup> Aside from this instrumental approach, there is another trend in the literature on access to information that approaches freedom of information as an intrinsic and independent right *per se* i.e. not merely related to the realization of other rights. For instance, Michael Karanickolas and Toby Mendel argue that linking access to information to the realization of other rights both, limits the nature of access to information to cases of realization of these rights, and affects its constitutional protection as a separate right. See Michael Karanickolas & Toby Mendel, *Entrenching RTI: An Analysis of Constitutional Protections of the Right to Information*, (The Centre for Law and Democracy, 2012), available at <http://www.law-democracy.org/wp-content/uploads/2012/04/Const-Report-with-Annex.pdf>. This view is also supported by Ann Florini who claims that the recognition of the right to information as a separate human right is fundamental to the functioning of a democratic and representative society. See Ann Florini, *Introduction: the Battle over Transparency*, in Florini (ed.),

information is conceptualized internationally is seen in the questioning of its impact on socio-economic equality.<sup>19</sup>

Over the past two decades, the potential of the right to information to serve as an instrumental tool for furthering the realization of social and economic rights has become clear. This particularly powerful potential of right to information is increasingly seen in comparative practice. According to evolving international practice,<sup>20</sup> freedom of information has been framed as being instrumentally capable of providing citizens, especially marginal communities, with an enabling condition on questioning government's running of public resources, services delivery, and livelihood opportunities. The focus on marginal and poor communities has been specifically justified by their preponderant incapability to access whether resources associated with their basic rights, or information that is vital to the realization of these rights.<sup>21</sup> Their social exclusion has been arguably defined by their lack of voice to influence social and economic policy decisions, and inability to engage with public participation on such decisions.

The thesis takes on this recent paradigm shift in conceptualizing freedom of information. For this purpose, this chapter elaborates on the thesis's preoccupation with freedom of information's transformative potential, and argues that access to information is potentially capable of serving as a stimulus for inclusion for excluded segments of the population. To this end, the chapter perceives freedom of information as an instrument for political struggle for a reinvented relationship between the state

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The Right to Know: Transparency for an Open World (New York: Columbia University Press, 2007) 3. Joseph Stiglitz also proposes that the notion of access to information should not be derivative of other rights. Stiglitz, to this end, suggests the existence of an intrinsic right to information for purpose of greater openness and transparency. See Joseph Stiglitz, *The Role of Transparency in Public Life*, in World Bank, *The Right to Tell: The Role of the Mass Media in Economic Development* (Washington, D.C.: World Bank, 2002) 42.

<sup>19</sup> See Richard Calland, *The Right of Access to Information: The State of the Art and The Emerging Theory of Change*, in Richard Calland & Fatima Diallo (eds.) *Access to Information in Africa, Law, Culture, and Practice*, 2013. Maeve McDonagh has also suggested that the link between access to information and the realisation of economic and social rights has been recently a subject of increasing recognition. See McDonagh, *supra* note 14.

<sup>20</sup> International human rights bodies have referred to the potential of right to information in realizing socio-economic rights. Most remarkably, the Committee on Social and Economic Rights has made a number of general comments about the practical implementation of access to information in realising rights embodied in the convention. This includes General Comment No.14 on the right to the highest attainable standard of health, General Comment No.15 on the right to water, General Comment No.13 on the right to education, and General Comment No.12 on the right to food. See *Our Rights, Our Information: Empowering People To Demand Rights Through Knowledge*, 39 (Maja Daruwala & Venkatesh Nayak (ed.) ,Commonwealth Human Rights Initiative Working Paper, 2007).

<sup>21</sup> UNDP, RIGHT TO INFORMATION: PRACTICAL GUIDANCE NOTE, *supra* note 5, at 2.

and its citizens marginalized by exclusions from both: the public sphere and socio-economic policies.

The chapter begins with an explanation of international principles governing freedom of information and the best practices for its legal framing. It then proceeds with investigating how freedom of information is connected to the politics of inclusion that furthers its instrumental capacity. The chapter concludes by exploring relevant mobilizing actions expected from civil society's involvement with the instrumental capacity of access to information.

### **A. International Principles Regulating Freedom of Information and Best Practices in Its Legal and Institutional Framing**

This section explores international principles on freedom of information that have gained broad consensus internationally. They define concretely the scope of the right to access information, and the mechanisms regulating information sharing. The section also sheds light on international best practices that govern the ideal legal and institutional environments on the right to information. Together, the international principles and the legal and institutional architecture, embody the favorable conditions for access to information.

#### **1. International Principles Regulating Freedom of Information**

Based on comparative best practices and international standards,<sup>22</sup> a tenable set of nine principles are suggested as international standards for national regimes to provide access public information. Acting as plausible points of departure for promoting progressive and effective freedom of information legislation, these principles ensure that its utmost transformative potential is guaranteed.

The nine principles revolve around a two-sided understanding of the nature of state bodies' obligations towards the right to access information, as derived from the wording of Article 19 of the ICCPR. It has been argued that the article's provision of "freedom to receive information" prevents public authorities from interrupting the flow of information to individuals, whereas "freedom to impart information" applies to the communication of information sought by individuals. The interpretation of

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<sup>22</sup> These include the standards laid down by the UN Special Rapporteur on Freedom of Opinion and Expression in the Annual Report of 2000. See 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. I also refer here to principles laid down by ARTICLE 19, the international human rights organisation with a specific mandate on promotion of freedom of expression and information. See Article 19, *supra* note 6.

freedom to "seek" information in conjunction with the right to "receive it" places another obligation on public bodies to provide actual access to the information they hold.<sup>23</sup>

**a. Principle One: Maximum Disclosure**

According to principle one, maximum disclosure, all information held by public bodies is, in principle, public. Thus, it is subject to maximum openness and accessibility, except if there exist legitimate reasons for not disclosing it.<sup>24</sup> A public's right to access information, therefore, extends to all classes of information generated by all public bodies. This principle further means that public authorities have a duty to release information and, that the public in return have the equivalent right to request this information.<sup>25</sup> This broad scope of disclosure is nonetheless fettered by limitations to disclosure. However, limitations should be dealt with only as exceptions to the general principle that all information should be disseminated as openly as possible to the public.<sup>26</sup>

**b. Principle Two: Limited Scope of Exemptions**

The second principle- limited scope of exemptions- represents the most empirically significant means of testing the effectiveness of a right to information law: by assessing the scope of exemptions that the law specifies as reasons for withholding information.<sup>27</sup> According to this principle, grounds for withholding information must be clearly and specifically established by law and for the sole purpose of protecting legitimate interests.

In all cases, it is recognized as crucial that the wording used in the law be narrowly drawn to avoid wide discretionary attempts by public officials to withhold information that does not genuinely fit in the exemptions. In a related manner, where certain exemptions to information disclosure traditionally require time-limits on their

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<sup>23</sup> TOBY MENDEL, FREEDOM OF INFORMATION AS AN INTERNATIONALLY PROTECTED HUMAN RIGHT, <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>. Alasdair Roberts argues for example in this context that mere "negative freedoms" are not enough, but "positive freedoms" are required too for providing citizens with the opportunity to ask for and receive information in pursuit of socio-economic rights. See Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 University of Toronto Law Journal 262, 243-71, 2001.

<sup>24</sup> LaMay, Freeman & Winfield, *supra* note 6, at 14.

<sup>25</sup> UNDP Right to Information Practical Guidance Note, *supra* note 5, at 21. The principle has been said to represent thus a progressive fundamental shift in the provision of public information from "need to know" to "right to know, See Dokeniya, *supra* note 2, at 599.

<sup>26</sup> *Id.*

<sup>27</sup> UNDP RIGHT TO INFORMATION PRACTICAL GUIDANCE NOTE, *supra* note 5, at 21.



disclosure, such time limits must be reasonably set so as not to breach the core of accessibility.

It is generally agreed that limitations on the right of access to information must comply with the requirements of paragraph (3) of Article 19 the ICCPR. Limitations according to the article must be justified on the basis of the “harm” and “public interest” tests, using a three-part test procedural safeguard.<sup>28</sup> According to this test, public authorities should show that: (i) the information requested is related to a legitimate aim established by the law; (ii) disclosure of the requested information threatens to cause substantial harm to that legitimate aim; and that (iii) the substantial harm is greater than the public interest expected in having the information disclosed.<sup>29</sup>

#### **c. Principle Three: Obligation to Publish**

Principle three- obligation to publish- requires not only that public bodies respond to information requests, but also that they publish and disseminate openly key information of significant public interest. Examples include information on the functioning of public bodies, decisions and policies affecting the public along with their rationale, public service information, and budgetary data.<sup>30</sup>

#### **d. Principle Four: Promotion of Open Government**

Principle four-promotion of open government- relates to effecting change in the culture governing the operation of governmental bodies, especially in societies with a long history of a secrecy culture. The principle aims at promoting a culture of openness within governments and informing the public of their rights to give effect to the right to information, without depending only on legislation. Examples in this regard includes the training of public officials, providing for criminal penalties for willful obstruction of access to information, providing incentives for good performers, supporting public education campaigns, and promoting good record maintenance.<sup>31</sup>

#### **e. Principle Five: Processes to Facilitate Access**

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<sup>28</sup> Paragraph (3) of Article 19 of the ICCPR stipulates that, "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others;(b) For the protection of national security or of public order, or of public health or morals." The International Covenant for Civil and Political Rights art.19, Mar. 23, 1979, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. See also Article19, The Public's Right To Know: Principles on Freedom of Information Legislation, available at: <http://www.article19.org/pdfs/standards/righttoknow.pdf>.

<sup>29</sup> *Id.*

<sup>30</sup> Helen Darbshire, *Proactive Transparency: The Future of the Right to Information?* ,(World Bank Institute Governance Working Paper Series No. 56598, 2010).

<sup>31</sup> Article19, International Standards: Right to Information, April 5 2012, available at <https://www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information>

Principle five- process to facilitate access- requires that freedom of information laws should clearly stipulate the procedures for deciding upon requests submitted to public bodies. Such procedures are expected to ensure that responses to information requests will take place in a rapid and cost-effective manner.

Also related to the effective processing of information requests is the establishment of an external mechanism for encouraging state bodies' compliance with access laws. To this effect, access laws should provide in particular a system of independent review of public bodies' decisions in the event of their refusal to disseminate information.

**f. Principle Six: Costs**

Principle six-costs- requires that fees for processing information requests must not be so high as to deter individuals from making requests for information. Laws should provide, in this regard, different categories of charges for access to different classes of information.

**g. Principle Seven: Open Meetings**

Principle seven- Open Meetings-supports the concept of making meetings of public authorities open. Open meetings in this sense do not only mean access to the public body's official documents, but also access to the processes and meetings of the public body itself. Justification for this principle is driven by the underlying rationale for freedom of information that applies not only to information in its documentary form, but also to actual meetings of public bodies.

**h. Principle Eight: Disclosure Takes Precedence**

Principle Eight- Disclosure Takes Precedence- addresses cases where existing laws are inconsistent with the principle of maximum disclosure. Disclosure in such cases, according to this principle, take precedence over secrecy legislation provisions, and accordingly any existing secrecy laws should be amended or repealed. The principle, as such, imposes an obligation on national public bodies to review existing laws that restrict disclosure of information in order to bring them into line with the utmost cause of openness.

**i. Principle Nine: Protection for Whistleblowers**

Principle nine- Protection for Whistleblowers- requires that freedom of information legislation should provide specifically for the protection of whistleblowers from any legal, administrative or employment-related penalties for releasing information on wrongdoing. The principle's aim is to change the culture of secrecy in the civil service

by ensuring that public information reaches the public and is not hindered by fear of civil service liability.

## **2. Established Mechanisms of Information Sharing**

Interlinked with the implementation of the above regulating principles, are commonly applicable mechanisms for information sharing according to international standards. As per these standards, information in the possession of public bodies flows to the public through two processes: the information request process and the automatic affirmative disclosure process.

### **a. Information request process**

The information request, also known as reactive disclosure, process enables an individual to file a request for information in the government's possession, by demanding the public authority to disclose information held by it.<sup>32</sup> The rationale for this is based on a citizen's right to *pull out* information held by the public body.<sup>33</sup>

Where a public authority denies access to information, it bears the onus of justifying its refusal by showing that the withheld information falls within the scope of the limited list of exceptions, or generally satisfies the three-part test.

### **b. Automatic affirmative disclosures**

Automatic affirmative, also known as proactive, disclosures requires the government to automatically and proactively disseminate information of significant public interest in its possession to the public. This is achieved by the public body's making information public on their own initiative, without need for a formal information request.<sup>34</sup> The reasoning for this mechanism is based on the presumption of the public body's obligation not only to respond to information requests by individuals, but also to *push out* information in the public interest.<sup>35</sup>

## **3. The Legal and Institutional Frame for a Freedom of Information Regime**

For the purpose of examining the transformative potential of access to information, it is significant to analyze the way access to information, according to commonly accepted international standards, is imagined and made operational at the level of legal rules and institutions.

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<sup>32</sup>Angela Migally, *Freedom of Information: A Cornerstone of Egypt's Democratic Transition*, 9 (2012).

<sup>33</sup>Angela Migally, *Freedom of Information Legislation: Best Practices for Egypt*, The Egyptian American Rule of Law Association (EARLA), (April 12, 2012), at 6.

<sup>34</sup>Darbishire, *supra* note 30, at 15.

<sup>35</sup>*Id.*

It is increasingly recognised that the most effective mechanism for guaranteeing the exercise of the right to information is the enactment of a specific law protecting this right. In fact, states' international obligations under the ICCPR entail that states put in place effective legal systems to give practical effect to freedom of information.<sup>36</sup> Under Article 2(2) of the ICCPR, state parties are obliged to adopt laws, or other measures as may be necessary, to give effect to rights recognized by the Covenant, including the right to information.<sup>37</sup>

The purpose of a freedom of information law is to provide mechanisms for "processing" the right of access to information, along with providing legal "guarantees" for protecting its exercise. Right to information legislation ensures, to this end, the existence of a legally enforceable mechanism for individuals to request and obtain information from governmental bodies, placing a workable regime on information disclosure.<sup>38</sup> For this purpose, comparative empirical evidence indicates that passing a freedom of information law is important even if a constitutional provision on information disclosure exists, since constitutional guarantees are difficult to enforce practically without the intermediation of legislation.<sup>39</sup>

Practically, international best practices offer commonly accepted key considerations for the effectiveness of the regime on information disclosure. These considerations are mainly embodied in the nine principles of information sharing. Yet, when addressing freedom of information in domestic jurisdictions, relevant legal regimes are typically characterized by guaranteeing, specifically, the maximum openness of possible information, limited scope of exemptions to such openness, and an efficient appeals mechanism in the event access to information requests are denied.<sup>40</sup> Further, a properly-designed legal framework on access to information should assure the adequate implementation of the two mechanisms of information sharing: response to information requests and proactive disclosure of information.

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<sup>36</sup> According to General Comment No. 34 on Article 19 of the ICCPR, state parties to the covenant should make every effort to ensure effective and practical access to such information, most specifically by enacting a freedom of information legislation. See Human Rights Committee, General Comment No 34, *supra* note 4.

<sup>37</sup> Article 2(2) of the covenant states that, "Where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The International Convention for Civil and Political Rights art.2, Mar. 23, 1979, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

<sup>38</sup> UNDP RIGHT TO INFORMATION: PRACTICAL GUIDANCE NOTE, *supra* note 5, at 20.

<sup>39</sup> Ackerman & Sandoval-Ballesteros, *supra* note 3, at 94.

<sup>40</sup> UNDP RIGHT TO INFORMATION: PRACTICAL GUIDANCE NOTE, *supra* note 5, at 20.

The overall goal of such legal framework is then; firstly, to guarantee absence of restrictions on the flow of information; and secondly, to impose positive obligations on state bodies for providing open and accessible channels to information.

The legal framework regulating access to information should also embrace, as per comparative best practices, other complementary laws besides the access to information law. These laws, along with the specific law on freedom of information, mainly attempt to secure the utmost protection for access to information in practice. They specifically encompass laws protecting public whistleblowers from prosecution for disclosing information, records maintenance, and the promotion of open government through opening up the processes and activities of a government to the public.<sup>41</sup>

At the institutional level, a key element in the success of an access to information regime lies with a well-functioning information and records management system that provides citizens with a practical means to obtain full and accurate information on their government's activities and decisions.<sup>42</sup> In this context, it has been suggested that the way access to, and protection of, information and records is managed is a critical institutional catalyst in an access to information regime. This institutional catalyst is a prerequisite for exercising the right to information itself since in fact the entire premise of access to information relies on information being there in the first place and being properly archived so that it can be easily found and retrieved.<sup>43</sup> More specifically, the essence of exercising this right means assuring people's ability to seek documented information on a government's decisions with official evidence to support it;<sup>44</sup> and therefore it is pinned on the government's ability to maintain reliable information.

Practically speaking, it is understood that developing an effective information and records management system affects the efficiency of the entire information disclosure

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<sup>41</sup> Patrick Birkinshaw, *Freedom of Information and Openness: a fundamental Human Right?*, Admin. L. Rev., 2006, at 190

<sup>42</sup> Records management is defined as "the systematic control of all records from their creation or receipt, through their process, distribution, organisation, storage and retrieval, to their ultimate disposition" see for this Hagan, H., 2011. *Developing Records Management in Support of Access to Information*, National Records of Scotland , available at <https://goo.gl/KQ0Iu0>, as cited in Rebecca Zausmer, *Towards Open and transparent Governments, International Experiences and Best Practice* , 14, (Global Partners and Associates, 2011).

<sup>43</sup>*Id.*, at 18.

<sup>44</sup>Laura Millar, *The Right to Information, the Right to Records The Relationship between Record Keeping, Access to Information, and Government Accountability*, 2003, available at [http://www.humanrightsinitiative.org/programs/ai/rti/articles/record\\_keeping\\_ai.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/articles/record_keeping_ai.pdf).

regime. In effect, citizens' ability to obtain information is likely to be detrimentally affected by poorly managed government records, since their requests for information would either be delayed or ultimately not processed. The significance of an efficient records management system is, further, related to its potential for setting up efficient proactive disclosure mechanisms by state bodies. The absence of effective information and records management, thus, implies the impracticality of providing quality access to reliable and useful information.<sup>45</sup> Where assisted in practice by freedom of information being legislated, sound records and archives laws are required to be developed to support access to information.

### **B. Freedom of Information: a Mechanism to Leverage Inclusion on the Level of Public Sphere and Socio-economic Change**

Having examined optimal conditions for pushing the utmost instrumental capacity of right to information, this section explores possibilities of using the right as a leverage tool in the event these conditions are met. The section investigates the instrumentalist nature of freedom of information as a mechanism to leverage inclusion on behalf of excluded marginalized individuals, on the levels of both: inclusive governing process, and inclusive social and economic order. Its instrumentalist capacity is approached in the stances where "information asymmetry"<sup>46</sup> leads to citizen's exclusion, and where hence access to information presents opportunities for reducing information asymmetry and citizenry exclusion.

The section highlights on the thesis's theoretical assumptions as derived from the instrumental capacity of access to information in relation to politics of inclusion. The section, therefore, addresses specifically two politics of inclusion arguably brought by access to information for marginal groups, both on the levels of public sphere and socio-economic rights.

#### **1. Instrumental Capacity of Right to Information as a Mechanism for Citizen's Inclusion within the Public Sphere**

For discussing the potential of access to information as a mechanism for citizen's inclusion within the public sphere, the section focuses on some of the contemporary

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<sup>45</sup> *Id.* at 1

<sup>46</sup> This notion has been suggested by Rick Snell and Peter Sebina in describing the case where public bodies persistently impede the free flow of public information. See Rick Snell and Peter Sebina *Information Flows: The real art of Information Management and Freedom of Information*, 35, Archives and Manuscripts, 54, 64-68 (2007).

theories drawn on public sphere that primarily imply the notion of citizenry participation.

Sina Odugbemi presents a theory on the public sphere, defining it as the space situated between private households and the state. According to Odugbemi, the concept of public sphere is related to the achievement of responsive and accountable governments. Connected to the quality of governance, a democratic public sphere is “where free and equal citizens come together to share information, to debate, to discuss, or to deliberate on common concerns.”<sup>47</sup> Odugbemi underscores the significance of freedom of information legislation as one of the conditions required for a democratic public sphere.

On another note, Gerard Hauser presents his own rhetorical model of the public sphere, represented by what he calls the reticulate public sphere. Hauser defines this model of public sphere as “a discursive space in which individuals and groups associate to discuss matters of mutual interest and, where possible, to reach a common judgment about them.”<sup>48</sup> This discursive space is created to allow public discourse that is vernacular, whereby participants, who are members of the public, engage in matters of public concern that has significance for their association. Hauser’s model of the public sphere is therefore vernacular and rhetorically-based on individuals' discursive practices. This public sphere works then as “the locus of . . . rhetorically salient meanings,”<sup>49</sup> as it rhetorically constitutes salient meanings that shape public opinion and collective reasoning,<sup>50</sup> establishes the public's interpretations of social practice, and thus influences policies.

Nancy Fraser also emphasizes the informal nature of the public sphere by presenting it as a site of discourse that it is spontaneously formed apart from the structured organisations of the state. Unlike Hauser, Fraser views this ad hoc sphere as an arena where the public constitute themselves as citizens through deliberations. According to Fraser, the public sphere is identified as “a theater in modern societies in which political participation is enacted through the medium of talk.”<sup>51</sup> Fraser tends to

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<sup>47</sup> Sina Odugbemi, *Public opinion, the Public Sphere, and Quality of Governance: An exploration*, 2008, at 17 in Sina Odugbemi and Thomas Jacobson (ed.), *Governance Reform Under Real-World Conditions: Citizens, Stakeholders, and Voice*, Washington, DC: World Bank.

<sup>48</sup> GERARD A. HAUSER, *VERNACULAR VOICES: THE RHETORIC OF PUBLICS AND PUBLIC SPHERES* 61 (Gerard A. Hauser ed., University of South Carolina Press, 2008), (1999).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 110, in Craig J Calhoun (ed.), *HABERMAS AND THE PUBLIC SPHERE* (MIT Press 1992).

conceive public sphere as an institutionalized arena of discursive interaction by citizens for debating public affairs through their discursive engagement. Citizen's political participation in this arena is where the state and the public life spheres connect, and thereby allows "the production and circulation of discourses that can in principle be critical of the state."<sup>52</sup>

These views are nevertheless inspired by the important contribution to the modern understanding of the public sphere presented by Jürgen Habermas. Drawing on their same idea of the public sphere as a site of deliberative engagement, Habermas offers his own view on citizen's participation in public deliberations on matters of common concern. As a discursive arena, Habermas defines the public sphere as a "network for communicating information and points of view . . . [where] the streams of communication are . . . filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions."<sup>53</sup> As conceptually distinct from both the state and the market, Habermas's public sphere is defined as the space between private and public authority domains where citizens engage in debates on public affairs and articulate their views to influence political institutions of society.

Where the relationship between decision-makers and society is defined through this sphere, the public sphere becomes "the public of private individuals who join in debate of issues bearing on state authority."<sup>54</sup> As a domain where different discourses, including state activities flow through it to be judged and challenged, this public space, for Habermas, is capable of influencing decision-making. According to Habermas, deliberations of the public sphere "must be given shape in the form of decisions by democratically constituted decision-making bodies."<sup>55</sup>

Habermas's earlier account on public sphere is, nonetheless, defined in terms of the bourgeois public sphere, by limiting participation to the discursive community of the bourgeois alone whose deliberations generate public opinion. Habermas bourgeois public sphere has been, however, perceived as a one-layered domain from which other marginalized sectors of society are excluded.

In addressing the potential capacity of access to information, the chapter adopts Habermas's account on the nature of the public sphere. The thesis views Habermas

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<sup>52</sup> *Id.* at 205

<sup>53</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 360 (The MIT Press, 1998) (1992).

<sup>54</sup> Jürgen Habermas, *Further Reflections on the Public Sphere* 7 in Craig J Calhoun (ed.), HABERMAS AND THE PUBLIC SPHERE, (MIT Press 1992).

<sup>55</sup> See Habermas, *supra* note 53, at 452.



theory as constitutive of an inclusionary account of the public sphere that promotes citizenry participation in debating issues bearing on state authority. Such interaction through dialogues on public issues is seen to guarantee equal authority in, and access to, means of popular participation in the public realm, especially for segments of the public who are regularly excluded from decision-making and deliberative venues. It is specifically the deliberative aspect of Habermas's public sphere that serves as the basis for the construction of a deliberative and negotiated decision making process that the chapter intends to build on for its inclusionary theme. This concept works as an important entry point for relevant consequences on the state's political behavior especially relevant to its accountability.

To this end, the thesis adopts specifically Habermas's early argument on the public sphere, however, disregarding his account on the concept as a one-layered domain that excludes parallel spaces of political interactions by other societal sectors. The thesis thus understands Habermas public sphere in separation from the medium in which it developed in his earlier works<sup>56</sup> as an alienated bourgeois public sphere. The thesis adopts instead an inclusionary understanding of it as a locus of public discourse where participation is granted to all societal actors and are capable therefore of influencing decision-making.

Access to information is, thus, understood as necessary for participation within the public sphere. Freedom of information in this sense supposes the creation of public domains where informed participants are capable of engaging in interactive communication on public affairs.<sup>57</sup> In fact, it is the public's ability for gaining access

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<sup>56</sup> I mean here his first major work *The Structural Transformation of the Public Sphere*. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (THE MIT Press, 1989) (1962).

<sup>57</sup> Likewise, the rationale of recognising a right to information in international human rights law is also functionally related with the right to take part in public affairs, as protected in international human rights instruments. For example, Article 25 of the ICCPR promotes the right of participation in government in so far as it protects the right to take part in the conduct of public affairs. See the International Covenant for Civil and Political Rights art.19, Mar. 23, 1979, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. This position has been lately supported by international human rights jurisprudence. For example, in *Claude v Chile*, the Inter-American Court of Human Rights recognised arguments concerning the role played by access to information in promoting political participation by holding that information disclosure could permit public participation. Also, The European Court of Human Rights in *Társaság A Szabadságjogokért v. Hungary* emphasised the role of freedom of information in facilitating participation in public debate on matters of public concern. See Maeve McDonagh, *supra* note 14, at 38.

to channels of free flow information on public affairs that lies at the core of meaningful political participation.<sup>58</sup>

The instrumentalist basis for the right to information in this context is explained by Alasdair Roberts who suggests that political participation rights "have little meaning if government's information monopoly is not regulated."<sup>59</sup> Similarly, Ann Florini argues for the instrumentalist capacity of the right to information for "the functioning of a democratic society . . . [whose] essence . . . is informed consent, which requires that information about political practices and policies be disclosed."<sup>60</sup>

Where Habermas public sphere is centered on the idea of participatory democracy, this participatory approach calls specifically for the politics of the participatory governance model. Such model of governance is based on the capacity of access to information in formulating public policies, and enabling citizens to participate in government decision making through an open and inclusive governing processes.<sup>61</sup>

Public participation in terms of influencing government's decision making becomes emblematic of participatory democracy citizenship exercised by citizens.<sup>62</sup> This attribute of citizenship suggests that public authorities have surrendered their information monopoly over policymaking and have accepted to subject both public policy results, and implicit assumptions on which these policies are based to public review. Here, information rights are not only important in supporting the traditional process of public participation, but also in serving as an empowerment tool for citizens to "participate in, negotiate with, influence, [and] control . . . institutions that affect their lives."<sup>63</sup>

This participatory argument also relates to another aspect of political engagement related to the establishment of a strategy for effective control over governmental actions.<sup>64</sup> Through providing an institutional means for monitoring a government's performance, right to information contributes to strengthening public oversight over government's functioning, and holds government's decisions and actions to public

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<sup>58</sup> Stiglitz, for example, argues that "meaningful participation in democratic processes requires informed participants." See Stiglitz, *The Role of Transparency in Public Life*, in World Bank, *The Right to Tell: The Role of the Mass Media in Economic Development* (Washington, D.C.: World Bank, 2002) 30.

<sup>59</sup> See Roberts, *supra* note 23, at 262.

<sup>60</sup> See Florini, *supra* note 18, at 3.

<sup>61</sup> See Maeve McDonagh, *supra* note 14, at 38.

<sup>62</sup> Mark Bovens, Information Rights: Citizenship in the Information Society, 10 J. Pol. Phil. 324, 317-41 (2002).

<sup>63</sup> See Dokeniya, The Right to information As a Tool For Community Empowerment, *supra* note 2, at 4.

<sup>64</sup> Frederick Schauer, *Transparency in Three Dimensions*, U. ILL. L. REV. 1347, 1339-1357, (2011).

scrutiny. Access to information thus offers conditions for both exercising influence over decisions affecting citizens' rights,<sup>65</sup> and boosting processes of democratic accountability.

This instrumental value of access to information brings forth an important purport related to state bodies' responsiveness to the public, especially with respect to their social and economic needs.<sup>66</sup> Responsiveness in this context implies a citizen's access to redress mechanisms to deal with failures in the delivery of their rights.<sup>67</sup> It is this sense of accountability that indicates that a government is open to its citizens and that they are included.<sup>68</sup>

## **2. Instrumental Capacity of Right to Information as a Mechanism for Citizen's Social Inclusion**

Building on the right to information's capacity in strengthening citizenry inclusion within the public sphere, this chapter seeks to highlight on another complimentary role for freedom of information, with a view to inclusion, as a force for socio-economic change.

Besides increasing public participation, this chapter views the right to information as also being concerned with an element of citizenship related to citizen information rights that correspond with citizen social functioning.<sup>69</sup> Information channels are therefore conceived not only as participation channels to voice citizen's views, but also as social and economic tools for citizen social empowerment. This role of information disclosure, along with its participatory attribute in the public sphere, provides for citizenry inclusion and empowerment.

The instrumental capacity of freedom of information in this regard is aligned with T.H. Marshall's theory on social citizenship. In his prominent work *Citizenship and*

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<sup>65</sup> Richard Calland & Kristina A Bentley, *The Impact and Effectiveness of Transparency and Accountability Initiatives: Freedom of Information*, 31 Development Policy Review, 69, 2 (2011).

<sup>66</sup> ALAKA HOLLA, MARGARET KOZIOL & DENA RINGOLD, *CITIZENS AND SERVICES DELIVERY : ASSESSING THE USE OF SOCIAL ACCOUNTABILITY APPROACHES IN HUMAN DEVELOPMENT SECTORS*, 1 (The International Bank For Reconstruction and Development) (2012), Washington, DC: World Bank.

<sup>67</sup> *Id.* at 2

<sup>68</sup> Franck Bousquet, Jeff Thindwa, Mariana Felicio & Helene Grandvoinet, *Supporting Social Accountability in the Middle East & North Africa : lessons from transitions* 3 (MENA knowledge and learning quick notes series, Paper no. 53, Washington, DC: World Bank, 2012).

<sup>69</sup> I refer here to Mark Bovens' recent theory on right to information conceived by him as the "fourth great wave of citizens' rights" equating with civil, political, and social rights outlined in Marshall's theory. See Bovens, *supra* note 62.

*Social Class*,<sup>70</sup> Marshall analyzes various citizenship rights by historically sketching the development of the notion of citizenship, and suggesting the interconnection of its civil, political, and social rights. He presents his evolutionary view on citizenship through his introduction of its social element represented in citizen's social entitlements.

Marshall's account on citizenship implies institutionalizing the social element of citizens' rights in the welfare state model. His theory suggests a reconfiguration of the status of citizenship that is intimately related to welfare protection offered by the state. This welfare state model, according to Marshall, is inclined to compensate for socio-economic inequalities and mitigate the impacts of class differences on individual well-being.<sup>71</sup> It thus implies a corresponding argument on a state's social responsibilities in availing citizens of the minimal provisions for their socio-economic well-being.

By employing Marshall's theory, the right to information becomes, therefore, conceptualized as a welfare right related to affecting the distribution of citizen's well-being. Justifiably considered as a "primary social good,"<sup>72</sup> the intersection between information rights and social rights offers citizens a direct claim on their governments for providing information on their socio-economic tendencies.<sup>73</sup> This intersection is then instructive of the policies and measures taken by states in the sphere of welfare provisioning, by questioning the state's role in affecting the distribution of well-

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<sup>70</sup> THOMAS HUMPHREY MARSHALL, *CITIZENSHIP AND SOCIAL CLASS: AND OTHER ESSAYS* (New York press), (1950).

<sup>71</sup> MARTIN BULMER & ANTHONY M. REES, *CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL* (MARTIN BULMER & ANTHONY M. REES eds., UCL Press, 1996).

<sup>72</sup> That is an expression used by John Rawls in his chiefly known work: *A Theory of Justice*. See JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press, 1999) (1971). Rawls's view on primary social goods is that they represent basic needs that every man is presumed to require. His- non exhaustive- list of these goods include: (a) civil rights and political liberties; (b) basic opportunities as freedom of movement and choice of occupation; (c) income and wealth; and (d) the social bases of self-respect. In connecting his list of primary social goods to right to information, the thesis account is that such right is a primary social good in the sense that it is essentially useful to individuals for pragmatically meeting their basic needs and satisfying their fundamental interests as members of a society. Kay Mathiesen, in her article "Access to Information as a Human Right", suggests in this context that the right to access information as a fundamental human right has become a resource necessary for living a minimally good life. See Kay Mathiesen, *Access to Information as a Human Right*, available at <https://goo.gl/EncUlm>.

<sup>73</sup> In her article entitled *The Right to Information as a Leverage Right*, Saras Jagwanth explains that the exercise of other human rights is preconditioned with people's primary ability to exercise their right to access public information as a leverage right. Jagwanth makes this clear by noting that "[T]he right of access to information ensures that action which may violate one or other of the fundamental rights is not concealed under the guise of secrecy." See Saras Jagwanth, *The Right to Information as a Leverage Right*, in Richard Calland & Alison Tilley (eds.) *THE RIGHT TO KNOW, THE RIGHT TO LIVE: ACCESS TO INFORMATION AND SOCIO-ECONOMIC JUSTICE 8* (Cape Town Open Democracy Advice Center, 2002).

being.<sup>74</sup> Where actions and decisions of public authorities are publicly disclosed, access to information offers the potential for sanctioning the role of governments, and their degree of responsiveness towards social inclusion of vulnerable segments incapable of gaining access to their basic socio-economic rights.

In increasing public oversight of government's performance, access to information additionally represents an instrumental tool for exposing corruption. Instrumentally the right to information is expected to effectively empower marginalized segments of the population to hold their governments to account for corrupt practices affecting the delivery of their rights, and that lead to their social exclusion.<sup>75</sup> As an enabling tool, access to information allows citizens therefore to assert their claims on service entitlements through its capacity in monitoring government's delivery of their obligations.

Indeed, the state's role in delivering its socio-economic obligations is directly associated with the attributes of a governance system that maximizes public participation and accountability.<sup>76</sup> It refers to a transparent and accountable governance system that is capable of ensuring efficient public service delivery in a fair manner within an inclusive economic and political environment.<sup>77</sup> The instrumental capacity of information access is thus reflected in creating a distinctive balancing of public participation with social policy goals. This balancing suggests a political construction that assures its citizens not only political equality, but also social inclusion. The thesis seeks, therefore, to reflect on the potential social good of right to information as a political tool on bringing institutional change in state-society

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<sup>74</sup> Richard Calland suggests that since right to access information empowers citizens to demand information from the state, it alters the balance of power between them, whereby citizens become capable of holding the state to account for decisions pertinent to the delivery of citizens' social and economic rights. See Calland as cited in Anupama Dokeniya, *Implementing Right to Information: Lessons from experience*, 50, (2013), Washington, DC: World Bank.

<sup>75</sup> Lala Camerer, *Information and the Quest for Global Accountability*, in Richard Calland & Alison Tilley (eds.) *THE RIGHT TO KNOW, THE RIGHT TO LIVE: ACCESS TO INFORMATION AND SOCIO-ECONOMIC JUSTICE 8* (Cape Town Open Democracy Advice Center, 2002). An important rationale for this is increasing empirical evidence on the impact of corruption on impeding the delivery of public services to citizens, hindering their equal access thereto, and thus preventing the realization of economic and social rights. See International Council on Human Rights Policy, *CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION*, 2009, available at <https://goo.gl/KRaKkd>.

<sup>76</sup> Georges Nzongola-Ntalaja, *Democratic Governance And Human Rights In The International Framework*, Keynote address for Joint Monthly Assembly of Finnish Advisory Board of Human Rights, Helsinki, 15 June 2004.

<sup>77</sup> Adel M. Abdellatif, *Good Governance And Its Relationship To Democracy And Economic Development*, a paper presented in Global Forum III on Fighting Corruption and Safeguarding Integrity, Workshop IV. Democracy, Economic Development, and Culture, Seoul 20-31 May (2003), available at <ftp://pogar.org/localuser/pogarp/governance/aa/goodgov.pdf>.

relations. The thesis, in this respect, proceeds in the subsequent section with discussing possible waves of mobilization for this institutional change towards civil society's involvement with access to information.

### **C. Civil Society's Employment of the Instrumental Capacity of Freedom of Information & Politics of Inclusion**

The instrumental capacity of access to information in spurring the politics of inclusion is suggested to contribute to its role as an advocacy tool by civil society. To this end, the right to information acts in parallel as a stimulant for public action in citizens' relations with public authorities. This brings insights into the role of civil society in engaging with the question of access to information.

The relation between civil society and public sphere is inextricably linked. Within its interaction with public sphere, civil society is defined as the "civil sphere . . . that generates the capacity for social criticism and democratic integration,"<sup>78</sup> namely the arena where civic movements "strive to constitute themselves into an ensemble of arrangements to express themselves and advance their interests."<sup>79</sup>

In its involvement in the public sphere, the space offered through civil society's interaction defines the relationship between the state and civil society. As a sphere of social interaction between the state and civil society,<sup>80</sup> the public sphere determines the capability of civil society to act as an agent for collective action for the organized expression of society's values and interests. The two concepts then become closely tied. The public sphere as a participatory space where citizens' voices are represented permits civil society organizations to act as an amplifying vehicle for these voices. Civil society's action in connecting citizens' voices is oriented towards realizing influence by allowing citizens to engage with the state. Operating within this sphere, civil society's capacity in providing forums for participation and influence on public authorities is framed. As collective platforms, civil society actors serve as tools for representing and negotiating citizens' interests vis-à-vis the state.

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<sup>78</sup> JEFFREY C. ALEXANDER, *THE CIVIL SPHERE*, (Oxford University Press, 2006).

<sup>79</sup> JEFF HAYNES, *DEMOCRACY AND CIVIL SOCIETY IN THE THIRD WORLD: POLITICS AND NEW POLITICAL MOVEMENTS* (Polity Press, 1997).

<sup>80</sup> In showing the relation between them, Habermas explains that civil society consists of those "more or less spontaneously emergent associations, organizations and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere." JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY*, *supra* note 53, at 27.

Habermas argues, in this respect, that civil society is activated by a public sphere in which citizens create a “third space” in their engagement with the state. Operating in this space, civil society's intermediary role offers a place for public deliberation, comprising a “network of associations that institutionalizes problem-solving discourses on questions of general interest.”<sup>81</sup> This third space, as such, implies communicative interaction that has civil society as one of its core elements.

The implication, as far as access to information is concerned, is that while there is room for civil society participation, its ability to affect state-citizen relations is premised on its ability to politically act on public information disclosed. Disclosed information is then understood as a participatory mechanism used by civil society in providing spaces for informed dialogue that is capable of influencing political decision-making and guaranteeing inclusive participation.

Such an instrumental role of access to information goes to the core of the intermediary role of civil society in fulfilling the utmost potential of this instrumentality. Instrumentally, through making demands to governmental bodies on disclose information on matters related to citizens' rights, civil society's involvement becomes significant in furthering the responsiveness of these bodies to its demands.

In relation to this instrumental capacity, the chapter employs the concept of political opportunity as presented by Charles Tilly and Sydney Tarrow.<sup>82</sup> The concept defines the context offered as a result of social movements' interaction with political forces for political action. With viewing access to information as a political opportunity, the thesis investigates the extent to which civil society can push the utmost potential capacity of this opportunity as a leverage tool to influence existing social and political structures, and to expand political spaces especially connected with citizen's socio-economic rights. Within this space, civil society actors are viewed as stimulating actors towards challenging the state's role in the social and economic life by politically acting on information obtained to enable citizens to scrutinize state's delivery of its obligations connected with their socio-economic rights. Their intermediary role as political agents in making use of this political opportunity is then suggested in their capacity to mobilize a citizenry's socio-economic inclusion.

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<sup>81</sup> *Id.*

<sup>82</sup> See SIDNEY G. TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS*, (New York: Cambridge University Press), (1998) and Charles Tilly, *The Components of Collective Action*, in *FROM MOBILISATION TO REVOLUTION*, (Charles Tilly ed., New York, Random House), (1978).

The thesis adopts a radical view for information access that is oriented towards mobilization against the exclusion of the poor and marginalized who are additionally excluded from access to information channels. It views the practical relevance of freedom of information to the politics of inclusion by making freedom of information relevant to the inclusionary needs of marginalized segments. This argument is based on the interdependent relation between the instrumental capacity of access to information and the potential role of civil society in enforcing this capacity.



### **III. Freedom of Information and Politics of Exclusion in the Egyptian Case**

Creating an open government does not happen in a political vacuum. International empirical evidence today suggests a strong correlation between the underlying politico-economic environment and the extent to which access to public information is effectively implemented.

The potential effectiveness of the right to information is also closely linked to the extent of a government's political will to adopt a regime on freedom of information. As most comparative practices suggest, without a real buy-in on the part of governments, efforts to attain government transparency are hampered.<sup>83</sup> This is significantly relevant as international pressure on countries to adopt freedom of information laws has increased lately, and such pressure does not guarantee in itself the state's political will for promoting meaningful access to information.

This bearing invites the thesis to analyze the underlying politico-economic and legal environment in Egypt on access to information, along with the degree of the government conformity to international pressure on government transparency. As freedom of information has been recently included in the current Egyptian constitution, this chapter examines how this constitutional setting operates, and the degree of the Egyptian government's real buy-in in allowing its operation.

The thesis's examination of the politico-economic environment in Egypt emanates from the analysis of the rentier character of the Egyptian state. Based on a rentier mentality, this chapter highlights how economic rents accrued by the Egyptian state have impacted the nature of its political governance.<sup>84</sup>

To start with, the rentier-based nature of the Egyptian state has driven its economic behavior towards ascertaining control over resource allocation and rent distribution, while simultaneously maintaining its capture of rent surplus. Since rentier revenues accrue solely to the state, they have therefore increased the authority of the state bureaucracy, with its political and economic power highly centralized. Based on this centralized system of state authority, the Egyptian political system is structured around maintaining the state's exclusive control over its functioning and accrued rents.

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<sup>83</sup> In fact empirical evidence from comparative practices show that the actions of governments in the implementation phase are often related to their original motive in supporting the access to information law. See Laura Neuman & Richard Calland, *Making the Access to Information Law Work The Challenges of Implementation*, available at <https://goo.gl/tWFsZG>.

<sup>84</sup> The Egyptian economist and politician Haezm Al Beblawi has explained the concept of the rentier state in his work *The Rentier State in the Arab World*. See Hazem Beblawi, *The Rentier State in the Arab World*, in *The Rentier State*, (eds. Hazem Beblawi and Giacomo Luciani, New York), 1987.

For strengthening its authority, the state's political mindset has traditionally sought to limit spaces for participation and dissent in the public sphere, by limiting the maneuvering capacity of civil society actors, and thus assuring that state control remains unchallenged.

Paradoxically, while the Egyptian state has maintained its control over the public sphere, it has withdrawn from public expenditures on social welfare. The rentier nature of the political system, relieved from extracting most of its revenues from society, has weakened the state's incentives for accountability, making it not bound in terms of public spending. Driven instead by incentives for extracting rents from international financial aid, the Egyptian state has embarked on neoliberal policies that have reinforced its roll back from welfare provisioning, resulting in the non-distribution of profits from rents to citizens.

Where civic participation is systematically eliminated, and with a neoliberal ideology entrenched in the state's management of its economic and social policies, the overall scheme of the Egyptian state's governmentality is of an exclusionary nature. This includes exclusion from both, public participation and welfare provisioning. This exclusionary system of governance has therefore traditionally influenced the underlying dynamics of the social order in Egypt, where millions of impoverished Egyptians have been pushed to the margins of society.

The state's exclusionary nature has been traditionally correlated with legally protected governance secrecy. The chapter then reaches its second level of its analysis for the Egyptian case, by arguing that governance secrecy has been systematically established through a legal and institutional framework that has worked to maintain the regime's exclusionary nature, along with the operation of its rentier-based social contract. To secure the continuous and unquestioned distribution of the spoils of economic rents across state networks, legally-protected governance secrecy provides the answer to maintain these gains.<sup>85</sup> This legal framework has proved to be successful in attaining state control, both on public information and decision-making,<sup>86</sup> thus assuring state's control over accrued economic rents and their distribution.

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<sup>85</sup> UNDP, *Arab Development Challenges Report 2011, Towards the Developmental State in the Arab Region*, 76, (United Nations Development Programme, Regional Centre for Arab States, Cairo, February 2012).

<sup>86</sup> Local studies, in this respect, refer to a current state monopoly that is maintained over approximately eighty percent of the content and production of public information in Egypt. See The Association For Freedom of Thought and Expression, *Azmt Āntaj w Tdawl w Itah'et Al-ma'lwmat Fy Msr*, 2012.

With this entrenched culture of secrecy in the Egyptian bureaucracy, access to information becomes particularly pressing. Within this context, freedom of information is perceived as an instrument for political struggle against the system's politico-economic nature and legal framework. With almost a new constitutional text on right to information, the constitutional right to information is seen as providing a new political opportunity to resist secrecy in the Egyptian context. Through the instrumental potential of this political opportunity, the right to information is capable of resisting citizenry exclusion, and of opening new domains for the maneuvering capacity of civil society actors.

Based on the foregoing, this chapter presents an analysis of the Egyptian case with relation to the right to access information, both; from the politico-economic governance perspective; and from the legal and institutional framework perspective regulating its operation.

#### **A. The Egyptian Politico-economic and Governance Environment & Politics of Exclusion**

In discussing the politico-economic and governance environment in Egypt, this section examines two aspects of citizenry exclusion: limited participation within the public sphere and the neoliberal context in which socio-economic rights operate.

##### **1. Egyptians' Exclusion from Participation within the Public Sphere**

This section explores the current Egyptian political landscape with regard to state-citizen relationship with its impact on limited participation within the public sphere.

On examining the functioning of the Egyptian government, one can easily see its centralized bureaucratic nature that extends right up to the apex of its hierarchical governing structure.<sup>87</sup> With excessive concentration of power in the state's bureaucratic apparatus, the whole philosophy of the Egyptian state in managing public affairs is premised on a tutelary nature.<sup>88</sup> Such nature has been traditionally entrenched in its governance system, establishing the Egyptian state as the supervising organisation over public affairs. This philosophy has driven the state's incentives for maintaining monopoly over decision-making in all aspects related to public affairs.<sup>89</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> NINETTE FAHMY, *THE POLITICS OF EGYPT: STATE- SOCIETY RELATIONSHIP*, 30-42, (London: Routledge, 2002).

This tutelary nature of governance, backed by rentierism, reflects the way the overall state-society interaction in Egypt is defined. Such tutelary character, enriched by rent revenues, has been driving the Egyptian state's incentive to consolidate its power and assert its almost complete dominance over all domains of public decision-making.<sup>90</sup> To establish its authority with unchecked control, Egyptian political governance has sought to preserve its tutelary role by limiting opportunities for civic participation in public affairs, and asserting almost complete control of the public sphere.

This governing scheme has therefore permanently colored the state's relations with different centers of power in society by eliminating other political forces that might challenge the state's tutelary control,<sup>91</sup> or oppose its rentier character. Particularly, this is revealed in the limited capacity of civil society to serve as a force of resistance to state control or to contest its decisions.

Opportunities, then, for the creation of a public space with vibrant societal movements capable of confronting activities of the state, and subjecting them to critique, have been shackled. The state's view on its relation with civil society has historically been defined through a repressed public sphere in which civil society actors were kept distanced from the political realm. Attempts by the Egyptian state for limiting civil society's role have focused on restricting the maneuvering capacity of civil society actors.

Limiting the maneuvering capacity of civil society has realized the state's goal by permitting its operation only within narrowly defined spaces of action,<sup>92</sup> leaving civil society with limited opportunities for influencing the public sphere.<sup>93</sup> Tactics for suppressing this maneuvering capacity are diverse. One of these tactics is to ensure that civil society actors are not capable of creating their own “third space”, and that no sort of independence vis-a'- vis the state is realized to act as arenas of public debate.

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<sup>90</sup>See The Association for Freedom of Thought and Expression, *supra* note 86, at 9.

<sup>91</sup> See Fahmy, *supra* note 89, at 31.

<sup>92</sup> Jannis Grimm, *Repressing Egypt's Civil Society State Violence, Restriction of the Public Sphere, and Extrajudicial Persecution*, 2 (German Institute for International and Security Affairs, 2015), available at [https://www.swp-berlin.org/fileadmin/contents/products/comments/2015C41\\_gmm.pdf](https://www.swp-berlin.org/fileadmin/contents/products/comments/2015C41_gmm.pdf).

<sup>93</sup>Elizabeth Johnson, *Corruption trends in the Middle East and North Africa Region 2007-2011*, 4, (Transparency International, U4 Anti-corruption Resource Center, January 2012), available at [file:///C:/Users/Aya/Downloads/302%20\(2\).pdf](file:///C:/Users/Aya/Downloads/302%20(2).pdf).

To this end, formal political participation has been largely restricted to regime-affiliated activity or co-opted civil society participation.<sup>94</sup>

Consequently, erosion in public spaces for purpose of public participation has endured. Customarily, the norm has become over the years that millions of disadvantaged Egyptians are systematically left out of an inclusive public sphere that is capable of giving them spaces to participate in deciding on public affairs impacting their lives.

The limitation of space for public participation, backed by the regime's rentier - based nature, has also inhibited citizens' efforts to hold state bodies accountable. With the lack of direct citizen participation, Egyptians, most significantly the poor and marginalized, have had no share in the decision making process, or simultaneously in public oversight over such a process. Poorly functioning mechanisms of accountability have impacted the quality of public services delivered to disadvantaged Egyptians related to the realization of their basic needs.<sup>95</sup> With the limited ability to hold actions of government bodies to public scrutiny, millions of Egyptian citizens have become marginalized and disempowered through their inability to access redress mechanisms on failures in delivery of state obligations connected with their rights.

## **2. Egyptian's Exclusion from Welfare Provisioning and Socio-economic Rights**

The exclusionary process in the Egyptian case is not confined to exclusion from spaces of political participation, but encompasses social exclusion from welfare provisioning as well. Social exclusion of disadvantaged masses is interlinked with the rentier mentality of the governance system and its tutelary nature. The state's control over accumulated rents, with unrivaled economic and political power, has guaranteed the state's independence from society and insulated it from the need to bargain with its citizens. With the goal of obtaining maximum extraction of revenues, the state no

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<sup>94</sup> Lina Khatib, *Political Participation And Democratic Transition In The Arab World*, 34 U. Pa. J. Int'l L. 315, (2013).

<sup>95</sup> Statistics on the percentages of poverty and quality of basic services in Egypt are much revealing for this purpose. With a steady increase in poverty levels in the last two decades, statistics in 2011 refer to the fact that 25% of the Egyptian population fall below the national poverty line. Besides, in the Human Development Report of 2013, Egypt ranked 112 out of 187 countries. See for this, Laila El Baradei, *Enhancing Accountability in the Provision of Public Services through Direct Citizen Participation*, (Egypt Network for Integrated Development, Policy Brief 023, September 2014), available at [http://enid.org.eg/Uploads/PDF/PB23\\_DCP\\_baradei.pdf](http://enid.org.eg/Uploads/PDF/PB23_DCP_baradei.pdf).

longer needs to pay its citizens social bribes.<sup>96</sup> Instead, and in order to benefit from monopoly rents in the economy, the Egyptian state's accountability towards fair distribution of economic rents to society has been diminishing over time. With incentives to assert the distribution of the spoils of economic rents across co-opted state networks, the state's responsiveness to the public, with respect to their social and economic needs, is limited. Given, the rentier-based character of the Egyptian social contract, externally accruing rents have precluded the state's incentives to account for its welfare obligations towards its citizens.<sup>97</sup> Consequently, capital surplus is neither directed to fulfill citizens' social needs, nor directed to reduce poverty or income inequalities.

The rentier nature of the governance system coupled with neoliberal policies have been embraced by the Egyptian state almost for the past three decades. This neoliberal agenda has resulted in Egyptians' exclusion from public welfare provisioning, and the absence of state responsibility in availing citizens the minimal provisions for socio-economic well-being.

For the past three decades, social and economic inequalities became more visible with the implementation of economic liberalization policies, leading to increased levels of poverty and income inequality.<sup>98</sup> With the inability to afford the sort of social welfare subsidies promised by the July 1952 regime, the Egyptian regime has opted to extract international financial support based on tailored economic reforms and structural adjustment programs instead.<sup>99</sup> The ideological packaging of these reforms is premised on the classic neoliberal policies of market liberalization, privatization, deregulation, and opening to international capital investment.<sup>100</sup> Centered on the self-regulating capacity of the free market, government's policies are increasingly aimed at effecting a roll back in state-led economic and social policies.<sup>101</sup> The Egyptian government's views on economic growth have coincided with the views of international financial institutions, leading to the Egyptian state's gradual withdrawal

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<sup>96</sup> Hazem Kandil, *Why did the Egyptian middle class march to Tahrir Square?* 17 (2), *Mediterranean Politics*, 197-215, (2012).

<sup>97</sup> Shahjahan Bhuiyan, *Can democratic governance be achieved in Egypt?*, 38(7), *Int. j. public policy adm.*, 496-509, 500 (2015).

<sup>98</sup> Emad El-Din Shahin, *The Egyptian Revolution: The power of Mass Mobilization and the Spirit of Tahrir Square*, 3(1) *Journal of Middle East and Africa*, 46-69, (2012).

<sup>99</sup> See Kandil, *supra* note 96.

<sup>100</sup> See Koenraad Bogaert, *Contextualizing the Arab Revolts: The Politics behind Three Decades of Neoliberalism in the Arab World*, 22(3) *Middle East Critique*, 213-234, (2013).

<sup>101</sup> Joel Beinin, *Post-Populist Reformation in the Middle East*, in *WORKERS AND PEASANTS IN THE MODERN MIDDLE EAST*, 142-174, (Cambridge University Press, 2001).

from the economy, its reduction of subsidies, and the cutting of public investments in social services.<sup>102</sup>

Parallel to the regime's orientation towards economic growth, is the emergence of the system of crony capitalism that has contributed to rampant corruption in Egypt. With their sordid alliances with state bureaucrats, corrupt, state-nurtured capitalists have taken monopoly control over profitable sectors of the local economy, even sometimes government activities which impact the delivery of basic social services. While the aggregate wealth accumulation of the economy has worked to serve interests of the capitalist Egyptian state, it has never been accompanied by an increase in the real income of many Egyptians.<sup>103</sup> By allowing a domestic corrupt elite minority to benefit from monopoly rents in the economy and the capital surpluses of the implemented economic reforms, millions of impoverished Egyptians have become socio-economically isolated.

The impact, therefore, is of socio-economic injustices,<sup>104</sup> leading to harsh social and economic conditions incurred by millions of impoverished Egyptians,<sup>105</sup> where such neoliberal policies have failed to “trickle down” to disadvantaged citizens.<sup>106</sup> Operating within the ambit of the neoliberal economic trajectory, the Egyptian state has opted for abandoning its commitments to the welfare state.<sup>107</sup> This has been continuously emphasized by a reduction in its distributional role,<sup>108</sup> and a cut down on its welfare expenditures,<sup>109</sup> leading to rising socio-economic inequalities, with over a quarter of Egypt’s population still living in poverty.<sup>110</sup>

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<sup>102</sup> *Id.* at 146

<sup>103</sup> See UNDP, *Arab Development Challenges Report 2011, Towards the Developmental State in the Arab Region*, *supra* note 85, at 66.

<sup>104</sup> Taha Kassem, *Social Justice in Egypt, a Fragile Role of the State*, 3 *American International Journal of Social Science*, 3, *American International Journal of Social Science*, 124-135, (2014).

<sup>105</sup> Features of such socio-economic injustices, that were faced by middle-class fragments of the population, were drawn by Kandil in his article *Why did the Egyptian Middle Class March to Tahrir Square?*. See Kandil, *supra* note 96.

<sup>106</sup> Roberto Roccu, *David Harvey in Tahrir Square: the dispossessed, the discontented, and the Egyptian Revolution*, 34 (3) *Third World Quarterly*, 423-440, 425, (2013).

<sup>107</sup> Sylvia I. Bergh, Introduction: *Researching the effects of neoliberal reforms on local governance in the Southern Mediterranean*, 17 *Mediterranean Politics*, 303-321, 308 (2012).

<sup>108</sup> See Kassem, *supra* note 104.

<sup>109</sup> Tarek Osman points out that at the time of the 2011 uprising 5% of Egypt's elite controlled 40% of the wealth, whereas the Egyptian government had assumed rent-seeking and neo-patrimonial political power. See TAREK OSMAN, *EGYPT ON THE BRINK: FROM THE RISE OF NASSER TO THE FALL OF MUBARAK, US AND EUROPE*, (Yale University Press, 2011)

<sup>110</sup> According to official statistics issued by the Central Agency for Public Mobilization and Statistics (CAPMAS), about 28 per cent of the Egyptian population is living below the poverty line. See *27.8 percent of Egyptian population lives below poverty line: CAPMAS*, available at

Today, six years after the 2011 uprising, the current Egyptian state has inherited the same neoliberal legacy that operated prior to the uprising.<sup>111</sup> This is understood as international donor institutions continue to support the same economic reforms that caused the socio-economic imbalances of the capitalist project prior to the uprising.<sup>112</sup> Associated with liberalizing economic policies, and unequal distributions of wealth and class powers, neoliberal reforms have proven to be inadequate for addressing deepening socio-economic inequalities in Egypt.<sup>113</sup>

The Egyptian state's agenda on corruption control does not, similarly, deviate from the same neoliberal model. While adopting the first ever constitutional article for a state obligation to control corruption,<sup>114</sup> the state's agenda, in this regard, targets principally increasing the extraction of external revenues. Based on the traditional conception held by international financial institutions that corruption hinders economic growth, through its deterrence of both foreign investment and foreign aid,<sup>115</sup> the government's view of corruption control has thus been premised on a neoliberal prescription for improving the investment climate, and increasing the amount of financial aid, but not for removing it as a social ill.

This neoliberal orientation, identifying corruption in terms of investment needs, does not, however, reflect a real buy-in in controlling corruption impacting the delivery of the basic needs of millions of impoverished Egyptians. With the lack of accountability mechanisms, citizen's access to redress mechanisms, in the case of

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<http://www.egyptindependent.com/news/278-percent-egyptian-population-lives-below-poverty-line-capmas>.

<sup>111</sup> I refer here, for example, to the Egyptian government's spending obligations on education and health that failed to correspond with its constitutional stipulations in the state budget for the financial year 2016/2017. See Egypt's parliament approves state budget for FY 2016/17, June 2016, available at <http://english.ahram.org.eg/NewsContent/3/12/232142/Business/Economy/Egypt-parliament-approves-state-budget-for-FY-.aspx>. See also on explaining the budget austerity-driven character of the 2016/2017 state budget and its violation of governmental expenditure rates under the constitution, Rania Rabea Elabd, *What makes Egypt's budget so controversial?*, July 2016, available at <http://www.al-monitor.com/pulse/originals/2016/07/egypt-budget-constitution-controversy-sisi-requirements.html>.

<sup>112</sup> See Bogaert, *supra* note 100, at 218.

<sup>113</sup> PAOLO VERME, ET AL., *INSIDE INEQUALITY IN THE ARAB REPUBLIC OF EGYPT: FACTS AND PERCEPTIONS ACROSS PEOPLE, TIME, AND SPACE*, (Washington DC: The World Bank, 2014).

<sup>114</sup> The constitutional text is primarily a significant determinant of Egypt's efforts in carrying out its obligations under the United Nations Convention against Corruption. The constitutional provision in effect reflects legislative reforms taken by the Egyptian state, as required by the convention, in developing anti-corruption policies on proper management of public affairs, including taking measures for ensuring effective access by the public to information, according to Article 13 of the Convention. United Nations Convention against Corruption, December 9, 2003, GA res. 58/4, UN Doc. A/58/422 (2003), S. Treaty Doc. No. 109-6, 43 I.L.M. 37 (2004).

<sup>115</sup> Petter Langseth, *Prevention: An Effective Tool to Reduce Corruption*, (Global Programme against Corruption, Centre for International Crime Prevention, UNODCCP, Vienna, 1999), available at <https://www.unodc.org/pdf/crime/gpacpublications/cicp2.pdf>.



failures in the delivery of their rights, has become ineffective, exacerbating therefore their exclusion. With the increasing spread of corruption, the most vulnerable are systematically hindered from equal access to public services, and in most cases leading to a decline in these services' quality.<sup>116</sup> The absence of effective accountability mechanisms over government's conduct of public affairs<sup>117</sup> has led to an increase in the intensity of corruption,<sup>118</sup> and its impunity, whereby political loyalty networks give immunity to corrupt practices existing outside public oversight.<sup>119</sup> It is the combination of increasing corruption with socio-economic inequalities that has taken the greatest toll on the poor along with the majority of disadvantaged groups, being constantly discriminated against and deprived from their basic social and economic rights.

### **B. Status of Freedom of Information within the Egyptian Legal and Institutional Environment**

Taking into consideration the Egyptian politico-economic governance scheme, the particularity of the Egyptian case calls for analyzing its legal and institutional framework on access to information. Analyzing this framework is crucial in understanding how access to information is situated within the underlying politico-economic environment, and how it functions to establish images of the Egyptian state-citizen relationship. This section argues that the legal and institutional framework on information disclosure in Egypt reflects, and is influenced by, the underlying politico-economic governance environment, resulting in deep-rooted state secrecy. Such a legal and institutional environment on information sharing is innately premised on ensuring that information asymmetry is systematically institutionalized to serve the state's exclusionary ideology.

This section elaborates on the legal and institutional framework regulating access to information in Egypt. However, being provided for in the current constitution, it is beneficial to start first with exploring the constitutional order on freedom of information in Egypt.

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<sup>116</sup> Solava Ibrahim, *A Tale of Two Egypts: Contrasting State-reported Macro-trends with Micro-voices of the Poor*, 32(7), *Third World Quarterly*, 1347-1368, (2011).

<sup>117</sup> See Bhuiyan, *supra* note 97.

<sup>118</sup> According to the 2015 Corruption Perceptions Index by Transparency International, Egypt ranked 88 out of 168 countries assessed., available at <https://www.transparency.org/cpi2015/>.

<sup>119</sup> See UNDP, *Arab Development Challenges Report 2011, Towards the Developmental State in the Arab Region*, *supra* note 85, at 74.

## 1. The Constitutional Framework Regulating Freedom of Information in Egypt

Generally, the Egyptian constitutions adopted prior to the 2011 uprising did not include specific provisions on freedom of information. Traditionally, the right to access information was implicitly linked to freedoms of expression, scientific research and the press.<sup>120</sup> Exceptionally, Article 210 in the 1971 constitution provided for access to information as an affirmative "right to know" for journalists, for receiving news and information,<sup>121</sup> without extending this right to the populace.

A citizen's right to information first appeared explicitly in Article 47 of the nullified 2012 Egyptian constitution which establishes that Egyptians have the right to access, disclose and circulate data, statistics, information and documents held by public authorities.<sup>122</sup> However, the first ever constitutional entitlement of information access was restrained by specific limitations, namely, the inviolability of private life, the rights of others, and exigencies of national security.<sup>123</sup>

Egypt's current constitution re-asserts the first ever constitutional entitlement of information access, previously embodied in the 2012 Constitution, in Article 68. Embodied in the chapter of public rights and freedoms, the article provides that publicly-held data, information, statistics and official documents are owned by the Egyptian people, and that the state must provide their various sources and make them available to citizens as a right guaranteed by the state to all its citizens.<sup>124</sup> Not only are

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<sup>120</sup>According to Articles 14 & 15 of both the 1923 and 1930 Constitutions, both freedom of opinion and press are guaranteed according to law provisions. Same provisions are provided for in the 1956 and 1964 Constitutions, however, with the addition of freedom of scientific research. According to Article (47) of the 1971 Constitution, "Freedom of opinion is guaranteed. Every individual has the right to express his opinion and to publicize it ...within the limits of the law." Article (48) stated that, "Freedom of the press, printing, publication and mass media shall be guaranteed [...]." Article 49 provided that, "The State shall guarantee the freedom of scientific research and literary, artistic and cultural innovation and provide the necessary means for its realization." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 210, Sept. 11, 1971.

<sup>121</sup> Article 210 of the 1971 Egyptian Constitution, stated: "Journalists have the right to gather news and information in the conditions fixed by law [...]" CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 210, Sept. 11, 1971.

<sup>122</sup> Article 47 of the 2012 Egyptian Constitution stated that, "Access to information, data, documents and statistics, and the disclosure and circulation thereof, is a right guaranteed by the state, in a manner that does not violate the sanctity of private life or the rights of others, and that does not conflict with national security. The law regulates the rules for filing and archiving public documents, the means of access to information, the means of complaint when access is refused, and the consequent accountability." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 47, Dec. 26, 2012.

<sup>123</sup> *Id.*

<sup>124</sup> As per Article 68 of the Constitution, "Information, data, statistics and official documents are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency. The law shall organize rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for

government actors obliged, as per the constitution, to provide sources of information, but they are also committed to providing and making them available in a transparent manner.<sup>125</sup>

However, limitations on the exercise of this right were not set in Article 68, unlike its 2012 counterpart. The article has left constraints on the exercise of the constitutional entitlement to the law on freedom of information. Pursuant to Article 68, the law on freedom of information regulates disclosure of public information, including means of filing complaints against refusals to grant access, their deposit, storage, terms of availability, and confidentiality. Penalties for withholding information, or deliberately providing false information by public officials, are also left to the anticipated legislation.

Yet, to date, no specific legislation on the right to information has been passed, in practice, in Egypt. The constitutional provision, thus, remains till date the sole source of legal regulation for access to information in Egypt.<sup>126</sup> The constitutional provision is, however, complemented by international instruments providing for freedom of information, and to which Egypt is a state party,<sup>127</sup> and therefore, bears authority within the Egyptian legal system.<sup>128</sup>

## **2. The Legal Framework Regulating Freedom of Information in Egypt**

The legal framework regulating access to information in Egypt, however, renders the constitutional right on access to information ineffective, and serves to keep the public in Egypt isolated from access to governmental information and decision-making. This section elaborates on how bureaucratic secrecy is institutionalized in the Egyptian legal system through the absence of access to information legislation, the existence of

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withholding information or deliberately providing false information. State institutions shall deposit official documents with the National Library and Archives once they are no longer in use. They shall also protect them, secure them from loss or damage, and restore and digitize them using all modern means and instruments, as per the law." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 68, Jan. 18, 2014.

<sup>125</sup> *Id.*

<sup>126</sup> The thesis takes into account the contemporary legislative framework related to access of information in Egypt at time this paper was written, while considering concurrently the potential of legislative changes that might be taken in this regard by the Egyptian government in the future.

<sup>127</sup> These include, for example, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention against Corruption, and the Arab Charter on Human Rights.

<sup>128</sup> According to Article (93) of the Egyptian Constitution, "The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 93, Jan. 18, 2014.

a restrictive legislative framework on information disclosure, and constraints on dissemination of state archival materials and official documents.

**a. Absence of an access to information legislation**

As highlighted in the previous chapter, international best practices suggest that the most effective way of guaranteeing the protection and exercise of right to information is the enactment of a specific law protecting this right. However, no specific legislation on the right to information is realised in practice to date in Egypt. There is also an absence of complementary laws needed to facilitate information sharing and access. These include, for example, laws protecting public whistleblowers from prosecution, laws promoting open government, or laws establishing good record management practices.

As a result of this absence, no workable legal regime on access to information exists in Egypt. The absence of legal mechanisms for providing the practical scope of the constitutional right's content, in fact, deprives Egyptian citizens of practical legal mechanisms in exercising their constitutional right, or in providing them with protection. With the absence of an access to information legislation, the regime on information sharing in Egypt violates key international standards regulating information sharing. According to these standards, workable processes that facilitate citizens' access to publicly-held information should be guaranteed.<sup>129</sup>

Another issue raised here concerns the degree of the Egyptian government's real political will in to adopting a law on freedom of information. While the degree of a government's political will suggests the extent of its political commitment to implementing it, level of the Egyptian government's political will in promoting transparency on public affairs is doubtful.

This question is related to a recent debate on associating the passage of the legislation with Egypt's quest to receive loans from international financial institutions<sup>130</sup> and to attract foreign investment. This point is relevant in light of the

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<sup>129</sup> It is worth noting that different national stakeholders, including non-governmental organizations, academics and human rights bodies have previously prepared several drafts of the right to information law, since the right's first establishment in the 2012 Constitution, and have submitted them for consideration. Yet, the Egyptian government remained silent on the issue. See *Minister says freedom of information bill ready*, August 2012, available at <http://www.egyptindependent.com/news/minister-says-freedom-information-bill-ready>. The draft prepared and presented by civil society organisations is available at <https://goo.gl/GKCpid>.

<sup>130</sup> See Lina Attalah, *Egypt's first freedom of information law in the works*, June 2011, available at <http://www.egyptindependent.com/news/egypts-first-freedom-information-law-works>. See also Ziad A. Akl, *Egypt in a monopoly of information*, May 2016, available at <https://goo.gl/ZbRnxk>.

rentier-based character of the Egyptian state's politico-economic system. The rentier nature of this system has constantly driven it to partner with international actors in order to extract the financial support required to maintain its control, and thus stability.

This is understood through access to information, as being part and parcel of the larger agenda of intended governance reforms. These reforms are premised on a neoliberal ideology that encourages good governance principles of transparency and corruption control as public policy prescriptions for economic growth. Hence, the more a national government is committed to these reforms, the more it is able to obtain foreign financial aid.

Doubts as to the Egyptian government's real political will in promoting transparency is also related to its view of government transparency generally as important for creating an environment conducive to foreign investment. Its position on passing a right to information law is seen as centering on the disseminating of information to investors and business entrepreneurs,<sup>131</sup> for ultimately improving the economic atmosphere for private-sector investment.

Questions then arise as to the real political motive for promoting the right of access to information in Egypt. The question of championing the freedom of information law as a rubber stamp to prove the government's transparency credentials is, in effect, linked to the government's ongoing neoliberal and rentier mentality.

#### **b. A restrictive legislative framework entrenching bureaucratic secrecy**

The arsenal of secrecy provisions found in numerous Egyptian laws, and not repealed by a specific law on freedom of information, risk challenging the constitutional right on access to information.<sup>132</sup> These laws, all relevant to the functioning of the public sector in Egypt, include for example, the laws on Public Mobilization,<sup>133</sup> on Statistics

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<sup>131</sup> Sarah ElMasry, *Egypt's right to information law*, June 2013, available at <http://www.dailynewsegypt.com/2013/06/26/egypts-right-to-information-law/>.

<sup>132</sup> There are, however, few articles in certain Egyptian laws that allow dissemination of information for specific purposes. They include for example, the Law on Tenders and Bids No. 89 of 1998, The Law of the Central Bank and the Banking Sector No. 88 of 2003, and the Law of Capital Markets No. 95 of 1992. Yet, the predominant framework of laws relevant to information is of a tightening nature when it comes to information sharing. See for example, CIPE, *Freedom of Information and Transparency in Egypt*, (The Center for International Private Enterprise, 2010). See also some studies published locally in Egypt that provide an explanation on the existent legal framework, including, The Association for Freedom of Thought and Expression, *Horyyet Al-Alma'lumat w Al-Shafafyya Fy Horyyet Tadawl Alma'lumat: Drasa Qanounya*, 2013.

<sup>133</sup> Law No. 87 of 1960 (as amended by Law No. 12 of 1999) punishes individuals who disclose data or information related to public mobilization by imprisonment and/or fine of EGP 2500-5000. Specifically, public officials working in public mobilization are punished by imprisonment and/or fine

and Census,<sup>134</sup> on Intelligence,<sup>135</sup> on Civil Service,<sup>136</sup> on Budget,<sup>137</sup> on Governmental Archives,<sup>138</sup> and the Penal Code.<sup>139</sup> Together, these laws give Egyptian authorities wide discretion as to whether they disclose information they consider as confidential or not. Through their usage of a broad array of sweeping clauses of different

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of EGP 2500-5000 in case of disclosure of confidential information related to the administrative authority, business sector companies, individuals or authorities. Law No. 87 of 1960 (Law on Public Mobilization as amended by Law No. 12 of 1999), *Al-Jarida al-Rasmiyya*, 21 April 1999 (Egypt).

<sup>134</sup> Article 3 of Law No. 35 of 1960 considers data related to consensus and statistics to be confidential. The article further prohibits sharing of such data with any public or private body or individual. Exceptionally, this data could be shared for statistical purposes only. Obtaining this statistical and consensus data is limited to obtaining a prior written consent from the concerned public body. Law No. 35 of 1960 (Statistics and Consensus Law), *Al-Jarida al-Rasmiyya*, 18 February 1960 (Egypt). Moreover, according to law No. 28 of 1982, any individual who discloses confidential statistical information, secrets of industry, or trade, whose work is related to their content by imprisonment for a term not less than a month and not exceeding six months, and/or fine of EGP 100-500. Law No. 28 of 1982 (Statistics and Consensus Law), *Al-Jarida al-Rasmiyya*, 15 April 1982 (Egypt).

<sup>135</sup> Law No. 100 of 1971 on Intelligence stipulates that the Intelligence Authority shall be specialized with maintaining the nation's security and shall, for this purpose, put in place the mechanisms needed for collecting news and disseminating information related to the nation's security, and defining security considerations required in officials acquainted with the nation's secrets. Article 70 of the Law provides that any publication or dissemination of information, news, data or records related to the Intelligence Authority should be subject first to obtaining a prior written consent from the head of the Intelligence Authority, and any violation thereof is subject to criminal punishment. Also, Law No. 313 of 1956 (as amended by Law No. 14 of 1967) criminalizes disclosure by any individual (including public officials) of information that is related to the Egyptian armed forces except after obtaining a prior official written consent. Whoever disseminates such information is punished by imprisonment of a term not less than six months and not more than five years and /or a fine of EGP 100-500. Law No. 313 of 1956 (Law on Prohibition of Disseminating information on Armed Forces), *Al-Jarida al-Rasmiyya*, 18 August 1956 (Egypt).

<sup>136</sup> The Civil Servants Law No. 47 of 1978 forbids public officials from making public statements or publishing announcements without permission from either the ministry or local government department director, or chairperson of the public body. The law further prohibits public officials from disclosing information which ought to be confidential by its nature or by virtue of specific instructions. Law No. 47 of 1978 (Civil Service Law), *Al-Jarida al-Rasmiyya*, 1 July 1978 (Egypt).

<sup>137</sup> Concerning Budget and Fiscal Transparency, Law No. 53 of 1973 does not provide for such transparency. According to Article 32 of the Law, the Central Auditing Authority is obliged only to send its report with its remarks on the budget's final statement only to the Parliament, with a copy to the Ministry of Finance, without any duty of making this report publicly available. This is emphasized by law No. 144 of 1988 on the Central Auditing Authority, whereby the Authority shall send its remarks on budget's final statement only to the President, Ministry of Finance and the Parliament. Law No. 144 of 1988 (Law on the Central Auditing Authority), *Al-Jarida al-Rasmiyya*, 9 June 1988 (Egypt). It is worth noting also that Article 22 of Law No. 70 of 1973 on the State's General Planning on Economic and Social Development issues punishes whoever discloses information or data related to the State's General Planning by imprisonment for a term not more than six months and /or a fine of EGP 100. Law No. 70 of 1973 (State's general Planning Law), *Al-Jarida al-Rasmiyya*, 23 August 1973 (Egypt).

<sup>138</sup> As per Article 29 of the Minister of Finance's decree No. 270 of 2009 on Governmental Archives, it is not permissible for the public to obtain or check out any of these archives. Obtaining official extracts from these archives is only permissible subject to a prior official consent. According to the decree this shall apply to all governmental bodies and state authorities on all levels. Presidential decree No. 270 of 2009, (Decree on Governmental Archives), *Al-Jarida al-Rasmiyya*, 4 May 2009 (Egypt).

<sup>139</sup> Article 80 D of the Law No. 58 of 1937 punishes for imprisonment for a period not less than six months and not more than five years and /or a fine of EGP 100-500 any spreading of news or rumors regarding the internal situation of the country. Escalating punishments are stipulated for in the law where the information is related to national security. Law No. 58 of 1937 (Penal Code), *Al-Jarida al-Rasmiyya*, 5 August 1937 (Egypt).

overriding public interests that justify non-disclosure;<sup>140</sup> these laws serve to emphasize the Egyptian state's long tradition of secrecy and bureaucratic culture of censorship.<sup>141</sup> By criminalizing the disclosure of information, the prohibition of information sharing becomes normalized. This leads to the exclusion of entire categories of information and activities of public bodies from public purview. Such criminalization, while conflicting with the constitutional provision, does not only create contradictory incentives for public officials to disclose information, but also deprives public whistleblowers of legal protection.

An analysis of this restrictive legal framework reveals restriction not only on information disclosure, but also on public information production and dissemination. As a matter of law, the Central Agency for Public Mobilization and Statistics (CAPMS) is the sole agency in Egypt that is permitted to produce information and statistics, and to publish them.<sup>142</sup> By prohibiting other bodies from publishing information, a system of centralization and control over information production in Egypt is maintained. This control reflects the Egyptian bureaucratic system's long-standing ability to monopolize public information.

While key international standards regulating information sharing provide for an optimal flow of public information to citizens, the current legislative framework in Egypt conflicts with these standards. According to these standards, information held by public bodies should be subject to the principle of maximum openness except if there exist legitimate reasons for not disclosing it as per predefined exemptions. These

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<sup>140</sup> For example "military information", "national security", "secrets of units of administrative authority", "public order", "internal situation of the country," "secret statistical data" and "secrets of industry or trade."

<sup>141</sup> It is worth mentioning that although there are some laws that provide for the possibility of information dissemination, these laws either stipulate for impeding bureaucratic procedures prior to dissemination, or do not specifically define the scope of information sharing. Similarly, other laws limit information dissemination to information shared between public bodies only, for example, Ministerial Information Centers, established according to Presidential decree No. 627 for 1981, however, with no obligation to publish them. Likewise, although there are laws which do not criminalize information sharing by public officials, they do not explicitly state for their obligations of putting in place systems that ensure access to public information held in their possession. These include, for instance the law on Central Auditing Authority No. 144 of 1988.

<sup>142</sup> By virtue of the presidential decree No. 2915/1964, the Central Agency for Public Mobilization and Statistics is the only agency permitted to produce information and statistics and has the sole authority to publish statistics in Egypt. The decree further prohibits other bodies and individuals from publishing information, all of which suggests an institutionalized system of over-centralization and control over information. It is further worth noting that Law 12/1999, amending provisions of Law 87/1960 on public mobilization, states in Article 35 that any disclosure of information and data related to public mobilization is punishable by imprisonment and/or a fine of EGP 2,500–5,000. Presidential decree No. 2915 of 1964, (Decree on the Central Agency for Public Mobilization and Statistics), Al-Jarida al-Rasmiyya, 7 October 1964 (Egypt).

laws fall well short of satisfying the internationally accepted three-part test for justifying legitimate withholding of information by public bodies. The existing laws also do not meet other international principles concerning access to information, including, most significantly of, making public bodies' meetings open, and promoting open government.

With the absence of a freedom of information law, the legislative framework in Egypt does not satisfy either of the two mechanisms of information sharing acknowledged in international practice: the information request process and the proactive disclosure process.<sup>143</sup> The entire legal framework entrenches impediments to the free flow of public information, and is characterized by the absence of positive obligations on public officials to ensure effective access to information. In such a legal setting, public authorities not only violate the right to information through interfering with legal protection, but also through not taking affirmative action to protect the right.

The existent legislation, taken together, undermines the constitutional provision on access to information in every instance public authorities exercise their discretionary powers on information sharing, or responding to information requests.<sup>144</sup> The existing legislative framework neither deters public officials from denying information requests, nor provides the public with incentives to request it. Through arbitrary denials of requests for information and selective dissemination of public information, enforceable mechanisms for access to government's activities and decision-making are in serious question.

### **c. Laws on National Archives & Official State Documentation**

The established norm of prohibiting information sharing extends also to the Egyptian state archives and official documentation. The existing laws and regulations on official state documents and archives work to promote a culture of secrecy that reinforces the state's monopoly over information.

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<sup>143</sup> See Migally, *supra* note 32.

<sup>144</sup>The thesis builds on practical data as revealed, in this regard, by the 2013 report submitted by the Support for Information Technology Center on results of evaluating the degree of disclosure of public information by ministries of housing, utilities and urban communities; environment affairs; and education. The report tested information disclosure as per two criteria: voluntary disclosure of information, and access to information by means of submitted requests. With 104 marking the maximum score, the highest score was achieved by the ministry of environmental affairs, at only 44. Refusal of disclosure of information by these ministries, whose work touch upon Egyptians' basic rights, was in all cases backed by "national security" reasons, as contemplated by them. See for this ElMasry, *supra* note 131.



The first restriction on the sharing of state archival materials is found in Law No. 356 of 1954 establishing the National Library and Archives.<sup>145</sup> While the law makes it clear that the National Library and Archives' purpose is to make available the holdings to scholars and researchers,<sup>146</sup> Article (4) gave the Cabinet, the Azhar and Ministries of Justice, Foreign Affairs and Religious Endowments (Awqaf) the power to decide what official documents and archival materials would be handled to the National Library.<sup>147</sup> Where these bodies consider documents held in their possession to be secret, they are entitled, as per the law, to abstain from handing them over to the National Library. The article does not provide rules on the requisites of public bodies' rights in holding back documents from public disclosure.

This sweeping exemption on archival material sharing has been complemented by Law No. 121 for 1975 on the state's official documents.<sup>148</sup> This law provides for the withholding of state official documents from publication upon considerations of the public interest up to a maximum period of fifty years.<sup>149</sup> The Law exerts its hold on the secrecy of these documents through the criminalization of publication by any public official whose work is related to their content, in the absence of the Cabinet's prior approval.<sup>150</sup> The law further criminalizes the publication of secret information related to public policy or national security by a public official where such information could potentially harm the state's economic, social or security interests. Prior approval from the Cabinet is also required in such cases, unless twenty years have passed since the initial publication.<sup>151</sup>

In executing Law No. 11 for 1975, presidential decree No. 472 for 1979 was issued concerning the dissemination and usage of official state documents. According to the decree, all records and documents related to public policy and national security are secret and any publication or circulation is prohibited in the absence of a constitutional or legal stipulation that permits their publication. To ensure such secrecy, the decree obliges all public bodies to put in place systems for guaranteeing

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<sup>145</sup> Law No. 356 of 1954 (On Collecting and Keeping National Archives of Egypt's Intellectual Heritage, as amended by Law No. 22 of 1983), published in the Official Gazette in 24/6/1954 (Egypt).

<sup>146</sup> *Id.* at art. 2.

<sup>147</sup> *Id.* at art. 4.

<sup>148</sup> Law No. 121 of 1975 (On State Official Documents), published in the Official Gazette in 25/9/1975 (Egypt).

<sup>149</sup> *Id.* at art. 1.

<sup>150</sup> *Id.* at art. 2.

<sup>151</sup> *Id.* at art. 2*bis*. According to Article 3 of Law No. 121 of 1975, punishment for violation of Article 2 of the law is confinement and a fine not exceeding EGP 1000, or either of the two penalties.

their secrecy.<sup>152</sup> A general period of secrecy for such documents is fifteen years while in the possession of the relevant body, and another fifteen years after being deposited in the National Library and Archives.<sup>153</sup>

The entire body of these laws and regulations represent a significant administrative block on the flow of information found in state archival material and official documents. Through the usage of vague wording, provision for unjustifiable periods of archive preservation and the requirement of security permissions before publication, an entire system of state secrecy is institutionalized, and exclusive control over official public knowledge by the government is maintained.

In the absence of access to information legislation that makes state archives and official documents easily available, no legal obligations are imposed on public officials to ensure effective access to these documents. Although access to official documents is stipulated in the constitution, criminalization for the publication of state archival materials and official documents creates, in fact, two parallel and inconsistent processes for accessing them.

### **3. Inadequacy of Institutional Supports for Effective Implementation of Access to Information**

Discussing the legal stance of information sharing in Egypt cannot be pursued without concurrent research on the challenges of accessing information found in the infrastructure of information management in Egypt. This infrastructure reflects the deep-rooted state monopoly over public information in Egypt, and the customary blockage of channels for information flow. The long-term unease of Egyptian public bodies with the notion of governmental openness has consequently resulted in the absence of incentives for establishing proper systems for information and records management.

This is reflected in the fact that public information, and records documenting it, in Egypt are neither properly stored nor managed in a way that facilitates the ability of state bodies to hold information in the first place, or to retrieve and make effective public use of it.<sup>154</sup> Practically, examples for flaws in records and information management include: undated data, inconsistent information,<sup>155</sup> incorrect

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<sup>152</sup> Presidential Decree No. 472 of 1979, art.3.

<sup>153</sup> *Id.* at art.4.

<sup>154</sup> See ElMasry, *supra* note 131.

<sup>155</sup> Inconsistency in data is caused by many reasons, most importantly are causes related to the structure of information production in Egypt. For example, Information agencies have conflicting mandates with

statistics,<sup>156</sup> and most often public officials' lack of awareness of what information they accurately have or where records containing the required information are located if they do.

The inefficient nature of information and records management in Egypt has had a detrimental impact on the free flow of public information. As the institutional architecture on information sharing in Egypt is not user-friendly, access to public information has proved to be burdensome and costly. As such, this institutional architecture constrains the process of access to information, discourages interested individuals from requesting information, and challenges efforts of public bodies intending to automatically disclose information.

This institutional gridlock is furthered by the absence of freedom of information legislation that provides for clear mechanisms for records maintenance and information management. This is practically conceived with reading Article 68 of the constitution. The article makes a broad statement on state bodies' obligation to deposit official documents in the National Library and Archives;<sup>157</sup> however, it leaves the regulation of their storage and retrieval to other related laws. Reference in such case to existing laws, which do not establish any kind of legal obligations for record and information management reduces the constitutional right of access to information to mere rhetoric.

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regard to information production. By law, the Central Agency for Public Mobilization and Statistics is the only agency permitted to prepare information and statistics, however, other agencies now participate in this task, as for instance the General Authority of State Information Service established by Presidential decree No.1820 of 1967. See for this Heba Khalil, *The Crisis of Information Monopoly in Egypt* (2014), available at <https://goo.gl/9RF9jo>.

<sup>156</sup> See ElMasry, *supra* note 131.

<sup>157</sup> Article 68 of the Constitution states in this regard that, " State institutions shall deposit official documents with the National Library and Archives once they are no longer in use. They shall also protect them, secure them from loss or damage, and restore and digitize them using all modern means and instruments, as per the law" CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 68, Jan. 18, 2014.

#### **IV. Freedom of Information as an Advocacy Tool for Mobilization By Civil Society**

The history of the global freedom of information movement strongly suggests that one of the key factors in realizing the right to information is civil society.<sup>158</sup> The thesis's focus in its final chapter builds on civil society's capacity in offering a significant monitoring mechanism for creating an "ecology of transparency"<sup>159</sup> that is necessary for the effective functioning of the right to information.<sup>160</sup> Based on the contention that the instrumental capacity of access to information and the potential role of civil society in enforcing this capacity are interdependent, the chapter explores the extent to which civil society movements are capable of making public information available. It examines how their mobilization efforts can put pressure on public authorities to instigate openness in face of inherent state resistance to information disclosure, especially information related to social justice issues. For this purpose, the chapter addresses freedom of information as a strategic advocacy tool employed by civil society groups in advocating for socio-economic rights through resisting bureaucratic secrecy.

While drawing on the international advocacy role of civil society for socio-economic rights by using the instrumental capacity of the right to information, the thesis will equally adopt such instrumentalist approach in exploring civil society's

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<sup>158</sup> The author here focuses solely on the factor of civil society activism in examining the potential of the right to information realisation. In extracting out the factor of civil society for the purpose of focused research in this paper, the author understands that there are other external supporting factors as well that are relevant to realizing the potential of access to information. These include, for example, the media, the press, the academia, the underlying atmosphere of rule of law, the degree of political participation and freedom of expression and association, the independence of the judiciary, and the degree of the government's political will.

<sup>159</sup> The notion of "ecology of transparency" is developed by Kreimer to explain the experience of transparency, as resulting from interaction between organizational contexts, within the United States of America. See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. Pa. J. Const. L., 1011 (2008).

<sup>160</sup> International NGOs have been working on the issue of freedom of information most remarkably since the late 1980s, concurrently with increasing demands for greater accountability to prevent corruption combined with the democratic transitions at the end of the Cold War. See Ann M. Florini, *Increasing Transparency In Government*, 19 (3) *International Journal on World Peace*, 3-37, (2002). Beginning with the 1987 formation of Article19, followed by the International Freedom of Expression Exchange in 1992, and then Transparency International in 1993. All three organisations maintain a global network of local chapters and partner organizations for conducting advocacy campaigns at international levels. Also, in recent decades, numerous local civil society groups in many countries have been active on advocating for freedom of information. See Daniel Berliner, *The Strength of Freedom of Information Laws After Passage: The Role of Transnational Advocacy Network* (Draft prepared for the Global Conference on Transparency Research, Rutgers University, May 19-20, 2011), available at <https://goo.gl/LBE26F>.

advocacy role in Egypt. This chapter argues that civil society groups in Egypt, acting as political agents, have been able to experience new domains in their maneuvering capacity through the political opportunity offered by the constitutional right to information. Through lawsuits filed to request information disclosure, civil society groups have been able to make use of access to information to stimulate inclusion in matters related to social justice.

The chapter begins with an overview of the role played by civil society in this respect on the global level in domains related to social justice advocacy. The chapter then focuses on the Egyptian civil society's reaction to the underlying political and economic governance scheme and legal regulation of access to information in Egypt.

#### **A. International Advocacy Role of Civil Society for Social and Economic Rights through the Lens of Freedom of Information**

This section elaborates on the intersection between civil society's engagement with access to information and its advocacy for social justice issues. Civil society's engagement with the right to information is premised on the conception that such a right is not enforced autonomously, but depends on active demands for its enforcement in the face of bureaucratic obstinacy. The intermediary role then played by civil society actors by their interference as agents in actively "using" the right and "acting" on the information obtained is crucial. By acting on information, civil society organisations become capable of increasing pressure for transparency in governance functioning related to people's social and economic rights.<sup>161</sup> In fact, the basic lever that civil society groups have in holding the state to account through information access is their power to demand information about how, and for what purpose, decisions on these rights are made.<sup>162</sup> It is then within this context that strategies adopted by civil society groups on the global level have strategically aimed at giving the right to information strength and sanctioning non-compliance by public authorities.

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<sup>161</sup> See Darbishire, *supra* note 30, at 12.

<sup>162</sup> Rosemary McGee, et. al. , *Freedom Of Information: Review Of Impact And Effectiveness Of Transparency And Accountability Initiatives*, (paper prepared for the Transparency and Accountability Initiative Workshop, 3, IDS Institute of Development Studies, October 2010), available at <http://www.ids.ac.uk/files/dmfile/IETASynthesisReportMcGeeGaventaFinal28Oct2010.pdf>.

For this purpose, advocacy strategies used by civil society actors have traditionally been characterized by their "professionalized" advocacy roles.<sup>163</sup> This section, hence, introduces two common professional strategies that international civil society actors use in providing information channels on government's functioning, both as drivers of information requests,<sup>164</sup> and as instigators for socio-economic rights litigation on the basis of disclosed information.<sup>165</sup>

### **1. Testing compliance through information requests**

Evolving empirical evidence suggests that presenting requests for information by civil society organizations has become a common practice on the international level<sup>166</sup> for the purpose of assessing the degree of the right's implementation by state bodies. Countries that have the highest response rates to requests for information are those where civil society movements have been actively pushing for governments' commitments to information disclosure.<sup>167</sup>

A common tactic that can be discerned from such cases primarily revolves around promoting the "demand side" for information, and not solely waiting for the "supply side" of information from state bodies.<sup>168</sup> The driving logic behind this tactic is that the intersection between the supply and demand sides of right to information is fundamental for the effective use of the right.<sup>169</sup> Change in the effective use of the right is not expected to come from governments, rather societal actors, instead, must take responsibility for monitoring government efforts and "making" actual use of the

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<sup>163</sup> *Id.* at 6.

<sup>164</sup> *Id.* at 17.

<sup>165</sup> On the global level, efforts made by civil society groups related to right to information cover a range of different mobilization acts and strategies. This includes, for example, networking, forming local coalitions, generating awareness among the general public, making effective use of the media and capacity building for using right to information, lobbying and campaigning for implementing access to information,, participating in the process of drafting and shaping legislation, promoting best practice standards for access to information policies, monitoring the implementation of information legislations, helping citizens understand how to use legal rights of access, training public officials in the handling of information requests. See for a detailed explanation for this, along with comparative example from different countries, Mendel, *supra* note 1. The paper, nevertheless, focuses on the two above mentioned strategies as the most connected to the realization of socio-economic rights through information disclosure, from empirically-tested experiences.

<sup>166</sup> Particularly, case study evidence from the South African and Indian experiences refer to evidence of direct impact of access to information on the ability to demand rights and hold governments to account. See for this, for instance, Rosemary McGee, et. al., *supra* note 162.

<sup>167</sup> Evidence refers to the fact that civil society groups account for the larger number of freedom of information requests in most countries. See *Craig L. LaMay, et. al.*, *supra* note 8, at 11.

<sup>168</sup> Richard Calland & Kristina Bentley, *The Impact and Effectiveness of Accountability and Transparency Initiatives: Freedom of Information*, 31 (1), *Development Policy Review*, 17, (July 2013).

<sup>169</sup> Suggesting this issues is presented in Laura Neuman & Richard Calland, *supra* note 83.

right. In fact, the request-driven aspect of the right to information makes the demand side particularly important in providing access to information that otherwise might not be disclosed.<sup>170</sup> Accordingly, comparative studies suggest that without an adequately developed demand side, any access to information law, no matter how ideally written, is likely to fail.<sup>171</sup>

Using this tactic, civil society actors have sought to submit requests for strategically-oriented information from public authorities to test their compliance. Strategically, information related to the schemes, policies and measures actually taken by state bodies in various aspects of people's social and economic needs is the type of information, in particular, to be acted upon. As far as socio-economic rights are targeted in information requests, demands for information disclosure cover, in practice, a wide array of government-held information, ranging from government policies to public expenditure dispositions and budgetary commitments.

Civil society's advocacy scheme is meant to reflect on how public bodies respond to such requests by measuring their willingness to provide the requested information. It is then their reaction to formal requests for information that is documented for purpose of other advocacy action, mainly relevant to legal action.

## **2. Strategic legal action for effecting right to information**

Complimentary to the information requests tactic is recent international evidence on advocacy movements by civil society in undertaking strategic litigation in response to refusals by public bodies to release requested information.<sup>172</sup> The professionalized aspect of civil society activism is particularly manifested in their legal action. That is because it is mainly highly skilled and professional rights-based civil society groups who are competent to drive litigation processes towards successful outcomes.<sup>173</sup>

In cases brought by civil society actors in this context, the arbitrary refusal of the government to respond to information requests, not falling within the legitimate set of exemptions from disclosure, is tried in courts.<sup>174</sup> In fact, some cases go further in

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<sup>170</sup> See Anupama Dokeniya, *Implementing Right to Information: Lessons from experience*, *supra* note 74, at 24.

<sup>171</sup> See Calland & Bentley, *supra* note 168, at 18.

<sup>172</sup> See Our Rights, Our Information: Empowering People To Demand Rights Through Knowledge, *supra* note 20, at 51

<sup>173</sup> See Calland & Bentley, *supra* note 168, at 19.

<sup>174</sup> International examples of cases brought by civil society actors on basis of right to information include, for instance, the case brought by *Maragopoulous Foundation for Human Rights v Greece*, requesting access to information as a necessary condition of the enjoyment of the right to health and the right to safe and healthy working conditions under the European Social Charter. Other examples

legally challenging the measures taken by the state in order to fulfill its assumed obligations towards effecting freedom of information. Within the process of litigation, reasons for ineffective application of the right to information are also documented,<sup>175</sup> upon which further mobilizing efforts are considered. These include, for example, the lack of political will, the weakness of institutional capacity, poor records' management, and embedded bureaucratic traditions of secrecy, all of which create barriers to disclosure responsiveness.

To a great extent, this form of legal activism for right to information proves to be virtually indispensable in the arena of socio-economic rights advocacy. As far as accessibility to information pertinent to socio-economic rights for marginalized groups is concerned, the provision of legal support for these groups, whose socio-economic rights are frequently under threat, through protecting their right to information, becomes critical. Intervention by professional civil society actors see that the most disadvantaged groups are often the least likely to possess means to pursue their rights in court.<sup>176</sup> The capacity of professional civil society groups in such litigation cases is represented in their provision of "specialist companionship to communities that need to access information to create political space to engage in power."<sup>177</sup>

As far as socio-economic rights are concerned, the need for information is viewed as critical to effectively litigate these rights and challenge the degree of state's obligations in "tak[ing] steps ..... to the maximum of [its] available resources, ... [in] achieving progressively the full realization"<sup>178</sup> of these rights.<sup>179</sup> The interaction between the right to information and social rights is highly instructive of a

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include the case of *Claude Reyes and Others v. Chile* before the Inter-American Commission, where right to information was linked to the right to a healthy environment. See Inter-American Court Case: *Claude vs. Chile* available at <http://www.corteidh.or.cr>.

<sup>175</sup> Calland & Bentley, *supra* note 168, at 19.

<sup>176</sup> *Id.* at 18

<sup>177</sup> *Id.* It has been argued that cases of this sort are expected to have far-reaching practical implications for future requests for information disclosure, and for creating an overall culture of openness.

<sup>178</sup> Article 2.1 of the International Covenant on Economic, Social and Cultural Rights states that, "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." International Covenant on Economic, Social and Cultural Rights, art.2, Jan. 3, 1976, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>179</sup> Due to their nature, economic and social (and cultural) rights are considered 'positive' rights because they generally require some positive action on the part of the government which then gives rise to their justiciability.



government's attitude towards their realization,<sup>180</sup> specifically if it has failed in taking the appropriate measures, or in fulfilling its obligations in relation to them. To this end, advocacy groups within civil society put pressure on governmental bodies, through their legal action, to disclose public policies to discern how budgetary commitments and public services are delivered.<sup>181</sup> On the contrary, the failure to provide information by the state constitutes a violation of its international commitments and statutory obligations. Legal proceedings in these cases have allowed a wide array of benefits including: scrutiny of public policies, raising public consciousness of the merits of the case, pressing for correction in social injustices, building up political pressure in changing the political attitude, and reasserting influence over future policy formulation.<sup>182</sup>

International advocacy groups have proved to be important for realizing the potential of the right to information as a tool for scrutinizing the functioning of governments, and advancing the claims of the poor and marginalised in holding their governments accountable. Through forcing the disclosure of information on governments' decision-making processes and performance, either through information requests or strategic legal action, civil society actors have offered potentials for improving governance and policy outcomes related to socio-economic rights.

### **B. Civil Society Strategic Advocacy Role for Socio-economic Rights through the Lens of Freedom of Information in Egypt**

This section explores how the interlinkage between the instrumental capacity of access to information and the potential role of civil society is actually realized in the Egyptian context through the lens of the advocacy role of Egyptian civil society groups. However, addressing the advocacy role of civil society in Egypt concerning right to information faces several challenges. These include the entrenched culture of secrecy within the Egyptian bureaucracy, the novelty of the constitutional provision on access to information, the absence of legislation on freedom of information, and the existence of a wide array of secrecy laws. The exclusionary nature of the Egyptian

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<sup>180</sup>See Article19, ACCESS TO INFORMATION: AN INSTRUMENTAL RIGHT FOR EMPOWERMENT, 17, (2007), available at <https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf>. In relation to socio-economic rights, a three-tier system of obligations is determined to identify the duties imposed on states regarding their obligation to respect; protect; and fulfill them.

<sup>181</sup> *Id.*, at 20.

<sup>182</sup> *Id.*, at 25.

governance system also has an influence on the limiting public space for participation and opposing voices.

Against this particular background, mobilization efforts of civil society groups in Egypt remain influenced by the surrounding political environment and dictations of the state-society relationship. In fact, the burden borne by Egypt's civil society to demand information disclosure must be viewed within the context of civil society's struggle itself for exerting influence over the Egyptian public sphere after the 2011 uprising, in spite of the limited space for mobilization and political representation.<sup>183</sup> Faced with several waves of crackdowns and state attempts to regain control over the public sphere, societal actors have fought for creating new political spaces for activism<sup>184</sup> among which are their calls for information disclosure.

This section addresses cases of intervention by Egypt's civil society in the public sphere through the lens of right to information. This is approached by studying civil society's employment of the right as an inclusionary mechanism for creating new avenues for citizen's engagement, and for opening up spaces in the public sphere. Understanding the underlying legal and political environment, civil society's action has focused on building a new social contract based on novel arenas of resistance and political openings that are capable of challenging exclusion in Egypt.

In studying advocacy action taken by civil society groups in Egypt, it is worth mentioning that they have adopted the same two widely used advocacy strategies by the international civil society movement on freedom of information. Civil society actors in Egypt have sought to examine government's real buy-in in applying the right by submitting requests for information to various state bodies for the sole purpose of testing their compliance. Refusal to disclose information was then documented by civil society advocacy groups in court for the purpose of documenting government's resistance to disclosure.

This section will focus on strategic litigation taken by Egyptian civil society actors, by studying lawsuits filed by 'professionalized' human rights advocates in response to denials by public authorities to requests of information disclosure.<sup>185</sup> Professional

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<sup>183</sup> Azzurra Meringolo, *The Struggle over the Egyptian Public Sphere*, (IAI Working Paper, Paper No. 15, January 2015).

<sup>184</sup> Housam Darwisheh, *The State and Social Movement in Egypt: Phases of Contentious Activism*, (March 2015), available at <https://goo.gl/PqCrGv>.

<sup>185</sup> The phenomenon of strategic litigation has developed in Egypt by human rights groups since the 1990s, through bringing cases in front of Egyptian courts in efforts to expand political action to new venues. While beginning with a rights-based discourse, strategic legal advocacy has been extended to

legal action taken by human rights organisations in this regard has aimed at; firstly, bringing the battle for freedom of information to discussions over policy questions related to government's obligations towards ascertaining socio-economic rights; and secondly, challenging the underlying legal and institutional environment on access to information in Egypt. The professionalized aspect in their legal action is evident in their efforts for establishing judicial precedents on the constitutional principle of freedom of information. Their strategic goal was to obtain judicial verdicts that would set precedents to ensure future legal protection on exercising right to information, in the light of absence of a freedom of information legislation.

Although their advocacy legal action has mainly targeted Egyptian government compliance with freedom of information, the thesis argues that their legal action can be viewed as forms of new advocacy tools for socio-economic rights. The thesis suggests that their usage of the right to information in these lawsuits can be approached as a strategic tool in investigating the government's socio-economic leanings. Through their radical interpretation of the right to information in these lawsuits, civil society groups in Egypt have been successful in resisting entrenched bureaucratic secrecy which conceals government's exclusionary ideology.

This advocacy role calls specifically for implementing the social element of the Egyptian citizenship model in line with Marshall's theory. Civil society groups' intervention is viewed as being capable of reconfiguring an ideological shift in the role of the Egyptian state that avoids the exclusionary tendencies of neoliberal policies. As these policies have traditionally operated within a rentier state model, legal action taken by civil society groups has promoted disclosure of how the spoils of economic rents are being distributed, and the degree of the Egyptian state's real buy-in in delivering its commitments of welfare provisioning to its citizens.

Similarly, the advocacy role of civil society groups in these lawsuits sheds lights on their parallel efforts to hold government officials to account for corrupt practices through their demands for information. Through their legal action, civil society actors have opened new avenues for reporting on the quality of public services delivered, and for establishing new mechanisms for public accountability that question government's conduct of public affairs impacting Egyptians' socio-economic rights.

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more professionalized legal questions in relation to broad policy questions. See for this Joe Stork, *Three Decades of Human Rights Activism in the Middle East and North Africa: An Ambiguous Balance Sheet* in Joel Beinin (ed.), *Social Movements, Mobilization, and the contestation in the Middle East and North Africa*. (Palo Alto, Stanford University Press), (2013).

To this end, the thesis specifically focuses on four key cases brought particularly by four human rights organizations in Egypt: the Egyptian Initiative for Personal Rights, the Egyptian Center for Economic and Social Rights, the Arabic Network for Human Rights Information, and the Association for Freedoms of Thought and Expression.<sup>186</sup> The four human rights organizations through these lawsuits have requested courts to oblige public bodies to respond to information release requests associated with the exercise of socio-economic rights in Egypt.<sup>187</sup>

The goal of civil society groups, through these lawsuits, has been to push for social accountability and participatory governance with a view of government transparency that is different from the government's neoliberal-driven one. By adopting a strategic approach to information access to monitor government practices, and to press for government's responsiveness, civil society actors have used this political opportunity to advocate for socio-economic rights.

The chapter examines cases brought for obtaining information on: the schedule related to the government's policy in reducing electricity loads, conditions and documents related to the 4.8 billion USD loan from the IMF, the state's public budget for the fiscal year 2013-2014, and the budget of the Egyptian Railway Authority and loans obtained for improving its transportation service. By reflecting on the implications information in these cases could have on protecting social and economic rights in Egypt, the four organizations have sought to monitor the government's socio-economic policies through adopting legal reasoning premised on the right to access information. The section will give a brief note on these cases with a focused analysis on the legal reasoning used in them in relation to access to public information. The section examines how civil society groups have invoked both relevant constitutional provisions and international instruments to which Egypt is a state party on right to access information in their legal reasoning for advocating for socio-economic rights.

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<sup>186</sup> It is worth mentioning that civil society groups partnered with each other in active coalitions for bringing up these cases and for presenting support in connection with legal work needed on them. The strategy of forming effective coalitions proved to be crucial to the success of their legal cases. Their partnership movement has been analogous to strategies of coalition and partnerships taken also by civil society actors worldwide. See for this Andrew Puddephatt, *Exploring the Role of Civil Society in the Formulation and Adoption of Access to Information Laws: The Cases of Bulgaria, India, Mexico, South Africa, and the United Kingdom*, (Access To Information Working Paper Series, World Bank Institute, 2009).

<sup>187</sup> The paper will particularly consider rulings delivered by Administrative Courts in Egypt in cases filed by civil society actors, since they provide the traditional institutional channel to sue public officials' abuses of power in Egypt. The thesis has depended for this purpose on the statements of claim presented by civil society organisations in lawsuits they filed, along with the issued reports of the Commissioners Authority at the Egyptian State Council.

### **1. Case for obtaining information on the schedule related to the government's policy in reducing electricity loads<sup>188</sup>**

In reacting to the Egyptian government's policy in reducing electricity loads, a group of human rights organisations,<sup>189</sup> along with lawyers working in the human rights,<sup>190</sup> filed case no.52717 of Judicial Year 67 in June 2013 against the Egyptian government, requesting information disclosure on its policies related to electrical load reduction. This case is one of the early examples of strategic litigation by human rights groups to test governmental bodies' compliance with the constitutional right of access to information.

Their objective was to compel public authorities to implement the load reduction policy on the basis of regional justice, equal opportunity, and equality between citizens, especially in relation to instances of long-term and sudden electrical cuts. To this end, they requested that the Egyptian government prepare and publish a comprehensive schedule on its electricity load reduction policy, detailing the locations and times of power cuts in each governorate. Implicitly, the claimants intended future implementation of this load reduction policy by concerned state bodies on the basis of this schedule. The human rights advocates drew on the lack of transparency of the applied standards in the government's electricity load reduction policy, and how this had resulted in inequality among different regions in the frequency of electricity cuts.<sup>191</sup>

Their legal action was based on a number of pleas related to legal and constitutional provisions. The claimants based their reasoning primarily on the public's right to know, specifically article 47 of the 2012 nullified constitution on the right to information. The claimants then proceeded with explaining how the comprehensive schedule on electricity cuts would reinforce equality between citizens,

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<sup>188</sup>The Egyptian Center for Economic and Social Rights (ECESR), *Court Commissioners' Report Requires State to Issue and Announce Its Policy to Reduce Electricity Loads*, July 2014, available at <http://ecesar.org/en/06/07/2014/court-commissioners-report-requires-state-to-issue-and-announce-its-policy-to-reduce-electricity-loads/>

<sup>189</sup> Most significantly the Egyptian Center for Economic and Social Rights (ECESR) and the Arabic Network for Human Rights Information.

<sup>190</sup> They included attorneys Khaled Ali, Ali Atef Atiyya, Mohammed Mahmoud Hassan, Jamal Sayed Abdel-Radi, Mohammed Farouq Saad, Nouredin Mohammed Fahmi, and Rawda Ahmed. See ECESR, *supra* note 188.

<sup>191</sup> The claimants referred that inequality in electricity cuts was much related to the standard of living of the concerned region. For example, they indicated that regions like New Cairo and Maadi did not witness power cuts as much as other regions with lower levels of living standards like Al Waily, Al Zawya El Hamra, and Dar El Salam populated in large with middle-to-lower classes.

and how, in parallel, the lack of transparency violates principles of citizen equality and right for equal protection by the state. They cited Article 8 on state's obligation to guarantee the realization of justice, equality and freedom along with the protection of citizens' basic necessities,<sup>192</sup> Article 9 on the state's obligation to provide security, tranquility and equality of opportunity for all citizens,<sup>193</sup> and Article 33 on all citizens' right to enjoy equality before the law and to have identical rights and public duties without discrimination among them.<sup>194</sup>

The claimants then intended to show how realizing citizen's right to information was linked to their economic rights, most specifically the right to consumer protection. They demonstrated how disclosure of information by the Egyptian Electricity Holding Company, and the Egyptian Electric Utility and Consumer Protection Regulatory Agency is considered a right that is capable of helping citizens in determining their options, arranging their priorities, and scrutinizing the quality of goods and services provided through public funds. They cited, for this purpose, constitutional articles relevant to citizens' economic rights concerning consumers' rights. The claimants referred to Article 14, on the state's development plan towards protecting the rights of the consumers,<sup>195</sup> and to Article 18, on the state's obligation to safeguard people's own natural resources and their proper usage.<sup>196</sup> They

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<sup>192</sup> Article 8 of the 2012 Constitution provided that, "The state guarantees the ways of realizing justice, equality and freedom. It commits itself to facilitating the expression of compassion and solidarity among members of society. It guarantees the protection of individuals and their families and of property. It works toward securing the basic necessities for all citizens, as prescribed by law." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.8, Dec. 26, 2012.

<sup>193</sup> Article 9 of the 2012 Constitution provided that, "The state commits itself to providing security, tranquility and equality of opportunity for all citizens, without discrimination", CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 9, Dec. 26, 2012.

<sup>194</sup> Article 33 of the 2012 Constitution provided that, "The citizens enjoy equality before the law. They have identical rights and public duties. There is no discrimination among them." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.33, Dec. 26, 2012. See the Arabic version of the press release issued by the Egyptian Center for Economic and Social Rights (ECESR) in this regard on <https://goo.gl/IxytpS>.

<sup>195</sup> Article 14 of the 2012 Constitution provided that, "The national economy aims at steady and comprehensive development, at elevating the standard of living and realizing welfare, at combating poverty and unemployment, and at increasing job opportunities, production, and national income. The development plan works toward establishing social justice and solidarity, guaranteeing distributive justice, protecting the rights of the consumer, safeguarding the rights of the workers, engendering cooperation between capital and labor in defraying the costs of development, and ensuring a fair distribution of income[...]."CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.14, Dec. 26, 2012.

<sup>196</sup> Article 18 of the 2012 Constitution provided that, "The People owns the state's natural wealth and is entitled to its returns. The state commits itself to safeguarding this wealth and its proper use and to respecting the rights of future generations[...]."CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.18, Dec. 26, 2012.

accompanied this with reference to Article 2 of the Egyptian Law on Consumer Protection relevant to a consumer's right to access information needed for protecting his/her rights and interests.<sup>197</sup> Right to information has been then viewed as significant not only in promoting popular oversight, but also in ensuring consumer rights to public services, and establishing the foundations of regional justice.

The Commissioners Authority of the Administrative Court within the State Council issued its report ultimately recommending the realization of the claimants' requests. Their recommendation was based on applying the principle of freedom of information requiring state bodies to announce their policies in reducing electricity loads.

## **2. Case for obtaining information on conditions and documents related to the 4.8 billion USD loan from the IMF**

With information published only in private newspapers and on the IMF website that the Egyptian government had requested a 4.8 billion USD loan from the IMF, lawyers from the Egyptian Center for Economic and Social Rights, along with other prominent human rights lawyers,<sup>198</sup> filed lawsuit number 56810 for the judicial year 66 in August 2012. The lawsuit called for Egyptian public officials to make publicly available the conditions and documents relevant to the loan which had been deliberately kept secret by the government.

The Egyptian government justified its request for the loan on its ability to spur economic reform in light of the deteriorating economic conditions owing to the increasing state budget deficit, and the decline in exports and cash reserves at that time. The loan represented a positive step towards raising Egypt's credit rating in the eyes of foreign investors. However, the IMF had explicitly stated that its financial assistance was to correct flaws in Egypt's balance of payments.<sup>199</sup> Alongside this statement, and despite the Egyptian government's denial of the attachment of any conditions to the loan, its subsequent pro-austerity measures revealed its intended economic policies in return for gaining the fund's financial support.

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<sup>197</sup> Article 2 of The Egyptian Consumer Protection Law provides that, "Freedom to carry out economic activities shall be guaranteed to all. However, a person shall be prohibited from concluding any agreement or carry out any activity that prejudices consumers' essential rights, particularly: .....ii The right to obtain correct information and data of the products that are bought or used by or offered to consumer;.....v. The right to obtain information related to the protection of consumer's rights and legitimate interests [...]." Law No. 67 of 2002 On Consumer protection, Al-Jarida al-Rasmiyya, May 2006(Egypt).

<sup>198</sup> For example Khalid Ali, Taher Abou El Nasr, Aziza El Tawila, Malek Adly, Mohamed Fadel, and Allaa Abdel Tawab. See the Arabic version of the case's petition on <https://goo.gl/4EgTSa>.

<sup>199</sup> *Id.*

Due to the potential foreseen implications of the loan on Egyptians' socio-economic needs, the claimants requested that the court oblige the Egyptian government to make publicly available the conditions and documents relevant to the loan. The claimants referred to IMF's policies revolving in cases of loans around a fixed set of reforms that were designed to decrease the budget deficit. These reforms traditionally centered around promoting an increase in resources through cutting public spending, reducing fuel subsidies and sums allocated for employment in government, increasing taxes, and raising prices of government's goods.<sup>200</sup> As these tough economic and financial measures were required for the fund's continuous support, the claimants highlighted how the fund would assure its supervision over the government's economic and fiscal policies. According to the claimants, the Egyptian government's goal had solely been nevertheless to meet its financing needs and boost foreign investor's confidence, following the same neoliberal orthodox reform plans of Mubarak.

The claimants, therefore, pushed the principle of freedom of information in order to enable the Egyptian people to monitor the practices of their government relevant to obtaining this loan. Their view was that since Egyptians would be bound by policies the government would prescribe for the purpose of the loan then they had the right to know and observe its impact on their socio-economic rights.<sup>201</sup> The claimant's view was that disseminating information on this loan would pave the way for future public debate and participation in investigating the Egyptian government's socio-economic biases and underlying policies.<sup>202</sup> A distinctive character of the legal reasoning in this lawsuit was its dependence on international instruments in advocating for people's right to information, since the first constitutional provision on the right had not yet been adopted. The basis of their plea for the right to information was founded instead on Article 13 of the UN Convention against Corruption on state parties' obligations to promote societal active participation through access to information.<sup>203</sup>

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<sup>200</sup> The claimants pointed out that the fund's policies were inferred from their reading of its Articles of Agreement published on its website at <https://www.imf.org/external/pubs/ft/aa/>.

<sup>201</sup> The Egyptian Center for Economic and Social Rights (ECSR), *ECSR Files a Lawsuit to Disclose the Terms of the 4.8 Billion USD IMF Loan to Egypt*, August 2012, available at <http://ecsr.org/en/29/08/2012/imf-lawsuit/>.

<sup>202</sup> See for this the Arabic version of the press release issued by the Association for Freedoms of Thought and Expression in 2012, and available at [http://afteegypt.org/right\\_to\\_know/2012/11/01/730-afteegypt.html](http://afteegypt.org/right_to_know/2012/11/01/730-afteegypt.html).

<sup>203</sup> Article 13 of the UN Convention Against Corruption provides that, " 1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and



### **3. Case for obtaining information on the state's public budget for the fiscal year 2013-2014**

Following the presentation of the 2013-2014 draft state budget to the Shura Council by the Minister of Finance, without releasing it first to the public, several civil society organizations requested the Shura Council not to take any decision about it. They called for making the draft budget available first publicly for citizens to allow public dialogue involving all interested societal stakeholders in discussing the draft.

In parallel, with the above calls, a coalition of civil society groups<sup>204</sup> filed a lawsuit in April 2013 against the prime minister and the president of the Shura Council for purpose of obliging the Egyptian government to make the state budget for the fiscal year 2013-2014 available to the public. Human rights organisations based their request on the right of Egyptian citizens to access information related to the state budget with reference to Egypt's constitutional and international commitments on budget transparency. The lawsuit referred to the government's obligation for disseminating public information under article 47 of the 2012 constitution, under which Egyptian citizens have the right to access information and the state must guarantee that this right is exercised by disclosing and circulating all relevant data and documents. Reference to the constitutional right to information was accompanied by reference to the Egyptian citizen's right of participating in public life in matters related to their nation as per Article 55 of the 2012 constitution.<sup>205</sup>

Alongside the constitutional rights to information and participation, the claimants made reference specifically to the Egyptian government's constitutional commitment

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the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information; (c) Undertaking public information activities that contribute to non tolerance of corruption, as well as public education programmes, including school and university curricula; (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. [..]"United Nations Convention against Corruption, December 9, 2003, GA res. 58/4, UN Doc. A/58/422 (2003), S. Treaty Doc. No. 109-6, 43 I.L.M. 37 (2004).

<sup>204</sup> This coalition embraced the following civic associations: Egyptian Center for Economic and Social Rights, Association for Freedom of Thought and Expression, Egyptian Initiative for Personal Rights, Hisham Mubarak Center for Law, Budgetary and Human Rights Observatory, Habi Center for Environmental Rights, Association for Human Rights Legal Aid, Cairo Institute for Human Rights Studies, Appropriate Communication Techniques for Development Center, and Egyptian Women's Legal Assistance. See The Egyptian Center for Economic and Social Rights (ECESR), *Release the State Budget to the People... Now!*, April 2013, available at <http://ecesr.org/en/2013/04/21/release-the-state-budget-to-the-people-now/>.

<sup>205</sup> Based then on article 55 of the nullified Egyptian constitution of 2012 stating that, "Citizen participation in public life is a national duty. Every citizen has the right to vote, run for elections, and express opinions in referendums. The law organizes the direct application of these rights [...]"*CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT*, art.55, Dec. 26, 2012.

with regard to submitting the draft annual state budget to public purview at least three months before the beginning of the fiscal year.<sup>206</sup> Their call for making the state budget available in a public manner was further assured by pointing to the government's international commitments under governing international principles on budget transparency.<sup>207</sup> They underscore the fact that budget transparency is achieved, most significantly, by publishing budget documents and decisions through all stages of its formulation, approval, execution, and oversight. According to civil society advocates, disclosing budget information for this purpose entails the publishing of all details relevant to expenditures and revenues in the draft budget.

In the lawsuit statement, the coalition of civil society groups made it clear that the Egyptian government's attitude after the 2011 uprising should be more participatory and inclusive in contrast to its approach during Mubarak's reign. They stated that the approach of the government before the uprising, based on neglecting social participation in public affairs and suppressing space for civic voices should be completely abandoned. A strong sign of the government's new approach towards its citizens is then, according to the claimants, making the state budget available in a public and social-participatory manner in order to allow all concerned parties to review and comment on it.

There are implications, however, in disclosing information regarding the state budget on the realization of social and economic rights which cannot be denied. Disclosure of government policies, public expenditure dispositions and budgetary commitments would enable citizens and concerned civil society organizations to hold the government accountable according to the released public spending policies. Targeting the publication of budgetary information, civil society groups offered Egyptian citizens a checking mechanism on allocations of public resources, their actual flow and how they are employed in relation to overall public service delivery.

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<sup>206</sup> Article 115 of the 2012 constitution provided that, " The annual state budget includes all revenue and expenditure without exception. The draft annual state is submitted to the Council of Representatives at least 90 days before the beginning of the fiscal year. It is not considered in effect unless approved thereby, and it is put to vote on a chapter-by-chapter basis[...]."CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.115, Dec. 26, 2012.

<sup>207</sup> Several international principles have provided for budget transparency. These include, for example, the IMF Code on Fiscal Transparency (1999, revised 2007), defining it as making government's fiscal activities, along with the structure and functions of government that determine fiscal policies and outcomes, open to the public.. I refer here also to principles laid down by The Organisation of Economic Co-operation and Development translated in its guide for Best Practices in Budget Transparency (2001). The guide focuses more broadly on the information relevant to the budget and how to make it available to the public, describing fiscal transparency as 'openness about policy intentions, formulation and implementation.'

By promoting fiscal transparency, civil society's goal is to allow disadvantaged Egyptian citizens to monitor budgetary goals associated with their economic and social rights, and be able to hold the Egyptian government properly to account on revenues and expenditures impacting these rights.

An additional goal is allowing citizens to participate in shaping their country's public economic policy, by making aspects of public spending subject to popular oversight in all domains related to management of public funds. The claimants pinpointed that the lack of budget transparency could lead to severe economic problems related to the spread of corruption and public resource waste, where public spending is not reflected in the improvement of citizens' lives. The claimants explained that budget transparency has become an economic necessity that cannot be disregarded in light of the current economic crisis, such as the budget deficit, and the rapid growth in public debt. These economic problems associated also with austerity policies have a severe impact on service sectors affecting specifically the poor.<sup>208</sup>

Civil society groups have made it clear that budget transparency that allows citizen's participation is required since Egyptian citizens are those who bear the burden of the budget, whether through taxes imposed on them, public services they expect, or the manner by which their public resources are spent.<sup>209</sup>

#### **4. Case for obtaining information on the budget of the Egyptian National Railway Authority and loans obtained for improving its transportation service**

In January 2013, lawyers from the Egyptian Center for Economic and Social Rights filed lawsuit No. 20979 for the judicial year 67 requesting the release of information, along with documents and accounts, related to the Egyptian National Railway Authority's budget.<sup>210</sup> The lawsuit was accompanied by another lawsuit - No. 20980 for the judicial year 67- requesting the Ministry of Transportation and the Egyptian

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<sup>208</sup> See the Egyptian Initiative for Personal Rights (EIPR) press release, *The Absence of Transparency : An Economic Cost and An Infringement on Citizens' Constitutional Rights*, December 2014, available at <http://eipr.org/en/press/2014/12/absence-transparency-economic-cost-and-infringement-citizens%E2%80%99-constitutional-rights>.

<sup>209</sup> See the ECESR, *Release the State Budget to the People... Now!*, *supra* note 204.

<sup>210</sup> The lawsuit was accompanied by another lawsuit - No. 20980 for the judicial year 67- requesting the Ministry of transportation and the Egyptian National Railway Authority to form a technical committee for evaluating operational efficiency and safety in the rail infrastructure and passenger services. See the Arabic version of the press release issued by ECESR in January 2013 stating legal reasoning used in their statements of claim at <https://goo.gl/6115Sz>.

National Railway Authority to form a technical committee to evaluate the operational efficiency and safety of the rail infrastructure and passenger services.<sup>211</sup>

Together, the two lawsuits were pinned to a former national railway restructuring financing project entered into between the Egyptian National Railway Authority and the International Bank for Reconstruction and Development in the amount of 270 million USD in 2009.<sup>212</sup> The loan's target was to assist in improving the efficiency of railway services, and modernizing its management for the ultimate purpose of enhancing the railway sector's responsiveness to economic and social needs.<sup>213</sup> In 2011, the loan was supplemented with an additional financing of 330 million USD whose objective was to expand and accelerate the modernization of signaling systems and strengthen operating practices critical to the safety of rail services.<sup>214</sup>

The purpose of the two lawsuits was then to monitor both the actual usage of the loan funds in railway services along with the National Railway Authority's budget, and the Authority's running of railway services and infrastructure on the ground. The claimants indicated that they took consideration of the fact that the increase in railway accidents impacted a large number of poor Egyptian citizens who died from using the dysfunctional railway system.<sup>215</sup> The claimants specifically pointed to the fact that the National Railway Authority did not fully use however, according to the state's general budget of 2011/2012, the full amounts allocated to it in its internal budget.<sup>216</sup> Instead, according to the budget's final statement, the Authority returned approximately a quarter of the budget allocated to it within the state budget of 2011/2012,<sup>217</sup> the same year it obtained the additional financing for its restructuring project. Lawyers of the center questioned how the Authority's budget was managed and how funds obtained through the financing project were spent since the multi-million pound project did not achieve the much needed infrastructure upgrading, or maintenance for limiting accident rates or improving its service. This was raised in light of what was mentioned in the Bank's report number ISR8919 on December 23, 2012 that the Authority did not

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<sup>211</sup> *Id.*

<sup>212</sup> See a short explanatory note on the financing project on the Egyptian Ministry of International Cooperation's website, Egypt National Railways Restructuring Project, available at <http://www.moic.gov.eg/Front/Projects/ProjectDet.aspx?ProjID=535> (last visited February 2, 2017).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See for this the Arabic version of the press release issued by ECESR, *supra* note 210.

<sup>216</sup> *Id.*

<sup>217</sup> See the Arabic version of the press release issued by ECESR explaining the legal reasoning stated in their statement presented to the Public Prosecutor Office at <https://goo.gl/42GKyb>.

fully implement its obligations under the financing project and that its overall performance had raised the Bank's concern.<sup>218</sup>

The claimants referred to the constitutional right to information, as drawn in Article 47 of the Constitution, in requesting information on the Authority's budget and loans. The lawyers made a successful link between their request for information disclosure in this respect and the socio-economic needs of Egyptian citizens, especially the poor and marginalized. The claimants explained how the Authority's performance in running the efficiency of railway services is associated with the protection of citizens' social and economic rights. The lawyers cited relevant articles from the 2012 constitution related to Egyptian citizens' right to enjoy living their lives in safety and the state's parallel obligation to guarantee this. They specifically cited Article 8 on the state's obligation to guarantee the protection of individuals and their basic necessities,<sup>219</sup> Article 9 on the state's obligation to provide security and tranquility for all citizens,<sup>220</sup> and Article 40 on the state's obligation to guarantee that its citizens live their lives in safety.<sup>221</sup>

In March 2016 the Commissioners Authority of the Administrative Court within the Egyptian State Council issued its opinion obliging the Egyptian government to disclose information related to the Egyptian National Railway Authority's budget along with data on all loans obtained by the Authority.<sup>222</sup> The Body of Commissioner's report pointed out that the Egyptian Constitution is clear on binding Egyptian state bodies to disclose information to citizens. The report further asserted that since the law of the Egyptian National Railway Authority provided that the Authority's funds be public funds owned by the Egyptian people, and since citizens had not witnessed any decrease in the number of railway accidents despite the

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<sup>218</sup> See for this the Arabic version of the lawsuit statement presented by the lawyers of the Egyptian Center for Economic and Social Rights to the Public Prosecution Office under No. 242 for 2013, available at <https://goo.gl/D8MWUX>.

<sup>219</sup> Article 8 of the 2012 Constitution provided that, "The state guarantees the ways of realizing justice, equality and freedom. It commits itself to facilitating the expression of compassion and solidarity among members of society. It guarantees the protection of individuals and their families and of property. It works toward securing the basic necessities for all citizens, as prescribed by law." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.8, Dec. 26, 2012.

<sup>220</sup> Article 9 of the 2012 Constitution provided that, "The state commits itself to providing security, tranquility and equality of opportunity for all citizens, without discrimination." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.9, Dec. 26, 2012.

<sup>221</sup> Article 40 of the 2012 Constitution provided that, "Living in safety is a right. The state guarantees it to anyone living on its soil." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.40, Dec. 26, 2012.

<sup>222</sup> See the Arabic version of the press release issued on the Body of Commissioner's report <https://goo.gl/zTNSM5>.

obtained loans, then the Authority must be accountable to the public concerning the manner in which it runs public services.<sup>223</sup>

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<sup>223</sup> *Id.*

## **V. Conclusion**

As shown in this thesis, the right to information has the potential of bringing a shift in state-society relations in Egypt. The thesis argues that access to information within this particular Egyptian context has presented a new political opportunity for social actors to invoke change and stimulate inclusion of the Egyptian citizenry.

As an inclusionary tool, access to information has instrumentally provided civil society actors with an enabling space for directly addressing the exclusionary ideologies of the Egyptian state by challenging its penchant for secrecy. The thesis's proposition is to push for resistance to Egyptian state's control over information related to its functioning, especially information associated with its management of socio-economic rights. Such resistance is already seen in civil society's legal battles strategically administered in courts. Their battles have proved to be successful in, indeed, renegotiating the current social order in Egypt.