Criminalizing imagination...

How does Parliament view freedom of creativity?
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Introduction

The House of Representatives is the main entity responsible for regulating legislations that restrict freedom of creativity. However, the council that was elected in 2015 overlooked repealing articles restricting freedom of creativity in Egyptian laws, and even went further, as it approved the law entitled: “The law of honoring the flag and criminalizing its insult”. Some of its deputies sought to enact a law that would impose a penalty on “insulting historical symbols”, which may pose a serious threat to the freedom of creativity and thought in Egypt.

The legal accountability of creators cannot be separated from the negative role played by the House of Representatives with respect to protecting freedom of creativity. For example, an imprisonment sentence was issued against novelist Ahmad Naji because of a literary work; several sentences were also issued against some “mahraganat” singers. Former Minister of Culture, Gaber Asfour, was also a victim of the guillotine of hostility to freedom of creativity, as he was given a one year suspended prison sentence and 10,000 pounds fine, because of describing the prosecution’s pleading in Naji’s case as “more extreme than ISIS terrorist organization”. All these examples were sort of a direct result of the structure established by the legislative institution against freedom of creativity.

In its first section, the paper addresses the constitutional protection of freedom of creativity and the extent to which some legislation breach it, including articles (98) and (178) of the Penal Code, which address contempt of religion and violating public decency, respectively. The paper then reviews in its second section the adoption of a law that “criminalizes insulting the Egyptian flag” and the submission of a bill to criminalize the insult of historical symbols, the two of which represent a great threat to freedom of creativity. The third section of the paper focuses on presenting the impact of these legislations through some of the cases that AFTE has worked on or followed.

The paper is based on the legal analysis of articles of the Egyptian Constitution, the Penal Code and the Law No. 41 of 2014 on the Flag and the National Anthem, as well as the analysis of the draft law on criminalizing the insult of historical symbols. The paper used the official statements of the Speaker of the House of Representatives, the Secretary of the religious Committee of the House and some deputies concerning the discussions of the abolition of the articles on violating public decency and contempt of religion and the draft law on criminalizing the insult of historical symbols.
This paper seeks to highlight the role of the House of Representatives in violating and restricting freedom of creativity, and to urge the groups and concerned parties to raise this issue this year—which witnesses new elections for the House of Representatives—with the aim of asking the Council with its current structure to address this issue during the few months remaining of its term.

First: Freedom of creativity between the constitution and the law

There is a long Egyptian constitutional history linked to freedom of creativity, as article 49 of the 1971 constitution stipulates that: “The State shall guarantee the freedom of scientific research and literary, artistic and cultural creativity and provide the necessary means for its realization”. The wording of this article was considered too broad, which allows the interpretation to be expanded. This would, naturally, lead to the executive authorities’ control of its implementation and interpretation methods. The article, also, did not provide any mechanism to protect creators from legal prosecution because of their creative and intellectual work. At the same time, however, this article has established the subject of freedom of creativity as a matter of constitutional consideration, and subsequently several decisions of the Supreme Constitutional Court encouraging freedom of creativity have been passed.

As for the current constitution -amended in 2019- it included, for the first time, an article on the freedom of creativity. Article 67 prohibits the imprisonment of creators for publishing their work, and makes the repealing of every legal article that contravenes it obligatory. This article allows all citizens to challenge any legislation that violates the freedom of creativity or provides for punitive articles that imposes custodial sentences on creators. And since the global standards of freedom of creativity have not made freedom of creativity absolute, the Egyptian constitutional text has taken the same course in setting boundaries and prohibitions that do not fall within the scope of freedom of creativity, which are: incitement to violence, discrimination between individuals, and impugning the honor of individuals.

These standards were put as a limitation to freedom of creativity on the one hand, and on the other they are a guarantee that no legal provision will be enacted which will punish creators with any charge other than those three prohibitions. However, Egypt’s penal code has already included legislations that penalize activities and practices related to freedom of creativity, although they do not fall within the three prohibitions contained in the constitutional provision.
In the last decade, Egypt has witnessed two very serious verdicts against creators. The first was in 2013; a five years imprisonment sentence against writer Karam Saber for charges of contempt of religions in his short stories collection “Where is God?”¹ The other is the two-year imprisonment sentence against writer Ahmad Naji for violating public decency in his novel “Using Life.”² It is noticeable that the verdicts in the two cases included the maximum penalty established in accordance with the Egyptian Penal Code, specifically in article 98 related to contempt of religion, and article 178 related to violating public decency. They are the same articles that have long been described as violating the constitution's provisions that seek to protect the freedom of creativity and prevent the imprisonment of creators because of their creative work, unless their work incites violence or includes racial discrimination or impugns the honor of individuals.

In 2016, Egyptian media professional Islam El Beheiri was sentenced to five-year imprisonment that was reduced to one year³, for accusations of contempt of religions, in his program “With Islam”, in which he attacked Islamic heritage and the two imams Bukhari and Muslim. After this verdict, MP Amna Nossir, who is also a professor of faith and philosophy and former Dean of the Faculty of Human Studies of Al-Azhar University, Alexandria branch, proposed amending some articles of the Penal Code for unconstitutionality, calling for the deletion of article 98 on contempt of religion from the Penal Code. The article provides that: “Whoever exploits religion in order to promote extremist ideologies by word of mouth, in writing or in any other manner, with seditious intent, disparaging or contempt of any divine religion or its adherents, or threatening national unity, shall be punished with imprisonment between six months and five years or paying a fine of at least 500 Egyptian pounds.”

Sixty eight MPs signed the bill's proposal. The bill's argument was that the contempt of religion article violated Egypt's current constitution of 2014 and the articles of freedom of expression and belief in it, and it also violated the international conventions ratified by Egypt, notably article 19 of the International Covenant on Civil and political Rights⁴. During the discussion of the proposal, it was opposed by the member of the Legislative Committee, Hassan Al-Bardaisy, as well as the well-known MP, Mostafa Bakri. Bakri argued that a penalty for contempt of religion was “not incompatible with freedom of creativity”, giving the example of the repetition of the Danish cartoons offending the prophet. After that, the Legislative Committee of the House of

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². France 24, Egyptian writer sentenced to two years in prison for “ violating public decency ” in one of his novels, February 20, 2016 https://bit.ly/3aGC8dK
Representatives rejected Amna Nossir’s proposal and kept the article in effect⁵.

In the context of the detention of novelist Ahmad Naji, MPs Ahmad Said and Nadia Henri presented a draft amendment to the penal code, which aimed to cancel the penalty of imprisonment in publishing crimes for violating public decency. During the discussions of the bill, MP Abu Al-Maati Mostafa’s comment, showed how difficult it is for the House of Representatives to accept the amendment. Mostafa attacked in his discussions the Egyptian Nobel laureate, Naguib Mahfouz, saying: “Yes, Al-Sokkariya and Qasr El Shouk violate public decency, and Naguib Mahfouz deserves punishment, but at that time no one filed a criminal lawsuit against him”⁶. After which the vote on the draft was rejected by 21 members and approved by six members⁷.

The same thing was repeated with the “mahraganat” songs that have not stopped provoking controversy over the past years, and this year witnessed an open war against its makers. After a number of mahraganat makers have been banned from holding concerts⁸, the head of the musicians syndicate approached the management of some social media sites asking them to remove their songs⁹. MP Farag Amer also presented a proposal to the House of Representatives to tighten the penalty of violating public decency to three years, and that imprisonment should be mandatory. Amer, chairman of the Industry Committee in the Parliament, called for the trial of “mahraganat” singers by virtue of this article after tightening it. This is a violation of the principles of legal legislation that require the legislation to be general, abstract, and not intended to charge a particular person; otherwise, the law becomes legislated to take into consideration a personal interest of the MP, and becomes flawed by the abuse of power, and thus, if challenged, is repealed¹⁰.

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⁸. Mohamed Reda, Youm7, “Shakosh, Kamal, Shata, and Bika .. We publish the names of those banned from singing by the “musician’s” decree. February 18, 2020 https://bit.ly/2UrMfNs
⁹. Mahmoued El Refaay, Al Watan, “The musicians’ asks YouTube and Sound Cloud to remove the “mahraganat”. February 19, 2020
Second: Parliament tightens the grip on freedom of creativity

The parliament did not only refuse all attempts that aimed at cancelling articles restricting freedom of creativity, as mentioned earlier, it also tried to expand the enactment of laws that restrict the space available for creators in Egypt. According to the authority constitutionally entrusted to it, the parliament approved the “honoring of Egyptian flag” law issued by the interim president Adly Mansour, and also some of its MPs proposed a bill that would criminalize “insulting historical symbols”.

- Honoring of the flag law

In 2014, before the formation of the current House of Representatives, a decree-law was issued by interim president Adly Mansour for “honoring the Egyptian flag and criminalizing insulting it.” The decree-law, which carried number 41 for 2014, provided for a penalty of up to one year and a fine of up to thirty thousand pounds for anyone who “insults the Egyptian flag”, adding that the flag should be respected and honored, but it did not specify what is the meaning of “honored” and the limits of the term, accurately. It considered that showing the flag in an “inappropriate” manner is considered an insult to the flag, also without clarifying the meaning of the word “inappropriate”.

The law on insulting the Egyptian flag was issued by a decree of the interim president, Adly Mansour, as the parliament was not formed at that time, which gave Mansour the opportunity to monopolize the legislative power. The laws he issued in the transitional period had to be revised and regulated after the current House of Representatives assumed the legislative power on January 10, 2016. However, the House of Representatives approved this law among a wide range of laws of the transitional period that were issued with the signing of the interim president Adli Mansour and the current president Abdul Fattah Al-Sisi.

The constitution stipulates that the President of the Republic may issue decree-laws, provided that these decrees are then presented to the House of Representatives, discussed and approved within 15 days from the date the new House convenes. If such decrees are not presented to the House and discussed, or if they are presented but not approved, their legality is revoked retroactively, without the need to issue a decision to that effect.

According to this law, the dancer “Sufienar” was sentenced to six months in prison and fined 10 thousand pounds for insulting the Egyptian flag, because of wearing the flag during performing a dance\(^\text{11}\). Sufienar justified her attitude to the court during the course of the lawsuit saying that

11. Mohamed Talaat Dawood, Al Masry Al Youm, “Safinaz” sentenced to 6 month of imprisonment and 5 thousand pounds fine for dancing without a permit, April 21, 2016
she wore the flag as an expression of her love to Egypt. Later, the Court of Appeal upheld the first
degree sentence against Sufienar and only fined her 30,000 Egyptian pounds. Sufienar left Egypt
without a return after dozens of lawsuits were filed against her because of her work, and she was
convicted in many of them.

- **Draft law on the insult of historical symbols**

By the end of 2019, the debate on this law was renewed after the controversy over Sheikh al-Shrawi’s
criticism, as members of the House of Representatives pointed to the importance of adopting
the law of insulting historical symbols, so that personalities such as Sheikh al-Shrawi won’t be
subject to criticism. The motive behind proposing a bill against insulting historical symbols was
what some considered insults to the character of Salah El Din Al Ayoubi. In a television program
broadcast on May 10, 2017, writer Youssef Zeidan said that Salah El Din Al Ayoubi was “one of
the most despicable figures in human history”\(^{12}\). Zeidan attacked Salah El Din once more, along
with other historical figures like Ahmad Orabi, several months after the first incident. Zeidan said
that Ahmad Orabi “was the reason of the British occupation to Egypt”\(^{13}\).

Later, a lawyer filed lawsuit No. 5033 of 72, before the Administrative Court, against Youssef
Zeidan, which the court referred to the second circuit, on January 2, 2018. The plaintiff accused
Zeidan of defaming historical figures and demanded that Zeidan be banned from appearing in
all media outlets, satellite channels, and all programs, whether as a host or through telephone
calls, provided that this lasts for a period that commensurate with the gravity of the established
offenses. The proceedings of the case were subsequently suspended because of the absence of the
plaintiff.

A few days after Zeidan's statements, MP Omar Hamroush, secretary of the religious affairs and
endowments committee in the parliament, presented the draft law, considering that “the last
period witnessed several attempts to defame historical figures and symbols”\(^{14}\). On November 8,
2017, the Speaker of the House of Representatives referred the draft law to a joint committee
comprising members of the Legislative Committee and the Culture, Media and Antiquities
Committee. On the background of this, some media outlets published a statement by the writer
Youssef Zeidan declaring that if this flawed law was passed; he would emigrate from Egypt forever.

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12. Bassam Ramadan, Al Masry Al Youm, Youssef Zeidan: Salah El Din Al Ayoubi was one of the most despicable figures in human history

13. Ibrahim Hassan, Youm7, Youssef Zeidan: ‘Ahmed Orabi was the reason of the British occupation to Egypt that lasted 70 years’. October

14. Amin Taha, Al Tahrir, “Criminalizing insulting historical symbols”: The law forbids insulting Zewail and Hatshepsut. August 30, 2018
In press statements, Hamroush said: "Recently, the voices of many fame seekers were raised as they appeared in the media, defaming some historical symbols such as Ahmed Orabi and others. This has shaken young people's confidence in history and is taking the homeland off its roots". He also confirmed that: "The law aims to protect the historical symbols of society after they passed away, because there is no one to defend them". While in other statements Hamroush says that the bill will include the historical symbols that are still alive.

Through the bill, the legislature has compromised some interests and favored others. The legislature compromised the right to freedom of expression and intellectual creativity in the interest of preserving the “prestige” of historical figures. Here we come to the requirement of the purpose of the legislation, which is an objective condition for writing the legislative text. The purpose must be the public interest, in other words this balance of rights and preferring one over the other does not revoke the legislation as long as the purpose is the public interest; an interest is set aside in exchange for maintaining a primary interest, provided that the discretionary power of the legislator does not violate a constitutional provision specifying clear controls of the right.

The current president of the Constitutional Court, the newly appointed Chancellor Dr. Hanafi Al Gebali, says that the origin of the legislator’s authority in the field of the regulation of rights is that it is discretionary, unless the constitution restricts its exercise with controls that limit it, and are considered boundaries not to be broken or exceeded, since the origin in the legislation is its conformity with the provisions of the constitution.

In the same context, the Director of the Center for Research, Legal Consultations and Training at the Faculty of Law of Cairo University, explains in a legal paper entitled “Pillars of the Validity of Legislation”, in the context of a discussion of the “public interest” pillar, that any administrative decision by a state employee must be aimed at a greater interest than the one which will be abolished, and that this interest is the primary one. The public interest is an inherent and fundamental pillar in administrative decisions. The researcher raises the question of whether the law is subject to the same principle. What concerns us here is the law of insulting symbols; we wonder with him: must the public interest pillar in issuing laws be a fundamental pillar? How is the public interest measured then?

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15. Tamer Hendawi, Al-Quds Al-Arabi, Youssef Zeidan: I will emigrate from Egypt in case the law criminalizing the insult of historical symbols is approved. August 24, 2018 https://bit.ly/3dE0XJn
In his research, Dr. Sabri Al-Senussi explains how the legislator deviates from the public interest, especially when the legislator aims to achieve a particular interest of a particular individual, group, party, or harm a particular individual, group or party, other than what is required by the public interest. This is the opinion of a number of history professors who have argued that what's evident from the text of the law on insulting historical symbols is that it punishes the writer Youssef Zidan.

The penalty for insulting historical figures is up to 5 years in prison, after which, in case of committing the same offence again, it becomes 7 years imprisonment, in addition to a fine of up to 500,000 pounds to be raised to one million pounds in the event of repeating the act. This amount of violence in the face of an opinion on a historical figure expresses a desire to spread fear, and not only maintaining a particular approach in discussing and understanding historical figures.

It should also be noted that the law on insulting historical symbols does not conform to the Egyptian constitution, as article 67 of the constitution prohibits imposing any custodial penalties because of the public nature of the artistic, literary or intellectual product. Article 67 of the constitution states that “No lawsuits may be initiated or filed to suspend or confiscate any artistic, literary, or intellectual work, or against their creators except through the public prosecution. No punishments of custodial sanction may be imposed for crimes committed because of the public nature of the artistic, literal or intellectual product. The law shall specify the penalties for crimes related to the incitement of violence, discrimination between citizens, or impugning the honor of individuals”. Egypt is also committed to the articles of the International Covenant on Civil and Political Rights, which it has ratified. The covenant states in article 19 that “Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

The law also violates the precedence of the right to criticize over what lawmakers describe as “protecting historical figures.” The principles of the Supreme Constitutional Court considered freedom of expression to be the original freedom, from which many intellectual, cultural and other public freedoms and rights are derived. It is also the real beginning for the serious practice of these rights, such as the right to criticize, freedom of the press, printing and publishing, freedom of scientific research, freedom of literary, artistic and cultural creativity, the right to freedom of assembly, consultation and exchange of opinions and the right to address the public authorities. Thus, the violation of the right to criticize and freedom of expression is not limited to them alone, but extends to a wide range of constitutionally protected rights, whose existence is derived from the right to criticize and freedom of expression.
The Supreme Constitutional Court, in its rulings, acknowledges the right to criticize\(^{19}\), and establishes that it is necessary for maintaining a disciplined behavior in democratic countries. If this right is violated it will affect other rights such as access to information, flaw of information, etc, which are all granted by the International Covenant, as we already explained.

Furthermore, the law confuses criticism and insult or in a more precise sense “slander”, and slander as described in article 302 of the Penal Code is: “To attribute to a person a particular act which if true would necessitate inflicting on the person to whom it is attributed penalties”, such as accusing him of theft which is punishable by law, if you cannot prove that he is a thief you become the perpetrator of the crime of “slander”.

Although “slander” is a crime in Egyptian law, which is punishable by a fine of up to 15 thousand Egyptian pounds, yet if it comprises an attack against the dignity and honor of individuals, or an outrage of the reputation of families, the penalty inflicted shall be that of detention of up to three years together with the payment of a fine. However, it is clear that historical criticism is not intended to discredit the historical figures, but to criticize what they represent.

### Third: The impact of legislations on the provisions related to freedom of creativity

The problem with the legislations that provide for the imprisonment of artists is that they completely eliminate the usefulness of the idea of freedom of expression and the right to criticize. They also give higher weight to censorship at the expense of the constitutionality of laws, which contradicts constitutional provisions that have repeatedly stated that creativity is the most favored. These legislations even grant many entities the right of censoring the creative product, which affects the entire artistic industry with all its sectors. Since artist Reda Al-Foli, who starred in the video clip “Leave my hand”, was sentenced to one year in prison for violating public decency\(^{20}\), and since the two years imprisonment sentence for the writer Ahmad Naji for the same accusation, the censorship authorities established the believe that preventing the artistic works is the origin, and that separate censorship entities have an inherent right to decide what should reach the public and what should be prevented.

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\(^{19}\) (Case No. 37 of 2011, Judicial Constitutional, the hearing held on February 6, 1993, "Constitutional", p. 183)  
(Case No. 42 of 2016, Judicial Constitutional, the hearing held on May 20, 1995, "Constitutional", p. 740)  
As the pace of legislation inciting the imprisonment of artists has escalated, the artistic unions have adopted the role of the police and decided to contribute to the arrest of artists. At the forefront was the musical professions union, which signed a cooperation protocol with the Ministry of the Interior. Many “mahraganat” artists and others were later arrested for violating public decency by publishing video clips. In one of these cases the singer Shema was sentenced to two years in prison, and then the sentence was commuted to one year. The court explained in its ruling that it depended on the opinion of the musical professions union concerning Shema’s clip, as the union decided to withdraw the permit after it gave it to Shema, and described the clip as “pornographic.” This cruelty in dealing with artists was followed by restrictions imposed by the censorship authorities, so that even the procedures for registering the intellectual property of any musical work now require approval of the censorship on artistic works, while before it was done immediately.

The Parliament, as a legislature, is not the only entity that restricts freedom of creativity, the Supreme Constitutional Court also plays a role in that. The Constitutional Court can rule on the unconstitutionality of the laws that violate the provisions of the constitution and the international conventions that were ratified by Egypt. But this role remains constrained by an important procedure, which has long been a stumbling block to resorting to the Constitutional Court as a last resort for the protection of freedom of creativity. The problem is that referring the law to the Supreme Constitutional Court to consider its constitutionality, and then suspending it until it is amended or abolished is restricted by the ordinary court’s (criminal, civil or administrative) permission to refer the case to the Constitutional Court.

This is what happened in the case known as the case of “Sheikh Mizo.” In February 2017, Mohamed Abdullah Nasr, known as Sheikh Mizo, was sentenced to the maximum penalty in the law for contempt of religion, which is five years imprisonment. A lawyer had filled a lawsuit against him after Nasr appeared in a television program, and during the course of the case, Nasr’s lawyer submitted a memorandum challenging the constitutionality of the article on the contempt of religion, but the criminal court did not allow the case to be referred to the Supreme Constitutional Court.

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22. Yara Emad, Fi El Fan, Two mahraganat singers imprisoned, December 20, 2017
23. Kareem Sobhy, Youm Sabe7, The reasoning for sentencing singer Shema to two years in prison, December 16, 2017
24. Ibid
Conclusion and recommendations

At the same time that the state’s rhetoric mentions the soft powers and their influence, the House of Representatives is discussing laws that restrict freedom of artistic expression that violate the constitution. The political will of the Parliament must be based on the belief in the freedom of artists in artistic expression and the freedom of the public to watch and criticize, and that the opinion of the public alone determines the success or failure of the artwork. The artist does not carry a weapon or call for violence when he publishes a video clip, but the state does so by restricting his voice. Therefore, AFTE believes that the Parliament must consider the following:

1- Repealing the law on “Honoring the Egyptian Flag and Criminalizing its Insult” that was issued by the interim President, Adly Mansour, in 2014.

2- Withdrawing the bill on “criminalizing insulting historical symbols” that restricts freedom of thought, expression, and creativity.

3- Repealing articles 98 and 178 of the Penal Code that are related to charges of contempt of religion and violating public decency.