

## **QUE DESASTRE? AS IMPLICAÇÕES LEGAIS E PRÁTICAS DA LEI DE SIGILO DO JAPÃO NA GESTÃO E SEGURANÇA DE DESASTRE**

### **WHAT DISASTER? THE LEGAL AND PRACTICAL IMPLICATIONS OF JAPAN'S SECRECY ACT ON DISASTER MANAGEMENT AND SAFETY**

Anna Leah Tabios\*

**Resumo:** O acidente de Fukushima aconteceu há mais de três anos, mas os riscos que cercam os reatores nucleares TEPCO estão longe de ser finalmente resolvidos. Como o Governo Japonês, juntamente com a operadora nuclear, continua a lidar com a crise e combinar esforços para estabilizar a situação nuclear em Fukushima, pessoas, no Japão e em outras partes do mundo, são deixadas aguardando por notícias tranquilizadoras. O artigo explora a natureza pública e o papel significativo da informação e dos relatos da imprensa, nos momentos seguintes aos desastres, especialmente no desastre nuclear de Fukushima. A forma como os Estados lidam com recuperação do controle e estabelecem a ordem em âmbito nacional, na maioria das vezes, afeta a soberania do povo e tem repercussões sobre o ambiente natural. Assim, apesar da complexidade da gestão pós-desastre, os direitos das pessoas a um ambiente saudável e à informação pública no que diz respeito aos eventos que os afetam e ao seu modo de vida devem ser respeitados.

**Palavras-chave:** Desastre nuclear. Direito à informação. Fukushima. Gestão pós-desastre.

---

\* Doctoral candidate and DAAD-GSSP scholar at the Faculty of Law, Ludwig Maximilians University Munich and Rachel Carson Center. Email: [anna.tabios@campus.lmu.de](mailto:anna.tabios@campus.lmu.de)

**Abstract:** The Fukushima accident transpired more than three years ago, but the risks that surround the stricken TEPCO nuclear reactors are far from being finally settled. As the Japanese Government, along with the nuclear operator, continues with crisis management and combined efforts to stabilize the nuclear situation in Fukushima, people, both in Japan and in other parts of the globe, are left awaiting reports on safety issues. The article explores the public nature and significant role that information and journalistic reports play, following the occurrence of a disaster, in particular the Fukushima nuclear disaster. How States deal with regaining control over and establishing order in the national situation, more often than not, affects the sovereign people and has repercussions on the natural environment. Thus, notwithstanding the complexities of post-disaster management, people's rights to a healthy environment and to public information regarding events that affect them and their way of life should be upheld.

**Keywords:** Nuclear disaster. Right to information. Fukushima. Post-disaster management.

Japan, an island country that lies in the Pacific Ocean, has always brought an animated mix of advanced technology and tradition to the East Asian region. Considered to be one of the biggest economic powers in the world, Japan has a wealth of industries and maintains a highly innovative production of motor vehicles, electronics, chemical products, and nonferrous metals. At the same time, Japanese culture continue to pervade the streets and the daily lives of the archipelago's more than 120 million inhabitants - from the *yukata*-clad Japanese girls<sup>1</sup>, enjoying the *hanabi*<sup>2</sup> in the summer, to the sushi chefs or *itamae* who work hard in perfecting their cuisines and delivering quality sushi to their patrons.

The daily hustle-and-bustle in Japan is also encased in a cocoon of safety and security, as the nation lives up to its reputation as one of the safest countries in Asia, if not the world. Indeed, the Land of the Rising Sun, amid its lack of military power<sup>3</sup> and its geographical position, which subjects the island nation to intense crustal volatility, offers tourists and citizens alike a sense of security and safety.

Consistent with the country's swift industrial growth, Japan had some of the world's leading and innovative reactors and installations as the year 2000 dawned. The government supported the country's nuclear energy development, and in 2005 the Cabinet approved "The Framework for Nuclear Energy Policy" that was proposed by the Atomic Energy Commission. This Framework grants the "basic political measure" for nuclear power usage to be carried out in the country for the next 10 years.<sup>4</sup> It likewise promotes the employment of nuclear

fuel cycle and further stipulates that a projected minimum threshold of 30-40% of the country's total power supply shall be gleaned from nuclear power.

In the afternoon of March 11, 2011, however, an immense earthquake<sup>5</sup>, with a magnitude of 9.0, off the east coast of Japan occurred, especially drawing a shade of doubt to Japan's technological milieu and reliance on nuclear energy.

The earthquake triggered a tsunami, with waves of up to 40.5 meters and which hit the northeastern coast an hour later. Severe damage followed the onslaught of the disaster, especially in the northeastern part of the island nation. Roads were split open, railways buckled and train operations stopped, causing commuters to be stranded for hours. More than 100,000 buildings, designed to withstand Japan's constant earthquakes, completely collapsed, and about 950,000 more were damaged.<sup>6</sup> More importantly, thousands of lives were lost, and many more went missing or were injured, making the gloom left by the disaster much direr.

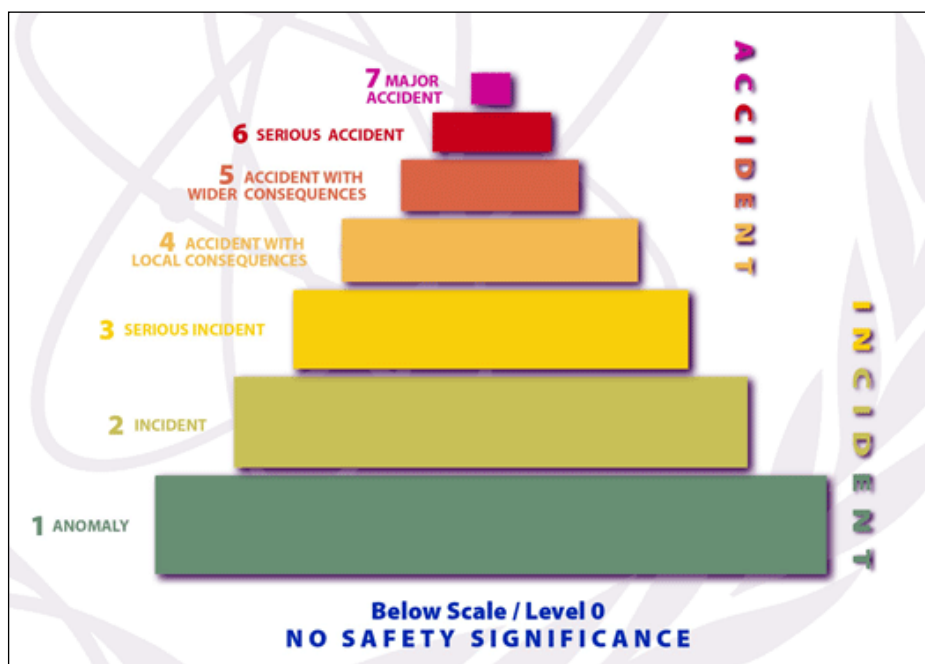
The tsunami also caused the meltdown of the reactors in Fukushima Daiichi, the nuclear power plants of the Tokyo Power and Electric Company's (TEPCO) in Fukushima, making it the worst nuclear accident to happen since the 1986 Chernobyl nuclear disaster.

Upon investigation, it was discovered that when the earthquake and tsunami struck, the Fukushima Daiichi Units 1, 2, and 3 were in operation, while the other units, 4, 5, and 6 were undergoing routine inspection.<sup>7</sup> The controls in the nuclear reactors triggered an automatically shut down function at the time of the earthquake. However, used nuclear fuel was already discharged before the reactor was shut down and this hot fuel did not have the chance to cool down. The intensity of the earthquake affected the power grids, and soon the power supply in the Fukushima Daiichi plant was lost. Nevertheless, the emergency diesel generators were still able to function at the onset and the electricity they provided was used to maintain the safety of the reactors.

When the tsunami hit, however, the electrical sources of the plant and its generators failed as the waves caused flooding<sup>8</sup> in the installations, impairing the flow of electricity to the cooling pumps and also disengaging the back-up diesel generators.<sup>9</sup> The rise of the temperature inside the reactor cores later caused explosions in at least three reactors therein, scattering radioactive materials into the air and thereby also spreading the risk of harm and contamination, not just within the area but all over Japan and across neighboring countries.

The Japanese Government raised a state of emergency in the city of Sendai in Miyagi Prefecture and instructed residents in the nearby areas to evacuate straightaway. The Nuclear and Industrial Safety Agency initially raised the alarm level to five (5), putting the Fukushima nuclear accident in the same level as that during the Three Mile Island accident in the United States of America. But, later, the Fukushima accident had to be raised to level seven (7), owing to the pressing dangers it continued to present.

**Figure 1 - The International Nuclear Event Scale (INES), developed jointly by the International Atomic Energy Agency (IAEA) and the Nuclear Energy Agency of the Organization for Economic Co-operation and Development (OECD/NEA), 1990**



Source: International Atomic Energy Agency (IAEA). Accessed at <http://www.iaea.org/>

A nuclear situation with Level 5 significance denotes that “wider consequences” are expected to follow this “accident,” including damage to the reactors, the dispersion of radioactive materials into the atmosphere, and deaths.<sup>10</sup> A level 7 classification, on the other hand, is a “major accident,” signifying severe consequences on the nuclear installations, the nearby communities, and the environment.<sup>11</sup>

## THE PUBLIC CHARACTER OF INFORMATION ON SAFETY AND SECURITY

March 11, 2011 happened almost three years ago, but the risks and hazards of a nuclear meltdown and high-dose radiation still continue today. Far from being over, disaster management operations continue to be undertaken in the calamity-stricken plants, leaving a number of evacuees not only in a state of homelessness but in one of indeterminate uncertainty, as well.

The occurrence of the Fukushima disaster affected not just Japan and its citizens, but also initiated a ripple of reactions beyond the territorial jurisdiction

of the island nation. Other Asia-Pacific nations, like Japan, also face threats of tsunami occurrences. Other States' concerns, particularly those that maintain and rely on nuclear facilities for their energy supply, rest on the risks that shroud nuclear energy use and development. But primarily, both citizens of Japan and the international community are interested in ensuring that the crisis in Fukushima is controlled and that harms, as the contamination of both water and soil and radioactive fallout, are effectively impeded.

In lieu of this, information gleaned from the investigations that are still being undertaken in the stricken facilities, as well as the reports about the progressions or changes therein, are a matter of public interest. This is so, as these pertinent information help in equipping concerned individuals and States alike with adequate knowledge as to the possible risks that continue to afflict the Fukushima plant, especially when they themselves stand to be affected.

Loose reference can be made to the nuclear disaster near Kyshtym in the Soviet Union, which occurred beginning in the 1950's to the 1970's and which docketed as Level 6 in the INES.<sup>12</sup> There, radioactive materials were released, nuclear wastes were released into surrounding bodies of water, recurring necessitated the closure of the area to as a safety and security measure.<sup>13</sup> Reports about this nuclear accident were limited, even in the course of the explosions; therefore, the residents of the affected and nearby areas were not adequately informed of the occurrence not even of the reason behind the evacuation operations that consequently followed.<sup>14</sup> Nevertheless, the severity of these incidents vastly caused the contamination of the area. Other authors, however, assert this grave area contamination was due to "Soviet carelessness coupled with general disregard for the citizenry and the environment" and not caused by a nuclear waste accident.<sup>15</sup>

Due to the mishandling by the governmental authorities, the nuclear explosions and radioactive pollution therein persisted – and the public was not sufficiently informed thereof all throughout the ordeal, although they are the ones that are directly affected by it. Through simply and willfully withholding significant information on the nature of the disaster, the government, in this respect, is purposely remiss in its duties to afford protection to its citizens. Such practice is not only practically dangerous but is also legally questionable.

In the case of the 2011 Fukushima disaster, the threats to both nature and society continue. As such, the public interest involved therein also continues to exist. However, the passing of the new "Special Secrecy Law" or Act No. 108<sup>16</sup> of 2013 in Japan may jeopardize this element of public interest, to say the least.

The said legislation, promulgated on the 13<sup>th</sup> of December 2013 and which will come into force within one year, broadens the scope of matters that the State can designate as confidential or a national secret, that was earlier codified in Japan's Self-Defense Forces law, as amended.<sup>17</sup> The scope of such matters originally only refers to that information determined by the Minister of

Defense to be “especially necessary to be made secret for Japan’s defense”.<sup>18</sup> Effectively, the designation cannot be used to cover any other matter or subject as the designation was to be made pursuant only to the country’s defense system and needs. In the 2013 legislation, however, the information, which can be designated as special secret, would include “defense, diplomacy, ‘designated dangerous activities,’ and “prevention of terrorism;” it would authorize not just the Ministry of Defense, but other Cabinet Ministers, and other governmental agencies to designate these information as such.<sup>19</sup> The reporting, publication, or making known details of the designated matter or subject is prohibited. Further, the legislation increases the penalties for violations thereof.<sup>20</sup>

Even at first glance, these subject matters or information groups appear to be overly broad and even vague, for lack of further elements to qualify the scope thereof. Matters of “designated dangerous activities,” for example, are not further defined and do not provide the process to be adopted in the determination of what “danger” covers and denotes. Instead of providing prerequisites or specific conditions and qualifications for the designation, the new legislation allows the State to have an unrestricted hand in determining which information is to be withheld from the public. Allowing this legislation to be implemented then is tantamount to dimming the lights all over Japan, thereby disallowing any matter to be visible, unless the specifically allowed to be so by the State.

The 2013 secrecy legislation, thus, may very well tread on the protected freedom of speech and the freedom of the press. Journalistic reports and activities by the media will then be subjected to the close scrutiny of the State, wherein a foot into the broad window encapsulating the matters designated by the State to be of a confidential nature can land them in prison or similar sanctions. What is worse is that there exists no pre-ordained and specific list of these matters; instead, the State, through its Ministers and authorized agencies, has authority to make the designation, when it decides to do so. Furthermore, the legislation can endanger the safety and security of both the inhabitants of the island nation and other States, when the same legislation is applied to matters with transboundary implications, as the on-going investigations in Fukushima.

Neighboring countries, as South Korea and China, which may be affected by radioactive fallouts and resource contamination, and other countries in Europe and the Americas, which import products such as rice from Japan, would clearly have interest in providing their respective citizens with details on matters that may affect their atmospheres, trade, and health, as well as in equipping their governments with technological knowledge necessary to respond to similar crises. However, these affected States will not have access to information regarding the condition and affairs at the Fukushima power plants, when such matters are so designated by the Japanese Government as confidential.

Suffice to say, although the international community can meet its goals for sustainable development, international aid, and cooperation through information-sharing, Japan's secrecy legislation, however, may essentially discourage the same, or worse, provide the impetus for this kind of legislation.

## **ISSUES ON ENVIRONMENTAL AND HUMAN RIGHTS, CONSTITUTIONALITY**

The 2011 nuclear accident had put in question not just the technological flaws and inherent risks of TEPCO's nuclear energy operations, but also the situation and present conditions of other reactors in Japan, like the Hamaoka complex, which is located near a fault line. An earthquake similar to that, which had rocked Japan on March 11, 2011, will prove disastrous to the Hamaoka complex and to nearby Tokyo – Japan's metropolitan capital and primary business center.

The disaster, thus, recharged the debate on nuclear energy, vis-à-vis environmental protection and conservation: Do the underlying risks to both the ecology and public health and security outweigh the benefits to the society, namely the fulfillment of the Japanese people's energy needs and nuclear energy's boons to economic development? Is the support and primacy given by the Japanese government to the nuclear industry firmly and reasonably grounded on impartial study and investigations on the sustainability of nuclear technology and operations? Is the government acting in representation of its citizenry?

Although Japan's relatively conservative citizens rarely voice out their apprehensions in public, protests were held all over the island country in the aftermath of the accident<sup>21</sup>, signifying the gravity of the occurrence to the public. Apart from the concerns of the affected public and the physical damage in the wake of the nuclear disaster, the government response and handling of the Fukushima disaster was also laid in focus, and often criticized.<sup>22</sup> With the 2013 secrecy legislation, however, the Japanese government may very well be able to designate the nuclear disaster as confidential state matter, thereby disallowing public reports and media coverage on the disaster.

Having such designation in place, the affected public will practically have no access to significant information regarding the conditions in the stricken plant, including but not limited to the health risks and environmental consequences, such as radioactive fallout and contamination of basic natural resources. Instead, the government would have the power to control all information to be released and shared, if any at all, thereby discounting the significance of these pieces of information to the affected public.

Hence, when such legislative power to designate information as “state secret”, and thus confidential, is applied in a situation of nuclear emergency, the public and the international community will not have access or have limited access to reports that will enable them to properly act in response to this emergency.

While the government may undertake actions in defense of the nation, as the 2001 secrecy legislation had intended, the government cannot empower itself to the point of infringing the fundamental rights of its citizens, much less without reasonable basis and necessity therefor. The seeming unrestricted scope of the government’s authority, under the foregoing legislation produces a chilling effect, not just within the Japanese society but in the international community as well.

The Preamble to the Japanese Constitution<sup>23</sup> states, “[The] Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.” It is upon this principle<sup>24</sup> that the Japanese Constitution was consecrated. However, a cursory examination of the 2013 secrecy legislation would demonstrate a breach of this trust, since the legislation in effect subjects the people’s right to information on matters that concern the public themselves to the broad discretion of the government. This, to all intents and purposes, allows the withholding by the government from the people of relevant information about the affairs within their own nation, as well as the governmental activities, when so determined by the government itself and without limitations.

In this light, the legislation goes against Article 11<sup>25</sup> of the Japanese Constitution, which guarantees the fundamental human rights of the people and the future generations as eternal and inviolate rights. More specifically, the legislation is also a direct violation of Article 21 thereof, which protects freedom of speech, of the press, and of expression. These same rights are also guaranteed in the Universal Declaration of Human Rights (UDHR) specifically Article 19<sup>26</sup> thereof, which protects the right of expression and opinion, as well as both the giving and receiving of information through any media. In the same vein, Article 19, in paragraphs 2 and 3 therein, of the International Covenant on Civil and Political Rights<sup>27</sup>, echoes the same protection, albeit with restrictions to the right to freedom of expression. These restrictions include provisions in the law, which are necessary to respect the rights or reputations of others or for the protection of national security, public order, public health, or morals.

In accordance with these rights, Repeta draws attention to the Global Principles on National Security and the Right to Information, otherwise known as the “Tschwane Principles,” which seek to safeguard the public’s right to know alongside considerations for national security matters. The Principles intend to provide guidelines to states in the drafting or implementation of laws



that concern states' authority to "withhold information on national security grounds or to punish the disclosure of such information".<sup>28</sup>

Principle 1 thereof states, "[e]veryone has the right to seek, receive, use, and impart information held by or on behalf of the public authorities".<sup>29</sup> Consequently, the public authority issuing or implementing such legislation or withholding information has the "the burden of demonstrating the legitimacy of any restriction." Any exemptions, restrictions, or limitations to the right to know should then be strictly interpreted. Moreover, Principle 4 (c) provides that rather than just stating or declaring that there exists a risk of harm, the public authority has a duty "to provide specific, substantive reasons" in support of such declaration.

Japan's 2013 secrecy act, however, does not do such but blatantly disregards the primacy of human rights and the citizens' right to know. In the same vein, the said act may possibly endanger the lives and safety of the very people who empowered their government to protect them, especially when the provisions of this act are carried out during disasters and situations of national emergency.

## NOTES

<sup>1</sup> A yukata is a light cotton or linen garment that resembles a kimono, though more informal. Yukata are often worn in the summer, festivals, or in hot spring resorts by both men and women.

<sup>2</sup> Hanabi is the Japanese term for "fireworks," and most commonly refers to the firework shows and festivals held in summer.

<sup>3</sup> Pursuant to Article 9 of the Japanese Constitution, the State maintains no armed forces, with the exception of a self-defense force. Article 9, Chapter II of the Constitution of Japan provides: Article 9. "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

<sup>4</sup> "Framework for nuclear energy policy", The Federation of Electric Power Companies of Japan, n.d., *accessed at* [http://www.fepc.or.jp/english/nuclear/energy\\_policy/framework/index.html](http://www.fepc.or.jp/english/nuclear/energy_policy/framework/index.html) on 13 October 2013.

<sup>5</sup> Also referred to as the "Great East Japan Earthquake".

<sup>6</sup> See also Isao Nishiyama, Izuru Okawa, Hiroshi Fukuyama, and Yasuo Okuda, "Building damage by the 2011 off the Pacific coast of Tohoku earthquake and coping activities by NILIM and BRI collaborated with the administration," Report presented in the 43<sup>rd</sup> Joint Meeting of the Panel on Wind and Seismic Effects (Tsukuba, Japan: 2011).

<sup>7</sup> See Tokyo Electric Power Company, Inc., "Fukushima Nuclear Accident Analysis Report" (Japan 2012) 1. The report aims to supplement December 2011 Interim Report of the company, adding thereto results of investigations carried throughout or completed within the period in between the two reports.

<sup>8</sup> See Tokyo Electric Power Company, Inc., see note 7. The flood height at the area surrounding Units 1 to 4 reached approximately 15.5m, while the area surrounding Units 5 and 6 were measured to have flooding of up to 14.5m.

<sup>9</sup> Tokyo Electric Power Company, Inc., see note 7. The flood height at the area surrounding Units 1 to 4 reached approximately 15.5m, while the area surrounding Units 5 and 6 were measured to have flooding of up to 14.5m.

<sup>10</sup> Ibidem, 3.

<sup>11</sup> *INES The International Nuclear and Radiological Event Scale: User's Manual*, 2008 ed., International Atomic Energy Agency (Vienna 2013) 3. The INES rates the events on the basis of several criteria: 'people and the environment, radiological barriers and controls at the installations; and defence in depth.'

<sup>12</sup> See Figure 1 - The International Nuclear Event Scale (INES), developed jointly by the International Atomic Energy Agency (IAEA) and the Nuclear Energy Agency of the Organization for Economic Co-operation and Development (OECD/NEA), 1990; See IAEA website.

<sup>13</sup> See *USSR: Nuclear accident near Kyshtym in 1957-58, An Intelligence assessment*, National Foreign Assessment Center, available at [http://www.foia.cia.gov/sites/default/files/document\\_conversions/89801/DOC\\_0000498481.pdf](http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000498481.pdf), accessed on 7 November 2013.

<sup>14</sup> A report on the topic was released, through the work of Soviet geneticist Zhores Medvedev, more than 20 years after the Kyshtym nuclear accident. See Žores Aleksandrovič Medvedev, *Bericht und Analyse der bisher geheimgehaltenen Atomkatastrophe in der UdSSR* (Hamburg: Hoffman und Campe 1979).

<sup>15</sup> Diane M. Soran and Danny B. Stillman, *An analysis of the alleged Kyshtym disaster* (New Mexico: Los Alamos National Laboratory 1982) 1.

<sup>16</sup> 特定秘密の保護に関する法律 ("Act on Protection of Specified Secrets"), Act No. 108 of 2013, Japan.

<sup>17</sup> 自衛隊法 ("Self-Defense Forces Law"), Act No. 165 of 1954, as amended, Japan.

<sup>18</sup> Lawrence Repeta, "A new state secrecy law for Japan? 新たな秘密保護法? *The Asia-Pacific Journal*, Vol. 11, Issue 42, No. 1 (2013). See footnote 1.

<sup>19</sup> Ibidem.

<sup>20</sup> From five years of imprisonment, the 2013 legislation increases the maximum penalty for violations of its provisions to 10 years. See Lawrence Repeta, note 18.

<sup>21</sup> David Elliot, *Fukushima: Impacts and implications* (2013), 18.

<sup>22</sup> Ibidem, 12-14.

<sup>23</sup> The Constitution of Japan (1947). An English translation is available at the website of the Prime Minister of Japan and his Cabinet, accessed at [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html), on 30 January 2014.

<sup>24</sup> The Preamble to the Japanese Constitution refers to it as "a universal principle of mankind." See The Constitution of Japan, note 23.

<sup>25</sup> Article 11, The Constitution of Japan, see note 23, provides: Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

<sup>26</sup> Article 19, Universal Declaration of Human Rights provide: Article 19. 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>27</sup> Article 19, paragraphs 2 and 3, provide: Article 19. xxx ... xxx 2. 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. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>28</sup> The Global Principles on National Security and the Right to Information: Tshwane Principles (New York: Open Society Foundations 2013) 5.

<sup>29</sup> Principle 1, The Global Principles on National Security and the Right to Information (2013).

**Article received in december/2013. Approved in december/2013.**