

ARTICLE 19

# Tunisia: Protecting freedom of expression and freedom of information in the new Constitution

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September 2012

Legal analysis

# Executive Summary

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The National Constituent Assembly of Tunisia (NCA), elected in October 2011, has completed drafting a new Constitution for Tunisia, the text of which will be discussed shortly at the plenary session of the NCA.

In September 2012, ARTICLE 19 analysed the text of the Draft Constitution in order to support the drafting process and to stimulate the debate around provisions relating to the right to freedom of expression and freedom of information. This analysis examines their conformity with international human rights standards, in particular those on freedom of expression and freedom of information. These standards include the decisions of international and regional human rights courts as well as the authoritative interpretation of international human rights law by the UN Human Rights Committee and the Special Rapporteur on Freedom of Opinion and Expression.

ARTICLE 19 appreciates the efforts of the drafters of the new Constitution to ensure a successful democratic transition for the country by adopting constitutional provisions that guarantee the right to freedom of expression and information. However, our analysis reveals that provisions on freedom of expression and information do not entirely conform to international standards on the matter.

Firstly, the restrictions on freedom of expression and freedom of information in the Draft Constitution are incomplete, and do not wholly correspond with international standards. Secondly, the protection of the freedom of the media is not sufficiently explicit. Provisions on media authority are incompatible with international standards and provide highly inadequate guarantees of independence. Thirdly, we note that protection of religions and sacred values, and the criminalisation of attacks on them, are not permitted by international law. Fourthly, the protection of women's' rights, notably in the application of the "principle of complementarity", constitutes a major regression from the former Tunisian legislation and contravenes the fundamental principle of equality between men and women. Finally, with regard to effective enforcement of rights at the national level, the provisions are vague and lack clarity. The place that the constitution gives to international law does not conform to the Vienna Convention on the Law of Treaties.

ARTICLE 19 calls on the NCA to take this document into consideration when reviewing the final text of the Draft Constitution. We hope that the provisions of the Draft Constitution will be amended in the light of our recommendations in the final text. Such changes are necessary in order to bring the text of the Draft Constitution in line with international standards in this area..

## Summary of Recommendations

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- The new Constitution should define the right to freedom of expression broadly to include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to guarantee this right to every person. It should also explicitly declare that all forms of expression and the means of their dissemination, including expression through ICTs – or on the Internet or other electronic information dissemination systems – are protected by the right to freedom of expression.
- The Constitution should indicate that there may be restrictions imposed on freedom of expression if these are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals.
- In a separate provision, the Constitution should ensure that the right to hold opinions is not restricted in any way.
- The Constitution should protect the right to freedom of information and access to information held by or on behalf of a public body, as well as access to information held by private persons necessary to enforce a right.
- The Constitution should state that access to information should be guaranteed unless: (a) disclosure would cause serious harm to a protected interest; and (b) this harm outweighs the public interest in accessing the information.
- The Constitution should also specify that the State has an obligation to publish and disseminate documents on matters of public interest.
- The Constitution must provide complete and explicit protection for freedom of the media and **specifically protect the following elements of media freedom**:
  - There should be no licensing or registration system for the print media.
  - There should be no licensing of individual journalists or entry requirements for practising the profession.
  - The current provisions on the media regulatory authority must be amended as being incompatible with the fundamental principles of democracy. Moreover, new provisions,

guaranteeing the independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be inserted to the final text of the Constitution.

- The right of journalists to protect their confidential sources of information must be guaranteed.
  - Journalists must be free to associate in professional bodies of their choice.
- The Constitution must guarantee freedom of religion for all in accordance with the International Covenant on Civil and Political Rights.
  - In line with international best practices and in order to satisfy the democratic aspirations of the revolution, references to the universal values of human rights, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and the fundamental principles of democracy should be reinforced in the Preamble to the Constitution.
  - Constitutional provisions relating to the protection of "sacred values" and "criminalisation of attacks on sacred values" should be removed from the Draft Constitution as they violate international human rights standards.
  - The Constitution must clearly and unequivocally incorporate the fundamental principle of equality between men and women. The reference to the principle of "complementarity" should be removed.
  - The Constitution should make the constitutional guarantees of freedom of expression and freedom of information directly enforceable against the State as well as non-state or private actors. These guarantees should take precedence over legislative provisions that are incompatible with them.
  - The Constitution should specifically provide effective remedies allowing the rights and freedom guaranteed by the Constitution to be enforced. For this purpose, the existing provisions should be amended, or the rules on effective remedies should be clearly specified in a law.
  - Article 18 of Part IV of the Constitution should state that the Constitution must be amended before an international treaty is ratified, in the event that the Constitutional Court declares that such a treaty contains a clause in contravention to the Constitution.
  - The Constitution should contain another article stating that signed and ratified treaties, once they have been published, are directly binding in the domestic legal order.

- Article 16 of the Constitution should be removed. If the National Constituent Assembly wishes to give greater value to the Constitution than international treaties, this should be specified in a provision such as the one suggested in their previous recommendation (also, compare with Article 55 of the French Constitution, for example).
- The Constitution could also contain, if applicable, a provision stating that, in principle, treaties and international agreements which have been signed and ratified, may only be repealed, modified or suspended in the way provided for in the treaties themselves, or in accordance with general standards of international law (see article 96 of the Spanish Constitution, for example).

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# About ARTICLE 19 Law Programme

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their enforcement in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this document further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org).

# Introduction

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In January 2011, the Tunisian Revolution put an end to the authoritarian government and opened the way for democratic transformations in the country. The National Constituent Assembly ("NCA"), established following the elections of 23 October 2011, has completed its mission of drafting a new constitution for Tunisia. The new Constitution ("Draft Constitution"), which will shortly be debated in Parliament, constitutes the basic legal framework on which the post-revolution Tunisian government will be built.

Tunisia is, therefore, at a crucial period of its history, and the success of its democratic transition is largely dependent on the adoption of a new constitution which conforms to international human rights law, and notably to standards protecting the right to freedom of expression and freedom of information.

ARTICLE 19 has previously produced a policy brief<sup>1</sup> to support the process of drafting the new Tunisian Constitution; the brief provides a detailed analysis of relevant provisions of international law on freedom of expression and freedom of information. In doing so, it drew on international human rights law, including the decisions of international and regional human rights courts as well as the authoritative interpretation of international human rights law by the UN Human Rights Committee and the Special Rapporteur on Freedom of Opinion and Expression. It also highlighted specific examples of constitutional provisions in a range of other countries. This policy brief was also intended to support and stimulate the debate around the new Tunisian Constitution and particularly its provisions on the right to freedom of expression and freedom of information by underlining key issues to be considered by the NCA. In this respect, it should be noted that the document is also the result of several policy workshops on the Constitution organised by ARTICLE 19 in collaboration with local players, notably in Kasserine, El Kef and Tunis.

In the present analysis, ARTICLE 19 examines the provisions of the Draft Constitution relating to the protection of the right to freedom of expression and freedom of information, using the earlier policy brief and, above all, relevant provisions from international human rights law as its foundation. It analyses whether the Draft Constitution represents a true break with past abuses and repression and, more generally, with the former political regime in Tunisia.

ARTICLE 19 believes that this radically positive change in direction must happen through the adoption of constitutional provisions that effectively protect human rights. In the developments following this assessment, we analyse the new provisions which should allow for genuine protection of human rights, while also granting post-dictatorial legitimacy to the bodies of Tunisia. More precisely, first and foremost, we make some general observations about the

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<http://www.article19.org/resources.php/resource/3013/en/Tunisia:%20Protecting%20freedom%20of%20expression%20and%20freedom%20of%20information%20in%20new%20constitution>



constitutional entrenchment of human right. Furthermore, we place emphasis on the conformity of these constitutional guarantees with international law. We also examine how the Draft Constitution provides for mechanisms for enforcing human rights.

ARTICLE 19 is well placed to undertake this analysis thanks to our extensive experience on the issue of freedom of expression in Tunisia. For example, in 2011 we issued several analyses of the Draft Decree Related to Freedom of the Press and Communication<sup>2</sup>, the Draft Decree on the Freedom of Audiovisual Communication<sup>3</sup>, the Draft Decree on Access to Administrative Documents<sup>4</sup> and the Electoral Law<sup>5</sup>, at various stages of the parliamentary process. Furthermore, over time, we have accumulated a great amount of expertise by commenting on a significant number of UN resolutions concerning the defamation of religions, domestic legislation on blasphemy and legal cases tried all over the world.

The structure of this analysis is as follows. First, we outline the positive features of the new Constitution in a specific section on human rights. Second, we examine the relevant constitutional provisions on freedom of expression and freedom of information in the light of international standards. Third, we review the provisions on the enforcement of the guaranteed rights. At the end of each part, we provide specific recommendations that we urge the National Constituent Assembly to carefully consider when discussing the final text of the new Constitution.

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<sup>2</sup> See: <http://www.article19.org/resources.php/resource/2944/en/tunisia:-press-regulation>.

<sup>3</sup> See: <http://www.article19.org/resources.php/resource/2942/en/tunisia:-broadcasting-regulation>.

<sup>4</sup> See: <http://www.article19.org/resources.php/resource/2945/en/tunisia:-freedom-of-information>.

<sup>5</sup> See: <http://www.article19.org/resources.php/resource/2943/en/tunisia:-elections>.

# The Constitutional Entrenchment of Human Rights

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The Draft Constitution contains guarantees of constitutional protection to human rights. For example, the Preamble refers to "noble humanist values" and the aim of "building a democratic, republican, participatory government in which the State will be civil". According to the Preamble, the Tunisian government will be founded on the "principle of separation of powers and their mutual balance", in which "sovereignty belongs to the people based on peaceful alternation of power" and in which "the right to organise, founded on the principle of pluralism, administrative impartiality, good governance and free elections, is the foundation of political life."

In its general provisions, freedom of conscience and free worship are guaranteed, as well as the neutrality of places of worship in relation to all political propaganda (Article 4). The right to organise political parties, trade unions and associations, and to engage in political opposition are also protected (Article 7). Article 8 guarantees the right to freedom of opinion, expression, of the press and publication, and rights to assembly and protest. Article 16 provides that peace, founded on justice, is the basis of the relationship between States and peoples.

Part I of the Draft Constitution is entirely devoted to protection of human rights and freedoms. As such, its main provisions guarantee:

- The right to life, except in cases provided for in law (Article 1)
- Freedom of conscience, free worship and criminalisation of attacks on sacred values (Article 3)
- The right to form trade unions, including the right to strike, provided that it does not endanger the life, health or safety of individuals (Article 15)
- The right for everyone to access information, provided that it does not represent a threat to national security and the rights guaranteed by this constitution (Article 16)
- Academic freedom and freedom of scientific research, and the State's obligation to provide necessary resources for the development of academic work and scientific research (Article 18)
- Impartiality of the administration, companies and public institutions and places of worship, which must not be used for the purposes of political or partisan propaganda (Article 23)
- Freedoms of opinion, expression, information and creative endeavour, intellectual and literary property, and artistic and literary creative endeavour which the State encourages, contributing to national culture and its openness to universal culture (Article 26). This provision also provides for restrictions to freedoms of information and publication which may only be restricted by law in order to protect the rights of individuals, their reputation, safety and health. These freedoms may not be subject to any prior censorship of any kind.
- Women's rights and the promotion of their entitlements under the principle of complementarity to men within the family and as an

associate of men in the task of building the country. The State guarantees equal opportunities for women and men in all roles, and action against any form of violence perpetrated on women (article 28).

- The right of all citizens to access culture. In this regard, the State encourages cultural creative endeavour and production and consumption of cultural works. It will take care to promote the diversity and enrichment of national culture, prohibit violence and entrench the values of tolerance and openness towards other cultures, and foster dialogue between civilisations. The State protects the cultural heritage of the Nation and guarantees the right of future generations to have access to this heritage (article 32).

ARTICLE 19 congratulates the National Constituent Assembly on its efforts on the constitutional entrenchment of human rights. Its efforts in this regard are of great importance, as they provide the impetus for Tunisia's democratic transition. In this respect, following the popular uprising in December 2010 and President Ben Ali's departure from power, the new Constitution could play the role of a true predecessor to reforms which must essentially begin with the Constitution. Such reforms must respond to the legitimate demands of the Tunisian people in the area of human rights, and notably with regard to freedom of expression, freedom of the media and access to information. As such, the reference in the preamble of the constitution to "humanist values" is particularly appreciated.

Further, by instating the constitutional protection of human rights in a separate section, Tunisia is aligning itself with the constitutions of a large number of States which have incorporated various degrees of protection of human rights.<sup>6</sup> In this regard, it is also appropriate to stress the importance that the new Constitution accords to human rights, notably by incorporating them into Part I. Furthermore, Article 3 of the final provisions of the Constitution provides that "no constitutional amendment may call into question (...) the entitlements to human rights and the freedoms guaranteed by this Constitution."

Finally, the existence of a section entirely devoted to human rights in the text of the Constitution makes it more credible, especially now, at a time when the Tunisian institutions are seeking legitimacy on matters of democracy, protection of human rights and rule of law - principles which were scorned by the previous government. In this regard, the

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<sup>6</sup>The incorporation of protections for civil liberties, usually through a bill of rights, is a practice that has existed at least since the Magna Carta of 1215 and is found most notably in the constitution of the United States of 1787 and the French Declaration of the Rights of a Man and Citizen (Déclaration des droits de l'Homme et du Citoyen) of 1787. Following the Second World War, Japan, Germany and Italy incorporated the protection of human rights into their constitutions. Shortly thereafter, numerous States escaping colonial rule also inherited constitutional bills of rights as part of their legacy. After the end of the Cold War, many newly emerged or transformed States of Central and Eastern Europe adopted bills of rights out of a desire to distinguish themselves from the arbitrariness of communist rule. Recent constitutions protecting human rights include those of Kenya (2010), Bolivia (2009), Cameroon (2008), Ecuador (2008), Nepal (2007) and Montenegro (2007). Egypt's provisional constitution of 30 March 2011 and the Libyan constitutional declaration of 3 August 2010 protect a number of rights and freedoms, albeit in limited way.

reference to the right to access culture, the promotion of diversity, the enshrining of values of tolerance and openness towards other cultures, the fostering of dialogue between civilisations, and the prohibition of violence, is particularly highly valued.

The following sections analyse the provisions of the Draft Constitution in a greater detail. Despite some progress compared with the situation in Tunisia before the protests of the Arab Spring, certain provisions of the Draft Constitution still do not provide an adequate protection of rights and freedoms and are not always consistent with international standards in respective areas.

# Freedom of Expression: Content and Limitations

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## **The content of the right to freedom of expression**

The right to freedom of expression is protected by Draft Constitution under the following terms:

- "Freedoms of opinion, expression, of the press and publication, and rights to assembly and protest are guaranteed freedoms and rights" (Article 8 of the general provisions)

Part I, entitled "Rights and freedoms", provides for the following:

- "The right to access information is guaranteed for all (...)" (Article 16);
- "Academic freedom and freedom of scientific research are guaranteed". "The State must mobilise necessary resources for the development of academic work and scientific research" (Article 18);
- "The State will take care to guarantee the impartiality of the administration, companies and public institutions and places of worship. None of these institutions may be used for the purposes of political or partisan propaganda." (Article 23);
- "Freedoms of opinion, expression, information and creative endeavour are guaranteed.  
Freedoms of information and publication may only be restricted by law in order to protect the rights of individuals, their reputation, safety and health.  
These freedoms may not be subject to any prior censorship of any kind.  
The State encourages artistic and literary creative endeavour, contributing to national culture and its openness towards universal culture (Article 26)  
Intellectual and literary property is guaranteed" (Article 26);
- "The State guarantees the right to access culture for all citizens. It encourages cultural creative endeavour and production and consumption of cultural works. It will take care to promote the diversity and enrichment of national culture, prohibit violence and entrench the values of tolerance and openness towards other cultures, and foster dialogue between civilisations.  
The State protects the cultural heritage of the Nation and guarantees the right of future generations to have access to this heritage" (Article 32).

The key provisions of the Draft Constitution are examined below.

## ***The components of the right to freedom of expression***

This section analyse the conformity of the constitutional provisions to international law, first in terms of freedom of opinion, and then freedom of information.

### Freedom of opinion

As a preliminary point, ARTICLE 19 welcomes that the Draft Constitution provides an explicit protection for **freedom of opinion**.

The ability for every person to hold and express an opinion is an essential component of freedom of expression. Contrary to the right to freedom of expression and freedom of information, international law and many constitutions protect the right to hold opinions as well as expression generally<sup>7</sup>. Indeed, the right to hold opinions is an absolute right which requires that opinions may be held without interference.

Given the importance of international standards, it is regrettable that the drafters of the Constitution have not provided for a separate provision on this matter. Furthermore, its protection, in the same terms, in two different provisions (Article 16 of the general provisions and Article 26 of Part I) of the Constitution, is unnecessary. We recommend removing the article that appears in the general provisions of the Constitution, and retaining the article that appears in the section specifically devoted to the protection of rights and freedoms.

ARTICLE 19 also believes that the absolute nature of this right should be explicitly stated in the new constitution. As we have previously mentioned, the right to hold opinions has such high importance that it must be granted in a separate constitutional article which underlines its inviolability. Given Tunisia's turbulent past and the ongoing issues linked to its compliance with freedom of expression in the broad sense of the term, we believe it is important for the constitutional provisions relating to freedom of opinion to be amended.

#### Freedom of information

As for the right to **freedom of information**, we note that Article 19 of the ICCPR encompasses also freedom of information or the right to access information. Freedom of information or the right to receive and have access to information is the "flip side" of the right to freedom of expression. However it is also a right of the public at large. It therefore guarantees a collective right of the public to receive information that others wish to pass on to them.

International bodies, in particular the special mandates (or international mechanisms) on freedom of expression have recognised the right to access information in their Joint Declarations for many years.<sup>8</sup> In their 2004 Declaration, they stated:

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<sup>7</sup> By way of example, among the international instruments which have enshrined freedom of opinion, article 19 of the Universal Declaration of Human Rights (UDHR) can be cited, which applies in customary international law (*Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit)). Article 19 of the International Covenant on Civil and Political Rights (ICCPR) can also be mentioned. This treaty, which Tunisia ratified, has binding legal force in the matter. Regional instruments, such as the African Charter on Human and Peoples' Rights (ACHPR) also protect freedom of opinion (article 9 (2)).

For further information about international, universal and regional provisions and comparative examples taken from constitutional law dedicated to freedom of opinion, see the policy brief prepared by ARTICLE 19 for the purpose of drafting the new Tunisian constitution: <http://www.article19.org/data/files/medialibrary/3013/12-04-03-tunisia.pdf>

<sup>8</sup>See Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and

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

The importance of access to information has been also stressed in numerous reports by the UN Special Rapporteur on Freedom of Opinion and Expression;<sup>9</sup> he also endorsed *The Public's Right to Know: Principles on Freedom of Information Legislation*, principles drawn up by ARTICLE 19 in 1999.<sup>10</sup>

Furthermore, in one of its decisions, the UN Human Rights Committee emphasised:

To give effect to the right to access information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.<sup>11</sup> The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.

At the regional level, on the African continent, the Declaration of Principles on Freedom of Expression in Africa ("African Declaration"), adopted by the African Commission on Human and Peoples' Rights in 2002, also extensively addresses the right of access to information. In Part IV, the Declaration mandates that public bodies hold information not for themselves but as custodians of the public good, and that everyone has a right to access this information, subject only to clearly defined rules established by law.

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Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, 20 December 2006 <http://www.article19.org/data/files/pdfs/igo-documents/four-mandates-dec-2006.pdf> and Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004 <http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2004.pdf>.

<sup>9</sup> See for instance: A/HRC/14/23 (paras. 30-39) A/HRC/7/14 (paras. 21-31); E/CN.4/2005/64 (paras. 36-44) E/CN.4/2004/62 (paras. 34-64); E/CN.4/2000/63 (paras. 42-44; Annexe II: *The Public's Right to Know: Principles on Freedom of Information Legislation*).

<sup>10</sup> ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999).

<sup>11</sup> Concluding Observations on Azerbaijan (CCPR/C/79/Add. 38 (1994)).

We also note that the African Platform on Access to Information, recently developed by groups across Africa including ARTICLE 19, has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.<sup>12</sup> These principles provide guidance to African States on the right to freedom of information, including the importance of battling corruption and protecting whistleblowers, to promote unhindered access to Information Communication Technologies, and access to electoral information.

In the light of these international standards, ARTICLE 19 congratulates the National Constituent Assembly for explicitly including the "right to access information" and "freedom of information" in the Draft Constitution. This now makes Tunisia one of over ninety States to have adopted constitutional provisions, legislation or national regulations on the right to freedom of information<sup>13</sup>.

We are also satisfied that the "right to access information [is] guaranteed for all", without any limitation, for example, only to Tunisian citizens. This provision conforms to international standards, notably Article 19 of the UDHR, which provides that "[e]veryone has the right to freedom of opinion and expression", and Article 19 of the ICCPR similarly applies to everyone. Furthermore, Article 2 of the ICCPR requires States to ensure respect for the rights guaranteed by it for all persons "within its territory and subject to its jurisdiction", without distinction of any kind, including on the basis of national origin. Therefore, the rights contained in the ICCPR, including under article 19, apply to all persons physically within the territory of the State, as well as to persons under its jurisdiction.

Despite the positive aspects of these provisions, we note that constitutional protection of freedom of information is limited and incomplete for the following reasons. The new Constitution must explicitly provide for freedom of information and access to information held by or on behalf of a public body, and access to information held by private persons with a public service mission and necessary to enforce a right. Furthermore, it would be desirable for the Constitution to explicitly protect whistleblowers reporting wrongdoing, provided they have acted in good faith in order to reveal malpractice or other misdeeds and believe the disclosed information to be accurate. In principle, the fact of having violated an internal rule of an employer or another legal obligation should have no impact on this protection. Finally, it must not be forgotten that, under applicable international standards on the matter, the State (and therefore the public authorities) has an obligation to publish and disseminate documents on matters of public interest. It is therefore recommended that these principles be explicitly incorporated in the final text of the Constitution.

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<sup>12</sup> Adopted September 2011, see: <http://www.pacaia.org/images/pdf/apai%20final.pdf>

<sup>13</sup> See the policy brief prepared by ARTICLE 19 for the purpose of drafting the new Tunisian constitution: <http://www.article19.org/data/files/medialibrary/3013/12-04-03-tunisia.pdf> 104, p. 45.



We also believe that the simple references to freedom of information and access to information in the constitutional text, without their meanings being clearly and explicitly stated, may lead to them remaining dead letters, never becoming fully operational, or being interpreted in too limited a manner due to the lack of precision of their scope.

The restrictions on freedom of information provided for in the draft Tunisian constitution will be examined in a separate section.

### **The scope of the right freedom of expression and modes of expression**

Freedom of expression is provided for in several provisions of the new Constitution. Its drafters also mention "freedom of creative endeavour", and along the same lines, "artistic, literary and cultural creative endeavour". The Draft Constitution also guarantees "academic freedom and freedom of scientific research".

ARTICLE 19 salutes the will of the National Constituent Assembly to explicitly guarantee several modes of expression. In this sense, the wordings mentioned above seem to ensure very extensive protection of the right to freedom of expression.

However, the definition of freedom of expression in the constitutional provisions does not entirely meet international standards since its scope and its modes and means of expression remain limited, particularly in relation to Article 19 (2) of the ICCPR<sup>14</sup>.

Firstly, the various **modes of expression** that the drafters have envisaged are insufficient to guarantee freedom of expression as broadly as international law. More precisely, international standards and most constitutional systems give a much broader definition to the modes of expression protected by the right to freedom of expression and freedom of information. Article 19 of the ICCPR covers the "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 Human Rights Committee has also affirmed that these words require a very broad interpretation.<sup>15</sup>

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<sup>14</sup> The Human Rights Committee has asserted the significance of article 19 (2) of the ICCPR, stating that paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language, and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audiovisual as well as electronic and Internet-based modes of expression.

For jurisprudential references, see the policy brief prepared by ARTICLE 19 for the purpose of drafting the new Tunisian constitution:

<http://www.article19.org/data/files/medialibrary/3013/12-04-03-tunisia.pdf>, para. 78, p. 37.

<sup>15</sup> It declared that paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and public

Secondly, by mentioning "information and ideas of all kinds", Article 19 of the ICCPR gives freedom of expression a very broad **scope**, since it covers anything which has the aim of conveying a message.

Therefore artistic, literary and cultural creative endeavour, and academic freedom and freedom of scientific research, although important, do not constitute exclusive part of the modes of expression recognised by international law. From the wording, it appears that only the above are protected areas, while others are not; and such a wording might lead to a very restricted interpretation of freedom of expression. In order to avoid this problem, we believe that the Constitution should define freedom of expression broadly to explicitly include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to grant this right to every person. We therefore strongly recommended redrafting the provisions concerning the scope and modes of expression in relation to freedom of expression.

Thirdly, the Draft Constitution is silent on the various **means of dissemination** of the forms of expression. ARTICLE 19 underlines the importance of precisely stating them within the constitutional framework relating to freedom of expression. As such, it invites the drafters of the new constitution to incorporate a provision which explicitly provides for the ways in which the various forms of expression can be disseminated.

In this regard, among the various means of dissemination, the National Constituent Assembly has not taken the opportunity to include information and communication technologies (ICTs) such as the Internet and mobile information systems. We consider this all the more regrettable, given that ARTICLE 19 recommended steps to be taken on this matter in its policy brief published for the purpose of drafting the new Tunisian constitution. The same is true of the UN Human Rights Committee, which has drawn States' attention to the importance of the media environment<sup>16</sup>.

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affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20. For jurisprudential references, see the policy brief prepared by ARTICLE 19 for the purpose of drafting the new Tunisian constitution:

<http://www.article19.org/data/files/medialibrary/3013/12-04-03-tunisia.pdf>, para. 78, pp. 36-37.

<sup>16</sup>It recommended that States pay due attention to the changing media environment, particularly "the extent to which developments in ICTs have substantially changed communication practices around the world". It noted that: "there is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries." In this changing situation, "States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto", as well as ensure that regulatory systems take account of the differences between the print and broadcast sectors and the Internet, while also noting the manner in which various media converge. See Human Rights Committee, General Comment No. 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011.

Finally, ARTICLE 19 notes that several constitutional provisions (article 8 of the "general provisions" and article 26 of Part I devoted to "rights and freedoms") recognise freedom of expression using the same definition, which lends to confusion. We believe that repeating the same wording does not strengthen the value of freedom of expression, and we recommend that only Part I, "Rights and freedoms", be devoted to freedom of expression.

### **Permissible limitations on freedom of expression**

#### ***Freedom of opinion: no limitation permitted by international law***

Firstly, we would like to stress that international law does not permit the **right to hold opinions** to be limited in any way. It is a right which may not be contravened by anybody. In light of this, ARTICLE 19 is of the opinion that the absolute nature of this right should be explicitly stated in the new constitution.

#### ***Permissible limitations on the right to freedom of information***

From the outset, it should be underlined that international standards do permit certain limitations to freedom of expression and freedom of information. According to article 19 (3):

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.

Restrictions on the right to freedom of expression and freedom of information must therefore be strictly and narrowly tailored and may not put the right itself into jeopardy. In order to determine whether a restriction is sufficiently narrowly tailored, the criteria of Article 19 (3) of the ICCPR need to be applied. Any restrictions on freedom of expression or freedom of information must (i) be **prescribed by law**, (ii) **pursue a legitimate aim**, such as respect of the rights or reputations of others, protection of national security, public order (ordre public), public health or morals, and (iii) be **necessary to secure the legitimate aim and meet the test of proportionality**<sup>17</sup>.

In practice, the requirements in Article 19(3) translate into so called "three part test." More precisely, at the core of the test is the principle that the dissemination of information constitutes an obligation for public bodies. When a public administration wishes to

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<sup>17</sup> See Communication No. 1022/2001, *Velichin v. Belarus*, Views adopted on 20 October 2005.

refuse access to information, it is obliged to demonstrate that non-disclosure of information complies with three part test requirements:<sup>18</sup>

- The restriction relates to a legitimate aim prescribed in law;
- The disclosure of information would cause a substantial harm to that aim and
- The harm to the aim must be greater than the public interest in having the information.

The Draft Constitution does not guarantee freedoms of expression and freedom of information in absolute terms. The question here is whether the permitted restrictions to these freedoms conform to international law. They are actually provided for by two constitutional provisions. Firstly, Article 26 of the general provisions provides that freedom of information may only be restricted by law in order to protect the rights of individuals, their reputation, safety and health. This freedom may not be subject to any prior censorship of any kind. Secondly, according to Article 16 of Part I of the new constitution, "Rights and freedoms", the right to access information is guaranteed for all, provided that it does not represent a threat to national security and the rights guaranteed by the constitution.

ARTICLE 19 makes the following observations on these provisions.

- Firstly, we are satisfied that Article 26 expressly provides that any restriction to freedom of information must be prescribed in law.
- Secondly, as previously indicated, the law should draw up a restricted list of legitimate aims which justify non-disclosure of information. This list notably comprises: application of the law, private life, national security, confidentiality of commercial operations and others, public or individual safety, efficiency and integrity of governmental decision-making processes. Exceptions must be strictly and narrowly defined so that they do not jeopardise the right to freedom of information. Article 26 of the Draft Constitution repeats some of the legitimate aims mentioned above, such as the rights of individuals, their reputation, safety and health. Article 16 only lists national security and the rights guaranteed by the new constitution. The expression "rights guaranteed by this constitution" is cumbersome, in that it only relates to rights protected by the Tunisian constitution, without taking into consideration those which are guaranteed by existing international instruments in the area of human rights, and which Tunisia is bound to respect.

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<sup>18</sup>These conditions are incorporated in all regional human rights treaties (for instance, article 13 (2) of the ACHR or article 10 (2) of the ECHR) and applied by international and regional human rights bodies (see, for instance, the European Court of Human Rights, *The Sunday Times v. United Kingdom*, application no. 6538/7426, judgment of April 1979, para. 45).

- Thirdly, ARTICLE 19 notes with great concern that the drafters have not included in any of the analysed provisions the criteria for "serious harm" and "public interest" which allow the refusal to disclose information to be justified.

ARTICLE 19 therefore considers the framework of the limitations on freedoms of information in the Draft Constitution inadequate since it does not comply fully with international standards that Tunisia is bound to respect. In order to fully meet its international obligations, the Constitution should look to expressly incorporate the principle of maximum disclosure of information, and the criteria for "serious harm" and "public interest" in the provisions in question. The National Constituent Assembly should therefore refer to international standards on the matter.

#### Recommendations:

- The right to hold opinions without restriction must be protected in a separate article within the Constitution.
- As for the right of access to information, the Constitution must clearly stipulate the principle of maximum disclosure applied on information held by or on behalf of a public body, and by private persons with a public service mission and is necessary to enforce this right.
- The Constitution should state that the right to access to information must be granted unless a) disclosure would cause serious harm to a protected interest and b) this harm outweighs the public interest in accessing the information.
- The Constitution should also specify that the State has an obligation to publish and disseminate documents on matters of public interest.
- The Constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to grant this right to every person.
- The Constitution should expressly indicate that freedom of expression may be subject to restrictions which are provided by law and are necessary a) for respect of the rights or reputations of others; or b) for the protection of national security or of public order (ordre public), or of public health or morals.
- The drafters of the new Constitution should incorporate a new provision in the Constitution which explicitly provides for the means by which the various forms of expression can be disseminated, particularly information and communication technologies (the Internet and mobile information systems).
- The drafters of the new Constitution should preserve solely the provision in Part I protecting freedom of expression.

# Freedom of the Media

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The media play a crucial role in any democratic society. In this respect, international bodies have frequently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”<sup>19</sup>

To ensure that that freedom of the media is protected as a whole, it is important that a number of guarantees are explicitly inserted into the Constitution. We, therefore, consider that incorporation of the following guarantees into the text of the Constitution to be of particular importance:

- There must be no prior censorship;
- Any bodies with regulatory powers over the media, including governing bodies of the public media, must be independent from political, economic or other undue influences;
- The right of journalists to protect their confidential sources must be guaranteed;
- There must be no licensing of print media outlets;
- There must be no licensing of individual journalists, whether print, broadcasting or online and;
- Journalists must be guaranteed the right to associate freely.

The Draft Constitution guarantees freedom of the press and publication (Article 8 of the general provisions). Under article 26 of Part I, devoted to “Rights and freedoms”, freedom of publication may not be subject to any prior censorship of any kind.

ARTICLE 19 welcomes the inclusion of a constitutional provision relating to the **absence of prior censorship**. By incorporating this principle, Tunisia abides with international human rights law, where one of the fundamental principles on freedom of the media states that no media, whether a newspaper, television or radio programme, online publication or any form of publication, should be subject to censorship prior to dissemination.<sup>20</sup>

Regarding the requirement for the **independence of media regulatory bodies**, including governing bodies of public service media, the Draft Constitution refers to an “independent media authority”. This institution is described as follows:

...[An] independent public authority, responsible for organising, regulating and developing the media sector, and guaranteeing freedom of expression and information, the right to access information and establishing a pluralist and credible media landscape.

This authority is composed of nine independent, impartial and honest members, with both expertise and experience. They will be

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<sup>19</sup> As an example, see *Thorgeisen v. Iceland*, Application No. 13778/88 judgment of 25 June 1992 of the European Court of Human Rights, para. 63.

<sup>20</sup> For example, article 13 (2) of the ACHR prescribes that the exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship.

elected by the legislature for a period of five years and may not be re-elected.

The authority has legal personality and administrative and financial autonomy. Its Charter will determine its composition, organisation and the way in which it operates (Article 4-6 of the section devoted to the independent media authority).

From the outset, ARTICLE 19 questions the merit of this initiative, given that a decree creating a High Authority of Audiovisual Communication was already adopted on the 2 November 2011. Decree 2011-116 lays the foundations for new independent audiovisual media.

Furthermore, ARTICLE 19 is deeply concerned by the content of this provision for several reasons: firstly because it creates a control structure over all media, which is incompatible with the fundamental principles of democracy, and secondly because it contains inadequate guarantees of media freedom.

Regarding the **centralised structure of regulatory control**, we note that above provisions would place the whole of the media sector under the centralised control of a regulatory body. In the absence of a law on the matter, the media body possesses a wide range of functions and very wide-reaching powers.<sup>21</sup> This information control structure can only be described as incompatible with the fundamental principles of democracy. Media, telecommunications and postal sectors should be regulated by separate bodies with different powers and mandates.

Further, the State should not **regulate print media or the Internet**: however, according to the constitutional provisions it seems that those would be under the supervision of the media authority. ARTICLE 19 notes that although broadcast services are regulated by the State and are under the supervision of a statutory body, the press is usually self-regulated and monitored by a press council independent of the State. The members of this council are elected from among the major players in print media, such as journalists, media proprietors, editors and representatives of civil society.

**The independence of authorities** exercising regulatory powers over the media is one of the essential guarantees for media freedom recognised by international law<sup>22</sup>. It follows that bodies with regulatory or governing powers over broadcasters - that is to say, bodies which license broadcasters and governing boards of public media outlets - must be independent and protected against political interference. This will help to safeguard the media's role on matters of public interest.

Furthermore, the provisions which demand supervision of the media warrant complete and detailed regulation. Additional details

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<sup>21</sup> In this regard, we also note that these functions seem to overlap with access to information, which, from our point of view, lends to confusion and is therefore not desirable, especially since the authority for action against corruption is also responsible for enforcing 'transparency' in the public sector.

<sup>22</sup> See, for instance, the Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 18 December 2003 available here: <http://www.article19.org/data/files/pdfs/igodocuments/three-mandates-dec-2003.pdf>.

incorporated into a law should supplement the constitutional provisions. Among other things, they should define the position of the regulatory body in the State administration system, its powers, the sanctions that it can impose, the judicial arrangements for its funding, rules on the nomination and dismissal of its members and on the incompatibility of functions that they carry out, etc. Given the length of legislation addressing this subject around the world, we believe that the Tunisian constitutional provisions in this area should be supplemented by a law, and not by the media authority's charter as prescribed by the Constituent Assembly.<sup>23</sup>

ARTICLE 19 considers that the media authority does not provide adequate guarantees of media freedom. It therefore calls on the drafters of the new constitution to withdraw this provision from the text of the constitution. ARTICLE 19 urges the Government and the Constituent Assembly to take all necessary measures to implement Decree 2011-116, particularly the creation of the High Independent Authority of Audiovisual Communication.

As for other principles, we note with regret that they have not been explicitly provided for in the Draft Constitution. These principles are very widely recognised in national constitutions, and in many documents of international law. It is therefore recommended that specific provisions protecting media freedom be inserted in the final text of the new Tunisian constitution.

**Right to protection of sources** is a special privilege, recognised by international law, allowing journalists not to disclose their confidential sources of information, unless certain stringent conditions are met. It is also well established in international law that any **licensing** requirement for the print media, or for journalists as individuals, is incompatible with freedom of expression, although licensing of the broadcast media or cinema businesses may be permitted. Special mandates from the UN, OAS and OSCE on freedom of expression have declared that "imposing special **registration** requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical."<sup>24</sup>

However, some of these principles are implicitly hinted at, such as freedom of association for instance. Indeed, article 7 of the general provisions of the new constitution guarantees the right to "organise associations".

#### **Recommendations:**

**The Constitution must provide complete and explicit protection for freedom of the media. More specifically, it must protect the following elements of freedom of the media and, consequently, amend the draft of the new constitution:**

<sup>23</sup> The same is true for the other constitutional authorities prescribed in the Constitution, particularly the authority for the protection of human rights and the authority for action against corruption.

<sup>24</sup> Joint Declaration by the Special Mandates, published in 2003.



- There should be no licensing or registration system for the print media.
- There should be no licensing of individual journalists or entry requirements for practising the profession.
- The current provisions on the media regulatory authority must be amended as being incompatible with the fundamental principles of democracy. Moreover, new provisions, guaranteeing the independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be inserted to the final text of the Constitution.
- The right of journalists to protect their confidential sources of information must be guaranteed.
- Journalists must be free to associate in professional bodies of their choice.

# The Place of Religion in the Constitution

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## **International law permits protection of freedom of religion in the Constitution**

The freedom to express one's religion is a widely recognised right in the international law. Notably Article 18 of the ICCPR provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In light of this provision, the position of international law in relation to the place of religion in the constitution is clear: the protection of *freedom of religion* in the Constitution does not present a problem. However, ARTICLE 19 wishes to point the following.

- Firstly, we note that *freedom of religion* is generally protected by a specific provision in the Constitution. A large number of examples of comparative constitutional law show this practice by States. In this regard, it must be underlined that these provisions do not refer directly to God or to any particular religion. ARTICLE 19 is of the opinion that this is the most effective way of protecting freedom of religion, as it protects everyone's freedom of religion, including that of religious minorities.
- Secondly, religion is sometimes mentioned symbolically in a constitution's preamble. Here, the preamble often refers to the identity or cultural and religious traditions of the country, as well as to God, but in a symbolic manner. These references are accompanied by references to other universal or democratic values, or even international human rights treaties.

- Thirdly, a number of constitutions recognise the existence of a State religion. In most cases, these countries go further than mentioning religion in the preamble of the constitution, and institute a State religion through specific provisions. This position calls for reflection, but as a preliminary point it is important to underline that international law does not prohibit State religions in and of themselves. We could mention Norway or the United Kingdom, for example, which both have a long tradition of democracy.

Nevertheless, adopting an official religion, or giving a religious tradition a particular place, does not relieve States of their obligation to respect other rights and freedoms protected under international law. The UN Special Rapporteur on Freedom of Religion or Belief has expressed strong reservations on this matter. Indeed, he considers that the adoption by a State of a State religion could have harmful consequences, such as discrimination towards religious minorities for example<sup>25</sup>.

The position of the Draft Constitution in terms of the protection of freedom of religion in the constitution is as follows:

- The preamble makes reference to "constants of Islam" and to "Arabic-Muslim identity";
- Article 1 of the general provisions states that the religion of Tunisia is Islam;
- "Tunisia is the protector of religion. It guarantees freedom of conscience and free worship. It protects sacred values and guarantees that places of worship are neutral in relation to all political propaganda" (article 4 of the general provisions);
- "No constitutional amendment may call into question (...) the content of article 1 of this constitution pronouncing that Islam is the State religion" (article 3 of the final provisions)
- "The State guarantees freedom of conscience and free worship and criminalises attacks on sacred values" (article 3 of Part 1 on "Rights and freedoms").

Clearly, the Draft Constitution attributes great importance to religion. Although ARTICLE 19 would welcome a more impartial text in this regard, we respect the choice of the National Constituent Assembly to reuse Article 1 of the former Constitution, which recognises Islam as the State religion. As underlined above, the adoption of a State religion does not contravene international law. Furthermore, explicit reference to Islam is only made in the Preamble, which also mentions the humanist values of the country, which we congratulate.

We regret, however, that the drafters of the Constitution have chosen not to amend the former Tunisian Constitution, despite the aim of a new constitution generally being to mark a break with the past and signify, symbolically, a new start for the country. We are of the opinion that references to the universal values of human rights and the fundamental principles of democracy could be reinforced in the Preamble.

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<sup>25</sup>For further details on the position of the Special Rapporteur on Freedom of Religion or Belief, see Special Rapporteur on Freedom of Religion and Belief, A/HRC/19/60, 22 December 2011.

By contrast, we are particularly alarmed that provisions have been inserted into the text of the Constitution protecting religion in and of itself, and criminalising attacks on sacred values. The developments below explain why.

**The constitutional provisions protecting religion in and of itself and criminalising attacks on sacred values are incompatible with international law**

ARTICLE 19 notes that the wording "Tunisia is the protector of religion" does not comply with international law, since international law only protects the *freedom to practise* a religion and the right to *hold beliefs*, and does *not* protect religion in and of itself. This phrase should therefore be worded differently, to state that Tunisia protects freedom of religion and the right to hold beliefs.

In the same way, the Draft Constitution provides, on the one hand, for the protection of sacred values (Article 4 of the general provisions), and on the other hand, for the criminalisation of attacks on sacred values (Article 3 of Part I). We believe that these provisions must be eliminated, as they contradict international obligations which Tunisia recognized through its ratification of a number of international instruments. Indeed, these international texts do not grant legal protection to religions, values or symbols.

Furthermore, the very general wording "criminalisation of sacred values" risks giving rise to repressive interpretations. We would therefore like to reiterate the importance of removing these provisions, which are in contravention of international human rights law. The following development gives further details of the position of international law regarding the protection of religion *in and of itself* and sacred values.

ARTICLE 19 draws the attention of the National Constituent Assembly to the fact that the ICCPR does not permit any restriction of the right to freedom of expression with the aim of ensuring that values, beliefs or religions are respected, or protecting them against defamation or other attacks. The ICCPR, in addition to a large number of other standards, protects the rights of individuals and in some cases groups, but it does not apply to abstract entities such as values, religions, beliefs, ideas or symbols. Restrictions to freedom of expression are permitted under Article 19 (3) of the ICCPR, but only when they are necessary "for respect of the rights or reputations of others, or for the protection of national security or of public order (*ordre public*), or of public health or morals", which clearly excludes the protection of values, beliefs or religions.

In this regard, the Human Rights Committee declared that it did not recognise the notion of protecting "values" and did not consider the prohibition of "defamation of religions" to be a legitimate reason for restricting the exercise of freedom of expression. More recently, in its General Comment No. 34 on the ICCPR, the Committee stated that:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.<sup>26</sup>

This also strengthens the position on the matter of other bodies of international law, such as the Human Rights Council, which has abandoned all references to "defamation of religions" since the adoption of Resolution 16/18 in April 2011.

Furthermore, the Special Rapporteurs on the Promotion and Protection of Freedom of Opinion and Expression, on the Freedom of Religion or Belief, and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance condemned on numerous occasions laws prohibiting "defamation of religions" and/or blasphemy as they lend themselves to being used against religious minorities and heterodoxies. As such, the Special Rapporteur on the Freedom of Religion or Belief recently reiterated that the right to freedom of religion or belief "does not include the right to have a religion or belief that is free from criticism or ridicule"<sup>27</sup>.

To conclude, in light of the international principles which we have just set out, the constitutional provisions relating to the protection of religion and sacred values against attacks, denigration and defamation must be removed, as they constitute an improper restriction of the right to freedom of expression. In this respect, it has been universally acknowledged in international law that freedom of expression also applies to contested, false or even shocking information. The simple fact that an idea is not liked or is deemed incorrect is not sufficient grounds for freedom of expression to be restricted.

#### **Recommendations:**

- **In accordance with the ICCPR, the Constitution must guarantee freedom of religion for all.**
- **In line with international best practices and in order to satisfy the democratic aspirations of the revolution, references to the universal values of human rights, such as the ICCPR and the UDHR, and the fundamental principles of democracy should be reinforced in the text of the Preamble.**
- **Constitutional provisions relating to the protection of "sacred values" and "criminalisation of attacks on sacred values" must be removed, as they are in contravention of international standards.**

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<sup>26</sup>Human Rights Committee, General Comment No. 34: Article 19: Freedom of opinion and freedom of expression, adopted at the 102nd session in Geneva, 11-29 July 2011, paragraphs 48-49.

<sup>27</sup>See the Report from the Special Rapporteurs on the Freedom of Religion or Belief and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/HRC/2/3 (20 September 2006).

# Women's Rights

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Article 28 of Part I of the draft constitution is devoted to women's rights. It is defined as follows:

The State ensures the protection of women's rights and the promotion of their entitlements under the principle of complementarity to men within the family and as an associate of men in the task of building the country.

The State guarantees equal opportunities for women and men in all roles.

The State guarantees action against any form of violence perpetrated on women.

On the one hand, ARTICLE 19 is pleased that this provision in the Draft Constitution asserts Tunisia's commitment to fight against violence perpetrated on women.

On the other hand, Article 28 raises many questions, particularly the meaning of the "principle of complementarity" which the drafters have incorporated in this provision.

ARTICLE 19 believes that the wording of 'complementarity' is inappropriate, as it negates the recognition of women's rights and is an attack on the dignity of women. This position is also a complete turnaround, and therefore a backwards step in terms of the legislative entitlements in the area of women's rights that Tunisia adopted in its 1959 Constitution.

The Tunisian Code of Personal Status, adopted in 1956, was the first piece of legislation devoted to relations within the family. Under its provisions, a number of principles are guaranteed, including the right of boys and girls to education, a minimum legal age for marriage, the prohibition of marriage for young girls, criminalisation of polygamy, the granting of judicial divorce, access for women to education, reproductive and sexual rights for women, etc. This law provides the basis for a modernist model of the Tunisian family.

ARTICLE 19 considers that stating the "complementarity" of women to men as opposed to the notion of equality brings into question the internationally recognised principle of equality between men and women. What makes this wording all the more alarming is that it could lead to the implementation of a purely patriarchal government which grants all power to men and deprives women of their independence and their rights. This provision does not provide any reciprocity concerning the potential complementarity of men to women. Only women are described in terms of complementarity to men within the family. More precisely, such a situation could lead to the interpretation that women are dependent on men, whether their fathers, husbands or brothers. Women would therefore have a legal status of a wife, daughter or mother, but not of a citizen.

We underline that under fundamental and universal principles governing equality, men and women must have the same dignity as human beings,

enjoy the same rights and responsibilities independently of one another and have equal opportunities.

Furthermore, without being exhaustive, given that Tunisia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the drafters must integrate equality between men and women into the final text of the Constitution, which is essential as a condition for the successful democratic transition of the country.

It is therefore recommended that the National Constituent Assembly amends the wording of Article 28 by clearly and unequivocally reaffirming equality between men and women.

**Recommendations:**

- **The Constitution must clearly and unequivocally incorporate the fundamental principle of equality between men and women.**
- **The reference to the principle of "complementarity" must be removed.**

# Enforcement of Rights

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As a preliminary note, a distinction needs to be made between which rights are guaranteed by the Constitution, and which are protected under international law.

## **Enforcement of rights guaranteed by the Constitution**

Tunisia must guarantee effective enforcement of the rights protected by the Constitution. The human rights protected in the Constitution are enforced through action brought before a constitutional court, created for this purpose.

Part IV of the Draft Constitution, entitled "Judiciary", provides for appeals that can be brought before the Constitutional Court.

One of the fundamental principles in international human rights law is the obligation of States to ensure that individuals are able to assert their rights and freedoms at the national level. The protection of rights and freedoms is meaningless unless it is entrusted to an independent and impartial jurisdiction, and there are guarantees of a fair trial being held before it.

ARTICLE 19 welcomes the adoption of constitutional provisions which provide for individual appeals to be brought before the Constitutional Court (Article 21). Article 20 of the Constitution also seems to provide another means of appeal by means of an exceptional remedy (question of unconstitutionality), which is also welcome. The requirement for the Constitutional Court to explain the reasoning behind its decisions and the sharing of competences between the legislature and the executive in the election of constitutional judges are also positive points which deserve praise (articles 25 and 16). On this last point, we nonetheless have some regrets, notably the election criteria for the members of the Court being based on their "recognised legal and political expertise" (article 16). We are concerned that the political expertise and the fact that the Constitutional Court is a jurisdiction comprised of "members" and not judges, may threaten the independent nature of the institution.

In the absence of a law providing additional clarification, we note that many of the provisions relating to constitutional remedies are currently vague and incomplete:

Firstly, the types of review of constitutionality are not clearly defined. Article 18 sets out that "the Constitutional Court ensures a priori and a posteriori reviews of the constitutionality of laws." However, no other provision in the Constitution specifies the procedures of the a priori review, such as how the Constitutional Court is invoked, for instance. Furthermore, the provisions on a posteriori review lend to confusion. Although the provision for individual appeals guaranteed by article 21 should be praised, article 20 requires clarification: does it refer to an individual appeal, or the potential



for an appeal regarding a question of unconstitutionality? In any event, an organic law should specify the procedures for these appeals.<sup>28</sup>

In the same fashion, the wording “definitive judgments which may bring about a violation of the rights” (Article 21) raises questions. It is not clear whether this is referring to a judgment which represents a violation of that kind, or a simple allegation from the individual in question who feels prejudiced in terms of the rights which he has been guaranteed. It is unclear whether the appeal before the Constitutional Court provides constitutional guarantees which can only be directly enforced against the State, or also against non-state or private players. In the same way, it is not clear whether the individual could refer proceedings before the Constitutional Court regarding rights protected under international law but not by the constitution. These questions are difficult to answer by referring exclusively to the text of the Constitution.

Next, the Draft Constitution contains references to decisions and judgments by the Constitutional Court without providing clarification on any potential difference between them. We also observe that the Tunisian judicial system is largely modelled on the French system. We therefore wonder whether, like the French Constitutional Council, the Tunisian Constitutional Court has many prerogatives within the framework of which it hands down various types of decisions or judgments.

Finally, regarding the legal force of judgments delivered by the Constitutional Court, Article 23 provides that laws found to be unconstitutional will cease to be applied within the limits of the judgment delivered by the court. It is unclear whether this means that the law in question would remain applicable to any other person or authority. If that is the case, the restrictive character of the Court’s judgments for all the authorities (Article 25) is difficult to understand.

### **Enforcement of international law in domestic legal order**

States are required by international law to give effect to the rights set forth in international human rights treaties. As such, Article 2(2) of the ICCPR states that:

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.

Two questions arise from this: firstly, how do the international treaties become binding in domestic law, and secondly, what place does international law occupy within the domestic legal order?

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<sup>28</sup>See ARTICLE 19. Policy brief on the protection of freedom of expression in the aforementioned Tunisian Constitution.

Regarding the question of the **validity of treaties in domestic law**, and more specifically Tunisia's case, the Constitution seems to have adopted the monist system, which was also the case in the former 1959 constitution. Indeed, article 18 of Part IV on the judiciary specifies that the Constitutional Court performs an a priori review of constitutionality of international treaties before they are ratified.

However, ARTICLE 19 believes that this provision is inadequate. Firstly, Article 18 does not state that the constitution should be amended before an international treaty is ratified, in the event that the constitutional court declares that such a treaty contains a clause in contravention of the constitution. Furthermore, the constitution should contain another article stating that *regularly ratified or approved treaties, once they are published, are binding in the domestic legal order*, as is the case in article 96 of the Spanish Constitution, for example.

With regard to the **place of international law in domestic law**, international law takes precedence over contradictory domestic laws. In particular, under article 27 of the Vienna Convention on the Law of Treaties, a State may not invoke the provisions of its internal law as justification for its failure to adhere to international law.

In monist legal tradition, such as in Tunisia, the place of international law in domestic law varies between countries. For example, the constitution may provide for precedence of international treaties over the law but not over the constitution<sup>29</sup>. In other countries, the constitution only recognises the precedence of international treaties on human rights if they provide greater protection of fundamental rights. However, it should be noted that, in practice, the fact that treaties on human rights have a lower status than the constitution is generally inconsequential, given that the constitution is often based around these treaties. Moreover, constitutional rights are often interpreted in light of these treaties.

The Draft Constitution states that compliance with international treaties is compulsory, provided that they do not conflict with the provisions of the constitution (Article 16 of the general provisions). ARTICLE 19 considers this provision to be ambiguous and potentially harmful to the protection of human rights as recognised in the ICCPR. It should therefore be abandoned.

Indeed, Article 16 seems to grant supremacy of the Constitution over international treaties, following the tradition of many countries. However, Article 16 also seems to be intended to relieve Tunisia of its international obligations with regard to the provisions in the Draft Constitution which we consider to be incompatible with the ICCPR and other applicable international standards on the matter, such as Article 4 of the general provisions relating to the protection of sacred values. On this matter, we draw the attention of the National Constituent Assembly to the fact that, even assuming that Article 16 grants supremacy of the Constitution over international treaties, this provision must be interpreted in light of Article 27 of the Vienna Convention on the Law of Treaties, as mentioned above. In other words,

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<sup>29</sup>This is notably the case in the Dutch, French and German constitutions.

Article 16 would not be able to relieve Tunisia from upholding its commitments under the ICCPR, which it has already ratified. In view of the above, we invite the National Constituent Assembly to abandon article 16 and carefully read the recommendations below.

**Recommendations:**

- The Constitution should make the constitutional guarantees of freedom of expression and freedom of information directly enforceable against the State as well as non-state or private actors. These guarantees should take precedence over legislative provisions that are incompatible with them.
- The Constitution must specifically provide effective remedies allowing the rights and freedom guaranteed by the Constitution to be enforced. For this purpose, the existing provisions should be amended, or the rules on effective remedies should be clearly specified in a law.
- Article 18 of Part IV of the Constitution should state that the Constitution must be amended before an international treaty is ratified, in the event that the Constitutional Court declares that such a treaty contains a clause in contravention of the Constitution.
- The Constitution should contain another article stating that regularly signed and ratified treaties, once they are published, are binding in the domestic legal order.
- Article 16 of the Constitution should be removed. If the National Constituent Assembly wishes to give greater value to the Constitution than international treaties, this should be specified in a provision such as the one suggested in our previous recommendation (see article 55 of the French Constitution, for example).
- The Constitution could also contain, if applicable, a provision stating that, in principle, treaties and international agreements which are regularly ratified or approved may only be repealed, modified or suspended in the way provided for in the treaties themselves, or in accordance with general standards of international law (see article 96 of the Spanish Constitution, for example).

# Annex: Extract from the Draft of the new Tunisian Constitution

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## 1. Preamble

We, the representatives of the Tunisian people, members of the National Constituent Assembly, (...)

Based on

- The constants of Islam and its aims, marked by openness and moderation
- Noble humanist values

Drawing inspiration from

- The civilisational heritage of the Tunisian people, through successive stages in its History
- Its reform efforts, with its roots in the characteristics of its Arabic-Muslim identity and the civilisational achievements of humanity

Confirming its national achievements,

With the aim of building a democratic, republican, participatory government

- In which the State will be civil and will build itself upon institutions
- In which sovereignty belongs to the People based on peaceful alternation of power
- Founded on the principle of separation of powers and their mutual balance
- In which the right to organise, founded on the principle of pluralism, administrative impartiality, good governance and free elections, is the foundation of political life,

## 2. General provisions

Article 1 - Tunisia is a free, independent and sovereign State; its religion is Islam, its language Arabic and its government a republic.

Article 4 - Tunisia is the protector of religion. It guarantees freedom of conscience and free worship. It protects sacred values and guarantees that places of worship are neutral in relation to all political propaganda.

Article 7 - The right to organise political parties, trade unions and associations and to engage in political opposition are guaranteed.

Article 8 - Freedom of opinion, expression, of the press and publication, and rights to assembly and protest are guaranteed freedoms and rights.

Article 16 - Peace founded on justice is the basis of the relationship between States and peoples. Compliance with international treaties is compulsory, provided that they do not conflict with the provisions of the constitution

## 3. Amendment to the constitution

Article 2 - To be admissible, any proposal to amend the constitution must seek an opinion from the Constitutional Court attesting that the

proposition does not concern non-amendable provisions of the constitution. The principle of the amendment must be voted for by an absolute majority of the People's Assembly.

#### **4. Final provisions**

Article 1 - The preamble to this constitution is an integral part thereof. Its provisions have the same force as the other provisions of the constitution.

Article 2 - No amendment of this constitution may be introduced for a period of five years after it comes into legal effect.

Article 3 - No constitutional amendment may call into question the republican character of the government and the civil nature of the State; nor the content of article 1 of this constitution pronouncing that Islam is the State religion and Arabic its language; nor the entitlements to human rights and freedoms guaranteed under this constitution; nor the duration and number of presidential terms.

#### **PART I: Rights and freedoms**

Article 1 - The right to life is sacred and inviolable, except in cases prescribed by law.

Article 3 - The State guarantees freedom of conscience and free worship and criminalises attacks on sacred values.

Article 15 - The right to form trade unions, including the right to strike, is guaranteed, provided that it does not endanger the life, health or safety of individuals.

Article 16 - The right to access information is guaranteed for all, provided that it does not represent a threat to national security and the rights guaranteed by this constitution.

Article 18 - Academic freedom and freedom of scientific research are guaranteed. The State must mobilise necessary resources for the development of academic work and scientific research.

Article 23 - The State will take care to guarantee the impartiality of the administration, companies and public institutions and places of worship. None of these institutions may be used for the purposes of political or partisan propaganda.

Article 26 - Freedom of opinion, expression, information and creative endeavour are guaranteed.

Freedoms of information and publication may only be restricted by law in order to protect the rights of individuals, their reputation, safety and health.

These freedoms may not be subject to any prior censorship of any kind.

The State encourages artistic and literary creative endeavour, contributing to national culture and its openness towards universal culture (article 26).

Intellectual and literary property is guaranteed.

Article 28 - The State ensures the protection of women's rights and the promotion of their entitlements under the principle of complementarity to men within the family and as an associate of men in the task of building the country.

The State guarantees equal opportunities for women and men in all roles.

The State guarantees action against any form of violence perpetrated on women.

Article 32 - The State guarantees the right to access culture for all citizens. It encourages cultural creative endeavour and production and consumption of cultural works. It will take care to promote the diversity and enrichment of national culture, prohibit violence and entrench the values of tolerance and openness towards other cultures, and foster dialogue between civilisations.

The State protects the cultural heritage of the Nation and guarantees the right of future generations to have access to this heritage.

#### **PART IV: Judiciary**

The Constitutional Court

Article 16 - The Constitutional Court consists of twelve members, with recognised legal and political expertise, who have practised for at least twenty years.

The members of the Constitutional Court are appointed as follows:

- Four members nominated by the President of the Republic
- Four members nominated by the President of the Government
- Eight members are nominated by the President of the Chamber of Deputies
- Eight members nominated by the High Council of the Judiciary

The Legislative Assembly elects, by a qualified majority of two thirds, twelve members from the nominated members, for a single term of nine years. If the required majority is not obtained, the members who received the highest number of votes are retained.

The term of one third of the members of the constitutional court is renewed every three years.

It is forbidden to hold any other office while completing a term in the constitutional court.

Article 17 - (multiple wordings)

- The Constitutional Court is presided over by the eldest of its members
- The President of the Constitutional Court is nominated by the President of the Republic from among the members of the court
- The President of the Constitutional Court is elected by the members of the court
- The President of the Constitutional Court is elected by the Chamber of Deputies from among the members of the court

The procedure followed to fill a vacancy within the Constitutional Court is the same as the procedure followed for appointment.

Article 18 - The Constitutional Court conducts a priori and a posteriori reviews of the constitutionality of laws.

It carries out a priori reviews of the constitutionality of treaties, prior to their ratification.

It rules on the internal regulation of the Chamber of Deputies and of the constitutional authorities.

It rules on the conformity of draft amendments to the constitution and gives its opinion on any proposed referendum.

It confirms the vacancy of the office of President of the Republic.

It decides upon cases of a State of Emergency and exceptional circumstances.

It rules on conflicts of jurisdiction between the legislature and the executive, and between the President of the Republic and the President of the Government.

Article 20 - The constitutionality of laws may be challenged during any case being examined by the courts, in accordance with the procedures prescribed by law.

Article 21 - After all other options have been exhausted, any citizen may bring a direct appeal before the Constitutional Court against a definitive judgment which may bring about a violation of the rights and freedoms guaranteed by this constitution.

Article 23 - The Constitutional Court rules on charges brought against the President of the Republic, in the event of violation of the constitution or high treason.

If the Constitutional Court finds a law to be unconstitutional, it will cease to be applied, within the limits of the judgment delivered by the court.

Article 24 - The Constitutional Court only decides upon appeals which have been brought before it. It must rule on these appeals within three months, which may be extended upon a reasoned decision by the court.

Article 25 - Decisions of the Constitutional Court are taken by a majority of its members. The President of the Court has the casting vote in the event of a tie in votes.

Its decisions must be reasoned and are binding on all authorities. They are published in the Official Journal of the Tunisian Republic.

Article 26 - The charter of the Constitutional Court determines its organisation and procedures.

#### **PART V: Constitutional authorities**

The independent authority for elections

Article 1 - An independent public authority is responsible for managing, organising and supervising all stages of the national, regional and local elections, and referendums. It guarantees the trustworthiness of the electoral process, its integrity and its transparency.

Article 2 - This authority is composed of nine independent, impartial and honest members, with expertise and experience. They will be elected by the legislature for a period of six years. The term of one third of its members is renewed every two years.

Article 3 - The authority has legal personality and administrative and financial autonomy. It is accountable to the legislature. Its charter will determine its composition, organisation and the way in which it operates.  
The independent media authority

Article 4 - An independent public authority is responsible for organising, regulating and developing the media sector, and guaranteeing freedom of expression and information, the right to access information and establishing a pluralist and credible media landscape. Article 5 - This authority is composed of nine independent, impartial and honest members, with both expertise and experience. They will be elected by the legislature for a period of five years and may not be re-elected.

Article 6 - The authority has legal personality and administrative and financial autonomy. Its charter will determine its composition, organisation and the way in which it operates.  
The national authority for human rights

Article 10 - This authority is responsible for evaluating the degree of compliance with human rights and fundamental freedoms, strengthening them, presenting reports on the matter and proposing draft amendments to legislation governing human rights.

The authority investigates cases where human rights are violated, in order to remedy them or refer them to the competent authorities.

Article 11 - The authority is composed of independent and impartial individuals, elected by the legislature for a non-renewable period of six years.

Article 12 - The authority has legal personality and administrative and financial autonomy. Its charter will determine its composition, organisation and the way in which it operates.

The national authority for good governance and action against corruption

Article 13 - The State contributes to policies for good governance and action against corruption. It takes care to guarantee transparency, to monitor the implementation of such policies and to spread the culture behind these practices.

The authority is responsible for exposing cases of corruption in the public and private sector, conducting investigations into them and referring them to the competent authorities.

The authority gives its opinion on draft legislation and regulation pertaining to corruption.

Article 14 - The authority is composed of independent individuals with expertise and experience, elected by the legislature for a partially-renewable period of six years.

Article 15 - The authority has legal personality and administrative and financial autonomy. Its charter will determine its composition, organisation and the way in which it operates.