

ARTICLE 19

# Tunisia: The Third Draft Constitution of the Tunisian Republic

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Legal analysis



# Executive summary

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In this brief, ARTICLE 19 offers comments and recommendations on the Third Draft Constitution of the Tunisian Republic (Draft Constitution), inasmuch as it affects the protection of the right to freedom of expression and information.

ARTICLE 19 welcomes the changes that have been brought to this draft Constitution as compared to previous ones to ensure stronger compliance with international human rights law. On the other hand, there remain a number of articles and provisions that fall short of international human rights standards consented to by Tunisia. We urge the Constituent Assembly to improve this protection, in particular for the protection of the right of freedom of expression and information.

The analysis builds on our comments to the previous two constitutional drafts (in September 2012 and in January 2013). It intends to inform the preparation of the final draft of the new Tunisian Constitution which would be in accordance with international human rights standards and comparative best practices.

## **Summary of recommendations**

### **Preamble**

1. The reference in the second paragraph of the preamble to the protection of universal human rights “in harmony with the Tunisian people cultural specificity” should be removed.
2. The Preamble should establish as a matter of priority a clear commitment to the universal values of human rights, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
3. References to the principles that are not directly related to the Tunisian constitutional order should be eliminated from the Preamble.

### **Article 5 (On religion)**

4. Article 5 of the Draft Constitution must be revised: the references to the protection of religion (*the state protects religion*) and to the protection of “the sacred” (*the state is the protector of the sacred*) should be removed.
5. Article 5 of the Constitution must guarantee freedom of religion and belief for all, in compliance with international human rights standards.

### **Articles 6 and 7**

6. Provision of Article 6 should be revised to guarantee non-discrimination and equality between men and women, including non-citizens.
7. Provision of Article 7 should be revised to guarantee the protection of fundamental rights to all persons, not just citizens.
8. The drafters could consider replacing Article 6 and 7 with a single article that would state that “every person within the state territory or jurisdiction shall enjoy all rights and freedoms provided in the Constitution without any distinction, race, colour, sexual or gender identity, language, religion, political or other opinion, national or social origin, property, birth or other status.”

### **Article 21 (International treaties)**

9. Article 21 should clearly stipulate that despite the supremacy of the Constitution over international treaties, this cannot be invoked to justify the failure to comply with international law.

10. Article 21 should state that regularly signed and ratified international agreements 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.

#### **Articles 30 and 31 (Freedom of Association and Assembly)**

11. Article 30 must limit any restrictions on the right to freedom of association to those that are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.
12. Article 31 must stipulate that the right to freedom of assembly can be limited only if restrictions are imposed in conformity with the law and if they are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 34 (Access to information)**

13. Article 34 should state that the right to access of information can be limited only if i) withholding information relates to a legitimate aim listed in the international law; ii) the disclosure threatens to cause substantial harm to that aim; and iii) the harm to the aim must be greater than the public interest in having the information.

#### **Article 40 and 41 (Freedom of opinion and expression)**

14. The right to freedom of opinion should be guaranteed *without any interference*.
15. The Constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas without frontier, to cover all types of expression and modes of communication.
16. Freedom and independence of electronic, print and all other types of media, including the Internet and mobile information systems, should be explicitly guaranteed. This should be elaborated upon in its own section or subsection of the Constitution.
17. The following limitation clause relating to the right to freedom of expression should be introduced in the Constitution: "The right to freedom of expression may only be subjected to such restrictions as are provided by law and are strictly necessary and proportionate in a democratic society for the protection of national security, public order, public health or morals, for the prevention of crime; or for respect of the rights or reputations of others."

#### **Article 42 (Rights of Women)**

18. Article 42 should include a clause permitting positive measures aimed at elimination of existing inequalities between men and women.

#### **Article 78 (State of emergency)**

19. The Presidential power to declare derogation from right must be restricted to emergency measures must be limited to the extent strictly required by the exigencies of the situation" or to be imposed in a non-discriminatory manner.
20. The Constitution must include procedural provisions for informing other states on emergency measures.

#### **Article 121 (Media regulator)**

21. Article 121 of the Draft Constitution must be revised in line with international standards. It must explicitly limit the role of the Media Authority to broadcasting media and it should provide guarantees for its independence.

**Articles 112-118 (Enforcement of rights)**

22. 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.
23. The guarantees of judicial independence of the Constitutional Court must be stipulated in the Constitution.



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# Introduction

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On 22 April 2013, the Constituent Assembly of the Tunisian Republic released the Third Draft of the Constitution of Tunisia (Draft Constitution).<sup>1</sup> The Draft Constitution establishes a new, democratic Tunisia, following a fall of Ben Ali regime, spelling out the basic rights enjoyed by its people. The Draft Constitution also seeks to implement Tunisia's international obligations in both letter and spirit. Our comments and recommendations are made with a view to helping to ensure that this objective is fulfilled.

ARTICLE 19 has followed the development of the drafting of the new Constitution very closely since the beginning of the reform process. In order to support the constitutional reform and public debate on it, we issued a detailed report and comparative overview on how the new Constitution should protect freedom of expression and other fundamental rights.<sup>2</sup> We also analysed two previous drafts: the first draft in September 2012<sup>3</sup> and second in January 2013.<sup>4</sup> In all these documents, we urged the legislators to ensure that the new provisions comply with international human rights standards.

In this brief, ARTICLE 19 provides comments and recommendations on the Third Draft Constitution, again, in inasmuch as it affects the right to freedom of expression and information.<sup>5</sup> ARTICLE 19 welcomes some of the changes brought to the new, third, Draft Constitution which reflect comments raised by ARTICLE 19 in earlier analyses. In particular, we appreciate that Article 21 of the Draft Constitution clarifies the position of international treaties in the domestic legal system and gives them priority before domestic law. At the same time, we are concerned that in various areas the constitutional guarantees still fall short of international human rights standards by which the Tunisian Republic is bound.

We therefore urge the Constituent Assembly to pay due attention to our recommendations in this and earlier analysis and reflect them in the final Draft Constitution. These changes must be urgently introduced to make sure that the Constitution complies fully with international law.

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<sup>1</sup> ARTICLE 19, Tunisia: Protecting Freedom of Expression and Freedom of Information in the New Constitution, March 2012; available at <http://www.article19.org/data/files/medialibrary/3013/12-04-03-ANAL-tunisia.pdf>.

<sup>2</sup>The analysis is based on the French and English version of the Draft Constitution of 22 April 2013. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

<sup>3</sup> See ARTICLE 19, Tunisia: Protecting freedom of expression and freedom of information in the new Constitution, September 2012; available at <http://www.article19.org/data/files/medialibrary/3512/Legal-Analysis-Tunisian-Draft-Constitution.pdf>.

<sup>4</sup> See, ARTICLE 19, Tunisia: The Protection of Freedom of Expression and Information in the second draft Constitution, January 2013; available at <http://www.article19.org/data/files/medialibrary/3744/Legal-Analysis-Tunisian-Constitution-28-01-2013-GG.pdf>.

<sup>5</sup> As our previous analysis of two drafts provide detailed overview of applicable international standards, in particularly those on freedom of expression and freedom of information, this brief only refers to them in relation to specific articles of the Draft Constitution. For full list of applicable standards, see the ARTICLE 19 March 2013 brief; *op.cit.*

# Analysis

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## Preamble

ARTICLE 19 welcomes the fact that the Preamble to the Draft Constitution confirms the commitment of the people of Tunisia to build participatory and democratic regime based on protection of human rights. The Preamble also highlights the aspirations to eliminate injustice, corruption and oppression and the commitment to sustainable development, world peace and solidarity.

Despite these positive features, we find several provisions of the Preamble problematic from the perspective of international human rights standards.

## Universality of human rights

The Preamble states that the Constitution is build on “the fundamentals and the open and moderate objectives of Islam” and “on universal human rights that are in harmony with the Tunisian people’s cultural specificity.” It further emphasizes the aim to enhance “cultural and civilisational affiliation to the Arab Islamic nation.”

As ARTICLE 19 highlighted in the analysis of two previous constitutional drafts, explicit references to the state religion can be found in a number of Constitutions around the world. Often, religion is mentioned symbolically alongside with references to the cultural and religious traditions of the country.

On the other hand, we observe that the role of constitutional preambles is not only symbolic. Preamble also sets the overriding principles of the constitution and can be used as an interpretative aid to the actual text. Moreover, according to Article 138 of the Draft Constitution, the Preamble is an “integral part of the Constitution” and according to Article 139 of the Draft Constitution, all provisions shall be “interpreted as one homogenous unit.”

In light of these, we find the fourth paragraph of the Preamble problematic. It provides for the protection of those “universal human rights” that are in “harmony with the Tunisian people’s cultural specificity.” Such interpretation would violate international law. We observe that “cultural specificity” is a concept without definition and which can be subject to arbitrary interpretation. This vague concept is also often misused by states to legitimise discrimination of minority groups and can present challenge to those who seek to challenge established power hierarchies and inequalities.

In order to avoid such interpretation, we recommend that the second paragraph of the Preamble clearly and unequivocally declares Tunisia commitment to universal human rights and democratic values as recognized in international human rights treaties, in particular the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), and other treaties by which the country is bound. This commitment should not suffer any derogations.

## Arab unity and support to liberation movements

The Preamble to the Draft Constitution declares its commitment to “*attaining the Maghreb unity as a step towards achieving Arab unity*”, and “*achieving victory for the oppressed everywhere ... for rightful liberation movement, including the Palestinian Liberation movement and fighting all forms of discrimination and anti-human racism, including Zionism.*”

ARTICLE 19 remarks that it is not unusual for a constitutional text to refer to common heritage with other nations or to declare commonly shared aims of peace and mutual respect with others. However, we find the above declaration in the Preamble questionable. The role of a country's constitution is to set the foundation of the legal order in the country; it is, hence, not clear how the constitutional order of Tunisia will support the self-determination struggle of other nations. Further, highlighting one particular form of discrimination in the Preamble might appear as setting up hierarchy for other discrimination grounds, in particular with religious minorities, people with disabilities or for discrimination on grounds of gender and sexual identity.

#### Recommendations:

1. The reference in the second paragraph of the preamble to the protection of universal human rights “in harmony with the Tunisian people cultural specificity” should be removed.
2. The Preamble should establish as a matter of priority a clear commitment to the universal values of human rights, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
3. References to the principles that are not directly related to the Tunisian constitutional order should be eliminated from the Preamble.

#### Article 1 (Nature of the Tunisian state) and Article 5 (Protector of religion)

Article 1 of the Draft Constitution establishes Islam as the state religion of Tunisia. This article maintains the wording found in the current Constitution.

Article 5 of the Draft Constitution further stipulates that the states “protects religion, guarantees freedom of belief and religious worship, protects the sacred and ensures the neutrality of places of worship from partisan use.”

As noted above and in our analysis of earlier drafts of the Constitution, the adoption of a State religion does not necessarily contravene international law and Article 1 of the Draft Constitution would sustain the scrutiny of comparative law.

However, we continue to be concerned with the explicit protection granted to “religion” and “the sacred” in Article 5 of the Draft Constitution. We reiterate our concerns that the wording “*the state protects religion ... [and] the sacred*” fails to comply with international law. **International law protects the freedom to practise a religion and the right to hold beliefs. It does not protect religion as such.** In connection with Article 1 of the Draft Constitution and use of a singular (“religion” rather than “religions”), it also appears that the protection is only provided to the state religion. In any case, the wording of Article 5 must be revised to include that the state protects freedom of religion and the right to hold beliefs.

Any wording that would give protection to religions as such must be eliminated.

Further, ARTICLE 19 notes with great concern that the Draft Constitution guarantees the freedom of belief but fails to guarantee the right to freedom of religion. We note that the right to freedom of religion is protected in the international law; Article 18 of the ICCPR states, inter alia, that

- 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.
- No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

- 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. ...

We recommend that the Draft Constitution provides for the protection of the right of freedom of religion and belief instead of protecting religions as such.

**Recommendations:**

4. Article 5 of the Draft Constitution must be revised: the references to the protection of religion (*the state protects religion*) and to the protection of “the sacred” (*the state is the protector of the sacred*) should be removed.
5. Article 5 of the Constitution must guarantee freedom of religion and belief for all, in compliance with international human rights standards.

**Article 6 (Equality) and Article 7 (Citizen's rights)**

Article 6 of the Draft Constitution provides for the protection of “*equal rights and duties*” for “*all citizens, male and female alike*” [emphasis added] and guarantees that they are “equal before the law with no discrimination.” Article 7 further stipulates that the state shall grant “*citizens individual and collective rights and freedoms and shall provide them with sources of a dignified life.*”

ARTICLE 19 welcomes the strong commitment to non-discrimination between men and women and their equality. However, it observes that human rights treaties, such as the ICCPR, require states to respect and ensure protection of human rights of *all persons* present within their territory, without discrimination on any basis, including nationality. Hence, the guarantees of equality in Article 6 of the Draft Constitution should be extended to all men and women, including non-citizens, under the jurisdiction or on the territory of the country.

We recommend that the wording of Articles 6 and 7 be revised. It would be preferable to replace them with a single article providing broad guarantees to non-discrimination, similar to those in Article 2 para 1 of the ICCPR.

**Recommendations:**

6. Provision of Article 6 should be revised to guarantee non-discrimination and equality between men and women, including non-citizens.
7. Provision of Article 7 should be revised to guarantee the protection of fundamental rights to all persons, not just citizens.
8. The drafters could consider replacing Article 6 and 7 with a single article that would state that “every person within the state territory or jurisdiction shall enjoy all rights and freedoms provided in the Constitution without any distinction, race, colour, sexual or gender identity, language, religion, political or other opinion, national or social origin, property, birth or other status.”

**Article 21 (Status of international law)**

Article 21 of the Draft Constitution stipulates that international treaties approved and ratified by the Chamber of Deputies take precedence over domestic laws but not over the Constitution.

ARTICLE 19 notes the improvement of the provisions of Article 21 as compared to earlier constitutional drafts that were ambiguous in this respect.

We remind the drafters that although Article 21 gives supremacy of the Tunisian Constitution over international treaties, the Constitution must still be interpreted in light of Article 27 of the Vienna Convention on the Law of Treaties which requires that states may not invoke the provisions of its internal law as justification for its failure to adhere to international law.

Further, we also reiterate our earlier recommendation that it is desirable that the Constitution contains provisions 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.

**Recommendations:**

9. Article 21 of the Constitution should clearly stipulate that despite the supremacy of the Constitution over international treaties, this cannot be invoked to justify the failure to comply with international law.
10. Article 21 of the Draft Constitution should also state that regularly signed and ratified international agreements 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.

**Article 30 (Freedom of association) and Article 33 (Right to join syndicates and strike)**

Article 30 of the Draft Constitution guarantees the right to establish “*parties, syndicates and associations*” and stipulates that the law should regulate the procedures for their establishment “*without prejudice to the essence of this freedom.*” The statutes and activities of associations shall commit to “*financial transparency and the renunciation of violence.*” Further guarantees to “*join syndicates*” are stipulated in Article 33 of the Draft Constitution.

ARTICLE 19 highlights that freedom of association and assembly is a fundamental right for all and a powerful tool through which people can collectively stand for the protection of human rights, criticise the authorities or bring solutions to many problems in the society. The right to freedom of association, enshrined in international treaties,<sup>6</sup> may be subject to similar restrictions as the right to freedom of expression and any interferences with the right, therefore, have to pass the strict three-part test set in the international law. In particular, Article 22 para 2 of the ICCPR states that

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Article 30 of the Draft Constitution does not fully comply with this standard. In particular, it does not specify that the law regulating the procedures for establishment of parties, syndicates and associations must only impose measures that are necessary for protection of legitimate aims, as set in Article 22 para 2 of the ICCPR.

**Recommendation:**

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<sup>6</sup> The right of everyone to join in associations and trade unions is a separate human right recognised in Article 20 para 1 of the UDHR and Article 22 of the ICCPR. These rights are also enshrined in the main regional human rights treaties, including Articles 16 and 10 of the African Declaration on Human and Peoples’ Rights (*adopted 26 June 1981, in force 21 October 1986*).

11. Article 30 of the Constitution must limit any restrictions on the right to freedom of assembly to those that are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

### **Article 31 (Freedom of assembly and peaceful protest)**

Article 31 of the Draft Constitution guarantees the right to peaceful assembly and to peaceful protests which shall be *“exercised as per the procedural regulations provided for by law without prejudice to the essence of this right.”*

ARTICLE 19 welcomes the distinct protection guaranteed to peaceful protests, in addition to the right to freedom of assembly.

ARTICLE 19 notes that the right to assembly and peaceful protests share many characteristics with the right to freedom of expression and has a similar purpose – the expression of views. Both rights have fundamental importance for personal development as well as the progress and welfare of society and are regarded as foundations of a functioning democracy. Similar to the right to freedom of expression and the right to freedom of association, under international human rights standards, the right to assembly can be restricted under limited circumstances. In particular, Article 21 of the ICCPR stipulates that

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

ARTICLE 19 observes that the guarantees to the right of assembly in Article 31 of the Draft Constitution do not meet these requirements. In particular, the wording of Article 31 does not indicate very narrow limitations under which the procedural regulations might restrict the right.

The wording of Article 31 of the Draft Constitution must be revised to explicitly stipulate that the right to freedom of assembly can be limited only in pursuance of legitimate aims recognised under international law.

#### **Recommendation:**

12. In order to bring Article 31 of the Draft Constitution in conformity with international law, it must stipulate that the right to freedom of assembly can be limited only if restrictions are imposed in conformity with the law and if they are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

### **Article 34 (Right of access to information)**

Article 34 of the Draft Constitution guarantees the right of access to information *“within limits that do not prejudice national security, public interest, or personal information of the others.”*

ARTICLE 19 appreciates the fact that the drafters of the Constitution decided to grant a specific constitutional protection to the right to access to information. This is a highly positive aspect of the Constitution that will make Tunisia one of over ninety States to have adopted constitutional provisions, legislation or national regulations on this right.

However we note that under international law, in particular Article 19(3) of the ICCPR, the right to access of information can be limited only under very specific circumstances that meet a “three-part test.” We recall that the test demands that all exceptions to the right to freedom of information should meet the following requirements:

- The information must relate to a legitimate aim listed in the law. Overall, the list of legitimate aims which may justify withholding information is similar to the legitimate aims that justify restrictions on the right to freedom of expression;
- Disclosure must threaten to cause substantial harm to that aim; and
- The harm to the aim must be greater than the public interest in having the information.<sup>7</sup>

We consider that Article 34 of the Draft Constitution fails to ground exceptions to the right to freedom of information in accordance with international law. Although the shortcomings may be overcome by special legislation on freedom of information, it is very important that the constitutional provisions set out the standard of limitations in a clear and accurate manner.

#### **Recommendations:**

13. Article 34 of the Draft Constitution should state that the right to access of information can be limited only if i) withholding information relates to a legitimate aim listed in the international law; ii) the disclosure threatens to cause substantial harm to that aim; and iii) the harm to the aim must be greater than the public interest in having the information.

#### **Article 40 (Freedom of opinion) and Articles 36 and 41**

Article 40 of the Draft Constitution, entitled “Freedom of opinion,” guarantees the right to “freedom of opinion, thinking, expression and media.” It also limits the restrictions on the right to freedom of expression, media and publications unless in cases of “virtue of a law protecting the rights, reputation, safety and health of others.” In addition to the protection of the right to freedom of expression in Article 40 of the Draft Constitution, Article 36 guarantees the protection of “academic freedoms and freedom of scientific research,” and Article 41 guarantees “the right to creativity.”

ARTICLE 19 has the following comments to these provisions:

#### *Forms of expression and modes of dissemination*

ARTICLE 19 notes that freedom of expression includes different modes of expression; this includes freedom of media (as for Article 40 of the Draft Constitution), academic freedom and research (Article 36 of the Constitution) and creativity (Article 41 of the Draft Constitution).

ARTICLE 19 notes that international human rights standards understand the protection of freedom of expression broadly – both in terms of its forms and modes of dissemination. We recall that 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.” It should also be stressed out that the Human Rights Committee affirmed that these words require a very broad interpretation.<sup>8</sup>

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<sup>7</sup> The Public’s Right to Know: Principles on Freedom of Information Legislation, ARTICLE 19, Principle 4; available at <http://www.article19.org/docimages/512.htm>.

<sup>8</sup> The Human Rights Committee declared that the right to freedom of expression “includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others... It includes political discourse, commentary on one’s own and public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse. It may also include commercial advertising.” For

In light of these standards, we wish to stress out that media freedom, academic freedoms and creativity are not an exclusive part of the modes of expression recognised by international law. The current wording, however, may lead to a restricted interpretation of freedom of expression. In order to avoid this, the Draft Constitution should define freedom of expression broadly to explicitly include *the right to seek, receive and impart information and ideas, regardless of frontiers*.

We also reiterate our earlier recommendations that among the various means of dissemination, the drafters should consider including the protection of freedom of expression in relation to the information and communication technologies (ICTs) such as the Internet and mobile information systems.

#### Limitations on the right to freedom of expression

We are concerned that limitations on the right to freedom of expression in Article 40 of the Draft Constitution do not include the three-part test to assess the legality of the restrictions. Again, we recall that the test, established in Article 19 of the ICCPR, requires that the restrictions of the right to freedom of expression:

- are provided for by law;
- pursue one of the following explicitly provided legitimate aims: respect of the rights of others, respect of the reputations of others, protection of national security, protection of public order, or protection of public health or morals. This is an exhaustive list: a restriction that does not serve one of these legitimate aims constitutes a violation of the right to freedom of expression;
- are necessary for the accomplishment of a legitimate aim.

In contrast, Article 40 of the Draft Constitution allows restrictions on the right to freedom of expression by *“virtue of a law protecting the rights, reputation, safety and health of others.”* Further, Article 40 does not state that the restrictions must be necessary in achieving the listed legitimate aims.

ARTICLE 19 recommends that the provisions on limitations of the right to freedom of expression in Article 40 are revised and brought to full compliance with international law.

#### **Recommendations:**

14. The right to freedom of opinion *without any interference* should be guaranteed.
15. The Constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas without frontier, to cover all types of expression and modes of communication.
16. Freedom and independence of electronic, print and all other types of media, including the Internet and mobile information systems, should be explicitly guaranteed. This should be elaborated upon in its own section or subsection of the Constitution.
17. The following limitation clause relating to the right to freedom of expression should be introduced in the Constitution: “The right to freedom of expression may only be subjected to such restrictions as are provided by law and are strictly necessary and proportionate in a democratic society for the protection of national security, public order, public health or morals, for the prevention of crime; or for respect of the rights or reputations of others.”

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references, see the policy brief prepared by ARTICLE 19 for the purpose of drafting the new Tunisian constitution; available at <http://www.article19.org/data/files/medialibrary/3013/12-04-03-tunisia.pdf>.

### **Article 42 (Women's rights)**

Article 42 of the Draft Constitution guarantees, *inter alia*, “equal opportunities for men and women in carrying different responsibilities.”

ARTICLE 19 notes a positive change in the wording of these provisions in comparison with an earlier draft which included problematic provisions on “the principle of complementarity” of women to men within the family and society. We welcome that these provisions have been removed.

Overall, ARTICLE 19 observes that “equality” is a complex issue that is understood and applied differently in various settings and it is usually used in connection to prohibition of discrimination. We note that the current understanding of the concept also acknowledges that “same” treatment of people in different situation can, in fact, lead to discrimination. The appropriate approach then is to treat those cases differently to achieve equality.

In order to recognise that positive action is needed to achieve equality for women we recommend that the Constitution also stipulates that measures aimed at the promotion of de facto equality between women and men, in particular those that are aimed at the elimination of existing inequalities are admissible. This will also ensure the compliance with the principles of the UN Convention on the Elimination of All Forms of Discrimination Against Women.

#### **Recommendations:**

18. Article 42 of the Constitution should include a clause permitting positive measures aimed at elimination of existing inequalities between men and women.

### **Article 78 (Imminent danger)**

Article 78 allows the Tunisian President to “*undertake any measures necessitated by the circumstances, after consultations with the Prime Minister and the Chair of the Chamber of Deputies*” in the event “*of imminent danger threatening the entity of the homeland and the security and independence of the country in such a manner preventing the normal operation of the entities of the state.*” The President shall announce the measures in the address to the nation. However, Article 78 does not elaborate any exceptions to the necessary measures, apart of prohibition to dissolve the Chamber of Deputies and a possibility to bring a case to the Constitutional Court by the Chair of the Chamber of Deputies or 30 members to verify whether circumstances allowing the measures still exist after elapse of thirty day period.

ARTICLE 19 observes that international law does recognise that during emergencies states may adopt certain measures, including derogation from human rights for the greater common good. In particular, Article 4 of the ICCPR provides for emergency derogations from rights but places a number of conditions, both substantive and procedural, on such derogations, as follows:

- derogations may only be imposed where the emergency threatens the life of the nation;
- derogations must be officially proclaimed;
- derogations may only limit rights to the extent strictly required and may never lead to discrimination;
- no derogation is possible from certain key rights;
- states imposing derogations must inform other States Parties of the rights to be limited and the reasons for such limitation; and
- derogating States must inform other States Parties of the termination of any derogations.

The case law of the Human Rights Committee indicates a great reluctance to recognise as legitimate states of emergency which are declared in peacetime.<sup>9</sup> As the Committee noted in its General Comment on Article 4:

If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.<sup>10</sup>

The provisions of Article 78 of the Draft Constitution do not meet these standards in several respects. Most importantly, they do not require derogations from rights to be limited *“to the extent strictly required by the exigencies of the situation”* or to be imposed in a non-discriminatory manner, as required by Article 4 of the ICCPR. The Draft Constitution also lacks the procedural rules imposed by the ICCPR in terms of informing other States, which should be enshrined in a constitutional provision.

**Recommendations:**

19. The Presidential power to declare derogation from right must be restricted to emergency measures must be limited to the extent strictly required by the exigencies of the situation” or to be imposed in a non-discriminatory manner.
20. The Constitution must include procedural provisions for informing other states on emergency measures.

**Article 121 (Media Authority)**

Article 121 of the Draft Constitution provides overall standards of the Media Authority, an institution charged with oversight of *“regulation and development of the media sector.”* It states that the Media Authority *“shall guarantee freedoms of expression and of the media and the right to access to information in order to guarantee the existence of plural and fair media.”* Article 121 further stipulates that the Authority will be comprised of *“nine independent, impartial and competent members who undertake their work for one six year period mandate that is subject to partial renewal.”* The Authority shall be *“consulted on relevant draft laws in the domain of the jurisdiction thereof.”*

ARTICLE 19 highlights that in order to protect the right to freedom of expression, it is imperative that the media can operate independently from government control. It follows that any bodies with regulatory or governing powers over either public or private broadcasters should be independent and be protected against political interference. This relates to two main categories of institutions: bodies which license broadcasters and governing boards of public media outlets.

The need for regulatory bodies to be independent is recognised under international<sup>11</sup> and regional standards, such as the African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of Expression in Africa explicitly<sup>12</sup>.

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<sup>9</sup> See, for example, *Ramirez v. Uruguay*, UN Doc. CCPR/C/10/D/4/1997, *Silva v. Uruguay*, UN Doc. CCPR/C/12/D/34/1978 and *Montejo v. Colombia*, UN Doc. CCPR/C/15/D/64/1979.

<sup>10</sup> General Comment No. 29: States of Emergency (Article 4), 24/07/2001, para 3.

<sup>11</sup> For example, the 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression stated: “All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is

ARTICLE 19 acknowledges that the detailed rules on the Media Authority are addressed in the implementation registration, namely the Decree on High Authority of Audiovisual Communication that was adopted already in 2011. We assume that the aim of Article 121 is to provide the constitutional foundation for this body.

However, we reiterate our concerns about the constitutional provisions raised in the earlier analysis of the previous drafts. These recommendations have not been implemented and require urgent implementation to comply with relevant international standards. We wish to highlight especially the following:

- **The Media Authority should only regulate broadcasting media:** however, Article 121 does not distinguish between different standards under international law for regulation of print and broadcasting media. It appears that all forms of media will be under the supervision of the Authority.
- **Lack of guarantees of the Media Authority independence:** As noted above, bodies with regulatory or governing powers over broadcasters must be independent and protected against political interference. However, the Draft Constitution does not provide any explicit guarantees of independence from government and political and commercial interests.
- **Further protection:** We reiterate that it would be useful for the Draft Constitution to clarify the position of the Media Authority in the state administration and stipulate that its powers, sanctions, arrangements for its funding, rules on the nomination and dismissal of its members and on the incompatibility of functions and other issues must be provided in a dedicated legislation.

#### Recommendations:

21. Article 121 of the Draft Constitution must be revised in line with international standards. It must explicitly limit the role of the Media Authority to broadcasting media and provide guarantees for its independence.

#### Enforcement of rights

ARTICLE 19 is concerned that the guarantees for the enforcement of rights provided by the Constitution, in Section two on Constitutional Court (Articles 112 – 118) have not been revised based on our earlier recommendations to previous drafts of the Constitution. We reiterate the following recommendations.

The Draft Constitution should specify the basis for the review of constitutionality of laws.

Ability of individuals to bring cases to the Constitutional Court for the violation of their rights should be included. At present, there are only unclear provision in Article 114 para 5 on the possibility to refer laws to the Constitutional Court “as a result of the request by a litigator”, but it is not clear whether this amounts to possibility of individual petitions. It also appears that this will only concern laws under which individual cases are judged but not the constitutionality of actual decisions of lower courts. The Constitution remains silent on whether the individual could refer proceedings

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transparent, allows for public input and is not controlled by any particular political party.” Available at: <http://www.article19.org/resources.php/resource/3046/en>.

<sup>12</sup> Adopted by the African Commission on Human and Peoples’ Rights at its 32nd Session, 17-23 October 2002

before the Constitutional Court regarding rights protected under international law but not by the Constitution. Guarantees for the judicial independence of the Constitutional Court are also missing in the Draft Constitution.

**Recommendations:**

22. 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.
23. Guarantees for the judicial independence of the Constitutional Court must be stipulated in the Constitution.