ARTICLE 19

Tunisia: Protecting Freedom of Expression and Freedom of Information in the New Constitution

March 2012

Policy Brief

Executive Summary

The Constituent Assembly of Tunisia, elected in October 2011, is currently drafting a new Constitution of Tunisia. In response to these efforts and to support the work of the drafters, ARTICLE 19 has produced a comprehensive policy brief outlining how the new Constitution should protect the right to freedom of expression and freedom of information.

The brief is based on international legal standards on freedom of expression, 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. The brief also lists specific examples of constitutional provisions in a range of other countries.

ARTICLE 19 hopes that international and regional standards and comparative examples indicating the best practices of states on the protection of the right to freedom of expression and freedom of information shall provide a useful source of reference for drafters of the new Tunisian Constitution.

More specifically, ARTICLE 19 believes that the new Tunisian Constitution must contain a substantive chapter or section devoted to the protection of human rights, in the form of a Bill or Charter of Rights or equivalent. Such protection of human rights should be at the heart of the new Constitution. It is also of paramount importance that the new Constitution states that all international treaties ratified by Tunisia, customary international law and general international law have legal force in Tunisia, and that the core international human rights treaties which Tunisia has ratified are applicable and binding in domestic law. ARTICLE 19 also strongly urges the drafters to ensure that the new Constitution defines 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. The Constitution should grant this right to every person and should explicitly require that all limitations to the right to freedom of expression strictly meet the three-part test set by the international law.

The brief makes a whole range of specific recommendations for the protection of the right to freedom of expression and freedom of information, including the access to information, and details how the new Constitution should protect freedom of media and freedom of expression through Information and Communication Technologies (ICTs). The policy brief also examines the place of religion in the Constitution. Finally, it describes the most appropriate mechanisms to effectively protect constitutional rights through a tribunal or constitutional court.

Crucially, ARTICLE 19 calls on the Tunisian Government to ensure that the process of drafting the new Tunisian Constitution is genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a real sense of ownership over the final text.

ARTICLE 19 hopes to continue to be engaged in assisting the Constituent Assembly and Tunisian stakeholders to formulate the best possible constitutional framework for the Tunisian people, one to meet the state's international obligations but also serve to make human rights protection and promotion part of daily life and social consciousness in the country.

Table of Contents

About ARTICLE 19 Law Programme

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 implementation 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.

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Summary of Recommendations

- The protection of human rights should be at the heart of the new Tunisian Constitution, which should include a substantive chapter or section on human rights protection (such as Bill or Charter of rights).

- The new Constitution should state that all international treaties ratified by Tunisia, customary international law and general international law have legal force in Tunisia; that the core international human rights treaties which Tunisia has ratified, including the ICCPR, the CRC, the CRPD and ACHPR, are applicable and binding in domestic law.

- The new 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 new 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.

- The right to hold opinions without restriction should be specifically protected within the new Constitution.

- The new Constitution should protect 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 new Constitution should state that access to information should 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 new Constitution should provide explicit protection for freedom of the media and specifically protect the following elements of media freedom:
    - There should be no prior censorship;
    - 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 independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be guaranteed;
    - The right of journalists to protect their confidential sources of information should be guaranteed;
    - Journalists should be free to associate in professional bodies of their choice.

- The new Constitution should state that all forms of expression and the means of their dissemination, including expression through ICTs – or on the Internet electronic or other such information dissemination systems – is protected by the right to freedom of expression.

- The new Constitution should also provide that any restrictions on such ICTs, including the responsibilities of Internet service providers, must meet the requirements for permissible limitations on freedom of expression as already indicated.

- **Freedom of religion must be guaranteed for all, in accordance with the International Covenant on Civil and Political Rights.**

  - **The new Constitution may make reference to the country's cultural and religious traditions, as is the case in many constitutions. In order that international best practices are followed and the revolution's democratic aspirations are met, these cultural and/or religious references must be limited to the Preamble of the Constitution, and must not mention religious law (the Sharia). In light of the recent recommendations made by the UN Special Rapporteur on religion, we also do not recommend the inclusion of a state religion in the Constitution.**

  - **Finally, any references made in the preamble to the country's cultural or religious values must be accompanied by other references to the universal values of human rights and the fundamental principles of democracy.**

- The new Constitution should make the constitutional guarantees of freedom of expression and freedom of information directly enforceable against state as well as non-state or private actors. These guarantees should take precedence over domestic legislation that is incompatible with it to the extent of that incompatibility.

- **The Constitution should provide effective remedies allowing the rights and freedom guaranteed by the Constitution to be enforced. In particular, the remedies that can be brought before German and Spanish constitutional courts, as well as the composition of those courts, should be carefully studied as potential models for Tunisia.**

- Consideration should be given to a constitutional provision explicitly incorporating rights guaranteed in international treaties, such as the ICCPR, into Tunisian law.

- All Tunisian state organs – the Legislature, Executive and Judiciary – should properly implement the new Constitution through legislation, policies, judicial decisions and practices. The Tunisian Government must also ensure compliance with the new Constitution through, publicity through all media, awareness campaigns, expansion of judicial education programmes and other means.

- The process of drafting the new Constitution must be genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a genuine sense of ownership over the final text. In particular:

  - Workshops on the Constitution should be periodically organised in the regions.
  - Local authorities should be trained in parallel, so they can learn how to devise suitable proposals for the draft Constitution.
  - Actors from civil society should meet so they have the opportunity to form coalitions, which could allow them to make themselves better heard by the people responsible for drafting the Constitution.

- The Tunisian judiciary should be trained in the judicial practice and implementation of human rights law, including Tunisia's international human rights obligations.

- The Tunisian government needs to "bring human rights home" into the domestic legal order and establish and embed a "human rights culture" in society so that rights are not alien, but familiar entitlements for its individual members. This requires human rights education for the masses.

- NGOs, intergovernmental organisations and the media should monitor the compliance of Tunisia's state organs and public bodies with the new Constitution as well as its international human rights obligations.

Introduction

1. Tunisia, the country where the protests of the Arab Awakening first began, is presently at a critical stage of its democratic transition. It is also at a crucial moment of its constitutional history and approach to the protection of human rights, including freedom of expression and freedom of information. This because the newly formed Constituent Assembly, which was established following the elections of 23 October 2011, is primarily tasked with the drafting of a new Constitution for Tunisia. This new constitutional settlement will provide the basic legal framework for how Tunisia will be governed and how fundamental rights will be guaranteed.

2. ARTICLE 19 believes that the future Tunisian Constitution must contain substantial chapter(s) or section(s) devoted to the protection of human rights. This is not only because most constitutions do contain such rights protections or because the so-called Jasmine Revolution of 2010/11 was itself sparked by the lack of freedom of speech and political freedoms (as well as poor living conditions, corruption and high food inflation). It is also because but Tunisia's new and future leaders should be best placed to deliver on the promise of human rights, which can be done by ensuring there are proper constitutional guarantees protections, amongst other things. Rather like the non-discriminatory Constitution of South Africa 1996, which contains a chapter on the Bill of Rights, the new Constitution of Tunisia should spell a break with past abuses and repression, allow the Tunisian people to express and unite around fundamental values, and mark a radically positive change in direction in the actual protection of human rights in Tunisia. It should also bring a sense of legitimacy to the post-dictatorship state organs of government. Thus, the "powerful symbolism" of a Tunisian Constitution containing a substantive chapter or section on human rights protection "would establish an arena not just for law, but would also be a definition of what is, and what is not, politically legitimate".[1]

3. This policy brief is intended to support and stimulate the debate around the new Tunisian Constitution and, in particular its provisions on the right to freedom of expression and freedom of information by outlining key issues that should be considered by the Constituent Assembly. It also provides an analysis of relevant international and comparative constitutional law on these subjects. In doing so, it draws 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 highlights specific examples of constitutional provisions in a range of other countries.

4. ARTICLE 19 also wishes to stress the need for transparency, broader society participation and deliberations in the drafting process of the Constitution as pre-requisite for success of the final text. The experience of such processes from other countries that have recently undergone a democratic transition or constitutional overhaul, such as South Africa or Kenya, shows that public participation in the drafting

[1] See Martin Chanock, "A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate" in P Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: OUP, 1999) at 394.

process was necessary for the democratic legitimacy of the final text itself. Such participatory processes allow the input from citizens, but also promote public interest in the text and consolidate democratic institutions. As noted by the political scientist, Muna Ndulo:

> A constitution should be the product of the integration of ideas from all the major stake-holders in a country (i.e., all political parties both within and outside parliament, organized civil society and individuals in the society)... A constitution perceived as having been imposed on a large segment of the population or having been adopted through the manipulation of the process by some of the stake-holders is unlikely to gain sufficient popularity or legitimacy to endure the test of time.[2]

5. ARTICLE 19 therefore strongly recommends that the Constituent Assembly and the drafters of the Constitution ensure that the drafting of the Tunisian Constitution is genuinely participatory and encompasses all groups in society, including women and minorities. It should also be transparent so that there is a genuine sense of public ownership over the final text.

6. The process of the Constitution drafting shall be, obviously, not conducted in isolation from other needed efforts that the Tunisian Government must undertake in the transition to democracy. The Tunisian government needs to "bring human rights home" into the domestic legal order and establish and embed a "human rights culture" in society so that rights are not alien, but familiar entitlements for its individual members. This requires human rights education for the public as well as state administration. The Tunisian judiciary must be trained in the judicial practice and implementation of human rights law, including Tunisia's international human rights obligations. Importantly, NGOs, intergovernmental organisations and the media should be able to monitor the compliance of Tunisia's state organs and public bodies with the new Constitution as well as its international human rights obligations.

7. The policy brief proceeds as follows. The first part makes the case for the protection of human rights in general, and the protection of freedom of expression and freedom of information in particular, through constitutional entrenchment. The brief then highlights relevant provisions of international and regional human rights law on freedom of expression and freedom of information and then proceeds to reflect on some constitutional examples protecting these rights in various ways. The next parts examine how the new Tunisian Constitution should treat the following matters: the scope and limits of the rights at stake; freedom of information; freedom of the media; freedom of expression and ICTs; the place of religion in the Constitution and the enforcement of rights. At the end of each part there will be some recommendations which we urge the drafters of the new Constitution to carefully consider and follow in the next phase of the democratic transition of Tunisia.

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[2] Muna Ndulo, "The Democratic State in Africa: The Challenges for Institution Building", 16 *National Black Law Journal*, 70 (1998-1999) 88-92.

The Constitutional Entrenchment of Human Rights

The 1959 Constitution of Tunisia

8. In March 2011, Tunisia's Interim government suspended the country's 1959 Constitution.[3]. Pending the adoption of a new constitution the existing laws, including codes and decrees, remain in effect even though they may not be enforced as under the pre-Revolution government.

9. It is important to acknowledge the existence of constitutional protections for "fundamental freedoms and human rights" in the 1959 Constitution. The preamble of the text, for example, makes reference to "human dignity, justice and liberty", "democracy founded on sovereignty of people", "stable political system based on separation of powers" and the value of "republican regime" as "best guarantee for the respect of human rights, for the establishment of equality among citizens in terms of rights and duties". The main provisions guaranteed in such rights and freedoms in their "universality, comprehensiveness, complementarity and interdependence" (Article 5). The General Provisions provided that the Republic of Tunisia shall be "founded upon principles of the rule of law and pluralism and shall strive to promote human dignity and to develop the human personality" and "shall guarantee the inviolability of the human person and freedom of conscience, and defends the free practice of religious beliefs provided this does not disturb the public order" (Article 5). The General Provisions go on to provide that "All citizens have the same rights and obligations" and "all are equal before the law" (Article 6).

10. Article 8 of the 1959 Constitution protected freedom of expression, as well as other rights such as freedom of assembly and association, in the following terms:

> Freedom of opinion, expression, the press, publication, assembly and association are guaranteed and exercised according to the terms defined by the law. The right to organize in trade unions is guaranteed.
>
> Political parties contribute to supervising citizens, in order to organise their participation in political life, and they should be established on democratic foundations. Political parties must respect the sovereignty of the people, the values of the republic, human rights and principles pertaining to personal status.
>
> Political parties pledge to prohibit all forms of violence, fanaticism, racism and discrimination.
>
> No political party may take religion, language, race, sex or region as the foundation for its principles, objectives, activity or programs.
>
> It is prohibited for any party to be dependent upon foreign parties or interests.
>
> The law sets the rules governing the establishment and organisation of parties.

[3] Adopted 1 June 1959, amended 1988 and 2002.

11. The subsequent provisions protected the following: The "inviolability of the home, the confidentiality of correspondence and the protection of personal data save in exceptional cases established by law" (Article 9); "the right to move freely within the country, to leave it, and to take up residence within limits established by the law" (Article 10); the right not to be "banished from the country or prevented from returning to it" (Article 11); the right of an accused to be "presumed innocent until his guilt has been proven through a procedure that offers him the guarantees that are indispensable for his defence" (Article 12); the right of those deprived of their freedom to "be treated humanely" and to have "their dignity ... respected, in compliance with the conditions laid down by law" (Article 12); the right of ownership within the limits provided for by the law (Article 14); the right of political refugees not the extradited (Article 17).

12. Article 7 is a cross-cutting provision allowing limitations on rights on the basis of a range of considerations, including "social progress." It states:

> Citizens exercise all their rights in the forms and according to the terms provided for by law. The exercise of these rights can be limited only by laws enacted to protect the rights of others, the respect of public order, national defense, the development of the economy and social progress.

13. The remainder of the 1959 Constitution deals with the various limbs of government: Chapter II on the Legislative Power, Chapter III on the Executive Power, Chapter IV on the Judicial Power, Chapter V on the High Court, Chapter VI on the State Council, Chapter VII on the Economic and Social Council, Chapter VIII on Local Authorities, Chapter IX on the Constitutional Council and Chapter X on Amendment to the Constitution.

14. Despite this constitutional framework for checks and balances and some limited protection of rights, the 1959 Constitution was clearly not fit for purpose: it was not implemented and did not serve to curb the worst excesses of the previous regime. As international authorities and NGOs recognised, the 1959 Constitution but also the legal regime adopted by the previous regime was problematic from a freedom of expression and freedom of information perspective. Notably, in its 2008 Concluding Observations on Tunisia, the UN Human Rights Committee, expressed its concern about two freedom of expression related issues: First, the "lack of precision in the particularly broad definition of terrorist acts contained in the Terrorism and Money-laundering Act (Act No 2003-75); and second, certain provisions of the Press Code which contains a particularly extensive definition of the offence of defamation, especially in cases of criticism of official bodies, the army or the administration.[4] In his 2010 report on Tunisia, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, emphasised that existing provisions – in particular the broad definition of terrorism in counterterrorism legislation and the criminalization of the mere use of names, terms, symbols and signs in Law 2003-75 on incitement - stood to lead to undue restrictions on freedom of expression.[5]

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[4] Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant Concluding Observations on Tunisia, CCPR/C/TUN/CO/5 23 April 2008, paras 15 and 18.

[5] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Tunisia, A/HRC/16/51/Add.2 28 December 2010.

15. It is crucial that the new Tunisian Constitution properly protects human rights according to international standards and its provisions are, in turn, properly implemented through legislation, policies, judicial decisions and practices.

Arguments for the protection of human rights in the new Constitution

16. This policy brief is built on the premise that the constitutional entrenchment of human rights – including freedom of expression – guarantees is a valuable means of ensuring their realisation.[6] The incorporation of protections for civil liberties, usually through a bill of rights, has been a feature of constitutional settlements at least since the Magna Carta of 1215 and is to be 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 human rights protection into their constitutions and shortly thereafter, numerous states escaping colonial rule 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. Although not all constitutions guarantee individual human rights, recent constitutions such those as Kenya (2010), Bolivia (2009), Cameroon (2008), Ecuador (2008), Nepal (2007) and Montenegro (2007), have included human rights guarantees, although to varying degrees of protection and not always as part of a specially designated bill of rights. It is significant to note that 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.

17. ARTICLE 19 submits that there are four principal arguments in favour of the argument that the new Tunisian Constitution should properly protect of human rights, such as freedom of expression and freedom of information, through a formal section on human rights protection (such section can be titled charter, declaration or bill of rights or equivalent).

18. *First*, the constitutional protection of human rights in specific section or chapter would **contribute to the overall "culture of liberty" within Tunisia.**[7] "Effective constitutional human rights protection" depends "on the existence of a constitutional culture appropriate for ensuring that [the bills of rights is] received and implemented in constructive ways.[8] Following the adoption of a new Constitution, including a bill of rights, the Tunisian government would need to invest energy and resources to ensure that such a "culture of liberty" is nurtured. For example, the Canadian federal and provincial governments undertook many activities to strengthen this sense of liberty following the adoption of the Constitution Act of 1982 containing the Canadian Charter of Rights and Freedoms. These included the amendment of statutes to ensure

[6] See generally P Alston (ed), Promoting Human Rights Through Bills of Rights: Comparative Perspectives (Oxford: OUP, 1999).

[7] R Dworkin, *A Bill of Rights for Britain* (London: Chatto, 1990), p 10 - 11.

[8] M Darrow and P Alston at Alston above, supra note 6 at p 486.

compliance with Charter, publicity through popular journals and electronic media, affirmative action programmes, expansion of judicial education programmes recognising issues of systemic discrimination and judicial bias with respect to minority groups.[9]

19. Second, the constitutional protection of human rights **would enable the Tunisian judiciary to respond to the inevitable limitations of the new legislature's capacity to protect the rights of all members of society.** Members of Tunisia's new legislature, as representatives of the people, will be naturally inclined to respond to individuals and groups who vocalise their concerns and apply the most insistent pressure. Furthermore, as in other states, the legislature is almost certainly going impeded by the dominance of the executive branch, the sway of party politics and the influence of the bureaucracy. Constitutional protections therefore would allow Tunisia's courts to check the oppressive exercise of political power and in doing so to assert their legitimate role in the tripartite balance of power. The role of a "vigilant, active and independent judiciary is critical for ensuring that 'paper' rights in a constitution are interpreted purposively and applied fairly".[10] The Tunisian judiciary therefore needs to be willing and able to engage with constitutionally entrenched rights and Tunisia's international legal obligations, and should be well trained for this purpose. In addition, however, disadvantaged and marginalised groups should have meaningful access to the courts to ensure that constitutional litigation is focused on the most needed areas. Constitutional review on human rights grounds and coupled with parallel political efforts then may really serve to empower individuals and groups in Tunisia who lack the abilities or resources to compete in the political arena.[11]

20. The ability of the courts to provide a viable and effective alternative forum to the legislature depends significantly upon the perceived relevance of the constitution and particular formulation of rights concerned. In contrast to Kenya's post-colonial Bill of Rights, which was drafted summarily by the British Colonial Office and officials in the Kenyan Attorney General's office without any consideration of Kenyan politics, culture or society, the new Constitution of Kenya had a high degree of input from civil society and was based on Kenyan society. On this basis, ensuring that the interests of society are carefully incorporated into Tunisia's Constitution must be a basic priority of the drafters.

21. *Third*, the constitutional protection of human rights, especially within a Bill of Rights, **would facilitate the Tunisian people's own understanding of the message of human rights**. Referring to constitutional bills of rights, Harold Laski wrote that they are "quite undoubtedly, a check upon possible excess in the government of the day. They warn us that certain popular powers have had to be fought for, and may have to be fought for again. The solemnity they embody serves to set the people on their guard. It acts as a rallying point in the State for all who care deeply or the ideals of freedom".[12] Formal acceptance of treaty obligations and international standards has significant normative and symbolic value, but they will never be sufficient. Such obligations and standards

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[9] R Penner, "The Canadian Experience with the Charter of Rights", [1996] Public Law 114 -115.

[10] *Supra* note 6, p 488.

[11] As the Canadian experience under the Charter of Rights and Freedoms has showed on gender equality issues in particular.

[12] H Laski, Liberty and the Modern State (1948) at p75, quoted in Alston, supra note 6 at p 493.

need to be appropriately translated or "brought home" into the domestic legal order as well as embedded within the society so that there is a "human rights culture" in society in which rights are not alien, but familiar entitlements for its individual members. Therefore "the involvement of society at large – not just lawyers and governing elites – is required to foster a sense of ownership of the constitutional protection of human rights and help assure its acceptance, relevance and effectiveness."[13]

22. *Fourth* and finally, the constitutional protection of human rights, through a substantive section or chapter, **would also serve to consolidate Tunisia's human rights commitment and desire to comply with international law and confirm this to the international community.** This is particularly important at this time, as post-revolution Tunisian institutions begin to seek – as they are expected to – the kind of credibility and legitimacy on democracy, rule of law and human rights issues that eluded the previous regime. Tunisia's organs of state should care about their international reputation and such on-going external scrutiny depends largely on the monitoring of NGOs, intergovernmental and the media organisations.

Arguments for the specific constitutional protection of freedom of expression and freedom of information

23. In addition to the reasons cited above for constitutional protections of human rights in general, ARTICLE 19 strongly recommends the adoption of specific constitutional provisions and legislation on the right to freedom of expression and the freedom of information in Tunisia for several, overlapping reasons.

24. *First*, Tunisia's own human rights record **compels enhanced legal protection of these rights as constitutional rights.** In this context, it would be difficult to ignore the background to the revolutionary context that has prompted the drafting of the new Constitution to take place at all – a history of repression, censorship and corruption which sparked the demands of many of Tunisian protesters for free speech and against corruption. A number of human rights organisations – such as ARTICLE 19[14], Human Rights Watch[15], Amnesty International[16] and la FIDH[17] – has already expressed their

[13] *Supra* note 6, p 494.

[14] See http://www.article19.org/resources.php?action=resourcesearch&search=test

[15] In its 2011 World Report on events of 2010, the year ending in the beginning of the revolution, Human Rights Watch drew attention to the following media freedom issues: the country's print and broadcast media did not provide critical coverage of government policies, except for a few low-circulation, opposition magazines which are subject to occasional confiscation; whilst the country had licensed private radio and television stations, none had an independent editorial line; the government blocked access to certain domestic and international political or human rights websites featuring critical coverage of Tunisia; and the government was aggressively blocking access to websites containing critical political and human rights information and seemed to be directly or indirectly involved in sabotaging the email accounts of persons known to engage in human rights or opposition political activity. Human Rights Watch World Report 2010, Tunisia, see http://www.hrw.org/world-report-2011/tunisia

[16] Amnesty International noted that through 2010 freedom of expression remained "severely restricted". People who criticized the government or exposed official corruption or human rights violations faced harassment, intimidation and physical assault by state security officers. They were also prosecuted and imprisoned on trumped-up charges and targeted in smear campaigns in the pro-government media. The abuses were committed with impunity, with complaints rarely investigated. Critics were subjected to overt and oppressive surveillance, and their phone and internet connections were disrupted or cut. The authorities blocked websites and maintained close

long-standing and deep concerns about the protection of freedom of expression and media freedom in Tunisia prior to the Tunisian Revolution. At the end of 2010, just two months before the Tunisian Revolution, ARTICLE 19 noted:

> Tunisia remains one of the most repressive countries for independent journalists, bloggers and human rights defenders. Access to the Internet is heavily censored, independent websites are blocked or hacked, and emails and phone calls are intercepted.[18]

25. Following the popular uprising in Tunisia in December 2010 and the departure of President Ben Ali, there have been a number of positive developments in Tunisia aimed at reforming restrictive media legislation which ARTICLE 19 have examined and critiqued. These include immediate steps by the Interim Government towards protecting freedom of expression in the post-revolution context[19] the Draft Decree on the Press Code,[20] a draft Decree on the Freedom of Audiovisual Communication and the Creation of an Independent Higher Authority for Audiovisual Communication of Tunisia[21] and the Media Regulations for the Constituent Assembly Elections.[22] Furthermore, the Tunisian

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control over the media. See http://www.amnesty.org/en/region/tunisia

[17] In a letter dated 9 July 2010, FIDH and other organisations expressed deep concerns about the amendments to Article 61bis of the Criminal Code as a potential hindrance to the work carried out by Tunisian human rights defenders for the protection and promotion of human rights and a violation of Article 19 of the ICCPR. FIDH, "Appeal to the President of the Republic of Tunisia to repeal the amendment to Article 61bis of the Criminal Code" 9 July 2010 http://www.fidh.org/Appeal-to-the-President-of-the

[18] ARTICLE 19, "Tunisia: Five Years Past WSIS, Online Activity Even More Censored, Critics Silenced", 19 November 2011 http://www.article19.org/resources.php/resource/1666/en/tunisia:-five-years-past-wsis,-online-activity-even-more-censored,-critics-silenced. See also ARTICLE 19, "Tunisia: Detention of Prisoners of Opinion, Harassment, Intimidation of Human Rights Defenders and Journalists; Internet Censorship and Lack of Independence of the Judiciary", 17 May 2010 http://www.article19.org/resources.php/resource/1531/en/tunisia:-detention-of-prisoners-of-opinion,-harassment,-intimidation-of-human-rights-defenders-and-journalists;-internet-censorship-and-lack-of-independence-of-the-judiciary

[19] These included proclaiming freedom of information and expression as a fundamental principles; lifting Internet censorship on many previously blocked websites; and releasing jailed journalists, activists and bloggers. The Interim Government also abolished of the Information Ministry (Ministère de l'Information), the Supreme Council for Communication (Conseil Supérieur de la Communication) and the Propaganda Agency (Agence de Propagande) as well as the death penalty, among other measures. The Interim Government also agreed to accede to a number of international human rights instruments and to reform domestic legislation. On 15 March 2011, the High Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition, (HAARO) was established, taking over from the High Commission of Political Reforms and the High Commission for the Protection of Revolution, that were previously in charge of the political reforms. The HAARO operated until 13 October 2011 and was responsible for overseeing the transition towards a fully democratic country. Its responsibilities included immediate legal reforms, such as the electoral code, the law on political parties and the election of the new Constituent Assembly.

[20] ARTICLE 19 analysed several drafts of the Press Code throughout 2011. To access these analyses, please visit ARTICLE 19 website (www.article19.org) or contact the Law Programme.

[21] In 2011, ARTICLE 19 analysed two drafts of the Decree. To access these analyses, please visit ARTICLE 19 website (www.article19.org) or contact the Law Programme.

[22] ARTICLE 19, *Comment on the Decree on Election of National Constituent Assembly of Tunisia*, May 2011; available at http://www.article19.org/pdfs/analysis/comment-on-the-draft-decree-on-election-of-national-constituent-assembly-of-.pdf. For the analysis of the Media Regulations for the Constitutional Assembly Elections, visit the ARTICLE 19 website or contact the Law Programme.

Interim Government adopted a Decree on Access to Administrative Documents in July 2011.[23]

26. Yet these reforms are limited and there remain deep challenges to freedom of expression and the right to information – including a range of laws crafted and then abusively interpreted by courts to suppress the expression of dissent – that have not been addressed by the new reforms. The Press Code decriminalises defamation of state institutions and offence of the president of the republic and abolishes prison terms as a punishment. However, the law maintains the offence of defaming religions and the distribution of false information, provisions which were used by the Ben Ali government used to prosecute many dissidents and human rights activists. Moreover, Tunisia's interim government has relied on such provisions to detain individuals, such as Samir Feriani.[24] In addition, it is particularly disturbing that the director of Tunisia's Nessma television, Nabil Karoui, is being prosecuted for broadcasting the Iranian film "Persepolis" last October. Karoui is on trial for "insulting sacred values, offending decent morals and causing public unrest". Karoui claims that the investigation against him, which was launched on 11 October 2011 two days after protests against the screening of the film, the subsequent prosecution and trial is political motivated. At the resumption of his trial, Karoui poignantly said: "I am sorry to be here today, this is a political trial... It's the trial of 10 million Tunisians who dreamed of having a democratic country."[25]

27. Therefore, whilst the reforms deliver a certain momentum to the democratic transition, in substance they barely begin to address the legitimate human rights grievances of the Tunisian people, particularly in the areas of free speech, media freedom and access to information. Meaningful reform needs to be "root-and-branch start" with the Constitution.

28. *Second*, and the same vein, **freedom of expression and freedom of information are the very foundations of any democratic society, and are crucial to the enjoyment of other rights.** The importance of freedom of expression was particularly emphasised by the Inter-American Court of Human Rights which stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its

[23] ARTICLE 19, *Comment on the Decree on Access to the Administrative Documents of Public Authorities of Tunisia*, July 2011; available at http://www.article19.org/data/files/medialibrary/2208/Tunisia-FOI-Comment-July-2011-Fina-version-for-PR.pdf.

[24] For example, on 29 May 2011 authorities detained high-ranking police officer Samir Feriani on charges under the penal code of "harming the external security of the state" and distributing information "likely to harm public order" because he wrote a letter to the interior minister that accused current high-level ministry officials of responsibility for killing protesters during the Tunisian revolution. He also accused ministry officials of destroying classified documents showing collaboration between the Ben Ali administration and Israel's secret service. The Tunis military court provisionally released Feriani on 22 September, and acquitted him one week later of the charge of harming the external security of the state. See Human Rights Watch, *World Report 2012: Tunisia* http://www.hrw.org/world-report-2012/world-report-2012-tunisia.

[25] Al Arabiya News, "'Persepolis' trial resumes in tense climate" 23 January 2012 http://english.alarabiya.net/articles/2012/01/23/190094.html.

opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[26]

29. If people are not free to say what they want, to disseminate information and expression their opinion on matters of political interest, and to receive information and ideas from a variety of sources, then they will not be able to case an informed vote or to participate in governance in other ways. The right to freedom of expression and freedom of information are also key in any system for protecting and promoting the enjoyment of all other human rights – whether civil or political rights, or economic, social and cultural rights. It is important to highlight that human rights violations thrive in a climate of secrecy while freedom of expression helps combat violations by empowering journalists and others, notably civil society organisations to investigate and report on violations and by opening up government institutions to public scrutiny. Freedom of expression also has a wider importance in its own right: the idea that everyone should be able to speak their mind freely on matters of concern to them is central to human dignity. A person who is not free to speak their mind is not truly free. In this sense, the right to freedom of expression extends beyond the political arena, and finds its roots in people as social beings, relating and interacting at a multiplicity of levels through their ability to express themselves. Freedom of information fulfils an important social function, recognising that individuals not only have a right to speak, but that society at large also has a right to listen to what others have to say. In other words, freedom of information encompasses a broad guarantee of the free flow of information and ideas in society. The protection of the individual right to request information and a legal framework for proactive disclosure are unsurprisingly vital tools against corruption, one of the clearest enemies of the Tunisian Revolution.[27] At the same time, freedom of expression and the related right of freedom of information are not absolute and may be restricted under a limited range of circumstances as indicated in the next part.

30. *Third*, **as a participating member in the International Covenant on Civil and Political Rights, Tunisia is obliged to enforce these rights.** Article 19 of the Universal Declaration of Human Rights and the corresponding provision of the International Covenant on Civil and Political Rights (ICCPR) protect these rights. Tunisia signed the ICCPR on 30 April 1968 and ratified it on 18 March 1969. As a result of ratifying the ICCPR, the state of Tunisia is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national implementing measures including legislation and judicial decisions.[28] It is argued that one of the most effective ways of ensuring the legal implementation of these rights is through their constitutional recognition and protection. Given that the 1959 Tunisian Constitution provides limited protection to freedom of expression and no guarantee of freedom of information, new constitutional provisions on these rights would begin to address the

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[26] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No 5 (1985).

[27] We note that Tunisia ranked a 59 out of 178 states in *Transparency International*'s 2010 Global Corruption Index with a score of 4.3 out of 10 (0 indicating very clean and 10 highly corrupt). *Transparency International*, Corruption Perceptions Index 2010 http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

[28] Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

gap between Tunisia's domestic laws, on the one hand, and its international obligations on the other.

31. Whilst the relevance of international, regional and comparative approaches and interpretation of freedom of expression and freedom of information will be explored in further detail below, it is important to emphasise here that the international community has long recognised that freedom of information is a fundamental human right that is crucial to the protection of other rights. As the UN General Assembly indicated at its first session in 1946: "Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the UN is consecrated".[29] Furthermore, the UN Human Rights Committee has ruled that freedom of expression includes the right of persons to access government held information.[30]

32. *Fourth*, **the inclusion of the right to freedom of expression and freedom of information in Tunisia's new Constitution is also supported by international and regional human rights standards** – most notably the African and Arab human rights systems, as well as – from a comparative experience - the European and Inter-American systems of human rights protection.

33. *Fifth*, and finally, the adoption of constitutional legal protection for freedom of information would **allow Tunisia join the international community of states in which most states with constitutions include protections for the right to freedom of expression and freedom of information** within those texts. Whilst free speech provisions in constitutions have been extremely common since the 1st Amendment of the US Constitution, constitutional provisions of freedom of information have been less common. However, at present, more than ninety states have adopted constitutional provisions, legislation or national regulation on freedom of information to date. Furthermore, a growing number of inter-governmental bodies, such as the World Bank[31] and the Asian Development Bank,[32] have also adopted freedom of information policies. The collection of states that has adopted freedom of information legislation encompasses states as diverse as Angola (2002),[33], Chile (2008)[34] and Sweden (1766)[35]. It also includes states in the Middle East and North Africa (MENA) region such as Jordan (2007)[36]. Bills on freedom of information have been debated in Lebanon, the Palestinian territories, Kuwait, Yemen, Morocco and Bahrain.[37]. Tunisia

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[29] UN GA Res 59/1 14 December 1946.

[30] *Toktakunov v Kyrgyzstan*, Communication No. 1470/2006, CCPR/C/101/D/1470/2006, 21 April 2011.

[31] World Bank, Information Disclosure Policy, 1 July 2010 http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742_20100603084843/Rendered/PDF/548730Access0I1y0Statement01Final1.pdf

[32] See the Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information http://www.adb.org/Documents/Policies/PCP/default.asp?p=disclose March 2005.

[33] Law on Public Access to Information, No. 11/02, 2002.

[34] Law No 20.285 on Access to Information published in Official Gazette on 20 August 2008.

[35] The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.

[36] Law 47 of 2007 on Access to Information

[37] Said Almadhoun, *Status of Freedom of Information Legislation in the Arab World*, February 2010; available at

has become only the second Arab country to adopt legislation associated with freedom of information in 2011, as mentioned below. However, this legislation is insufficient. Constitutional protection of freedom of information would mean a higher status for the right and compel a new Tunisian government to adopt comprehensive freedom of information legislation.

Recommendations:

- **The process of drafting the new Constitution must be genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a real sense of ownership over the final text.**
- **The Tunisian judiciary must be trained in the judicial practice and implementation of human rights law, including Tunisia's international human rights obligations.**
- **The Tunisian government needs to "bring human rights home" into the domestic legal order and establish and embed a "human rights culture" in society so that rights are not alien, but familiar entitlements for its individual members. This requires human rights education for the masses.**
- **NGOs, intergovernmental organisations and the media should monitor the compliance of Tunisia's state organs and public bodies with the new Constitution as well as its international human rights obligations.**

http://right2info.org/resources/publications/Overview%20of%20FOI%20legislation%20in%20the%20Arab%20World%20-%20SA%20-%2002-06-2010.doc/view.

International and Regional Human Rights Law on Freedom of Expression and Freedom of Information

International law

International Covenant on Civil and Political Rights

34. The right to freedom of expression and freedom of information are protected by a number of international human rights instruments that bind states, including Tunisia, and others within the Middle East and North Africa region. Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.[38]

35. The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are regarded as having acquired legal force as customary international law.[39]. The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. As of 20 January 2012, the ICCPR has 167 states party to respect its provisions and implement its framework at the national level.[40] Article 19 ICCPR guarantees freedom of expression and freedom of information as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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[38] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

[39] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit)

[40] Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) à 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

36. As acknowledged above, Tunisia – like the majority of states in the region – has ratified and is bound to implement into domestic law the provisions of the ICCPR.[41]

37. As recently expressly confirmed by the Human Rights Committee, Article 19(2) embraces a right of access to information held by public bodies.[42]

Other international instruments

38. In addition, a number of other international human rights instruments protect freedom of expression and freedom of information. The Convention on the Rights of Persons with Disabilities of 2006 (CRPD)[43] which has been ratified by 109 States parties, including Tunisia (who ratified on 2 April 2008) includes a justifiably detailed provision on freedom of expression and freedom of information. Article 21 of the CRPD states:

> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:
>
> a. Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
> b. Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
> c. Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
> d. Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
> e. Recognizing and promoting the use of sign languages.

39. The Convention on the Rights of the Child (CRC)[44] which has been ratified by 193 States parties, including Tunisia (who ratified on 2 April 2008) protects the freedom of expression and freedom of information of children in similar terms to Article 19 of the ICCPR. Article 13 of the CRC states:

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[41] For ICCPR ratifications, see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. The majority of states in the Middle East and North African region have ratified the ICCPR, the exceptions being the United Arab Emirates, Qatar, Saudi Arabia, Oman and Palestine. While these states are not formally bound by the terms of the ICCPR as a matter of treaty law, Article 19 of the ICCPR is reflective of customary international law.

[42] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, See paras 18-19.

[43] Adopted 13 December 2006, Entry into force 3 May 2008.

[44] Adopted 20 November 1989, Entry into force 2 September 1990.

> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
>
> 2. The exercise of this right may 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; or
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

40. Tunisia has also ratified the UN Convention Against Corruption (on 23 September 2008) (UNCAC) which clearly requires states to ensure that the public has effective access to information.[45]

Regional instruments

African Union

41. Tunisia is also a member of the African Union,[46] and signatory to the principal human rights instrument for the African continent: the African Charter on Human and Peoples' Rights (ACHPR).[47] Article 9 of the ACHPR guarantees freedom of expression in the following terms:

> 1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

42. The Declaration of Principles on Freedom of Expression in Africa (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002[48], in Article II also affirms that

> 1. No one shall be subject to arbitrary interference with his or her freedom of expression.
>
> 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

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[45] Article 13, UNCAC, UN GA Resolution 58/4, 31 October 2003.

[46] For the list of member states, see http://www.au.int/en/member_states/countryprofiles.

[47] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct, 1986

[48] Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

43. Article XII of the African Declaration, which deals with the protection of reputation, stipulates that:

> 1. States should ensure that their laws relating to defamation conform to the following standards:
>
> - No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
> - Public figures shall be required to tolerate a greater degree of criticism; and
> - Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
>
> 2. Privacy laws shall not inhibit the dissemination of information of public interest.

44. Similarly, in Article XIII, on criminal measures, the African Declaration mandates states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society. It also further affirms that freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

45. The African Declaration also extensively addresses the right to 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 everyone has a right to access this information, subject only to clearly defined rules established by law. The African Declaration further specifies the right to information principles in following terms:

> - everyone has the right to access information held by public bodies;
> - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
> - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
> - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
> - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
> - secrecy laws shall be amended as necessary to comply with freedom of information principles.

46. In terms of regional standards, it is notable 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.[49] These principles provide

[49] Adopted September 2011, see: http://www.pacaia.org/images/pdf/apai%20final.pdf

guidance to African states on the right to freedom of information, including the importance of battling corruption, protecting whistleblowers, to promote unhindered access to Information Communication Technologies, and access to electoral information.

League of Arab States

47. The Arab Charter on Human Rights (Arab Charter), which was adopted by the Council of the League of Arab States in 2004, purports to affirm the principles of the UDHR, ICCPR as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Charter and the Cairo Declaration on Human Rights in Islam.[50] Although the Arab Charter provides less robust protections for certain fundamental rights, Article 32 of the Revised Arab Charter protects freedom of expression in the following terms:

> 1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
>
> 2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

48. In addition, Article 42 protects the right to scientific and artistic research and creative activity, and the right to take part in cultural life. Importantly, Article 24 now guarantees the right to political participation, including the freedom to pursue political activity, to form and join associations with others and to freedom of assembly.[51] It is significant that even this controversial text protects in express terms the rights to freedom of expression and freedom of information.

Other regional standards

49. From a comparative perspective, the drafters should consider the protection provided to the right to freedom of expression and freedom of information by other regional human rights instruments, such as the American Convention on Human Rights and the European Convention on Human Rights. The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although these are not directly binding on Tunisia, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.

50. Article 13 of the American Convention on Human Rights (ACHR) [52] protects freedom of expression in the following terms.

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[50] League of Arab States, Arab Charter on Human Rights, 22 May, 2004. Entry into force 15 September 2008.

[51] *Ibid.*

[52] American Convention on Human Rights, adopted on 22 November 1969, in force 18 July 1978. As of 20 January 2012, 24 of the OAS' 35 member states had ratified the ACHR.

> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.
>
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

51. Setting a landmark global precedent, the Inter-American Court of Human Rights held in 2006 that the general guarantee of freedom of expression contained in Article 13 of the ACHR protects freedom of information held by public bodies.[53]

52. Article 10 of the **European Convention on Human Rights** (ECHR) [54] protects freedom of expression. It is binding on all 47 Members of the Council of Europe who are obliged to give effect to the ECHR in their domestic legal orders. It states.

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
> This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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[53] In *Claude Reyes et al v Chile*, the Inter-America Court stated that Article 13 of the ACHR "encompasses the right of individuals to receive ... information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised in the Convention, the State may limit the access to it in the particular case." This remains an extremely important decision and showed the Inter-American Court leading the way for other regional human rights courts on the recognition of the right to information. *Claude Reyes et al v Chile* Judgment of the Inter-American Court of Human Rights of 19 September 2006 Series C.

[54] European Convention on Human Rights, adopted 4 November 1950, in force 3 September 1953.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

53. The European Court of Human Rights (European Court) has built up over the years a rich and instructive jurisprudence under Article 10 of the ECHR. The European Court has elaborated on the importance of freedom of expression on numerous occasions, stating in a seminal judgment:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to article 10, paragraph 2 (art. 10-2) it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. [55]

54. The European Court has also consistently emphasised the "pre-eminent role of the press in a state governed by the rule of law." The media as a whole merit special protection in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'".[56]

55. In 2009, the European Court recognised that when public bodies already hold information that is needed for public debate, the refusal to provide it to those who are seeking it is a violation of the right to freedom of expression and information as protected by Article 10 of the ECHR.[57]

56. The Council of Europe also adopted the **Convention on Access to Official Documents** in June 2009, the first regional treaty devoted to access to documents.[58]

57. Within the EU, Article 11 of the **European Charter of Fundamental Rights**,[59] which has binding legal effect equal to the EU Treaties, protects the freedom of expression and freedom of information in the following terms:

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[55] *Handyside v. United Kingdom*, Application No 5493/72, judgment of 7 December 1976, Series A no 24, 1 EHRR 737.

[56] *Thorgeirsen v Iceland*, 25 June 1992, Application No 13778, para 63.

[57] *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05 14 April 2009.

[58] As of 20 January 2012, the Convention on Access to Official Documents has been ratified by 3 states (Norway, Sweden and Hungary) and signed by 11. It requires 10 ratifications to come into legal effect.

[59] EU Charter of Fundamental Rights (2000/C 364/01).

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

58. The forgoing discussion of international and regional human rights law indicates that on the right to freedom of expression and freedom of information there is a wealth of treaty law, which is formally binding on states, as well as an increasing amount of "soft law" which is formally not binding, but has persuasive value. The most important international treaty law on the issue of freedom of expression and freedom of information – for Tunisia and all other states - is Article 19 of the ICCPR and this must provide the minimum framework for the new Tunisian Constitution's provisions on these rights.

Recommendations:

- **The protection of human rights should be at the heart of the new Tunisian Constitution, which should include a strong section or chapter on human rights protection (such as declaration, charter or bill of rights or equivalent).**
- **The new Constitution should state that all international treaties ratified by Tunisia, customary international law and general international law have legal force in Tunisia; that the core international human rights treaties which Tunisia has ratified, including the ICCPR, the CRC, the CRPD and ACHPR, are applicable and binding in domestic law.**
- **All Tunisian state organs – the Legislature, Executive and Judiciary – should properly implement such a new Constitution through legislation, policies, judicial decisions and practices. The Tunisian Government must also ensure compliance with the new Constitution through, publicity through all media, awareness campaigns, expansion of judicial education programmes and other means.**
- **The process of drafting the new Constitution must be genuinely participatory for all groups in society, including women and minorities, and transparent so that there is a genuine sense of ownership over the final text.**

Comparative Constitutional Examples

59. ARTICLE 19 urges the Constituent Assembly and the drafters of the new Constitution to draw on the best practices from around the world to ensure that the final text of the Constitution is not only in line with international standards but also includes the progressive protection of the right to freedom of expression and freedom of information. Comparative constitutional law examples are provided for several reasons. First, they often demonstrate how states recognise their international obligations in practice. Second, constitutions do not set out in detail every single obligation, rather they provide a framework for more detailed elaboration of rights by courts and other actors and comparative guidance indicates what issues other states have found important and what they have not. Third, comparative constitutional materials provide the drafters of the new Tunisian Constitution with suggestions as to how they may translate human rights principles into concrete drafting language. Finally, comparative constitutional law provide examples of how states often provide greater protection than is required in international law.

60. The recent Constitution of Kenya, which was promulgated on 27 August 2010, is the most recent of a constitution, which reflects an attempt to protection freedom of expression and freedom of information in a comprehensive manner. It was welcomed by international figures after a highly participatory drafting process which brought together a broad array of stakeholders and civil society organisations.[60] It has relatively elaborate – and broadly progressive – provisions on freedom of expression, media freedom and access to information.

The Constitution of Kenya, 2010

Article 33. Freedom of expression

(1) Every person has the right to freedom of expression which includes –
   a. Freedom to seek, receive or impart information or ideas;
   b. Freedom of artistic creativity; and
   c. Academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to –
   a. Propaganda for war;
   b. Propaganda for war; Incitement to violence;
   c. Hate speech; or
   d. Advocacy of hatred that –
      i. Constitutes ethnic incitement, vilification of others or incitement to cause harm; or
      ii. Is based on any ground of discrimination specified or contemplated in Article 27(4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 34. Freedom of the Media

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[60] "Clinton, Experts Laud Kenya Constitution Reform Process", 8 December 2009, http://www.america.gov/st/democracyhr-english/2009/December/20091208135059lEJrehsiF6.330073e-02.html?CP.rss=true

(1) Freedom and independence of electronic media, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).

(2) The State shall not –
   a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
   b. Penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –
   a. Are necessary to regulate the airwaves and other forms of signal distribution; and
   b. Are independent of control by government , political interests or commercial interests.

(4) All State-owned media shall –
   a. Be free to determine independently the editorial content of their broadcasts or other communications;
   b. Be impartial; and
   c. Afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides for the establishment, which shall
   a. Be independent of control by the government, political interests or commercial interests;
   b. Reflect the interests of all sections of the society; and
   c. Set media standards and regulate and monitor compliance with those standards.

61. Perhaps the most comprehensive and highly praised of all modern constitutions is the South African Constitution which includes a section entitled "Bill of Rights", detailing the protection of freedom of expression including freedom of information. It has generated particularly positive jurisprudence, particularly on social and economic rights.

Constitution of South Africa (Bill of Rights), 1996
Article 16. Freedom of Expression
(1) Everyone has the right to freedom of expression, which includes
   a. freedom of the press and other media;
   b. freedom to receive or impart information or ideas;
   c. freedom of artistic creativity ; and
   d. academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to

   a. propaganda for war;
   b. incitement of imminent violence; or
   c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

62. The Canadian Charter of Rights and Freedoms of 1982, which has also been interpreted progressively and has been valuable in improving the protection of minorities in Canada, includes only a brief guarantee to freedom of expression.

> **The Constitution Act of Canada (Charter of Rights and Freedoms), 1982**
> **Article 2. Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
> a. freedom of conscience and religion;
> b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c. freedom of peaceful assembly; and
> d. freedom of association.

63. Turning to the Arab world, the currently in force interim constitutional texts of both Egypt and Libya [61] contain protections of freedom of expression. However, these texts should not be followed as models by the drafters of the new Tunisian Constitution because are extremely limited from the perspective of human rights standards, including international law under the ICCPR. More specifically, the provisions of the interim texts of Egypt and Libya offer very general and vague guarantees, fail to protect the right to freedom of expression comprehensively and do not protect freedom of information at all.

> **Interim Constitution of Egypt, 2011**
> Article 12
> Freedom of opinion is guaranteed, and every person has the right to express his opinion and publish it spoken, written, photographed, or other form of expression within the law. Personal criticism and constructive criticism are a guarantee for the safety of national development.
>
> Article 13
> Freedom of the press, printing, publication and media are guaranteed, and censorship is forbidden, as are giving ultimatums and stopping or cancelling publication from an administrative channel. Exception may be made in the case of emergency or time of war, allowing limited censorship of newspapers, publication and media on matters related to general safety or the purposes of national security, all according to the law.
>
> **Draft Constitutional Charter for the Transitional Stage of Libya, 2011**
> ARTICLE 14
> The state shall ensure the freedom of opinion, individual and collective expression, the freedom of scientific research, the freedom of communication, the freedom of press, media, printing and publication as well as the freedom of movement, peaceful assembly, demonstration and sit-in in line with the law.

64. Out of the other Arab constitutions, three may be highlighted: Morocco, Iraq and Jordan.

65. In a referendum on 1 July 2011, the Moroccan people voted in favour of adopting a new Constitution. The former Constitution, adopted in 1996, affirmed the right to freedom

[61] For the unofficial English Translation of the Draft Constitutional Charter for the Transitional Stage of Libya, contact ARTICLE 19 Law Programme.

of expression at Article 9(b).[62] The 2011 Constitution improves upon Article 9(b), containing a number of provisions related to freedom of expression and information. Article 25 of the 2011 Constitution protects the right to freedom of expression as follows

> Freedom of thought, opinion and expression are guaranteed in all its forms. Freedom of creation, publication and exhibition in literary and artistic and scientific and technical research is guaranteed.

66. At Article 28, the Constitution of Morocco provides also for the protection of freedom of the press. This includes guarantees against prior censorship, and "encourages" independence of the press. However, limitations may be placed on these rights "as provided by law." ARTICLE 19 notes that this provision on limitation does not comply with Article 19(3) of the ICCPR, which requires restrictions on the right to freedom of expression to be provided by law, to pursue a legitimate aim, and to comply with the principles of necessity and proportionality.

67. The protections in the constitutions of Iraq, from 2005, and Jordan, from 1952, are very limited in their express protections. Notably, the Jordanian Constitution emphasises extensive possibilities for restricting the media. These texts should also not be relied on as models by the drafters of the new Tunisian Constitution.

> **Constitution of Iraq, 2005**
> Article 36
> The State shall guarantee in way that does not violate public order and morality:
> (a) freedom of expression using all means.
> (b) freedom of press, printing, advertisement, media and publication.
> (c) Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

> **Constitution of Jordan, 1952**
> Article 15. Rights and Duties of Jordanians
> (i) The State shall guarantee freedom of opinion. Every Jordanian shall be free to express his opinion by speech, in writing, or by means of photographic representation and other forms of expression, provided that such does not violate the law.
> (ii) Freedom of the press and publications shall be ensured within the limits of the law.
> (iii) Newspapers shall not be suspended from publication nor shall their permits be revoked except in accordance with the provisions of the law.
> (iv) In the event of the declaration of martial law or a state of emergency, a limited censorship on newspapers, publications, books and broadcasts in matters affecting public safety and national defence may be imposed by law.
> (v) Control of the resources of newspaper shall be regulated by law.

68. Turkey's laws and practices present a number of severe problems from a freedom of expression and right to information perspective. Notably, Article 301 of the Turkish Penal Code notoriously outlaws denigration of the Turkish Nation. The Turkish Constitution protects freedom of expression in detailed terms, as well as freedom of the

[62] Constitution of the Kingdom of Morocco, adopted on 13 September 1996 available at http://www.pogar.org/publications/other/constitutions/mrc-constitution-96-e.pdf

press and freedom of information. However, it is problematic from an international human rights standpoint given the very broad list of grounds for permissible restrictions under Article 26 (2) which include "the indivisible integrity of the State".

Constitution of Turkey, 1982
Article 26; Freedom of Expression and Dissemination of Thought
(1) Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.
(2) The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.
(3) The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.

69. In Europe, the 2000 Constitution of Finland demonstrates a positive example of protections for freedom of expression and the right of access to information in the same provision. It clearly envisages more detailed legal provisions to implement these rights.

Constitution of Finland, 2000
Article 12. Freedom of expression and the right of access to information
Everyone has the right to freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and communications without prior prevention by anyone. More detailed provisions on the exercise of freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down in an Act. Documents and recordings in the possession of the public are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.

70. Following the Cold War, a number of former Communist states adopted constitutions which formally identified freedom of expression and freedom of information as protected rights.

Constitution of Slovenia, 1991
Article 39. Freedom of Expression
Freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive and disseminate information and opinions.

Except in such cases as are provided for by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law.

71. From the Americas, the recent constitutions of Mexico and Colombia include entrenched protections of both freedom of expression and freedom of information.

Constitution of Mexico, 2005
Article 6
Free speech shall be restricted neither judicially nor administratively, but when it represents an attack to public morality or individual rights as well as when it produces a criminal offence or disturbs the public order; the right to information shall be enforced by the state.

Constitution of Colombia, 1991
Article 20
Every individual is guaranteed the freedom to express and diffuse his/her thoughts and opinions, to transmit and receive information that is true and impartial, and to establish mass media communications media.

The mass media are free and have a social responsibility. The right of rectification under equitable conditions is guaranteed. There will be no censorship.

72. Turning to Asia, although the Constitution of India does not provide an express protection for freedom of information, the Indian Supreme Court has held that the access to information held by public bodies is implicit in the protection the Constitution accords to free speech and expression.[63]

Constitution of India, 1950
Article 19
(1) All citizens have the right –
    a. Freedom of speech and expression.

73. The Thai Constitution of 2007 protects freedom of expression, freedom of the press, as well as freedom of information.

Constitution of Thailand, 2007
Section 45. Freedom of Expression of Individual and Press
A person shall enjoy the liberty to express his opinion, make speech, write, print, publicise, and make expression by other means.
The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or morals or preventing or halting the deterioration of the mind or health of the public.

Section 56. Rights to Information and Petition
A person shall have the right to receive and to get access to public information in possession of a government agency, State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.

[63] *S P Gupta v President of India* [1982] AIR (SC) 149, p. 234. See also *State of Uttar Pradesh v Raj Narain and Others*, (1975) 4 SCC 428 and *Indian Express Newspapers (Bombay) Pvt. Ltd.v India*, (1985) 1 SCC 641.

The Scope and Limits of Freedom of Expression and Freedom of Information

Scope of freedom of expression and freedom of information

74. This section highlights some important aspects of the right to freedom of expression and freedom of information which members of the Constituent Assembly should consider when drafting the state's new constitution.

75. *First*, **that freedom of expression and freedom of information are human rights and therefore are applicable to all human beings, not only citizens.** Under international law, Article 19 of the UDHR stipulates 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 (e.g. on a state-owned vessel or on a piece of territory which is under the effective control of the state although not belonging to it).

76. *Second*, **international law, and most constitutions, protects the right to hold opinions as well as expression generally.** Unlike the right to freedom of expression and freedom of information, the right to hold opinions is an absolute right under international law, in recognition of the illegitimacy of the state trying to either prohibit certain opinions or to force individuals to adopt certain opinions. Article 19 of the ICCPR protects all forms of opinion. General Comment No 34 of the Human Rights Committee states:

> 9. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion is incompatible with article 19, paragraph 1[64]. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or impairment of the opinions they may hold, constitutes a violation of article 19, paragraph 1.[65]
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> 10. Any form of effort to coerce the holding or not holding of any opinion is prohibited[66]. Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

[64] See communication nº 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996.

[65] See Communication No 157/1983, *Mpaka-Nsusu v Zaire*, Views adopted on 26 March 1986; No 414/1996, *Mika Miha v Equatorial Guinea*, Views adopted on 8 July 1994.

[66] See communication nº 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.

77. *Third*, **the scope of the right to freedom of expression is very broad and extends to almost everything intended to convey meaning.** Article 19 of the ICCPR indicates refers to "information and ideas of all kinds". In one of its earliest and oft-cited cases, the European Court of Human Rights determined that material deemed by the national courts to be obscene was protected by the right to freedom of expression. The Court stated:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to article 10, paragraph 2 (art. 10-2) it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[67]

78. *Fourth*, **international law and most constitutional systems define the modes of expression covered by freedom of expression and freedom of information broadly.** Article 19 covers " *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.* " (emphasis added). The Human Rights Committee has recently affirmed that these words require a very broad interpretation. It stated:

> 11. 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.[68]. It includes political discourse[69], commentary on one's own[70] and on public affairs[71], political canvassing[72], discussion of human rights[73], journalism[74], cultural and artistic expression[75], teaching[76] and religious discourse[77]. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive,[78]although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

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[67] *Handyside v United Kingdom*, Application No 5493/72, European Convention on Human Rights, judgment of 7 December 1976 para 49.

[68] See Communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.

[69] See Communication No. 414/1990, *Mika Miha v. Equatorial Guinea*

[70] See communication No. 1189/2003, *Fernando v.* Sri Lanka, Views adopted on 31 March 2005.

[71] See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006.

[72] Concluding observations on Japan (CCPR/C/JPN/CO/5).

[73] See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

[74] See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.

[75] See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.

[76] See communication No. 736/1997, *Ross v. Canada*, Views adopted on 18 October 2000.

[77] Ibid.

[78] Ibid.

12.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[79]. Means of expression include books, newspapers[80], pamphlets[81], posters, banners[82]dress and legal submissions[83]. They include all forms of audio-visual as well as electronic and internet-based modes of expression.

Permissible limitations on freedom of expression and freedom of information

79. While the right to freedom of expression and freedom of information is a fundamental human right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted in the following terms:

> 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.

80. Thus, restrictions on the right to freedom of expression and freedom of information must be strictly and narrowly tailored and may not put into jeopardy the right itself. 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 be: first **prescribed by law**; second, **pursue a legitimate aim**, such as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and third, should be **necessary to secure the legitimate aim and meet the test of proportionality**.[84]

81. It is important to note that this same test is incorporated in all regional human rights treaties [85] and applied by international and regional human rights bodies.[86]

Provided by law

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[79] See communication No. 926/2000, *Shin v. Republic of Korea.*

[80] See communication No. 1341/2005, *Zundel v.* Canada, Views adopted on 20 March 2007.

[81] See Communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006.

[82] See communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994.

[83] See communication No. 1189/2003, *Fernando v. Sri Lanka*.

[84] See Communication No 1022/2001, *Velichin v Belarus*, Views adopted on 20 October 2005.

[85] For example, see Article 13(2) of the ACHR or Article 10(2) of the ECHR.

[86] See, for example, the European Court of Human Rights in the case of *The Sunday Times v UK*, Application No 6538/7426, Judgment of April 1979, para 45.

82. Article 19(3) requires that restrictions on the right to freedom of expression and freedom of information must be prescribed by law. This requires a normative assessment; to be characterised as a law a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[87] Ambiguous, vague or overly broad restrictions on freedom of expression or freedom of information which fail to set the exact scope of their application are therefore impermissible under Article 19(3).

83. General Comment No 34 further provides that for the purpose of Article 19(3) a law may not confer unfettered discretion for restricting freedom of expression on those charged with executing that law.[88] Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The requirement that the law be sufficiently precise for this purpose is closely related to the requirements of necessity and proportionality. It ensures that restrictions on freedom of expression are only employed for legitimate protective objectives and limits the opportunity to manipulate those restrictions for other purposes.

84. Practically all of the states in the Middle East region only allow restrictions that are provided by law. Article 13 of the Lebanese Constitution is typical, providing:

> The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association are guaranteed within the limits established by law.

85. The "provided by law" part of the test for restrictions also means that laws should not grant authorities excessively broad discretionary powers to limit expression. This would again undermine one of the main purposes of this limitation on restrictions. The UN Human Rights Committee has repeatedly expressed concern about excessive official discretion in the context of media regulation. For example, in 2000, it expressed concern, "about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters."[89] National courts have expressed the same concerns.[90]

Legitimate aim

86. Interferences with the right to freedom of expression must pursue a legitimate protective aim as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order, or protect public health and morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the

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[87] Leonardus J.M. de Groot v *The Netherlands*, No. 578/1994, CCPR/C/54/D/578/1994 (1995).

[88] *Ibid.*

[89] Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para 21. See also its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para 23.

[90] See *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983) 31 O.R. (2d) 583 (Ont. H.C.), where the Ontario High Court struck down a law giving film censors wide powers to approve or deny films.

government or the political social system espoused by the government.[91] Nor would it be permissible to achieve such illegitimate objectives through a reliance on Article 19(3) that is merely pre-textual. Where a State does limit freedom of expression, the burden is on that state to show a direct or immediate connection between that expression and the legitimate ground for restriction.

87. General Comment No 34 also notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Whether characterised as treason laws, official secrets laws or sedition laws, they must conform to the strict requirements of Article 19(3). General Comment No 34 provides further guidance on laws that hinder freedom of expression with the purported purpose of protecting morals. Such purposes must be based on principles not deriving exclusively from a single tradition but must be understood in the light of the universality of human rights and the principle of non-discrimination.[92] It would therefore be incompatible with the ICCPR, for example, to privilege one particular religious view or historical perspective.

88. In the context of national security, the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*[93] (Johannesburg Principles), a set of international standards developed by ARTICLE 19 and international freedom of expression experts, are instructive on restrictions on freedom of expression that seek to protect national security. Principle 2 of the Johannesburg Principles states that restrictions that are justified on grounds of national security are illegitimate unless their genuine purpose and demonstrable effect is to protect the country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. The restriction cannot be a pretext for protecting the government from embarrassment or exposure of wrongdoing, to conceal information about the functioning of its public institutions, or to entrench a particular ideology. Principle 15 states that a person may not be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Necessity

89. States party to the ICCPR are obliged to ensure that legitimate restrictions on the right to freedom of expression are necessary and proportionate. This part of the test is the most critical element and the basis upon which the vast majority of international and national cases are decided. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its

[91] Concluding observations of the Human Rights Committee on the Syrian Arab Republic CCPR/CO/84/SYR.

[92] *Supra* note 42, paragraph 32.

[93] Adopted on 1 October 1995. These Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996.

protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.

90. General Comment No 34 states that generic bans on the operation of certain websites and systems are never proportionate and are therefore incompatible with Article 19(3).

91. Different constitutions use different terms to describe this condition. As noted above, the ICCPR and regional treaties normally permit only restrictions which are 'necessary' or 'necessary in a democratic society' while national constitutions use a range of terms including 'reasonably justifiable in a democratic society', 'reasonably required in a democratic society' and various other related combinations. The advantage of adding 'in a democratic society' as a required condition is that it incorporates by reference the full range of democratic values, ensuring the analysis of what is necessary is based on these democratic values. What may be considered necessary in a dictatorship may not pass muster in a democracy.

92. Courts around the world have elaborated on the specific requirements of this criterion. Three distinct elements can be discerned. First, the measures taken must be carefully designed to meet the objective in question. They should not be arbitrary, unfair or irrational.[94] If a government cannot provide any evidence to show that a particular interference with freedom of expression is necessary, the restriction will fail on this ground[95]. While States may, and should, protect various public and private interests, measures taken by them must be carefully designed so that they are effective in protecting those interests. It is a very serious matter to restrict a fundamental right and, when considering doing so, States are bound to reflect carefully on the various options open to them.[96]

93. Second, the interference should be designed to impair the right to freedom of expression "as little as possible". [97] If there are various options to protect a legitimate interest, then the one which least restricts the protected right must be selected.[98] In applying this rule, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad.

94. Third, there must be proportionality between the harm caused by the measures taken to freedom of expression and the benefits to the legitimate aim.[99] In particular, the harm to

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[94] See R. *v. Oakes* (1986), 1 SCR 103, pp. 138-139 (Supreme Court of Canada).

[95] See for instance, *Autronic v. Switzerland* (22 May 1990, Application No. 12726/87, European Court of Human Rights) where the respondent State argued it needed to restrict the availability of satellite dishes in order to protect confidential satellite communications but could not provide any evidence that these signals could be picked up with ordinary satellite dishes.

[96] For example, in *Observer and Guardian v. the United Kingdom*, note 47, the European Court of Human Rights found a violation of the newspapers' right to freedom of expression because the respondent government could have pursued other, less intrusive options and still have achieved the same result

[97] *R. v. Big M Drug Mart Ltd.*, note 99, p. 352 (Supreme Court of Canada).

[98] See the judgment of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 26, para. 46

[99] *Supra* note 94.

freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction that provided limited protection to reputation but which seriously undermined freedom of expression, for example, would not pass muster[100] . Democratic societies depend on the free flow of information and ideas and it is only when the overall public interest is served by restricting that flow that such a restriction can be justified. This implies that, for a restriction to be justified, its benefits of must outweigh its costs.

Comparative Constitutional Examples

95. There are a number of positive examples of constitutions that provide for a regime of limitations on fundamental rights and freedoms. The South African Bill of Rights provides a clear and helpful example to the drafters of the new Tunisian Constitution. It reflects principles of proportionality and necessity in a democratic society, but also indicates that such a society is based on notions of "human dignity, equality and freedom" which are important interpretive tools for the courts.

> **Constitution of South Africa (Bill of Rights), 1996**
> Article 36. Limitation of Rights
> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose.
> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

96. The Polish Constitution of 1997 includes a good example of a clause on the limitation of rights, which reflects the principles of legality, legitimacy of aims and necessity.

> **Constitution of Poland, 1997**
> Article 31
> 1. Freedom of the person shall receive legal protection.
> 2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
> 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

[100] See, for example, *Open Door Counselling and Dublin Woman Well Centre and Others v. Ireland*, 29 October 1992, Application No. 1423/88 and 142335/88 (European Court of Human Rights), para. 73.

97. Although the Canadian Charter of Rights and Freedoms provision on limitations on rights is brief, it adequately reflects international human rights law.

> **The Constitution Act of Canada (Charter of Rights and Freedoms), 1982**
> Article 1.
> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

98. The Kenyan Constitution of 2010 contains a particularly detailed provision on the limitation of rights and fundamental freedoms, which is overall positive. However, ARTICLE 19 has serious reservations about the way in which the equality provisions of the Kenyan Constitution may be qualified for Muslim law before certain courts. It is our opinion, that the new Tunisian Constitution would be ill-advised to follow this path, but should remain a completely secular text which protects the rights of all Tunisians, including women, equally. We also do not approve of the fact that there may be limits to the "application of the rights" for members of the armed forces and the police.

> **The Constitution of Kenya, 2010**
> Article 24. Limitation of Rights and Fundamental Freedoms
> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) The nature of the right or fundamental freedom;
> (b) The importance of the purpose of the limitation;
> (c) The nature and extent of the limitation
> (d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
> (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
> (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom –
> (a) In the case of a provision enacted or amended on or after effective date, is not valid unless legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation
> (b) Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
> (c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
> (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
> (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.
> (5) Despite (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service –
> (a) Article 31 – Privacy;
> (b) Article 36 – Freedom of association;

(c) Article 37 – Assembly, demonstration, picketing and petition;
(d) Article 41 – Labour relations;
(e) Article 43 – Economic and social rights; and
(f) Article 49 – Rights of arrested persons.

99. The principle of secularism is emphasised by the provision on the restriction of rights in Constitution of Turkey which stipulates that any limitations on rights must also meet the requirements of the "democratic order" and proportionality.

> **Constitution of Turkey, 1982**
> Article 13 Restriction on Fundamental Rights and Freedoms
> Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.

Recommendations:

- **The new Tunisian 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.**
- **It 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.**
- **The right to hold opinions without restriction should be specifically protected within the new Constitution.**

Freedom of Information

The right of access to information

100. The scope of Article 19 of the ICCPR (which binds the state authorities of Tunisia as a matter of international law to implement into domestic law those rights contained therein) encompasses freedom of information, or the right of access to 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 or the right to impart information. But freedom of information is also a right of the public at large. It therefore guarantees a collective right of the public to receive information others wish to pass on to them.

101. While the UN Human Rights Committee has recently affirmed that Article 19 of the ICCPR protects the right of access to information (or "freedom of information" as we call the right in this policy paper) as well as freedom of expression, international authorities – namely the special mandates or international mechanisms on freedom of expression of the international (UN) and regional human rights systems – have recognised this through Joint Declarations for many years.[101] In their 2004 statement, these international authorities stated:

> 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.

102. They elaborated on their position in their 2006 Joint Declaration which highlights that exceptions to the principle of maximum disclosure of information should be subject to the "harm" and "public interest" tests as indicated below:

> - Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.
> - International public bodies and inter-governmental organisations should adopt binding policies recognising the public's right to access the information they hold. Such policies should provide for the proactive disclosure of key information, as well as the right to receive information upon request.
> - Exceptions to the right of access should be set out clearly in these policies and access should 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.
> - Individuals should have the right to submit a complaint to an independent body alleging a failure properly to apply an information disclosure policy, and that body should have the power to consider such complaints and to provide redress where warranted.

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[101] See Joint Declaration of UN Special Rapporteur on Freedom of Opinion and 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.

103. The UN Special Rapporteur on Freedom of Opinion and Expression has stressed the importance of access to information in numerous reports over the years,[102] and in doing so has reflected upon *The Public's Right to Know*: *Principles on Freedom of Information Legislation*, principles drawn up by ARTICLE 19 in 1999.[103]

104. Beyond the global human rights framework, as mentioned above, the UNCAC clearly requires Tunisia to ensure that the public has effective access to information. Finally, as indicated above, more than ninety states – from Angola (2002),[104] Chile (2008),[105] Sweden (1766)[106] to Jordan (2007)[107] – have adopted constitutional provisions, legislation or national regulation on freedom of information to date. Bills on freedom of information have been debated in many other states including in the Middle East region and in North African such as Lebanon, the Palestinian territories, Kuwait, Yemen, Morocco and Bahrain.[108]

105. In terms of its scope, freedom of information should be broadly construed. "Information" includes "records held by public body, regardless of the form in which the information is stored, its source and the date of production".[109] The scope of "public bodies" is broad includes "all branches of State (the executive, legislative and judicial branches), as well as other public or governmental bodies, at whatever level – national, regional or local – who are in the position to engage the responsibility" of Tunisia.[110] Furthermore, the scope of public bodies also includes "other entities when such entities are carrying out public functions". [111] Furthermore, taken together with Article 25 of the Covenant (on the participation in public affairs), the right of access to information includes a right whereby the media has access to information on public affairs, and the right of the general public to receive media output." [112]

106. In the authoritative judgment of the UN Human Rights Committee has emphasised:

> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every to ensure, easy, prompt effective and practical access to such information. States should parties should also enact the necessary procedures,

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[102] 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; Annex II: *The Public's Right to Know: Principles on Freedom of Information Legislation*).

[103] ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999).

[104] Law on Public Access to Information, No 11/02, 2002.

[105] Law No 20.285 on Access to Information published in Official Gazette on 20 August 2008.

[106] The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.

[107] Law 47 of 2007 on Access to Information.

[108] *Supra* note 37.

[109] *Supra* note 42, para 18.

[110] *Ibid.*, para 7.

[111] *Ibid*, para 18.

[112] *Ibid*, para 18.

whereby one may gain access to information, such as by means of freedom of information legislation.[113] 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.

107. Other provisions of the ICCPR also address the right of access to information. The Human Rights Committee has indicated that Article 17 of the ICCPR on the protection of privacy means that "every individual should have the right to ascertain in an intelligible form, whether, and, if so, what personal data is stored in automatic data files, and for what purposes".[114] Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right have his or her records rectified. In this connection, pursuant to Article 10 of the ICCPR (on the right to liberty), a prisoner does not lose the entitlement to access to his medical records.[115] Under Article 27 (on minority protection), a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.[116] More generally, under Article 2 on the general obligations under the ICCPR, "persons should be in receipt of information regarding their Covenant rights in general".[117]

Comparative Constitutional Examples

108. The constitutions of Kenya and South Africa protect the right of access to information expressly and in a reasonably comprehensive way. They provide positive models for the drafters of the Tunisian constitution to follow.

Constitution of Kenya, 2010
Article 35
(1) Every citizen has the right of access to -
   a. Information held by the State; and
   b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

[113] Concluding Observations on Azerbaijan (CCPR/C/79/Add. 38 (1994)).

[114] Human Rights Committee, General Comment No 16, 08/04/1988 .

[115] See Communication No 726/1996, *Zheludkov v Ukraine*, Views adopted on 29 October 2002.

[116] See Communication No 145/2006, *Poma v Peru*, Views adopted on 27 March 2009.

[117] Human Rights Committee, General Comment No 31 CCPR/C/21/Rev.1/Add.13.

(3) The State shall publish and publicise any important information affecting the nation.

Constitution of South Africa (Bill of Rights), 1996
Article 32. Access to Information
1. Everyone has the right of access to
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

109. Sweden provides the oldest, and one of the strongest, constitutional protections of the right to information. The core of the principle, dating from the 1766 Constitution of Sweden, is that all government documents are public in the absence of contrary statutes. The Instrument of Government, one of the four fundamental and constitutional laws of Sweden, guarantees freedom of information in Chapter II, on Fundamental Rights and Freedoms, Article 1(2).

The Instrument of Government, Constitution of Sweden,
Article 1, Chapter II
Everyone shall be guaranteed the following rights and freedoms in his or her relations with public institutions:
...
(2) Freedom of Information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.

110. It is interesting to observe that another Scandinavian country, Norway, goes further and highlights within the constitutional framework the "responsibility" of the state to act to ensure that there is an atmosphere of transparency.

Constitution of Norway 1814, as amended in 2004
Article 100
...
Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.

111. The 2011 Constitution of Morocco includes a rather more restricted provision on the right of access to information.

Constitution of Morocco 2011
Article 27

The citizens have the right to access information held by public authorities, institutions and elected bodies with a public service mission. The right to information can only be restricted by law, in order to protect all aspects of national defence, internal and external state of security, and the privacy of individuals as well as in order to prevent the infringement of rights and freedoms enshrined in this Constitution and to protect sources and areas specifically determined by law.

Here, ARTICLE 19 points out that Article 27 of the Morocco Constitution does not comply with international standards in several respects. Only citizens can claim rights under Article 27, rather than all persons and only elected public institutions are subject to the obligation to provide access to information, excluding unelected bodies and private entities that exercise public duties.

112. The Constitution of Bulgaria also includes more restricted provision on the right of access to information.

> **Constitution of Bulgaria 1991 (as amended)**
> Article **41**
> (1) Everyone shall be entitled to seek, obtain and disseminate information…
> (2) Everyone shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

113. Beyond Europe, the right of access to information is protected in more simple terms in the constitutions of Mexico and Colombia. These minimal approaches should not serve as models for the new Constitution of Tunisia which should flesh out the right of access to information in more detailed terms.

> **Constitution of Mexico of 1917 as amended in 2005**
> Article **6**
> Free speech shall be restricted neither judicially nor administratively, except when it represents an attack to public morals or individual rights as well as when it represents a criminal offence or a source of disturbance to public order; the right to information shall be enforced by the state.

> **Constitution of Colombia 1991**
> Article **74**
> Every person has a right to access to public documents in cases established by law.

114. In Asia, although India has a vibrant debate concerning the right to information, there is no explicit provision on this right within the constitution. The Indian Supreme Court has however established in several decisions that the individual's right to information is based on two fundamental rights guaranteed by the Indian Constitution of 1949, namely the freedom of expression (Article 19(1)) and the right to life (Article 21).[118]

115. The Pakistani Constitution on the other hand since 2010 does contain an express right of access to information.

> **Constitution of Pakistan of 1973, as amended in 2010**
> **Article 19 A**
> Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.

116. The Constitution of the Philippines also includes a right to information in the following terms.

[118] The relevant cases of the Supreme Court are Bennett Coleman & Co. v Union of India, AIR 1973 SC 783, dissenting judgment of Justice KK Matthew in particular; *State of UP v Raj Narain*, AIR 1975 SC 865.

Constitution of Philippines of 1987
Article 3(7)
The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Constitution of Thailand, 2007
Section 56. Rights to Information and Petition
A person shall have the right to receive and to get access to public information in possession of a government agency, State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.

Recommendations:

- **The new Tunisian Constitution should protect 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 new Constitution should state that access to information should 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.**

Freedom of Media

117. While the right to freedom of expression and freedom of information are rights for all individuals, journalists and media organisations are clearly more reliant on these rights than ordinary people. This is because of the very nature of the work of journalists which involves expression and relies on quality information. Furthermore, the media play a crucial role in any democracy. International and regional authorities and courts have frequently emphasised the "pre-eminent role of the press in a State governed by the rule of law."[119]

118. In July 2011, the UN Human Rights Committee in General Comment No 34 recognised that a "free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society".[120] International law embraces a right whereby the media may receive information on the basis of which it can carry out its function.[121] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential for full enjoyment of the rights guaranteed in Article 25. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[122] The public also has a corresponding right to receive media output.[123]

119. The European Court of Human Rights has delivered on numerous occasions such statements as the following:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is the very core of the concept of a democratic society.[124]

120. Similarly, the Inter-American Court of Human Rights has stated:

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[119] *Thorgeisen v Iceland*, Application No 13778/88 judgment of 25 June 1992 of the European Court of Human Rights at 63.

[120] Human Rights Committee, General Comment 34, para 13. See also Communication No 1128/2002, *Marques v Angola*, Views adopted on 29 March 2005.

[121] See Communication No 633/95, *Gauthier v Canada*.

[122] See Committee's General Comment No 25 (1996) on Article 25 (Participation in public affairs and the right to vote) para 25, Official Records of the General Assembly, Fifty-first Session, Supplement No 40 vol I (A/51/40 (Vol I)), annex V.

[123] See Communication No 1334/2004, *Mavlanov and Sa'di v Uzkbekistan*.

[124] *Castells v Spain*, Application No 11798/85 judgment of the European Court of Human Rights of 24 April 1992, para 43.

> It is the mass media that make the exercise of freedom of expression a reality.[125]

121. It is the duty of the media to report on all matters of public interest, whether they related to the functioning of democracy or to other matters. The European Court of Human Rights has stated:

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[126]

122. Apart from benefiting democracy, freedom of the press also serves to enhance the protection of social and economic rights, as noted by the Nobel Laureat Amartya Sen. He has noted:

> In the terrible history of famines in the World, no substantial famine has ever occurred in any independent and democratic country with a free press ... While India [where he grew up] continued to have famines under British rule right up to independence, they disappeared suddenly with the establishment of multi-party democracy and a free press.[127]

123. There are a number of principles that apply to ensure genuine freedom of the media and media users. Two of the most important are: first, states are should take particular care to encourage an independent and diverse media in order to ensure that the rights of all media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas are protected; and second, states should ensure that public broadcasting services operate in an independent manner.[128] In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

124. A number of explicit guarantees are needed in the Constitution to ensure that that freedom of the media is protected as a whole. Such statements can be found in the constitutions of numerous countries around the world (see the comparative constitutional examples below). However, in order to strengthen freedom of the media, an explicit constitutional guarantee of the following constituent elements would be of great value

- there should be no prior censorship;
- any bodies with regulatory powers over the media, including governing bodies of the public media, should be independent from political, economic or other undue influences;

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[125] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC5/85 of 13 November 1985, Series A, No. 5, para. 34.

[126] See *Castells v Spain*, Ibid at 43; *The Observer v Guardian v UK*, Application No 13585/88 judgment of European Court of Human Rights of 24 October 1991 para 59; *The Sunday Times v UK (II)*, Application No 13166/87 judgment of European Court of Human Rights of 26 November 1991 at para 65.

[127] Amartya Sen "Democracy as a Universal Value" Journal of Democracy (1999) 10. Amartya Sen, Development as Freedom. (New York: Anchor Books, 1999).

[128] Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

- the right of journalists to protect their confidential sources should be guaranteed;
- there should be no licensing of print media outlets;
- there should be no licensing of individual journalists, whether print, broadcasting or online; and
- journalists should be guaranteed the right to associate freely.

125. The following sections deal with these issues in more detail.

No prior censorship

126. No person or media outlet shall have to ask the permission of a state body before publishing. This means that no media – whether a newspaper, television or radio programme, online publication or any form of publication – should be required to a state censorship body prior to dissemination. This is a fundamental tenet of international law that is reflected in many constitutions as well as in international human rights treaties. Notably, Article 13(2) of the ACHR states:

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship.

127. The European Court of Human Rights has stated that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny."[129]

Independence of media bodies

128. In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently from government control. This helps safeguard the media's role on matters of public interest. It follows that any bodies with regulatory or governing powers over either public or private broadcasters should be independent and protected against political interference. This relates to two main types of institutions: bodies which license broadcasters and governing boards of public media outlets.

129. The need for regulatory bodies to be independent is recognised in international law. A Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the 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 transparent, allows for public input and is not controlled by any particular political party.[130]

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[129] *The Observer v Guardian v UK*, Application No 13585/88 judgment of European Court of Human Rights of 24 October 1991 para 60.

[130] Joint Declaration of 18 December 2003; available at http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2003.pdf.

130. Regional bodies, including the African Commission on Human and Peoples' Rights, and the Council of Europe [131] have also made it clear that the independence of the regulatory authorities is fundamentally important for a free media.

131. It is recalled that the Declaration of Principles on Freedom of Expression in Africa includes the statement of principle:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[132]

132. Furthermore, the Declaration of Principles on Freedom of Expression in Africa also emphasises the importance for independence of public broadcasters. It states at Principle VI:

> State and government controlled broadcasters should be transformed into public services broadcasters accountable to the public through the legislature rather than the government, in accordance with the following principles:
>
> - public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
> - the editorial independence of public service broadcasters should be guaranteed.

133. A whole Recommendation of the Committee of Ministers of the Council of Europe provides for the independence of public broadcasters[133] This states, among other things: "The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy."[134]

Protection of sources

134. Journalists routinely depend on contacts outside the media for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate or expose wrongdoing. In many cases, anonymity is the precondition upon which the information is provided to the journalist by the source; this may be motivated by fear of repercussions which might adversely affect their job security or even physical safety.

135. In recognition of the importance of this flow of information, both national and international courts have recognised that the media enjoy a special privilege allowing them not to reveal confidential sources of information unless certain stringent conditions are met.

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[131] See for instance the Committee of Ministers Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector Recommendation No. R (2000) 23, adopted 20 December 2000.

[132] Adopted by the African Commission on Human and Peoples' Rights at its 32nd session 17-23 October 2002.

[133] Recommendation No R (96) 10 of the Committee of Ministers of the Council of Europe to Member States on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.

[134] *Ibid.*, Principle 1.

136. In the case of *Goodwin v. UK*, which set a legal precedent, the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his freedom of expression. In its decision, the Court emphasised the importance of affording safeguards to the press generally and of protecting journalists' sources, in particular. It held:

> Protection of sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[135]

137. The European Court of Human Rights emphatically reinforced this view in the 2010 decision of *Sanoma Uitgevers BV v. Netherlands* and details the procedural safeguards in cases where sources are ordered by the courts to be disclosed.

> 88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.
>
> 89. The Court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources...
>
> 90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources "the full picture should be before the court" was highlighted in one of the earliest cases of this nature to be considered by the Convention bodies... The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.
>
> 91. The Court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the Court's view, that

[135] *Goodwin v UK* Application No 17488/90 judgment of the European Court of Human Rights of 27 March 1996.

the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.

92. Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources... In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk.[136]

138. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights also states:

> Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.[137]

139. The African Commission's Declaration on Principles on Freedom of Expression in Africa also states:

> Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
> - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
> - the information or similar information leading to the same result cannot be obtained elsewhere;
> - the public interest in disclosure outweighs the harm to freedom of expression; and
> - disclosure has been ordered by a court, after a full hearing.[138]

140. The Council of Europe has issued an entire Recommendation on the protection of journalists' sources.[139]

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[136] *Sanoma Uitgevers BV v Netherlands*, Application No 38224/03 judgment of the Grand Chamber of the European Court of Human Rights of 14 September 2010.

[137] Inter-American Declaration Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

[138] *Ibid*.

[139] Recommendation No R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted 8 March 2000.

Licensing and registration

141. It is 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 legitimate.

142. The African Commission on Human and Peoples' Rights sees licensing requirements as a restriction on entry into the profession and it has stated, in its *Declaration of Principles on Freedom of Expression in Africa*:

> The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.[140]

143. In relation to journalists, the Inter-American Court of Human Rights held in Compulsory Membership in an *'Association Prescribed by Law for the Practice of Journalism'*[141] that a licensing requirement for all journalists effected through compulsory membership of a professional association constituted a violation of the right to freedom of expression. The Court accepted that ensuring "the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles" was a legitimate aim. However, the Court also observed that public order depends in many ways on respect for freedom of expression. While it agreed that many other professions are regulated through entry requirements, such as law or medicine, it pointed out that journalism is a fundamentally different activity.

> Journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional *"colegio"*. The argument that a law on the compulsory licensing of journalists does not differ from similar legislation application to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom to "seek, receive and impart information and ideas of all kinds … either orally, in writing or in print …" The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law or medicine – that is to say, the things that lawyers or physicians do – is not an activity specifically guaranteed by the Convention.[142]

144. Following the Inter-American Court's judgment, the Inter-American Commission on Human Rights has issued a Declaration stating:

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[140] *Ibid.*, Principle X(2).

[141] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 American Convention on Human Rights) Ibid note 26.

[142] Ibid paras 71-72.

> Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.[143]

Print media

145. Purely technical registration systems, pursuant to which print media outlets are required to provide certain information to the authorities, may be legitimate but only if they allow no discretion to the authorities to refuse registration. In this case, registration is not used as a mechanism of censorship but rather as a source of information on ownership. The UN, OAS and OSCE special mandates on freedom of expression, in a Joint Declaration issued in 2003, stated:

> 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.[144]

146. The UN's Human Rights Committee has frequently expressed concern about registration or licensing systems for the print media.[145] Most recently, in the case of *Kungurov v Uzbekistan*, the Committee for the first time decided that there had been a violation of freedom of association in conjunction with freedom of expression in a case concerning NGO registration. The Committee examined whether the refusal to register the NGO amounted to a restriction of Kungurov's freedom of association and freedom of expression, and whether any such restrictions were justified. It held that the substantive and technical requirements of Uzbekistan's law constituted *de facto* restrictions on Kungurov's rights which did not meet the conditions of Article 22 paragraph 2 of the ICCPR. In particular, the Committee considered that the state authorities had not advanced any argument as to why such restrictions would be necessary. Taking account of the "severe consequences of the denial of state registration of 'Democracy and Rights' for the author's right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Uzbekistan", the Committee decided that such a denial was in violation of Article 22 of the ICCPR. It also decided that the registration procedure did not allow Kungurov to practice his right to freedom of expression and held that the authorities of Uzbekistan had "not made any attempt to address the author's specific claims nor has it advanced arguments as to the compatibility of the requirements ... with any of the criteria listed in article 19, paragraph 3, of the Covenant", namely that restrictions should be provide by law and necessary (a) for the respect of rights and reputation of others or (b) for the protection of national security or public order (ordre public), or public health or morals. The Committee therefore concluded that there had been a violation of Kungurov's rights

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[143] Inter-American Declaration of Principles of Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th session, 19 October 2000.

[144] *Supra* note 131.

[145] See also Concluding Observations on Lesotho's Initial Report, 8 April 1999, CCPR/C/79/Add.106 para 23; Concluding Observations on Cambodia's Initial Report, 27 July 1999, CCPR/C/79/Add.108, para 18.

under Article 22, paragraph 1 of the ICCPR, "read alone and in conjunction with article 19, paragraph 2 of the Covenant".[146]

147. The European Court of Human Rights has similarly warned of abusive registration laws. In *Gaweda v Poland*, it criticised a law that allowed registration to be refused if the proposed name of the publication was "inconsistent with the real state of affairs".[147] The Court held that it is not a permissible function of registration systems to impose requirements relating to the names of publications. In particular, "to require a title of a magazine that it embody truthful information is ... inappropriate from the standpoint of freedom of the press."[148]

Freedom of association

148. The right of freedom of association is a human right recognised in the UDHR and the ICCPR and numerous other international and regional human rights instruments.[149] Article 20 of the UDHR states:

> (1) (1) Everyone has the right to freedom of peaceful assembly and association.
> (2) No one may be compelled to belong to an association.

149. The right to freedom of association is enshrined in Article 22 of the ICCPR which states:

> Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

150. The right to freedom of association may be subject to similar restrictions as the right to freedom of expression. Any interference with the right therefore have to pass the strict three part test outlined in relation to freedom of expression earlier.

151. Freedom of association is of particular importance to journalists as a means through which to strengthen their independence and professionalism. Through an association journalists can be empowered to criticise the authorities and they are also more likely to fight for editorial independence in the media.

152. International and regional authorities, courts and tribunals have fleshed out the scope of freedom of association. In *Wilson and National Union of Journalists v UK*, a case involving the de-recognition of a trade union at a national newspaper which resulted in the collapse of existing collective bargaining agreements, the European Court delivered a strong ruling stating that trade union activism is at the core of the right to freedom of association.[150] The case followed an earlier decision in which it was established that

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[146] Communication No 1479/2006 *Kungurov v Uzbekistan*, CCPR/C/102/D/1478/2006, 2 September 2011.

[147] *Gaweda v Poland*, Application No. 26229/95 Judgment of 14 March 2002, para 43.

[148] *Ibid*, para 47.

[149] See Article 11 of the ECHR, Article 16 ACHR and Article 10 of the ACHPR. See also the African Commission's Declaration of Principles on Freedom of Expression in Africa, Principle *X*.

[150] Application Nos 30668/96, 30671/96, 30678/96, Judgment of the European Court of Human Rights of 2 July 2002

states have a strong positive obligation to ensure that the actions of a private, non-state employer do not infringe upon the right to freedom of expression.[151]

153. Court has repeated stressed that the right to freedom of association means that no one can be forced to join an association. The Inter-American Court has accepted that compulsory membership in a professional association may be acceptable in the case of lawyers or doctors, but it held that similar requirements cannot be placed in relation to journalists without violating the right to freedom of expression.[152]

Comparative Constitutional Examples

154. The following examples offer various constitutional methods of protecting freedom of the media. The Kenyan Constitution of 2010 is elaborate and presents a positive example.

> **The Constitution of Kenya, 2010**
> Article 34. Freedom of the Media
> (1) Freedom and independence of electronic media, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).
> (2) The State shall not –
> a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
> b. Penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
> (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –
> a. Are necessary to regulate the airwaves and other forms of signal distribution; and
> b. Are independent of control by government, political interests or commercial interests.
> (4) All State-owned media shall –
> a. Be free to determine independently the editorial content of their broadcasts or other communications;
> b. Be impartial; and
> c. Afford fair opportunity for the presentation of divergent views and dissenting opinions.
> (5) Parliament shall enact legislation that provides for the establishment, which shall
> a. Be independent of control by the government, political interests or commercial interests;
> b. Reflect the interests of all sections of the society; and
> c. Set media standards and regulate and monitor compliance with those standards.

155. Yet most of the constitutional provisions on protecting freedom of the media are rather brief, including the South African and Canadian examples.

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[151] *Young, James and Webster v the UK* Application Nos 7601/76, 7806/77, 13 August 1981, para 49.

[152] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 American Convention on Human Rights) Ibid note 26.

Constitution of South Africa (Bill of Rights), 1996
Article 16. Freedom of expression
(1) Everyone has the right to freedom of expression, which includes
(a) freedom of the press and other media;

The Constitution Act of Canada (Charter of Rights and Freedoms), 1982
Article 2. Fundamental Freedoms
Everyone has the following fundamental freedoms:
…
a. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

156. It is interesting that the interim constitutional texts of Egypt and Libya both protect freedom of the media.

Interim Constitution of Egypt, 2011
Article 13
Freedom of the press, printing, publication and media are guaranteed, and censorship is forbidden, as are giving ultimatums and stopping or cancelling publication from an administrative channel. Exception may be made in the case of emergency or time of war, allowing limited censorship of newspapers, publication and media on matters related to general safety or the purposes of national security, all according to the law.

Draft Constitutional Charter for the Transitional Stage of Libya, 2011
ARTICLE 14
The state shall ensure the freedom of opinion, individual and collective expression, the freedom of scientific research, the freedom of communication, the freedom of press, media, printing and publication as well as the freedom of movement, peaceful assembly, demonstration and sit-in in line with the law.

157. We also see freedom of the media protected constitutionally elsewhere in the Arab world, albeit in rather brief terms.

Constitution of Iraq, 2005
Article 38
The State shall guarantee in way that does not violate public order and morality:
(a) …
(b) freedom of press, printing, advertisement, media and publication.

Constitution of Jordan, 1952
Article 15. Rights and Duties of Jordanians
(i) …
(ii) Freedom of the press and publications shall be ensured within the limits of the law.
(iii) Newspapers shall not be banned from publication nor shall their permit be revoked except in accordance with the provisions of the law.
(iv) In the event of the declaration of martial law or a state of emergency, a limited censorship on newspapers, publications, books and broadcasts on matters affecting public safety and national defence may be imposed by law.
(v) Control of the resources of newspapers shall be regulated by law.

158. Turkey's laws and practices present a number of severe problems from a freedom of expression and right to information perspective. Notably, Article 301 of the Turkish Penal Code notoriously outlaws denigration of the Turkish Nation. Yet, the Turkish

Constitution protects freedom of expression in detailed terms, as well as freedom of the press and freedom of information. However, it is problematic from an international human rights standpoint given the very broad list of grounds for permissible restrictions under Article 26(2) which include "the indivisible integrity of the State".

> **Constitution of Turkey, 1982**
> Article 28 Freedom of the Press
> The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.
> The state shall take the necessary measures to ensure freedom of the press and freedom of information.
>
> Article 31 Right to Use Media Other Than the Press Owned by Public Corporations
> (1) Individuals and political parties have the right to use mass media and means of communication other than the press owned by public corporations. The conditions and procedures for such use shall be regulated by law.
> (2) The law shall not impose restrictions preventing the public from receiving information or forming ideas and opinions through these media, or preventing public opinion from being freely formed, on the grounds other than national security, public order, public morals, or the protection of public health.

159. It is interesting to note that the Constitution of Columbia highlights the media's freedom as well as social responsibility.

> **Constitution of Colombia, 1991**
> Article 20
> ...
> The mass media are free and have a social responsibility. The right of rectification under equitable conditions is guaranteed. There will be no censorship.

160. The Thai Constitution of 2007 protects freedom of the press.

> **Constitution of Thailand, 2007**
> Section 45. Freedom of Expression of Individual and Press
> A person shall enjoy the liberty to express his opinion, make speech, write, print, publicise, and make expression by other means.
> The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public.

161. The Portuguese Constitution does provide a relatively positive precedent because it offers a detailed and comprehensive conception of what protection of freedom of the press means. It includes protection of journalists right to information, freedom to establish media outlets, it indicates that the state has the responsibility to ensure public service media, and also emphasises the independence of the public service media.

> **Constitution of Portugal of 1974**
> Article 38. Freedom of the Press and Mass Media
> (1) Freedom of the press is safeguarded.

(2) Freedom of the press includes:

a. The freedom of expression and creativeness for journalists and literary collaborators as well as a role for the former in giving editorial direction to the concerned mass media, save where the latter belong to the State or have a doctrinal or denominational character;

b. The journalists' right of access to the sources of information, protection of their professional independence and secrecy, and election of editorial councils, in accordance with the law;

c. The right to start newspapers and any other publication regardless of any prior administrative authorization, deposit, or qualification.

(3) The law ensures, in a general way, disclosure of the ownership and forms of financing of the mass media.

(4) The State ensures the freedom and independence of the mass media against the political and economic powers; it imposes the principle of specialty with respect to companies that own general information media; it treats and support the latter in a non-discriminatory fashion and prevents their concentration, notably through multiple or inter-locking financial interests.

(5) The State ensures the existence and the operation of a public service of radio and television.

(6) The structure and the operation of the media that remain within the public sector ensure their independence against the Government, the administration, and other public bodies; it also ensures that the different lines of opinion may be expressed and confronted.

(7) Radio and television stations may operate only where a license to that effect has been delivered pursuant to a public competition held in accordance with the law.

Recommendations:

- **The new Constitution should provide explicit protection for freedom of the media and specifically protect the following elements of media freedom:**
  - **There should be no prior censorship.**
  - **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 independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be guaranteed.**
  - **The right of journalists to protect their confidential sources of information should be guaranteed.**
  - **Journalists should be free to associate in professional bodies of their choice.**

Freedom of Expression and ICTs

162. This section of this analysis examines the issue of freedom of expression and information and communication technologies (ICTs), such as the Internet and mobile based electronic information dissemination systems. However, ARTICLE 19 has drafted a separate analysis on the appropriate legal framework for the protection of freedom of expression and ICTs. This section therefore deals only with the constitutional protection of freedom of expression through ICTs.

163. ARTICLE 19 recalls that the UN Human Rights Committee in its recent General Comment has 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",[153] 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.[154]

164. There are several important dimensions to highlight with respect to the Internet. *First* and importantly, as indicated above, Article 19(2) of the ICCPR applies to all forms of expression and the means of their dissemination, including expression on the Internet.[155] This is understandable as the Internet presents both a forum for the expression of and access to information and ideas.

165. *Second*, any restrictions internet-based, electronic or other such information dissemination systems, including the responsibility of Internet service providers meet the requirements of Article 19(3) of the ICCPR. They must therefore meet the regime for permissible exceptions as indicated above. For instance, the requirement that any restrictions must be narrowly tailored and content-specific, which means that it would be impermissible to shut down a website or liquidate an Internet service provider, while it would be possible to achieve a protective objective by isolating and removing the offending content. The Committee has emphasised this point in its recent General Comment stating:

> 43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination

[153] *Supra* note 42, para 15.

[154] *Ibid.*, para 39.

[155] *Ibid.*, para 12.

> system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.[156]

166. In June 2011, the four international special mandates on freedom of expression from the UN and regional human rights systems (Inter-American, European and African)[157] issued a Joint Declaration on Freedom of Expression and the Internet in consultation with ARTICLE 19.[158] Amongst other things, this joint declaration affirms the application of freedom of expression rights to the Internet and emphasises that the imposition of criminal liability for expression-related offenses must take into account the overall public interest in protecting both expression and the forum in which it is made.[159]

167. The UN Special Rapporteur has recently stated that the Internet has "become an indispensable tool for realizing a range of human rights."[160]

168. The mandate-holder has also on numerous occasions indicated his views on the relationship between the Internet and freedom of expression. [161] He has emphasised that in relation to restrictions on content on the Internet, as well as meeting the three-part cumulative test:

> any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.[162]

Comparative Constitutional Examples

169. In terms of comparative examples, the parliament of Estonia passed legislation in 2000 declaring Internet access a basic human right.[163] The Constitutional Council of France

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[156] Concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR). See General Comment para 43.

[157] The United Nations Special Rapporteur on Freedom of Opinion and Expression, Frank LaRue; the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the Organization of American States, Catalina Botero Marino; the Organization for Security and Cooperation in Europe Representative on Freedom of the Media, Dunja Mijatoviæ; and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, Faith Pansy Tlakula

[158] Joint Declaration on Freedom of Expression and the Internet (1 June 2011); available at http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf

[159] Paragraph 1(a) and 4(b).

[160] Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Frank La Rue, 16 May 2011 A/HRC/17/27 A/HRC/14/23/Add.2.

[161] A/HRC/17/27 A/HRC/14/23/Add.2 (paras 9 – 10); A/HRC/7/14 (paras 29- 31, Internet governance); A/HRC/4/27 (paras 38 – 43, Internet governance and digital democracy); E/CN.4/2006/55 (paras 29 – 43, Internet governance and human rights); E/CN.4/2002/75 (paras 88 - 95).

[162] Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Frank La Rue, 16 May 2011 A/HRC/17/27 A/HRC/14/23/Add.2 at para 69.

[163] "Internet as Human Right: This is Estonia! 4 December 2010; available from http://www.lithuaniatribune.com/2010/04/12/internet-as-human-right-this-is-estonia/

effectively declared Internet access a fundamental right in 2009, and the constitutional court of Costa Rica reached a similar decision in 2010.[164] Finland passed a decree in 2010 stating that every Internet connection needs to have a speed of at least one Megabit per second (broadband level).[165] According to a BBC survey in March 2010, 79% of those interviewed in 26 countries believe that Internet access is a fundamental human right.[166]

170. Whilst there no express constitutional provisions protecting freedom of expression and freedom of information on the Internet, there are a number of legal developments towards the recognition of access to the Internet as a fundamental right. It is speculated that Internet access will be protected in future constitutions as a human right. Given the paucity in protection of freedom of expression and restrictions on Internet speech in Tunisia over recent years, it would be perfectly appropriate and justifiable for the drafters of the Tunisian Constitution to include the exercise of the right of freedom of expression and freedom of information through the Internet as a constitutionally protected right.

Recommendations:

- **The new Tunisian Constitution should state that all forms of expression and the means of their dissemination, including expression through ICTs – or information dissemination systems, whether electronic, on the internet or otherwise, – are protected by the right to freedom of expression.**
- **It should also provide that any restrictions on such ICTs, including the responsibility of Internet Service providers, must meet the requirements for permissible limitations on freedom of expression as already indicated.**

[164] Decision 2009-580, Act furthering the diffusion and protection of creation on the Internet.

[165] "732/2009, Decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service," (original: Liikenne- ja viestintäministeriön asetus tarkoituksenmukaisen internet-yhteyden vähimmäisnopeudesta yleispalvelussa), FINLEX, 22 October 2009. Available from: http://www.finlex.fi/en/laki/kaannokset/2009/en20090732.

[166] "Four in five regard Internet access as a fundamental right: global poll" BBC News, 8 March 2010. Available from: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf.

The Place of Religion in the Constitution

171. Although the freedom to express one's religion is specifically protected by the ICCPR,[167] it still constitutes an aspect of freedom of expression. It therefore seems appropriate to clarify the place of religion in the Constitution in relation to international law. Furthermore, the matter was shown to be of clear importance during debates that took place in February 2012 at a discussion seminar in Sbeïtla organised by ARTICLE 19 and the organisations Alpha Steppa, Moulahedh and the Kasserine Development League.

1. The protection of freedom of religion in the Constitution is not controversial in itself.

(a) Freedom of religion is generally protected by a specific provision in the Constitution

172. First and foremost, it should be noted that freedom of religion is protected both by specific provisions in international human rights law and in the constitutions of many countries around the world. In other words, the protection of freedom of religion by the Tunisian Constitution is not controversial in itself.

173. As such, article 18 of the ICCPR is written as follows:

> 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.

174. Similarly, article 9 of the European Convention on Human Rights states that:

[167] Article 18 of the ICCPR.

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

175. Article 12 of the American Convention on Human Rights stipulates:

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

176. Finally, it is notable that Article 8 of the African Charter on Human and Peoples' Rights protects freedom of religion in the following terms:

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

177. Without being exhaustive, the following examples taken from comparative constitutional law may also be noted:

Constitution of Mali (1992)

Article 4: Every person has the right to freedom of thought, conscience, religion, worship, opinion, expression, and creation in respect to the law.

Senegalese Constitution

Article 24

Freedom of conscience and the free practice and profession of religion and culture, and the profession of religious education shall, subject to the respect for public order, be guaranteed to all.

Religious institutions and communities shall have the right to develop without hindrance. They shall not be subject to direct supervision by the state. They shall regulate and administer their affairs autonomously

178. It also seems relevant to note that freedom of religion is even protected in states with very strong secular traditions like France and Turkey:

Declaration of the Rights of Man and of the Citizen

Article X

No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.

Turkish Constitution

ARTICLE 24: Everyone has the right to freedom of conscience, religious belief and conviction.

Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.

No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.

Education and instruction in religion and ethics shall be conducted under State supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives.

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.

179. Finally, although freedom of religion is specifically protected, it should still be underlined that the specific provisions, such as those mentioned above, do not make direct reference to God or to any particular religion. From ARTICLE 19's point of view, this is the best way to protect freedom of religion for everyone, especially religious minorities.

(b) Religion is mentioned symbolically in the Preamble of many constitutions

180. In addition to specific provisions for freedom of religion, the preamble of many constitutions makes symbolic reference to the country's identity or cultural and religious traditions, or even to God.

181. As such, the preamble of the Slovak Constitution mentions *"the spiritual bequest of Cyril and Methodius"*, two saints who brought Christianity to the country.

182. The preamble of the draft Constitution of the European Union begins in the following way:

> DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law;

183. In many countries, references to God in the preamble are accompanied by references to other universal or democratic values, or even international human rights treaties.

184. As such, in Poland, where Catholic religious tradition is very strong, the Preamble of the Constitution refers to citizens of the Republic including both *"those who believe in God as the source of truth, justice, good and beauty"* as well as *"those not sharing such faith but respecting those universal values as arising from other sources"*. The preamble continues by mentioning the Polish people's responsibility *"before God or our own consciences"*.

185. In Switzerland, the Preamble of the Constitution begins with *"In the name of Almighty God"*, and then immediately followed by a declaration of the resolve of the Swiss People and the Cantons to *"renew their alliance so as to strengthen liberty, democracy, independence and peace in a spirit of solidarity and openness towards the world"*.

186. Similarly, the preamble of the Constitution of Liberia acknowledges its gratitude to God, while emphasising that the Liberian people are of one common body politic, *"irrespective of history, tradition, creed or ethnic background"*. Furthermore, the preamble clearly states that the Liberian government has been established for the purpose of promoting *"unity, liberty, peace, stability, equality, justice and human rights under the rule of law, with opportunities for political, social, moral, spiritual and cultural advancement of our society, for ourselves and for our posterity"*. [169]

[169] Ibid.

187. The preamble of the Brazilian Constitution is written in the same vein. The Brazilian people are placed under the protection of God, but the democratic State is established for the purpose of ensuring *"the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society"*. [170]

188. In the United States, the preambles of the constitutions of many American states, such as Alabama (1901) and Michigan (1908) contain a reference to God. However, the Constitution of the United States includes very strong protection of freedom of expression in the form of the 1st amendment to the Constitution, which expressly prohibits Congress from adopting laws leading to a state religion being created in the United States.

189. Finally, it should be noted that, in certain countries such as Afghanistan, the preamble of the Constitution makes reference to Islam, but also international human rights treaties. As such, the preamble of the Afghan Constitution proclaims both the Afghan people's *"faith in God Almighty"* and *"[Belief] in the Sacred religion of Islam"*, as well as *"Observing the United Nations Charter and respecting the Universal Declaration of Human Rights"*.[171]

(c) A number of constitutions recognise a State religion

190. Some countries go further than mentioning religion in the preamble of the Constitution, and instate a State religion. Notably, this was the case in the 1959 Tunisian Constitution.

191. First and foremost, it should be known that international law does not prohibit State religions in and of themselves. In fact, it would be difficult to ignore that many States with long-standing democratic traditions, such as Norway or the United Kingdom, have a State religion.

192. This was notably the reason why the Grand Chamber of the European Court of Human Rights, in the *Lautsi v. Italy* case (no. 30814/06, 18 March 2011), held that the place given to religion in a country was at the discretion of States:

> 68. The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.

193. The case in question involved the presence of religious symbols, in this case a crucifix, in the classrooms of Italian public schools. The Court concluded that:

[170] Ibid.
[171] Ibid.

69. The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination (*ibid.*).

194. Nevertheless, the highest international authorities, including the European Court, still emphasised that 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.

195. In particular, the The UN Special Rapporteur on Freedom of Religion and Belief expressed strong reservations toward State religions. He stated the following:[172]

64. The Special Rapporteur would like to reiterate in this context that, while the notion of State religions is not per se prohibited under international human rights law, States have to ensure that this does not lead to a de jure or de facto discrimination of members of other religions and beliefs. The burden of proof in this regard falls on the State. In this context, the Special Rapporteurs fully subscribes to the position taken by the Human Rights Committee in its general comment No. 22, paragraph 9, which emphasizes that "the fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.

65. The Special Rapporteur would also like to reiterate warnings against aggravated discrimination following the adoption of a State religion. While the mere existence of a State religion may not in itself be incompatible with human rights, this concept must neither be exploited at the expense of the rights of minorities nor lead to discrimination on the grounds of religion or belief. Formal or legal distinction between different kinds of religious or belief communities carries the seed of discrimination insofar as such a distinction in their status implies a difference in rights or treatment.

66. Indeed, it seems difficult, if not impossible, to conceive of an application of the concept of an official "State religion" that in practice does not have adverse effects on religious minorities, thus discriminating against their members. As an earlier mandate holder, Abdelfattah Amor, has rightly pointed out in this context, "to the extent that everything ultimately depends on the goodwill of the State, the personality of those in office at any given moment, and other unpredictable or subjective factors, there is no serious guarantee in law that the State will at all times respect minority ethnic and religious rights". When the State itself announces its religion in the Constitution, the law arguably ceases to reflect the ethnic and religious variety of the society, opening the floodgates to arbitrary action and religious intolerance. Furthermore, if one religion is recognized as a State

[172] Special Rapporteur on Freedom of Religion and Belief, A/HRC/19/60, 22 December 2011

religion, then women belonging to religious minorities, or those who do not follow the mainstream interpretation of the State religion, may face aggravated discrimination; for example when the State or society seeks to impose its view of women. Both with regard to State religions and other religious or belief communities, the State should never try to take control of religion by defining its content and concepts or by imposing limitations, apart from those which are strictly necessary pursuant to article 18, paragraph 3, of the International Covenant on Civil and Political Rights.

196. During the discussion seminar held at Sbeitla, it was ARTICLE 19's understanding that the drafters of the Tunisian Constitution intended to reuse article 1 from the former 1959 Tunisian Constitution, which recognised Islam as the official religion of the country. However, in the light of reservations expressed by the UN Special Rapporteur on this matter, ARTICLE 19 can only recommend the utmost caution in recognising a State religion within the Constitution.

197. Moreover, ARTICLE 19 recalls that adopting a new Constitution is generally meant to signal a break with the past and symbolise a new start for the country. It would therefore seem rather strange, from a symbolic perspective, to take article 1 from the former Tunisian Constitution and reuse it in the same place in the new Constitution.

198. Finally, it is notable that, even in predominantly Muslim countries that recognise a State religion, Islam is not necessarily mentioned in the Constitution. This is notably the case in Indonesia, where article 29 of the Constitution provides that *"the State is based on the belief in the one supreme God"*, without referring to Islam or the Sharia.

2. Freedom of religion remains limited

199. Although freedom of religion is protected both by international law and by a large number of constitutions, it is still subject to certain limits. As such, article 18 indent 3 of the ICCPR states that:

> 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.

200. Furthermore, ARTICLE 19 has long been fighting against laws which punish blasphemous remarks, as they are unjustified in a democratic society and are often used against religious minorities. This position is notably supported by the Parliamentary Assembly of the Council of Europe, which declared in its Recommendation 1805 (2007)

on blasphemy, religious insults and hate speech against persons on grounds of their religion, that:[173]

> 4. With regard to blasphemy, religious insults and hate speech against persons on the grounds of their religion, the state is responsible for determining what should count as criminal offences within the limits imposed by the jurisprudence of the European Court of Human Rights. **In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere.** Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.
>
> 5. The Assembly welcomes the preliminary report adopted on 16 and 17 March 2007 by the European Commission for Democracy through Law (Venice Commission) on this subject and agrees with it that **in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion.** Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.

201. This leads us to our last point regarding the place of "religious law" in the Constitution, and the place of the Sharia in particular. ARTICLE 19 believes the answer is clear and beyond question: any mention of the Sharia (or Islamic law) in the Tunisian Constitution should be prohibited. The Sharia, a set of standards and regulations belonging to a certain interpretation of Islam, is scarcely compatible, if not completely incompatible, with international law and the general demands of a democratic society, especially one emerging from a revolution.

202. This was formally recognised by the European Court of Human Rights in the *Refah Partisi (Prosperity Party) et al v. Turkey* ([GC], Nos. 41340/98, 41342/98, 41343/98 and 41344/98, para 123, ECHR 2003-I case involving the dissolution of a political party whose actions appeared to impose the Sharia. The European Court stated the following:

123. The Court concurs in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

> "72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia , are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. [...] In the Court's view, a political party whose actions seem to be aimed at introducing **sharia** in a State party to the

[173] The full text of the Recommendation is available at: http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta07/erec1805.htm

Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention."

203. This judgment is all the more remarkable, given that the European Court of Human Rights generally confers a wide margin of appreciation to States in cases involving laws on blasphemy or the place of religion within the State (see *Lautsi*, above). Furthermore, this does not exclude defending or teaching the sharia, so long as doing so does not incite violence (see the *Günduz v. Turkey* case, no. 35071/97, 4 December 2003).

204. In any event, ARTICLE 19 notes with approval that the drafters of the Tunisian Constitution do not seem inclined to include the sharia in the Tunisian Constitution, according to the debates during the discussion seminar on the Constitution in Sbeilta.

205. If they still wish to include a reference to the Muslim religion, we refer them to the preamble of the aforementioned Afghan Constitution as a possible model for the Tunisian Constitution (paragraph 189).

Recommendations;

- **Any reference to the sharia in the Constitution should be prohibited as it is unreconcilable with the fundamental principles of democracy and international human rights law.**
- **If the new Constitution makes references to the country's cultural and religious values, including Islam, they should be mentioned in the Preamble of the Constitution, and should be accompanied by references to the universal values of human rights and the fundamental principles of democracy.**
- **Freedom of religion must be guaranteed for all, in accordance with the International Covenant on Civil and Political Rights.**

Enforcement of Rights

First and foremost, it should be distinguished which rights are guaranteed by the Constitution, and which are guaranteed under international law.

Enforcement of rights guaranteed by the Constitution

206. The enforcement of rights guaranteed by the Constitution through the use of effective remedies is absolutely essential for full enjoyment of rights. Without being enforced, any declaration, charter or chapter dedicated to fundamental rights and freedoms is undermined. The following sections present various models which we believe to be most appropriate in the Tunisian context, on account of its predominantly civil law tradition. The French, German and Spanish examples are examined in particular detail, especially the types of constitutional remedies provided for in the Constitution of these countries and the composition of the competent bodies interpreting the Constitution. For completeness, although they have different traditions, ARTICLE 19 has also included some references to models taken from common law.

1. The French model

(a) The various types of remedy

207. The enforcement of rights and freedoms relies on the presence of a competent body to interpret the Constitution. In France, this is the Constitutional Council. The composition and the competencies of the Council are defined in the Constitution (Title VII, articles 56-63).

208. The Council reviews the constitutionality of laws in two ways. It can act both by way of "action" and "exception".

- Reviewing constitutionality by way of action

209. Reviewing constitutionality by way of action is an abstract review of the law, after it has been voted by Parliament but before it has been promulgated. The effect of this review is *erga omnes*, meaning that any law judged to be unconstitutional is rendered invalid.

210. The review is limited in so far as it is optional, except in the case of organic laws. Furthermore, the Constitutional Council can only be consulted by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or 60 Members of the National Assembly or 60 Senators. Individuals or

corporate bodies can therefore neither directly nor indirectly refer the constitutionality of a law to the Constitutional Council before it has been promulgated.[174]

211. When constitutionality is reviewed by way of action, the Constitutional Council must rule within one month, or one week in urgent cases and upon request by the Government.[175]

- Priority preliminary ruling on constitutionality

212. Priority preliminary ruling on constitutionality (PPRC) is a relatively recent procedure, allowing any person who is involved in legal proceedings before an administrative or judicial court to contest the constitutionality of a promulgated statutory provision. In other words, PPRC allows for constitutionality to be monitored *a posteriori* by way of exception.

213. PPRC is precisely defined.[176] Firstly, only parties in court can raise an exception of unconstitutionality. The judge therefore does not have the power to raise the constitutionality of a legislative provision of office. Secondly, only legislative provisions can be contested, and not administrative acts, such as decrees or judgments that fall under the control of the Council of State.

214. Furthermore, the PPRC is subject to a twofold screening process: first by the judicial or administrative trial judge, and then by the Supreme Court or the Council of State, depending on the type of court that the provision was contested in.

215. The reasons for the Constitutional Council being invoked are examined by the trial judge, followed by the Supreme Court or the Council of State depending on the case, in order to establish: (1) that the legislative provision being questioned is applicable to the dispute or the proceedings, or represents grounds for prosecution; (2) that the legislative provision being contested has not already been declared to conform to the Constitution by the Constitutional Council; (3) that the question is new and is serious in nature.

216. Only the Supreme Court or the Council of State can decide to refer the PPRC to the Constitutional Council.[177] Refusal by the supreme courts to refer to the Constitutional Council cannot be appealed. By contrast, if the trial judge refuses to refer a PPRC, this decision can be contested during an appeal or an appeal in cassation.

217. Once the PPRC has been referred, the court must suspend proceedings while waiting for a decision from the supreme courts and then, if it has been referred to, the Constitutional Council. The Constitutional Council has three months to reach its decision from the day that it is referred to. If the Constitutional Council rules that the contested provision conforms to the Constitution, the court must implement it. If the

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[174] See article 61 of the French Constitution, available at: http://www.assemblee-nationale.fr/connaissance/constitution.asp#titre_7.

[175] Article 61 of the French Constitution.

[176] Although remedy by way of exception is provided for in article 61-1 of the Constitution, the details of its implementation are laid out in organic law no. 2009-1523 of 10 December 2009 on the application of article 61-1 of the Constitution which amended ordinance No. 58-1067 of 7 November 1958 referring organic law to the Constitutional Council and by decree No. 148 of 16 February 2010

[177] See article 61-1 of the Constitution.

Constitutional Council rules that the contested provision is in contravention of the Constitution, the ruling has two consequences: (1) the provision is discarded in the relevant trial; and (2) the provision is abrogated, either with immediate effect, or from a later date determined by the Council. Rulings by the Constitutional Council cannot be appealed.

218. In conclusion, review of French constitutionality is relatively limited. In particular, the Constitutional Council does not have jurisdiction to hear individual complaints. In this regard, and as will be seen in the following sections, the German and Spanish models seem better placed to ensure effective protection of rights and freedoms. However, given that the Tunisian legal system is predominantly modelled on the French system, the French constitutional model remains relevant. Furthermore, although PPRC is not perfect, it still represents an overall improvement to the previous system, which was limited to reviewing the constitutionality of laws by way of action.

(b) Composition of the Constitutional Council

219. The Constitutional Council is composed in the following way: [178]

The Constitutional Council is composed of 9 members, one third of whom are replaced every three years. The members of the Council are appointed by the President of the Republic and by the Presidents of each of the Parliamentary Assemblies (Senate and National Assembly). Former Presidents of the Republic are de jure life members of the Constitutional Council, provided they do not occupy a post incompatible with the mandate of Council member, in which case they cannot sit.

The President of the Constitutional Council is appointed by the President of the Republic from among the members.

The members are appointed for a non-renewable nine-year term. However, where a member is appointed to replace another member who is unable to complete his term of office, the term of office of the replacement may be extended for the duration of a complete mandate if, on expiry of the mandate of the member who was replaced, his replacement has not occupied the post for more than three years.

The members take an oath before the President of the Republic.

There are no age or professional qualifications for membership of the Constitutional Council. The duties are incompatible with those of members of the government or the Economic and Social and Environment Council, as well as any electoral mandate. Members are also free of professional conflicts of interest, in the same way as members of Parliament. During their term of office, members of the Council cannot be appointed to public posts or be promoted on merit if they are civil servants.

Members of the Constitutional Council can freely relinquish their duties and can be compulsorily retired from office in the event of incompatibility or permanent physical incapacity established by the Constitutional Council.

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178 See http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/presentation-generale/presentation-generale.206.html

220. The process for appointing the members of the Constitutional Council therefore does not easily lend to it being considered a fully-fledged court. It is seen more as a political body. For this reason, ARTICLE 19 encourages drafters of the Tunisian Constitution to resist the temptation of resurrecting the former Tunisian Constitutional Council, which was largely based on the French model.

221. Indeed, although the jurisprudence of the French Constitutional Council has demonstrated its independence in the face of political pressures, the Tunisian experience has shown that its local equivalent has not been able to safeguard the country's rights and freedoms. Instead, ARTICLE 19 recommends a true constitutional court being implemented, following the German or Spanish models presented below.

2. The German model

(a) The various types of remedy

222. German Basic Law provides three types of constitutional remedy. Two of them, the *"Verfassungsbeschwerde"* or "constitutional complaint" and the *"konkrete Normenkontrolle"* or "concrete judicial review", allow individuals to bring a violation of their fundamental rights before the Federal Constitutional Court (*Bundesverfassungsgericht*). The third allows for abstract reviews of conformity to Basic Law to be conducted.

- Constitutional complaint

223. Constitutional complaint allows anybody to contest an act of public authority which the person believes to violate of his or her fundamental rights. The contested act can take various forms: it could be an act carried out by an executive power, a legislative provision or a ruling from a judicial power. The acts of private individuals may also be subject to a constitutional complaint if the people concerned carry out duties of public authority, notably by way of delegation.

224. The Federal Constitutional Court is exclusively competent for examining the admissibility of the complaint. An application is inadmissible if the contested ruling is subject to appeal. Furthermore, to be admissible, the complaint must fulfil one of the following requirements: it raises a constitutional question of fundamental importance; the alleged violation of fundamental rights is particularly serious; or the petitioner would suffer particularly serious harm in the absence of a Court ruling.[179]

225. The German constitutional complaint therefore presents certain advantages over the French unconstitutional exception (PPRC), particularly in that any individual can refer a constitutional complaint directly to the Federal Constitutional Court, without being screened by other courts first.

- Concrete judicial review

[179] For further details, see http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/cahiers-du-conseil/cahier-n-10/le-recours-constitutionnel-en-droit-allemand.52367.html

226. In German law, the equivalent remedy to the French unconstitutional exception is concrete judicial review. Basic Law provides that a court can refer to the Federal Constitutional Court during a pending dispute, if it believes that a law or legislative provision applicable to the dispute is unconstitutional.

227. However, unlike the PPRC, any court can refer to Federal Constitutional Court, without any prior screening by supreme courts. Furthermore, the referral to the Federal Constitutional Court is independent of a corresponding application from one of the parties in the dispute. In other words, the judge can refer to the Federal Constitutional Court and raise the unconstitutionality of a law or legislative provision *ex officio*.

228. If the Federal Constitutional Court concludes that the law or legislative provision is unconstitutional, it is declared null and void or incompatible with Basic Law. The Federal Constitutional Court is exclusively competent for declaring the annulment of a law.

- Abstract review of constitutionality

229. Finally, it should be noted that, beyond concrete judicial review, the Federal Government, the government of a *Land* or a quarter of members of Parliament (*Bundestag*) can refer to the Federal Constitutional Court requesting a law's conformity to Basic Law to be reviewed (abstract review of constitutionality). This type of monitoring is therefore similar to French abstract review of constitutionality by way of action, at least in so much as referral to the Constitutional Council.

(b) Composition of the Federal Constitutional Court

230. Unlike the French Constitutional Council, the Federal Constitutional Court has a true juridical role. It is composed of sixteen judges, appointed for a non-renewable mandate of twelve years. Eight of them are elected by the *Bundestag* and the other by the *Bundesrat*, depending on different procedures in each case. In principle, people chosen to carry out the role of a Federal Court judge are experienced lawyers. In addition, six of them are appointed by judges belonging to one of the five federal courts.

231. In view of the above, ARTICLE 19 believes that the constitutional remedies open to individuals in German law, together with the composition of the Federal Constitutional Court, are particularly appropriate for guaranteeing effective protection of fundamental rights and freedoms. We therefore encourage the drafters of the Tunisian Constitution to give it the greatest consideration.

3. The Spanish model

(a) The various types of remedy

232. In Spain, the Constitutional Court is competent to hear three types of constitutional remedy: (1) appeal for protection (*recurso de amparo*); (2) question of unconstitutionality (*cuestión de inconstitucionalidad*); and (3) action of unconstitutionality (*recurso de inconstitucionalidad*).

- Appeal for protection

233. The appeal for protection is the most significant mechanism for the protection of fundamental rights in the Spanish system. Article 53.2 of the Constitution states that any citizen may assert his or her claim to the protection of fundamental rights recognised in the relevant section of the Constitution before ordinary courts. This type of application is made by means of a preferential and summary procedure and, when appropriate, by submitting an individual appeal for protection to the Constitutional Court. Notably, this appeal is applicable to the actions of public authorities.

234. The Constitution also states that the appeal for protection is open to any individual or corporate body with a legitimate interest, as well as the Ombudsman and the Office of the Public Prosecutor.[180]

235. The rest of the procedure is defined in Organic Law 2/1979 on the Constitutional Court.

236. In principle, only acts or decisions from executive, legislative and judicial branches of the state are subject to appeal.[181] In other words, general regulatory or legislative standards are usually excluded, as well as acts originating from private individuals. That said, the scope for appeal has been widened in practice. Generally, individuals use appeal for protection to assert the violation of a fundamental right, even when the case in question relates to the application of a general law.

237. To be admissible, the decision or act being contested in the application must not be subject to appeal. Furthermore, the application must be submitted within 20 to 30 days, depending on the type of act being contested. In principle, the deadline is set from the date of notification of the ruling given in the previous legal proceedings by the competent courts.[182]A number of formal and material requirements must also be met.[183] Suffice to say that the application must show the appeal to be of special constitutional significance.

238. Finally, the Constitutional Court issues a judgment either granting or denying protection.[184] A judgment granting protection (*amparo*) contains one or more of the following pronouncements: a) Declaration of nullity of the decision, act or resolution that prevented the full exercise of protected rights and freedoms, specifying, where applicable, the scope of its consequences; b) Recognition of the public right or freedom in the light of the constitutional provision relating to its substance; c) Full restoration of the applicant's right or freedom and adoption, where appropriate, of measures conducive to its preservation.[185]

- Question of unconstitutionality

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[180] Article 162 (1)(b) of the Constitution: http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx#F24.

[181] See articles 41 to 44 of Organic Law No. 2/79 on the Constitutional Court as amended, available at: http://www.tribunalconstitucional.es/en/tribunal/normasreguladoras/Lists/NormasRegPDF/LOTC-en.pdf

[182] See articles 43 and 44 of the aforementioned organic law.

[183] See article 49 of the organic law.

[184] Article 53 of the aforementioned organic law.

[185] Article 55 of the organic law.

239. Further to an appeal for protection, article 35 of organic law 02/1979 on the Constitutional Court provides a review mechanism for the constitutionality of laws: the "question of unconstitutionality". Where a judge or a court, *proprio motu* or at the request of a party, considers that a legislative provision which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the question can be raised before the Constitutional Court.

240. It is important to note that, in any event, it is at the judge's discretion, and the judge's discretion alone, whether the contested law is in contravention of the Constitution, and therefore whether to refer it to the Constitutional Court. If the question is not referred to the Constitutional Court, in principle this does not affect the right to jurisdictional protection guaranteed by article 24 of the Constitution.

241. This remedy is still less restrictive than the French PPRC, as it is not subject to a twofold screening process, notably by supreme judges. It therefore has more in common with German concrete judicial review.

242. Furthermore, unlike the appeal for protection, the question of unconstitutionality can also cover a law's compatibility with all the provisions in the Constitution, and not just those in the core section on fundamental rights.

243. It is interesting to note that parties have the right to take part in proceedings before the Constitutional Court from the moment that the question of unconstitutionality is judged admissible.[186]

244. Where the Court rules the law is unconstitutional and invalid, the judgment has an *erga omnes* effect, thereby not only restricting it to the concrete dispute in question.[187]

245. The judgements from the Constitutional Court also cover interpretive authority, binding on judges and courts.[188] Furthermore, the Constitutional Court often gives interpretive judgements, where the law in question is not ruled unconstitutional, but the conforming interpretation is applied to the Constitution. This interpretation is binding on judges and courts.

- Action of unconstitutionality

246. The Spanish action of unconstitutionality allows for abstract review of the constitutionality of laws by way of action. Article 162 of the Constitution states that this remedy is open to the following people: the President of the Government, the Ombudsman, fifty Deputies, fifty Senators, the executive corporate bodies of the Autonomous Communities and, when applicable, their Assemblies.

247. Like the constitutional remedies mentioned above, the procedure is defined in the organic law on the Constitutional Court.[189] It is interesting to note that, unlike the French

[186] See articles 36 and 37 of the aforementioned 02/79 organic law.
[187] Ibid. articles 38 ets. See also article 164 of the Constitution.
[188] Ibid., article 38(3) and 40(2).
[189] Articles 31 to 34.

abstract review of constitutionality by way of action, the Spanish action of unconstitutionality takes place *a posteriori*, that is to say after the law has been published in the Official State Gazette.

248. In appeals against unconstitutionality, the judgments of the Constitutional Court can declare a contested law or legislative provision as unconstitutional. The pronounced judgment then has an *erga omnes* effect.[190]

(b) Composition of the Constitutional Court

249. The composition of the Constitutional Court is defined in articles 159 and 160, Part IX of the Constitution, outlined as follows:

PART IX
Constitutional Court

Article 159.

1. The Constitutional Court shall consist of twelve members appointed by the King. Of these, four shall be nominated by Congress by a majority of three fifths of its members, four shall be nominated by the Senate with the same majority, two shall be nominated by the Government, and two by the General Council of the Judiciary.

2. The members of the Constitutional Court shall be appointed from amongst Magistrates and Prosecutors, University professors, public officials and lawyers, all of whom must be jurists of recognised standing with at least fifteen years' experience in the professional exercise.

3. The members of the Constitutional Court shall be appointed for a period of nine years and shall be renewed by thirds every three years.

4. Membership of the Constitutional Court is incompatible with: any representative function, any political or administrative office, a management role in a political party or trade union or any employment in their service, a career as a Judge or Prosecutor, and any professional or commercial activity whatsoever. 4. Furthermore, the disabilities related to the members of the Judiciary shall also be applicable to the members of the Constitutional Court. 5. The members of the Constitutional Court shall be independent and irremovable during their term of office.

Article 160.

The President of the Constitutional Court shall be appointed by the King from amongst its members, on the recommendation of the Plenum of the Court itself, for a term of three years.

250. The composition of the Constitutional Court is a compromise between the German Federal Constitutional Court and the French Constitutional Council. In any event, it is

[190] See article 38 of the aforementioned 02/79 organic law.

clear that the Spanish Constitutional Court exercises purely judicial competences, and has greater independence than its French counterpart. It therefore represents a possible model for Tunisia.

251. Similarly, constitutional remedies provided for by Spanish law are entirely appropriate for effectively safeguarding rights and freedoms, and can also serve as a point of reference for drafters of the Tunisian Constitution.

4. Common law models

252. Finally, although common law models may seem difficult to translate into the context of Tunisian civil law, some provisions in the South African and Canadian Constitutions appear relevant to the enforcement of fundamental rights. They are replicated further below. In particular, the provisions provide for remedies to be brought before ordinary courts when rights protected by the Constitution have been violated. However, the type of remedy is not specified. The remedy must simply be appropriate for the circumstances of the case and, for Canada, must provide compensation. The relevant provisions of the South African and Canadian Constitutions are shown below:

Constitution of South Africa (*Bill of Rights*), 1996
Article 38. Enforcing Rights
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

The Constitution Act of Canada (Charter of Rights and Freedoms), 1982
Article 24
(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
Exclusion of evidence bringing administration of justice into disrepute.

Enforcement of international law in domestic legal order

253. Further to the protection of fundamental rights in the Constitution, States are required by international law to give effect to the rights set forth in international human rights treaties. As such, article 2 indent 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.

254. Three questions present themselves: firstly, how international conventions are enforced in domestic law, then, the place of international law in domestic legal order, and finally, the application of international law by national courts.

5. Validity of treaties in national law: monist and dualist systems

255. In many so-called 'monist' countries, like France or the Netherlands for example, a provision in the Constitution makes treaties binding as soon as they are ratified or published. This was also the case in the 1959 Tunisian Constitution where article 32 stated that "treaties have the force of law only after their ratification". This type of provision therefore makes international law directly applicable in national law.

256. Monist countries are different from so-called 'dualist' countries, such as the United Kingdom and Italy, where international treaties are only valid once they have been translated into domestic law. In other words, international standards must become 'national' in order to apply. From the point of view of international law, the dualist system runs the risk that a state could ratify a convention or treaty without the intention of translating it into domestic law, which makes the enforcement of the treaty much more uncertain.

257. The Human Rights Committee has recognised the validity of these different approaches so long as they result in effective enforcement of the rights guaranteed by the ICCPR. However, it has expressed a strong preference for immediate and direct application of these rights into the national legal order of States. In General Comment No. 31, the Committee stated:

> Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.[191]

6. The place of international law in domestic law

258. From the point of view of international law, international law should take 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.

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[191] General Comment No. 31 on Article 2 of the Covenant (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 21 April 2004, CCPR/C/74/CRP.4/Rev 6.

259. That said, the place of international law in domestic law varies between countries. Given that Tunisia has a monist legal tradition, the following developments are confined to examining the matter in other monist countries.

260. In many countries, the Constitution provides for precedence of international treaties over the law but not over the Constitution. This is notably the case in the Dutch, French and Czech Constitutions, where the relevant provisions are replicated below:

> **2002 Constitution of the Netherlands**
> **Article 91. 3**
> Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.
>
> **1958 Constitution of France**
> **Article 55**
> Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.
>
> **1993 Constitution of the Czech Republic**
> **Article 10**
> Promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international agreement make provision contrary to a law, the international agreement shall be applied.

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 with respect to these treaties (see below).

261. In other countries, like Slovakia, the constitution only recognises the precedence of international treaties on human rights if they provide greater protection of fundamental rights. The relevant article of the Slovak Constitution is shown below:

> **1992 Constitution of Slovakia**
> Article 11. Human Rights
> International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties.

262. In addition, it is notable that the legal systems of some monist countries have similarities with the dualist system, in that certain international treaties are not directly applicable and must be translated into domestic law. This is notably the case in the European Convention on Human Rights, which was translated into German law with an ordinary law. The Convention therefore has a lower status than the Constitution in German law. However, the German Constitutional Court has given this transposing law strengthened legislative value with regard to later laws, so that *lex posteriori derogat*

priori (the more recent law prevails over an inconsistent earlier law) does not apply in principle.[192]

7. Application of international law by national courts

(c) Direct application: reviewing compliance with the Convention

263. The monist system is based on the idea that international law is directly applicable in national law. However, any individual or corporate body can, in principle, invoke the provisions of a treaty before the courts. Similarly, the national judge can review the compliance of a law with international treaties. This is known as reviewing compliance with the Convention, or an "exception to convention compliance".

264. In France, for example, this review is guaranteed by judicial and administrative courts. Moreover, the courts have not hesitated to discard laws and rules which they deem to contradict the European Convention on Human Rights. Even though, in principle, judgments handed down in the conventional manner are only binding on case in question, meaning they only affect those parties, Olivier Dutheillet de Lamothe, a member of the Constitutional Council, has noted that in practice these judgments result in paralysis of laws deemed to contradict the Convention.[193]

265. A similar system exists in Spain, in that Spanish judges and courts can prevent laws contrary to the Convention from being applied.

(d) Indirect application: interpretation of domestic law in light of international law

266. Regardless of the place of international law in the hierarchy of standards, indirect application remains a leading interpretation tool in domestic law. In particular, international human rights treaties are used to interpret constitutional rights.

267. For example, article 10 paragraph 2 of the Spanish Constitution states that fundamental rights guaranteed by the Constitution must be interpreted in compliance with international human rights treaties ratified by Spain, including the European Convention on Human Rights. Furthermore, under the jurisdiction of the Spanish Constitutional Court, the jurisdiction of the European Court of Human Rights must also be taken into consideration when interpreting constitutional fundamental rights.

268. Similarly, the German Constitutional Court has ruled that rights from the Convention, as well as jurisdiction from Strasbourg, should be taken into consideration when interpreting fundamental rights guaranteed by the Constitution.[194] Failing to take these

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[192] BVerfGE 74, 358.

[193] See Olivier Dutheillet de Lamothe, Legal Review in Relation with Convention Law and Constitution Law in France, April 2009: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/madrid_odutheillet_avril_2009.pdf

[194] BVerfGE 74, 358 (370); 82, 106 (120); 111, 307 (317).

into consideration could undermine fundamental rights in conjunction with the principle of the rule of law.[195]

269. Similarly, in common law countries, ordinary courts – which are competent to examine complaints relating to violations of the Convention or Declaration of Rights – can refer to international law in their interpretation of the Convention or Declaration of Rights. This is despite the fact that international treaties are not automatically part of domestic law (dualist system). As such, article 39 of the Constitution of South Africa states:

> **Constitution of South Africa (*Bill of Rights*), 1996**
> Article 39. Interpretation of Bill of Rights
> (1) When interpreting the Bill of Rights, a court, tribunal or forum
> a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> b. must consider international law; and
> c. may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Recommendations:

- **The new Tunisian Constitution should make the constitutional guarantees of freedom of expression and freedom of information directly enforceable against state as well as non-state or private actors. These guarantees should take precedence over legislative provisions that are incompatible with it.**
- **The Constitution should provide effective remedies allowing the rights and freedom guaranteed by the Constitution to be enforced. In particular, the remedies that can be brought before German and Spanish constitutional courts, as well as the composition of those courts, should be carefully studied as potential models for Tunisia.**
- **Consideration should be given to a constitutional provision explicitly incorporating rights guaranteed in international treaties into Tunisian law.**

[195] See BVerfGE 111, 307. In this judgment (14 October 2004 – *Görgülü*) the Constitutional Court voiced in detail the place of the European Convention on Human Rights within the German legal system.

270. During the discussion seminar on the Constitution held at Sbeilta, it became apparent that not all Tunisian citizens knew how to participate in the Constitution drafting process, and make their point of view heard. As we have said, the success of any Constitution is predominantly reliant on the degree to which it belongs to the people, in this case the Tunisian people. It is therefore absolutely essential to put mechanisms in place which will enable this democratic participation. The Kenyan, Liberian and Senegalese experiences are particularly informative on this point. They are therefore described below in the light of ARTICLE 19's experiences in these countries.

The Kenyan experience

271. The drafting process of the Kenyan Constitution was particularly open to contributions from many actors of civil society. First, the Constitution of Kenya Review Commission (referred to below as "Commission") was appointed to gather citizens' views. The Commission therefore held several regional meetings or 'sessions' during which it received written opinions and other contributions from various actors.

272. After 6 months, the Commission published a report, which was debated at a constitutional conference at the National Constituent Assembly, consisting of representatives from all registered political parties, representatives from civil society and the private sector and all the members of parliament.

273. This process resulted in a draft incorporating a Declaration of Rights. However, the constitutional conference was adjourned, after President Moi dissolved parliament prompting the 2002 elections.

274. Afterwards, a series of meetings took place over 2003, cumulating in a draft Constitution which was put to referendum in 2005. The draft was rejected and a new Constitution review process was put in place following the 2007-2008 post-election violence.

275. A Committee of Experts representing various sectors of society was appointed and approved by Parliament. The committee's role was to bring the various existing versions of the Constitution together and accept contributions from various actors in society on contentious issues.

276. After a while, a new draft Constitution was published and put to referendum in 2010. The draft was approved by a large majority, and the Constitution was promulgated.

The Liberian experience

277. In Liberia, the Constitution drafting process was highly participatory, including people from every section of society, including those from remote regions.

278. Civil society implemented a working group at the national level, with the assistance of ARTICLE 19 and two other partners. A series of workshops was organised to raise awareness among civil society, the media and legislators responsible for reforms.

279. Meetings with key members of parliament were also organised, where local authorities were able to put forward their point of view. It is notable that these local authorities had been given preliminary training enabling them to defend their opinions.

280. At the end of the process, a draft Constitution was finalised which reflected the needs of the various sectors of society.

The Senegalese experience

281. For 3 years, civil society, the opposition, the private sector and Senegalese trade unions have been meeting to discuss problems related to the country's governance. A national consultation took place in several sectors, held in every region and with every relevant actor. The participants shared their challenges and their vision of the way that they would like their economic and social problems to be resolved.

282. These consultations established a set of priorities, which include drafting a new constitution and reforming justice and public institutions. The process led to the adoption of a Charter for Good Governance, which was signed by every candidate for the presidential elections, except the current president. If the opposition wins the elections, the Charter will be implemented and the reform process will be initiated.

Recommendations:

- **Workshops on the Constitution should be periodically organised in the regions.**
- **Local authorities should be trained in parallel, so they can learn how to devise suitable proposals for the draft Constitution.**
- **Actors from civil society should meet so they have the opportunity to form coalitions, which could allow them to make themselves better heard by the people responsible for drafting the Constitution.**