

ARTICLE 19

# Tunisia: Draft Law Amending and Completing Specific Provisions of the Penal Code on the Criminalisation of Offences against Sacred Values

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August 2012

Legal analysis

## Executive summary

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In this analysis, ARTICLE 19 calls upon the Tunisian Constituent Assembly to reject the Draft Law on the Amendment of the Penal Code concerning the Criminalization of Offences against Sacred Values (Draft Law) due to its illegitimate and excessive restrictions on freedom of expression.

ARTICLE 19's analysis highlights three critical problems with the Draft Law. First, the Draft Law seeks to impose broad restrictions on freedom of expression which go beyond what is permitted under international law, in particular by seeking to protect "sacred values" and "symbols" that do not enjoy protection under international law. Second, the Draft Law is conceptually flawed as it is written in vague terms, despite providing a detailed list of sacred symbols. The nature of the proposal leaves the provisions of the Draft Law open to extensive and overly broad interpretation.

Third, ARTICLE 19 observes that the Draft Law runs contrary to the growing global consensus amongst states and UN human rights bodies themselves who have agreed that prohibitions of defamation of religions and protection of symbols and beliefs are not only contrary to guarantees of freedom of expression, but are also counterproductive and prone to being abused against the religious minorities that they purport to protect.

ARTICLE 19 argues that if adopted, the Draft Law would represent a serious setback to democratic transition in Tunisia and a blow to Tunisians who had suffered enormously from censorship and restrictions on their freedom of speech under Ben Ali regime. It will also send an entirely wrong message to a democratic community and to activists and human rights defenders around the world who have worked tirelessly to expose the challenges posed by prohibitions of blasphemy or defamation, denigration or insult to religions and similar concepts. Freedom of expression is critical to the realisation of other human rights in Tunisia, including the right to freedom of religion and the right to equality and non-discrimination. The regression in standards that would result from the enactment of this Draft Law would threaten protection of all human rights, and potentially endanger democratic transition in the country.

ARTICLE 19 calls on the Tunisian Constituent Assembly to reject the Draft Law and refrain from any attempts to introduce similar measures in the future. We urge the Constituent Assembly to continue the review of the domestic legislation on freedom of expression and bring it in line with international standards in respective areas.

## About ARTICLE 19 Law Program

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their 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/>.

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# Introduction

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In this brief, ARTICLE 19 reviews the Draft Law for the Amendment of the Penal Code of Tunisia Concerning the Criminalization of Offences Against sacred values (“Draft Law”)<sup>1</sup> for its compliance with international human rights standards. The Draft Law seeks to amend the provisions of Book II, Chapter IV, Section XIII of the Tunisian Penal Code, entitled “Hindrances to Practicing Religion” by introducing a new article, Article 165b, protecting and defining “sacred” values.<sup>2</sup> The Draft Law is accompanied with a Briefing Note (Reasoning) that is analysed as well.

ARTICLE 19 is well placed to provide this analysis due to significant experience of working on freedom of expression issues in Tunisia. For example, in 2011, we provided comments on the Draft Decree relating to Freedom of the Press,<sup>3</sup> the Draft Decree on the Freedom of Audiovisual Communications,<sup>4</sup> the Draft Decree on Access to Administrative Documents<sup>5</sup> and the election regulations<sup>6</sup> at various stages of the parliamentary process. Moreover, over the years, we have gained a significant expertise in commenting on a number of UN resolutions on defamation of religion and on various domestic blasphemy legislations or cases around the world.

The Draft Law was introduced to the Tunisian Constituent Assembly on 1 August 2012 by the Ennahdha group. It is, reportedly, their response to extensive protests in June 2012 against an art exhibit near Tunis displaying works that some Tunisians deemed offensive to Islam and to the feelings of Muslims. Following the protest, on 12 June 2012, the Ennahdha Group issued a Communiqué in the Constituent Assembly, stating that “freedom of expression and

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<sup>1</sup> This analysis is based on the unofficial translation of the Draft Law and the accompanying Briefing Note from French to English in August 2012. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation. A copy of the Draft Law in English is reproduced in the Appendix to this analysis.

<sup>2</sup> For the current version of the Penal Code of Tunisia, Decree of 9 July 1913 on Promulgation of the Tunisian Penal Code, JORT No. 79 of 1 October 1913, see <http://www.jurisitetunisie.com/tunisie/codes/cp/menu.html>. The provisions of the respective section of the Penal Code read as follows.

Article 165: Anyone who impairs or disrupts religious worship or ceremonies shall be punished by six months’ imprisonment and a fine, without prejudice to the more severe penalties which would be incurred in cases of outrage, acts of violence or threats. (“Est puni de six mois d'emprisonnement et de cent vingt dinars d'amende, quiconque aura entravé ou troublé l'exercice des cultes ou cérémonies religieuses, et ce, sans préjudice des peines plus sévères encourues pour outrage, voies de fait ou menaces.”)

Article 166: Anyone who, without any legal authority over a person, forces that person by violence or threats to practise or refrain from practising a religion shall be liable to three months’ imprisonment. (“Est condamné à 3 mois d'emprisonnement quiconque, dépourvu de toute autorité légale sur une personne, la contraint, par des violences ou des menaces, à exercer ou à s'abstenir d'exercer un culte.”)

<sup>3</sup> See: <http://www.article19.org/resources.php/resource/2944/en/tunisia:-press-regulation>.

<sup>4</sup> See: <http://www.article19.org/resources.php/resource/2942/en/tunisia:-broadcasting-regulation>.

<sup>5</sup> See: <http://www.article19.org/resources.php/resource/2945/en/tunisia:-freedom-of-information>.

<sup>6</sup> See: <http://www.article19.org/resources.php/resource/2943/en/tunisia:-elections>.

the freedom of artistic creativity, even if they are among the freedoms that we approve, should not be absolute and without controls.” The Briefing Note to the Draft Law further enumerates a number of incidents that, according to the drafters, necessitate the introduction of the Draft Law. For example, the Briefing Note states that members of the public are on a “daily basis” exposed to hearing blasphemy in such forms as “fit of anger or during argument or ... for absurd or gratuitous reasons”; a TV channel broadcasted a film “personifying the divine being”, or a case of desecration of the mosque with a Star of David. According to the drafters, these and other incidents point to the need both to legislate the prohibition of such incidents in Tunisia and to adopt “worldwide legislation criminalising these offences.”

ARTICLE 19’s analysis, however, challenges these positions by arguing that the Draft Law contravenes international human rights law on freedom of expression, freedom of religion and equality and Tunisia’s international obligations in this regard, for the following reasons.

- *First*, the Draft Law seeks to impose broad restrictions on freedom of expression which go beyond what is permitted under international law, in particular by seeking to protect “sacred values” and “symbols” that do not enjoy protection under international law.
- *Second*, the Draft Law is conceptually flawed as it is written in vague terms, despite providing a list of sacred symbols. The nature of the proposal leaves the provisions of the Draft Law open to extensive and all encompassing interpretation.
- *Third*, ARTICLE 19 observes that the Draft Law runs contrary to a growing global consensus amongst states and UN human rights bodies themselves who have agreed that prohibitions of defamation of religions and protection of symbols and beliefs are not only contrary to guarantees of freedom of expression, but are also counterproductive and prone to abuse, including against the religious minorities.

ARTICLE 19 also believes that, if adopted, the Draft Law would represent a serious setback to democratic transition in Tunisia and a blow to Tunisians who had suffered enormously from censorship and restrictions on their freedom of speech under the previous political regime or Ben Ali. It will also send an entirely wrong message to a democratic community and to activists and human rights defenders around the world who have worked tirelessly to expose the challenges posed by prohibitions of blasphemy or defamation, denigration or insult to religions and similar concepts.

In the following section, ARTICLE 19 reviews the provisions of the Draft Law and accompanying Briefing Note in a greater detail and draws upon the applicable international standards in this area. Based on our analysis, we call on the Tunisian Constituent Assembly to reject the Draft Law and refrain from any attempts to introduce similar measures in the future. Instead, we urge the Constituent Assembly to continue the review of the domestic legislation on freedom of expression and bring it in line with international standards in respective areas. ARTICLE 19 stands ready to provide further assistance and support in the process.

# Analysis of the Proposed Amendment to the Penal Code (Draft Law)

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The Draft Law consists of a proposal of a new Article 165b of the Penal Code that would supplement the existing provisions of the Penal Code on “hindrances to the practicing of religion.” It is accompanied by the Briefing Note that lists justifications for the introduction of the Draft Law to the Constituent Assembly. This section examines both aspects in a greater detail.

## **Briefing Note**

The Briefing Note (Reasoning to the Draft Law) contains an explanation of why the Ennadha group wishes the legislation to be adopted, including examples of individual incidents that are of concern to the drafters.

ARTICLE 19 respectfully submits that the reasoning put forward by the drafters needs to be critically examined in the light of the international legal obligations of Tunisia. In particular, we would like to highlight the following.

### ***Justification to adopt the legislation protecting sacred symbols***

The Briefing Note points out to a “legal gap in the Penal Code and other laws” with regard to the protection of sacred values that necessitates “this legislation to be amended and completed.” It also stresses that by virtue of representing the people of Tunisia, the Constituent Assembly is “bound to adopt clear legislation criminalizing offences against sacred values of our people.”

ARTICLE 19 notes that contrary to these declarations, the **adoption of the Draft Law would, *in fact, go against the Tunisian obligations under international human rights law, which does not award legal protection to religions, values and symbols.***

The International Covenant on Civil and Political Rights (“ICCPR”)<sup>7</sup> provides the principal legal framework for Tunisia’s international obligations in relation to the rights which are protected by Article 19 (freedom of opinion and expression),<sup>8</sup> Article 18 (freedom of thought,

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<sup>7</sup> International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976

<sup>8</sup> Article 19 stipulates:

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.

conscience and religion or belief)<sup>9</sup> and Articles 2, 26 and 27 (equality before the law and the prohibition of discrimination).<sup>10</sup>

Tunisia signed the ICCPR on 30 April 1968 and ratified it on 18 March 1969 without reservations, and therefore, it is bound by the Covenant and must fully meet the obligations which flow from it. In particular, Tunisia is required to enact legislation to give domestic effect to its provisions and to bring domestic laws into line with the ICCPR.<sup>11</sup> ARTICLE 19 also recalls that Article 27 of the Vienna Convention on the Law of Treaties provides:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

*The Human Rights Committee*, the UN treaty body charged under the ICCPR with supervising its implementation, has explained that:

[A]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level... are in a position to engage the responsibility of the State Party.

The Human Rights Committee further stipulated that states parties are required to:

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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: for respect of the rights or reputations of others; for the protection of national security or of public order (ordre public), or of public health or morals.

<sup>9</sup> Article 18 reads:

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.

<sup>10</sup> The equality principle is protected by, *inter alia*, Articles 2 and 26 of the ICCPR. Article 2(1) states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. "

<sup>11</sup> Article 2(2) of the ICCPR; Articles 2(1)(b) and 15 Vienna Convention on the Law of Treaties 1969.

[T]ake the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant article... domestic law or practice [must] be changed to meet the standards imposed by the Covenant's substantive guarantees.<sup>12</sup>

Tunisia is also a member of the African Union and signatory to the principal human rights instrument for the African continent. We note that the African Charter on Human and Peoples' Rights ("ACHPR")<sup>13</sup> guarantees the right to freedom of expression in Article 9 of the ACHPR.<sup>14</sup> Further, the Declaration of Principles on Freedom of Expression in Africa ("African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002<sup>15</sup>, 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.

It needs to be stressed that the right to freedom of expression under these provisions applies not only to information and ideas generally considered to be useful or correct, but to any kind of fact or opinion which can be communicated. Specifically, the Human Rights Committee has emphasised that Article 19 of the ICCPR encompasses "news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression".<sup>15</sup>

Moreover, the right to freedom of expression also extends to controversial, false or even shocking material; the mere fact that an idea is disliked or thought to be incorrect cannot justify preventing a person from expressing it.

Although the right to freedom of expression under the international law is not absolute, restrictions are permitted in certain narrowly defined circumstances and must meet the so-called "three part test" of restrictions. The test requires that the restrictions must be provided in law, serve a purpose stipulated in Article 19(3) of the ICCPR and be necessary for that purpose. As the Human Rights Committee has stated that:

[A]ny restrictions ... must be permissible under the relevant provisions of the Covenant. ... States must demonstrate their necessity and only take such measures as are

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<sup>12</sup> Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 4 and 13 respectively.

<sup>13</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>14</sup> Article 9 of the ACHPR reads:

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.

<sup>15</sup> *Ballantyne and Davidson v Canada*, Communication No 359/1989 and *McIntyre v Canada*, Communication No 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev 1, 5 May 1993 Annex para 11.3.



proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>16</sup>

Likewise, the right to freedom of thought, conscience and religion may also be restricted, but only in certain narrowly-defined circumstances, similar (but not identical) to the restrictions permitted in Article 19(3) of the ICCPR. Because the right to freedom of religion is grounded upon the right of an individual to choose his or her own religion, Article 18 of the ICCPR makes clear that it must be accompanied by a full and free discourse as to the advantages and disadvantages of individual religions.

ARTICLE 19 would also like to draw the attention of the Constituent Assembly to the fact that the ICCPR does not allow restrictions to be placed on the exercise of the right to freedom of expression for the purposes of ensuring respect for values, beliefs or religions or protecting them from defamation or abuse.

The ICCPR (as well as other human right treaties) **protects the rights of individual persons** and, in some instances, of groups and persons, but **not abstract entities such as values, religions, beliefs, ideas or symbols**. As noted above, Article 19(3) of the ICCPR only allows restrictions to be placed on the exercise of the right to freedom of expression when necessary “for the respect of the rights and reputations of others, for the protection of national security or public order, or of public health or morals”, which does not include the protection of values, beliefs or religions as a legitimate aim.

Additionally, the Human Rights Committee has not recognised that the notion of protecting “values” and neither does it support the prohibition of “defamation of religions” as a legitimate ground for restrictions on the exercise of freedom of expression. It has held, however, that the right to freedom of expression is of paramount importance in any society, and any restrictions on the exercise of this right must meet a strict test of justification.<sup>17</sup>

Most recently, in General Comment No. 34 to the ICCPR, the Human Rights Committee stated that

[P]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.<sup>18</sup>

Importantly, this provision of the General Comment No. 34 reflects not only the Human Rights Committee's earlier jurisprudence, but also reinforces the position of other UN human rights bodies, notably the UN Human Rights Council that dropped any reference to “defamation of religions” since the adoption of resolution 16/18 of April 2011 (see below).

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<sup>16</sup> Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 6.

<sup>17</sup> See inter alia *Kim v the Republic of Korea*, Communication No 574/1994 views adopted on 3 November 1998 and *Park v the Republic of Korea*, Communication No 628/1995 views adopted on 20 October 1998

<sup>18</sup> Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, adopted at the 102nd session in Geneva, 11-29 July 2011, paras 48-49.

Besides the Human Rights Committee, other international human rights bodies have pointed to the incompatibility of the protection of symbols, religions and beliefs with international law.

The *UN Special Rapporteurs on freedom of opinion and expression, freedom of religion or belief and racism, racial discrimination, xenophobia and related intolerance* have repeatedly condemned laws prohibiting “defamation of religions” and/or blasphemy because they are relied upon to persecute religious minorities and dissenters. For example:

- The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has stated that limitations on the right to freedom of expression were “designed in order to protect individuals against direct violations of their rights” and “are not designed to protect belief systems from external or internal criticism.”<sup>19</sup>
- In a Joint Statement in December 2008, the UN Special Rapporteur on Freedom of Opinion and Expression together with the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information emphasised that restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>20</sup>
- The UN Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have emphasised that that “the right to freedom of religion protects primarily the individual and, to some extent, the collective rights of the community concerned, but it does not protect the religions or beliefs per se”.<sup>21</sup> The UN Special Rapporteur on freedom of religion has recently emphasised that “the right to freedom of religion or belief does not include the right to have a religion or belief that is free from criticism or ridicule.”<sup>22</sup>

The *UN Working Group on Arbitrary Detention* has also recognised that while “defamation of religions may offend people and hurt their feelings ... it does not directly result in a violation of their rights to freedom of religion.”<sup>23</sup>

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<sup>19</sup> Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, to the Human Rights Council, 28 February 2008 A/HRC/7/14 paragraph 85.

<sup>20</sup> Joint statement from 10 December 2008; available at <http://www.article19.org/data/files/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf>.

<sup>21</sup> Report to the Second Session of the HRC A/HRC/2/3, 20 September 2006, paragraph 38.

<sup>22</sup> Report of the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/2/3 (September 20, 2006).

<sup>23</sup> UN Working Group on Arbitrary Detention, Opinion No 35/2008 (Egypt), Communication addressed to the Government on 6 December 2008 at paragraph 38.

Similarly, the 2009 *Camden Principles on Freedom of Expression and Equality*, prepared by ARTICLE 19 on the basis of discussions involving a group of high-level UN officials and international experts on freedom of expression and equality, highlight the principle that “states should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions”, unless such expression constitutes incitement to discrimination hostility or violence.<sup>24</sup>

For these reasons, **any attempts to legislate domestically any protection of values, religions or symbols from attacks, denigration or defamation must be rejected as undue restrictions on the right to freedom of expression.**

### **Current trends on defamation of religion at the UN**

As another reason for the introduction of the Draft Law, the Briefing Note refers to the fact that “the Islamic word, of which Tunisia is part, continuously demands that the worldwide legislation criminalizing these offences be adopted.”

The Constituent Assembly should respectfully note that the support for the prohibition of defamation of religion - adopted in a resolution of the Human Rights Council and the UN General Assembly - has always been very divisive and ceased in 2011.

The concept of “defamation of religions” was first introduced to the UN Commission on Human Rights (now Human Rights Council) in 1999 by Pakistan on behalf of the Organisation of Islamic Conference (OIC).<sup>25</sup> The resolution continued to be raised in the Human Rights Council until 2010, and similar resolutions were introduced in the General Assembly in 2005. Resolutions are non-binding legal documents.

In April 2011, the Human Rights Council set aside the language of “defamation of religions” and adopted Resolution 16/18 on “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief”<sup>26</sup> in recognition of binding international law on freedom of expression, freedom of religion and prohibition of discrimination, The Resolution was submitted by Pakistan without any reference to defamation of religion and was adopted by consensus.

The 2011 resolution signals a fundamental shift away from the protection of religious beliefs and religious symbols, and to the protection of the believers. The new resolution does not seek to restrict peaceful expression, but calls for positive measures, including education and awareness-building.

This position was further consolidated in December 2011 when the General Assembly of the UN adopted a resolution in very similar terms to Resolution 16/18, General Assembly

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<sup>24</sup> ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, April 2009, para 12.3; available at <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>.

<sup>25</sup> U.N. Econ. & Soc. Council [ESOSOC], Comm’n on Human Rights, Draft Res.: Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination, U.N. Doc. E/CN.4/1999/L.40 (April 20, 1999)

<sup>26</sup> Available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/16/18](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/16/18).

Resolution 66/167.<sup>27</sup> Together, these resolutions appear to signal a new era for the protection of freedom of expression and freedom of religion at the UN. No resolution on defamation of religions was adopted in 2012.

Hence, ARTICLE 19 urges **the Tunisian legislators and government to join the international community in the current stance on the incompatibility of the concept of defamation of religion with international standards and focus on combating religious intolerance.**

***Effectiveness of the legislation prohibiting defamation of values, religions and beliefs***

The Briefing Note also suggests that “adopting legislation will help to limit the offences against the sacred values and symbols... and avoid having recourse to extra-judicial proceedings.”

ARTICLE 19 disagrees with these assertions. Indeed, the Draft Law is more likely to increase prejudices and undermine equality in the Tunisian society.

- If adopted, the Draft Law will **violate the right to freedom of religion and belief of religious believers and non-believers.** The Draft Law aims to protect “sacred values” that consist, *inter alia*, of beliefs, ideas and religious philosophies. However, different religions are often inherently in conflict to each other over certain truth claims (e.g. about creation, life, death and spiritual leaders). What may be a basic notion in one religion may be blasphemous and part of an impermissible doctrine in another religion. It is not an appropriate role for the state to judge which ideas and religions teachings are acceptable and which should be protected. Enforcement of the law will be left to the discretion of law enforcement officials who are free to act on their own prejudices. Ultimately, the Draft Law would empower majorities against dissenters and the state against individuals.

ARTICLE 19 notes that the right to freedom of religion or belief itself requires that individuals belonging to *any* religion or beliefs should be protected. Observing that “dissenting or dispassionate believers are being marginalized and face interreligious or intra-religious problems”, the UN Special Rapporteur on freedom of religion or belief has criticised “laws that openly discriminate against individuals on the basis of religion or belief or the perceived lack of religious fervour.”<sup>28</sup> The Special Rapporteur has also emphasised that states have positive obligations to “create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their ... religion.”<sup>29</sup>

Furthermore, freedom of religion and belief entails freedom to hold or *not* to hold religious beliefs and to practise or not to practise a religion. As the European Court of

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<sup>27</sup> General Assembly Resolution, A/RES/66/167, 27 March 2012; available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/468/84/PDF/N1146884.pdf?OpenElement>.

<sup>28</sup> Human Rights Council Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, 21 December 2009 A/HRC/13/40 para 34.

<sup>29</sup> Human Rights Council Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, 21 December 2009 A/HRC/13/40 para 34.

Human Rights noted freedom of religion or belief is also “a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”<sup>30</sup> Additionally, freedom of religion entails a right not to be obliged to disclose one’s religion or to act in a manner that might enable conclusions to be drawn as whether or not one holds such beliefs.<sup>31</sup>

- The Draft Law would provide a **tool for discrimination against non-believers and believers of religions and faiths other than those vaguely described in the Draft Law.** ARTICLE 19 believes these individuals would live in constant danger of violating the Penal Code if they express diverging interpretations about “sacred values,” as defined in proposed Article 165b. Hence, they would be discriminated against for the exercise of their freedom of religion or belief or the lack of thereof.

In this respect, ARTICLE 19 notes that the former UN Special Rapporteur on freedom of religion or belief has expressed concern about similar laws as proposed by the Draft Law being applied in a discriminatory sense. She has observed worrying trends towards applying such domestic provisions in a discriminatory manner and noted that they often disproportionately punish members of religious minorities, dissenting believers and non-theists or atheists.<sup>32</sup> The Special Rapporteur has, in particular, expressed concern that religious minorities and new religious movements face various forms of discrimination and intolerance, both from policies, legislation and State practice.<sup>33</sup> The Human Rights Committee also has expressed concern about “any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community”<sup>34</sup>

ARTICLE 19 calls upon the Constituent Assembly to reject any justifications of the Draft Law on the basis of its ineffectiveness. Instead, we encourage the legislators and the Government to promote an open debate about a broad range of issues in society.

### **Proposed text of new Article 165b**

The core of the Draft Law consists of the proposal of a new Article 165b of the Penal Code that reads as follows:

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<sup>30</sup> *Kokkanikis v Greece*, Judgment of the European Court of Human Rights, Application No 14307/88, 25 May 1993.

<sup>31</sup> *Sinan Isik v Turkey* Judgment of the European Court of Human Rights, Application No 21924/05 judgment of 2 February 2010.

<sup>32</sup> Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, UN Doc. A/HRC/4/21, 26 December 2006, para. 43.

<sup>33</sup> Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, UN Doc. A/HRC/4/21, 26 December 2006, para. 43

<sup>34</sup> Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para 2

Anyone whosoever offends the sacred values shall be punished by two years imprisonment and a two-thousand dinar fine. The sacred values include: Allah, God Almighty, The Most High; his prophets; the holy books; the Sunnah of Muhammad, seal of the prophets; the holy Kaaba, the mosques, churches and synagogues. Offences against the sacred values include "the abuse, insult, mockery, disdain or physical or moral desecration of sacred symbols, in word, image or act, and the representation of Allah and his prophets". The sentence is doubled in the event of a reoffender.

ARTICLE 19 wishes to reiterate that any restrictions on freedom of expression must meet the requirements of three part test. The provisions of the new Article 165b fail to meet this test for the following reasons:

- **Article 165b of the Draft Law does not meet the requirement that the restriction must be “provided by the law.”** This condition requires more than just a written piece of legislation. The legislation must also meet certain standards of clarity and precision, enabling citizens to foresee the consequences of their conduct on the basis of the law. Vaguely worded edicts, whose scope of application is unclear, will not meet this standard and are thus illegitimate restrictions on freedom of expression.

In this case, the Draft Law employs vague language, giving undue discretion to the authorities to extend the scope of Article 165b to any conduct they see fit. What exactly is the meaning of “insult”? What does one have to do to “insult”? What is the exact meaning of the “moral desecration” of “sacred symbols?” How can someone determine what amounts to “mockery?” What behaviour amounts to “disdain” of a sacred symbol? The answers to each of these questions raise a multitude of further questions. All these terms are so subjective that it will be impossible to know in advance whether one is committing the crime under Article 165b as it will be determined only after the event, according to other people’s subjective interpretation of the language used and based on a subjective assessment by the law enforcement officials.

ARTICLE 19 believes that to leave these determinations to law enforcement, or even to the judiciary, would lead to arbitrary results that would have a enormous chilling effect on freedom of expression and the ability of the Tunisian people to live free of fears and arbitrariness.

- Further, **restrictions of freedom of expression under Article 165b of the Draft Law do not pursue a legitimate aim** under Article 19(3) of the ICCPR. As noted in the previous chapter, “sacred values”, religious beliefs, religious books and venues do not enjoy protection from verbal attacks and do not enjoy protection under international law. Moreover, ARTICLE 19 believes that such a draft law will increase the power of the state to target dissenting opinions or certain beliefs. As such these provisions are illegitimate under international human rights law.
- Finally, **the prohibitions introduced by Article 165b of the Draft Law do not meet a criterion of necessity.** Under this requirement, the restrictions must impair the right to freedom of expression as little as possible and, in particular, must not restrict speech in a broad or untargeted way. The impact of restrictions must also be proportionate, meaning that the harm to freedom of expression caused

by a restriction must not outweigh its benefits to the interest to which it is directed.

As explained above, prohibition of defamation of religion, or of attacks against values, religions and beliefs do limit freedom of expression in broad way and are disproportionate to their purported benefits. Moreover, they also violate the rights of believers of minority religions and non-believers. ARTICLE 19 also recalls that the UN Special Rapporteur on freedom of religion or belief has emphasised that “the terms ‘religion’ and ‘belief’ are to be interpreted in a broad sense and that human rights protection is not limited to members of traditional religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The contents of a religion or belief should be defined by the worshippers themselves.”<sup>35</sup> As the Human Rights Committee has clarified, the “freedom from coercion to have or to adopt a religion or belief ... cannot be restricted.”<sup>36</sup> International standards also require States to “take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs.”<sup>37</sup>

Therefore, laws that induce a fear of prosecution effectively coerce a person or a group to adopt a religion or belief different from that which they would freely choose are contrary to guarantees to right to freedom of thought, conscience and religion or belief.

In conclusion, ARTICLE 19 submits that the Draft Law reviewed this analysis is irretrievably flawed from a human rights perspective. Freedom of expression is critical to the realisation of other human rights in Tunisia, including the freedom of religion and equality and non-discrimination. The regression in standards that would result from the enactment of this Draft Law would therefore jeopardise the protection of all human rights, and endanger democratic transition in the country. The Draft Law must, thus, be rejected in its entirety.

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<sup>35</sup> Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, 17 July 2009 A/HRC/64/159 para 31.

<sup>36</sup> Human Rights Committee General Comment No. 22: The right to freedom of thought, conscience and religion, UN Doc CCPR/C/21/Rev.1/Add.4, 30 July 1993, para 8

<sup>37</sup> UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992, para 4(2).