

Executive summary

In February 2017, ARTICLE 19 reviewed the Tunisian Draft Organic Law Related to the Elimination of Violence against Women (Draft Law) for its compliance with international freedom of expression standards. The Draft Law was initiated by the Tunisian Ministry of Women, Family and Children and was approved by the Cabinet in July 2016.

The Draft Law's purpose is to "define measures required to eliminate all forms of violence based on gender and to ensure equality and respect for human dignity, by adopting a comprehensive approach based on the fight against the different forms of violence, the prosecution and sanctioning of perpetrators and the protection and support of victims." It is a part of the ongoing efforts of the Tunisian Government to eliminate violence against women in the country; the measures include the adoption of the National Action Plan for the Elimination of Violence against Women in 2013 and the withdrawal of reservations to the Convention on the Elimination of All Forms of Discrimination against Women. It is also a result of strong advocacy by civil society and the support of many domestic and international organisations.

ARTICLE 19 commends Tunisia's efforts to legislate in accordance with its obligations under international law to combat violence against women. We note, however, that Tunisia will need to ensure that these efforts do not violate its obligations under international law regarding the right to freedom of expression. As such, we are particularly concerned about the provisions in the Draft Law that criminalize speech in an overly broad manner.

ARTICLE 19 calls upon the Tunisian government to ensure that all provisions in the Draft Law are made compliant with international standards on freedom of expression before the Draft Law is adopted. We believe that reviewing the Draft Law for the compliance with these standards will ultimately lead to a stronger protection of human rights for all in the country.

Summary of recommendations

- The Draft Law should be carefully reviewed and partially revised to bring it in line with Tunisia's obligations under international law regarding the right to freedom of expression;
- Priority should be given to the provisions in the Draft Law that criminalise speech, most notably the definitions that determine what entails "violence against women", as this impacts on the scope of the Draft Law in its entirety;
- Amendments should be made throughout the law to more narrowly and precisely define the scope of provisions that potentially infringe upon the right to free expression and privacy. This should be done by eliminating overly broad and vague terminology and clearly defining key elements of those provisions so as to meet the test of legality under international law.

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Introduction

In this legal analysis, ARTICLE 19 provides recommendations for bringing the Draft Organic Law Related to the Elimination of Violence against Women (Draft Law) into full compliance with international freedom of expression standards. The Draft Law, initiated by the Tunisian Ministry of Women, Family and Children, is an important part of the ongoing efforts of the Tunisian Government to eliminate violence against women in the country. These efforts include the adoption of the National Action Plan for the Elimination of Violence against Women in 2013 and the withdrawal of reservations to the Convention on the Elimination of All Forms of Discrimination against Women. It is also a result of strong advocacy by civil society and the support of many domestic and international organisations.

The Draft Law introduces positive measures to combat violence against women, both from a law enforcement and broader social policy point of view, and also introduces amendments to the Tunisian Penal Code to facilitate the prosecution and punishment of those engaging in any form of violence against women.

ARTICLE 19 commends the Tunisian Government on its efforts to legislate against violence against women. In its current form, however, a number of provisions in the Draft Law violate Tunisia's obligations under international law regarding the right to freedom of expression and privacy. ARTICLE 19 is of the opinion that these shortcomings need to be addressed in full before the law is adopted. We stand ready to support the review of the Draft Law and provide further assistance in this respect.

Applicable international human rights standards

Right to freedom of expression and information

The right to freedom of expression is a fundamental human right, recognized in international human rights law. The full enjoyment of this right is central to achieving individual freedoms and to developing democracy. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.¹

The right to freedom of expression is recognised in nearly every national constitution and in most international human rights treaties including the Universal Declaration of Human Rights (UDHR),² the International Covenant on Civil and Political Rights (ICCPR)³ as well as in the African Charter on Human and Peoples' Rights,⁴ and other regional treaties.⁵

In General Comment No. 34, the UN Human Rights Committee (HR Committee), the treaty body that authoritatively interprets the scope of States' obligations under the ICCPR, re-affirmed that freedom of expression is essential for the enjoyment of other human rights and confirmed that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all electronic and Internet-based modes of expression.⁶

The right to freedom of expression is not absolute. International standards make clear that freedom of expression is a qualified right which may be limited, provided the restriction complies with a three-part test. This test consists of the following, cumulative, requirements:

- The restrictions must be **"provided by law"**: this requirement will be fulfilled only where the law is accessible and formulated with sufficient precision to enable citizens to regulate their conduct;⁷
- The restrictions may only be imposed for one of the **legitimate grounds** set out in Article 19 para 3(a) and (b) of the ICCPR: respect for the rights or reputations of others, and the protection of national security, public order (*ordre public*), public health or morals;⁸ and
- The restrictions must be **necessary and proportionate**: 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.⁹ Proportionality means that if a less intrusive measure is capable of achieving

¹ UN Human Rights Committee (UNHRC), [General comment No. 34, Article 19: Freedoms of opinion and expression](#), 12 September 2011, CCPR/C/GC/34, par. 2-3.

² Universal Declaration of Human Rights (UDHR), 10 December 1948, GA res. 217A (III), UN Doc A/810 at 71 (1948), Article 19.

³ International Covenant on Civil and Political Rights, 16 December 1966, UN Doc. A/6316 (1966), Article 19.

⁴ African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc.CAB/LEG/67/3 rev.5, Article 9.

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), 4 November 1950, ETS 5, Article 10 and American Convention on Human Rights (American Convention), 12 November 1969, OAS Treaty Series No. 36, Article 13.

⁶ General comment No. 34, *op.cit.*, para 12.

⁷ *Ibid.*, para 25.

⁸ ICCPR, Article 19(3).

⁹ General comment No. 34, *op.cit.*, para 35.

the same purpose as a more restrictive one, the least restrictive measure must be applied.¹⁰

International law thus allows that freedom of expression may be subject to certain restrictions for the sake of other legitimate interests including, among other things, the rights or reputations of others.

Right to privacy

The right to privacy is also recognised in international human rights treaties including the UDHR,¹¹ the ICCPR,¹² and the regional treaties.¹³ Under these treaties, privacy is a broad concept relating to the protection of individual autonomy and the relationship between an individual and society, including governments, companies and other individuals. It is commonly recognised as a core right that underpins human dignity and other values, such as freedom of association and freedom of opinion. Privacy is also essential to ensure that individuals are able to realise their other rights without intrusion, including freedom of expression.

The wording of Article 17 ICCPR prohibits “arbitrary and unlawful” interferences with the right to privacy. Under international human rights law, restrictions to the right to privacy can only be permissible if the same three-part test is met as that applicable to Article 19.¹⁴

Prohibition of violence against women

A number of international norms and standards relate to ending violence against women.

While the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)¹⁵ does not explicitly mention violence against women, the CEDAW Committee's General Recommendations 12¹⁶ and 19¹⁷ clarify that the Convention requires States parties to eliminate violence against women, as both a form and driver of discrimination against women, and make detailed recommendations in this regard.

The Declaration on the Elimination of Violence against Women¹⁸ was the first international instrument that explicitly addressed violence against women. The Declaration defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of

¹⁰ *Ibid.*, para 34.

¹¹ UDHR, Article 12.

¹² ICCPR, Article 17.

¹³ C.f. European Convention, Article 8 and American Convention, Article 11.

¹⁴ UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, 28 December 1999, A/HRC/13/37; HR Committee, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988; UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

¹⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

¹⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989.

¹⁷ CEDAW, *CEDAW General Recommendation No. 19: Violence against women*, 1992.

¹⁸ UN GA, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."¹⁹

Further provisions regarding violence against women were included in the 1995 Beijing Platform for Action,²⁰ which also identified specific action for governments to take to prevent and respond to violence against women and girls. The UN General Assembly adopts bi-annual resolutions on the issue.

Various regional instruments also address the issue, such as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol),²¹ the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará),²² and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).²³

Mutually reinforcing nature of human rights

Under CEDAW, the Tunisian government has an obligation to prevent and respond to violence against women. However, under the ICCPR, it also has an obligation to uphold other human rights, including the right to freedom of expression. As international human rights law does not recognise a hierarchy of rights, in which one trumps the other, it is essential that governments balance human rights in a fair manner without giving precedence to one over the other. This includes refraining from adopting measures that would protect one right where that would constitute an undue restriction on another.

¹⁹ *Declaration on the Elimination of Violence against Women*, Article 1.

²⁰ United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995.

²¹ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

²² Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994.

²³ Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011.

Analysis of the Draft Law

The Draft Law consists of five chapters. Chapter One deals with preliminary issues, including definitions. The remaining chapters contain substantive provisions, as follows:

- Chapter Two deals with the prevention of and protection against violence targeting women;
- Chapter Three introduces amendments to the Tunisian Criminal Code related to the prosecution and punishment of crimes of violence against women;
- Chapter Four establishes procedures for the investigation of complaints on violence against women, including a procedure for the application of protective measures;
- Chapter Five arranges practicalities pertaining to the abrogation of previous legal provisions made obsolete by the Draft Law.

ARTICLE 19 reiterates that we consider the Draft Law a welcome effort to legislate against violence against women and we support the efforts of the Tunisian Government to tackle these issues. However, we consider that the Draft Law has some significant shortcomings that need to be addressed. This primarily concerns the Draft Law's failure to adequately safeguard the right to freedom of expression. Hence, we offer the recommendations how the Draft Law could be brought to full compliance with the international human rights standards outlined in the previous section.

Provisions criminalising speech

As outlined above, in order for a norm to be characterised as "law" for the purpose of legitimately restricting the right to free expression, it needs to be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."²⁴ Failing to do so leaves norms open to broad interpretation and potential abuse. As the UN Human Rights Committee stated:

A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. 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.²⁵

The Draft Law contains a number of provisions that criminalise speech in an overly broad manner, leaving wide discretion to the authorities for their application and implementation. Key in this regard is the definition of violence against women, which determines the scope of the Draft Law.

- As set out in **Article 3** in Chapter One, under "general provisions", violence against women includes "physical, moral, sexual or economic assault against women;"
- "Moral violence" is then further defined as "any verbal assault such as slander, insult, coercion, threat, neglect, deprivation of right and freedoms, abasement, degradation, derision, and other acts or statements offending women's human dignity or aimed at scaring or controlling them," while "sexual violence" is further defined as including "acts or statements aimed at subjugating women to one's own or others' sexual desires

²⁴ General Comment 34, *op.cit.*, para 25.

²⁵ *Ibid.*

through coercion, seduction, pressure and other means used to weaken and manipulate women regardless of the perpetrator's relationship with the victim."

ARTICLE 19 recalls that in order for a norm to be characterised as "law" for the purpose of legitimately restricting the right to free expression, it needs to be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."²⁶ The definitions on violence against women in Article 3 of the Draft Law do not meet the standard of legality under international law, as they are formulated in an overly broad manner, leaving them open to wide interpretation. By proscribing "any verbal assault", including "slander, insult, coercion, threat, neglect, deprivation of right and freedoms, abasement, degradation, derision, and other acts or statements" that offends "women's human dignity" or is aimed at "scaring or controlling them", without further defining what any of those terms mean, there is a complete absence of clarity as to what is actually being proscribed. The definitions use highly subjective criteria and, as currently formulated, almost any statement could be interpreted to have caused "offence", to have "scared" a woman, or be taken as an attempt to "control" them.

This is exacerbated by the fact that a violation of the Draft Law can incur criminal prosecution and penalties, including imprisonment, which poses a risk of violating the principles of necessity and proportionality, outlined above. The UN Human Rights Committee has stated that:

Defamation laws must be crafted with care to ensure that they comply with [the three-part test], and that they do not serve, in practice, to stifle freedom of expression. ... Care should be taken by States parties to avoid excessively punitive measures and penalties.²⁷

In order to comply with international standards on freedom of expression, the threshold of what does in fact constitute violence against women should be much more precisely and narrowly defined.

The vague and overly broad definition of violence against women impacts on many other provisions in the Draft Law that make use of the definition; namely **Article 8** of the Draft Law, which deals with the "prevention of violence against women." This provision tasks the Ministry of Health with the development of "integrated programs aimed at the fight against violence targeting women in medical and paramedics training curricula," which includes the training of "staff at all levels on the identification and evaluation of different forms of violence targeting women." Based on the current broad and vague definition of violence against women, it is unclear what type of expression and speech health care workers will be trained to identify.

Further problematic definitions can be found in the provisions aimed at amending the Tunisian Penal Code. One example is **Article 226 third (new)** of the Draft Law, which imposes a two-year prison term and a pecuniary penalty on perpetrators of "sexual harassment." This is defined as "assault on others with acts, signs or words having sexual connotation, which may affect others' dignity or disturb their shyness, with the aim of having the other respond to the perpetrator's or others' sexual desires, or to exercise pressure and weaken the other's capability to resist."

By using overly broad and vague terminology such as "acts, signs or words having sexual connotation" that "may" "affect other's dignity or disturb their shyness", the definition introduces numerous open-ended concepts that cannot be considered provided by law,

²⁶ General Comment 34, *op.cit.*, para 25.

²⁷ *Ibid.*, para 47.

leaving the provision open to broad interpretation and potential abuse. This is further exacerbated by the alternative motivations that an alleged perpetrator can be accused of, which are all formulated in a subjective and open-ended manner, such as "having the other respond to the perpetrator's or other's sexual desires", "exercising pressure", or "weakening the other's capability to resist."

ARTICLE 19 is concerned that, combined, these elements create a virtually open-ended definition that can be used to criminalise speech that would otherwise be protected under international law.

The offence of harassment, contained in **Article 16**, is defined in a similarly vague and overly broad manner. It levies a one-year prison sentence on anyone harassing women in public "by means of acts, words or signals disgracing their dignity or offending their diffidence." Without further defining what the vague terms such as "disgracing dignity" or "offending diffidence" mean, it is impossible for an individual to modify their behaviour accordingly.

ARTICLE 19 suggests that these definitions contained in the Draft Law are be more precisely worded to avoid their misuse. This is all the more pressing considering the fixed penalty of one year imprisonment which the provision prescribes.

Overly broad provisions restricting the right to privacy

The Draft Law contains a number of **positive initiatives**, which ARTICLE 19 would encourage the Tunisian government to maintain. Some of these are particularly commendable, such as **Article 12**, which guarantees a right of access to information for women victims of violence and their children to "access ... information and legal advice about rules and laws regulating prosecution and judicial services available."

However, some of the **relevant provisions should be carefully reviewed** to ensure that they do not end up restricting the right to free expression and the right to privacy.

- **Article 4** of the Draft Law, for example, outlines the general principles to be adhered to when the State provides care and assistance to women who are victims of violence. These include the principle to "respect and guarantee the privacy of victims' personal life and data." It would be advisable to clarify that, within the framework of the Law, any wish for anonymity expressed by the victims will be respected. It would also be helpful to clarify whether the term "services" - in the provisions "provide equal opportunities to have access to services in all regions" - refers to electronic communications or other types of services.
- **Article 39** of the Draft Law foresees the creation of a national observatory for the fight against violence targeting women and enumerates its tasks. The first task mentioned is for the observatory to "identify cases of violence against women based on reports and information received, and document various form of violence in a special database."

ARTICLE 19 finds that these provisions raise concerns regarding both the privacy of victims and data protection. It is unclear how the observatory is going to "identify" cases, how the "information received" will have been obtained, if the passing on of information to the observatory requires consent from the individuals involved, and what the parameters are for the processing of the — potentially sensitive — personal data by collecting them in a "special

database". As set out above, the right to privacy can only be limited if the restriction meets the same three-part test as applicable to restrictions to the right to freedom of expression.

ARTICLE 19 believes that without a narrower definition of its scope, Article 39 fails to meet the test of legality, as it currently provides an open-ended basis to restrict individuals' right to privacy.

Protection of sources and professional confidentiality

Article 13 of the Draft Law creates an obligation for "those bound by the professional secret principle" to nevertheless inform specialised authorities when they are informed about or witness a case of violence as defined by the Draft Law, or when they "observe the effects thereof." The provision safeguards the individuals making such legal notifications from legal proceedings if they have "good intentions." It also prohibits the disclosure of the identity of informants, unless authorised to do so or "when required by legal proceedings."

In addition to the problems raised by the overly broad definition of violence against women, discussed above, this provision can potentially raise problems for the protection of sources and protection of professional confidentiality as it states that divulging the identity of an informant can be compelled through "legal proceedings."

The ability to protect sources is a crucial element to the effective exercise of both journalists and NGOs in exercising their roles as "public watchdog."²⁸ Having a Court — or potentially even a single (investigative) judge, as the concept of "legal proceedings" is not further defined — compel anyone reporting on cases of violence against women who their sources are, will inevitably have a chilling effect. This will, in the end, be detrimental to the objective of the Draft Law, i.e. increased protection of women against violence. The press and civil society have an important role in bringing to light cases of abuse, as they do in reporting on all matters of public interest.

ARTICLE 19 believes that Article 13 should therefore be more carefully formulated to ensure that it does not interfere with the right to freedom of expression and the protection of sources in particular.

Content restrictions

Article 11 of the Draft Law combines the prescription that "public and private media shall raise awareness about risks of violence against women and the ways to prevent it and fight against it" with the prohibition "to advertise and broadcast media programs showing stereotyped images, sequences, statements or acts that are prejudicial to women's image or that promote violence against women or make violence seem trivial." It is unclear how either will be enforced.

The prohibition of advertising or broadcasting programmes that show "stereotyped images" or "statements or acts" that are "prejudicial to women's image" or "promote" violence against women is problematic:

²⁸ General Comment 34, *op.cit.*, para 45; European Court, *Goodwin v. UK* [GC], App. No. 17488/90), 27 March 1996, para 39; European Court, *Financial Times v. UK*, App.No. 821/03, 15 December 2009, para 70.

- First, it hinges on the definition of "violence against women" which, as has been discussed above is overly broad and does not meet the legality criterion of the three-part test;
- Second, none of the other key elements of the provision are further defined, leaving it open to interpretation what, for example, constitutes a "stereotyped image", what type of acts would fall within the highly subjective categories of "promotion" of violence against women, or what constitutes statements or acts that are "prejudicial" to "women's image".

ARTICLE 19 believes that the provision needs to be more narrowly defined to make clear what type of content it prohibits, and also needs to clarify what the legal consequences are of violating the standard set.

Recommendations

ARTICLE 19 welcomes the efforts of the Tunisian government to combat violence against women, but calls upon the legislature and civil society to ensure that the Draft Law is not adopted before its current infringements upon the right to freedom of expression have been resolved.

ARTICLE 19 recommends that the Draft Law be carefully reviewed and partially revised to bring it in line with Tunisia's obligations under international law regarding the right to freedom of expression. Priority should be given to the provisions in the Draft Law that criminalise speech, most notably the definitions that determine what entails "violence against women," as this impacts on the scope of the Draft Law in its entirety. Further amendments should be made throughout the Draft Law to more narrowly and precisely define the scope of provisions that potentially infringe upon the right to free expression and privacy. This should be done by eliminating overly broad and vague terminology and clearly defining key elements of those provisions so as to meet the test of legality under international law.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, 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 organisation 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. This analytical 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 of our analyses are available at <http://www.article19.org/resources.php/legal>.

If you would like to discuss this analysis 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. For more information about the ARTICLE 19's work in Tunisia, please contact Saloua Ghazouani Oueslati, Director of ARTICLE 19 Tunisia and MENA, at saloua@article19.org.