



## SUMMARY

### Comment on the Draft Decree on Election of National Constituent Assembly of Tunisia

by

ARTICLE 19, the Global Campaign for Free Expression

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This document contains a summary of the ARTICLE 19's analysis of the draft Decree on Election of the National Constituent Assembly of Tunisia (the Draft Decree) against international standards on freedom of expression.<sup>1</sup>

ARTICLE 19 welcomes the efforts of the Interim Government of Tunisia to pass a new regulation on election to the Tunisian National Constituent Assembly as an important step in preparing credible and peaceful nationwide elections in 2011. In order to support this process, ARTICLE 19 analysed the provisions of the Draft Decree that govern the right of voters and candidates to seek, impart and receive information in view of their participation in the elections. We also analysed the provisions of the Draft Decree – or the lack thereof - on media and election.

ARTICLE 19's analysis is based on international standards guaranteeing the right to freedom of expression and the right to political participation.<sup>2</sup> These standards, *inter alia*, grant political

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<sup>1</sup> The full text of the Comment and of the Draft Decree as of 13 April (both in English) can be accessed at <http://www.article19.org/pdfs/analysis/comment-on-the-draft-decree-on-election-of-national-constituent-assembly-of-.pdf>

<sup>2</sup> See Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"); Article 21 of the Universal Declaration on Human Rights; Article 25 of the ICCPR; UN Human Rights Committee, General Comment 25, adopted on 12 July 1996, para 12, available at: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/d0b7f023e8d6d9898025651e004bc0eb?Opendocument>

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parties and candidates the right to express their views freely through the mass media, and the right of the public to adequate and balanced information that enable electorates to participate fully in choosing their future governments. Furthermore, the ARTICLE 19's analysis is informed by the standards developed by four special mandates on freedom of expression (the *Joint Statement on the Media and Elections* of 1999),<sup>3</sup> documents of the Organization for Security and Co-operation in Europe<sup>4</sup> and ARTICLE 19's *Guidelines for Election Broadcasting in Transitional Democracies*<sup>5</sup> and the policy document *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*<sup>6</sup> that deal with various issues related to freedom of expression and election.

ARTICLE 19 is concerned that in its current form, the Draft Decree fails to sufficiently incorporate relevant international standards, and fails to guarantee the respect for freedom of expression and media freedom during election process. Our concerns are heightened because at present, Tunisia also needs to reform a number of other media laws to bring them in line with international standards on freedom of expression, including the need to transform the state broadcaster. Furthermore, we understand that series of initiatives have been undertaken by journalists, media, broadcasters and experts to introduce a comprehensive system of media self-regulation. Some of the issues outlined below (in particular the obligation of broadcasters to provide fair, balanced and impartial reporting on election) should be left of self-regulatory mechanisms. ARTICLE 19 fully supports the initiatives to introduce effective self-regulatory systems and the respective recommendations should be viewed in the light of absence of such mechanisms at present.

The ARTICLE 19 concerns relate to the following areas of the Draft Decree:

- **Failure of the Draft Decree to guarantee the respect for freedom of expression and media freedom during election process, and a failure to recognize the right to participate in election campaigning:** none of the provisions of the Draft Decree recognize the importance of the right of freedom of expression in relation to election. They also fail to impose an obligation to respect media freedom during election period. Similarly, the Draft Decree does not recognize that participation of voters in election campaigns is a form of their right to freedom of expression. Clear recognition of the right to freedom of expression in the election context is particularly important for countries in democratic transition, such as Tunisia.
- **Failure to require any restriction of expression should meet a three-part test in order to be in compliance with the law.** The restrictions on freedom of expression during election period can have a number of forms, such as speeches or distribution of leaflets or similar. Without clear recognition of this international standard, many future restrictions on freedom of expression in elections risk being in violation with international standards even though they are in compliance with the Draft Decree.
- **Failure to provide for fair, balanced and impartial reporting in broadcast media:** In the absence of self-regulatory mechanisms, ARTICLE 19 is concerned that the Draft Decree

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<sup>3</sup> International Mechanisms for Promoting Freedom of Expression, Joint Statement on the Media and Elections, 15 May 2009; available at <http://www.article19.org/pdfs/press/joint-statement-on-the-media-and-elections.pdf>. See also, Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain, UN Doc. E/CN.4/1999/64 29 January 1999.

<sup>4</sup> See for example, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29, June 1990, para. 7.8.

<sup>5</sup> ARTICLE 19 Guidelines for Election Broadcasting in Transitional Democracies, London, 1994; available at <http://www.article19.org/pdfs/tools/electionbroadcastingtrans.pdf>.

<sup>6</sup> ARTICLE 19 *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, March 2002; available at <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

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does not contain any provisions on the obligation of broadcast media (both private and state/public) to ensure that candidates receive fair, balanced and impartial coverage, while respecting the editorial independence of broadcasters. ARTICLE 19 notes that, generally, it is preferable to provide for fair, balanced and impartial reporting through effective self-regulatory mechanisms. ARTICLE 19 fully supports the introduction of effective self-regulatory system for media; this recommendation should be viewed in the light of fact that at present, such mechanisms do not exist in Tunisia. ARTICLE 19 is also aware that simultaneously with reforming the election laws, the Tunisian Interim Government is undertaking a review and reform of other legislation, including the regulations on electronic media. It is possible that the drafters intended these requirements are to be stipulated in other pieces of legislation or in the ethical codes. At the same time, the Draft Decree should guarantee **the editorial independence of broadcasters** meaning there should be no inappropriate interference with programmes' content.

- **Failure to provide for voter education:** the Draft Decree does not contain any provisions on the obligation of the Electoral Commission to carry voter education, such obligation stems from the international law obligation to “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” As such, ARTICLE 19 recommends that the Draft Decree explicitly stipulates such obligation.
- **Failure to protect the media during election process, including protection against attacks on media outlets and media workers:** the omission of such protection is particularly worrisome due to a long history of media censorship, media interference and oppression in Tunisia. ARTICLE 19 recommends that the Draft Decree regulates two specific issues in this respect.
  - First, the Draft Decree should **prohibit interference in work of media**. It should explicitly state that public authorities must refrain from interfering in the activities of media outlets and journalists with a view to influencing election.
  - Second, the Draft Decree should include provisions on **exempting media from legal liability for unlawful statements made by political candidates** in direct broadcast, unless the media outlet concerned has either taken specific steps to adopt the statements, or where the statements are quite clearly illegal and the media outlet had an adequate opportunity to prevent their being disseminated. The media should also have reduced responsibility for the content of direct access broadcasts. However, this limitation of liability does not relieve political parties and other speakers themselves from liability for their statements.
- **Lack of comprehensive provisions on the Electoral Commission:** ARTICLE 19 observes that although the Draft Decree stipulates various functions of the Electoral Commission, it does not specify its mandate and composition, and does not deal with any issues related to formation of the Commission. It is possible these matters are regulated in another piece of legislation that is being drafted simultaneously with the Draft Decree. Overall, ARTICLE 19 recommends the law should provide for the independence of the Electoral Commission and should also clarify its powers in relation to media.
- **Vague content restrictions on election campaigning:** Article 37 of the Draft Decree contains vague and overbroad prohibition of “electioneering” that “contains calls for hatred, fanaticism and religious, group, regional or tribal discrimination during the electoral campaign.” These provisions fail to respect international standards in this area and can lead to illegitimate restrictions of freedom of expression. ARTICLE 19 recommends that definition of hate speech should be uniform for all areas (including election) and the Decree should define and prohibit “advocacy of national, racial or religious hatred that constitutes

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incitement to discrimination, hostility or violence” in accordance with Article 20 para 2 of the ICCPR.

- Term “**national information media**” needs to be defined. The Draft Decree fails to provide any indication what is meant by this term.
- ARTICLE 19 recommends that the Draft Decree provides for **the right of political parties and candidates to access state/publicly owned media during the election campaign**. At present, the Draft Decree in Article 44 only states that the candidates are “allowed to use only the national information media” without stipulating that this in fact amounts to their right. The Draft Decree should also provide the definition of the term “national information media”.
- **Failure to guarantee the right of political parties to access state/publicly owned media:** Article 44 of the Draft Decree limits this right only to “candidates, men and women.” It is unclear whether the intention here was to create a dual system where special provisions would be provided for candidates (since some candidates will most likely be independent, without associating themselves with particular political party). However, the Draft Decree fails to provide access to political parties to media in a different manner. ARTICLE 19 suggests to clarify this issue and to stipulate clearly that free access to all public media is guaranteed to parties as well. Political parties should be then free to decide how to use their time as they best see fit, either by airing party messages or by presenting individual candidates.
- **Failure to provide for free direct access to air time for political parties and candidates:** as noted above, Article 44 of the Draft Decree states only state information media can be used for electoral campaigning. Subsequent articles then envision the rules for access to be set by the Electoral Commission. However, at no point in the Draft Decree it is stated that this access should be provided for free. ARTICLE 19 notes that free direct access to airtime for political parties and candidates, at least in the public media, is required by international law in transitional democracies as an essential means for ensuring that voters can make informed electoral choices.<sup>7</sup> Regardless, where such airtime is provided for, it is essential that it is allocated to political parties and candidates on a fair and non-discriminatory basis.
- **No access of political parties and candidates to private broadcast media:** the Draft Decree appears to limit the possibility of electoral campaigning to “national information media” (while failing to provide the definition of this term, as noted above). The Draft Decree fails to stipulate a penalty where private media is used for campaigning purposes. ARTICLE 19 notes that currently, there is an overwhelming consensus that equitable access should also apply in relation to privately owned broadcasting media, provided these obligations are not excessively onerous. The guiding principle in implementation, and in deciding whether or not to require private broadcasters to provide direct access slots, should be to ensure that the public is sufficiently informed in a balanced manner
- **Lack of provisions on transparency:** provisions of Article 52 of the Draft Decree, that provide regulate the electoral campaign spending, are insufficient. ARTICLE 19 recommends that the Draft Decree includes specific obligation of political parties to fully disclose – both prior and after the election – sources and amounts of financial contributions and the types and amounts of campaigns expenditures. This information should be available to the public. Furthermore, the Draft Decree should include provisions on transparency of the Electoral Commission. In particular, the Draft Decree should stipulates what materials and information of the Electoral Commission must be disclosed as a part of proactive disclosure requirement and specify the process of accessing information about the Electoral

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<sup>7</sup> See ARTICLE 19 Guidelines, No. 9.

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Commission operations. Further, the meetings of the Electoral Commission (including the local ones) should be open to everyone, including media.

- **Weak enforcement mechanism:** In general, ARTICLE 19 observes the current version of the Draft Decree does not contain a uniform complaint system for all matters related to election, including those concerning media and disputes. Furthermore, the current provisions for liability for interfering with the right to election campaigning is very brief. In particular, the Draft Decree sets no deadlines and specific processes for dealing with complaints, apart of stating that the Commission shall make “immediate end to any abuses”. The Draft Decree does not list any form of measures that the Commission can take based on its findings of violations. ARTICLE 19 notes no offences listed in the Draft Decree deal with sanctions for interfering with the right to election campaigning and interference with media freedom. It is unclear whether such sanctions are already provided in other laws (e.g. criminal or administrative codes). However, we again note that it might be preferable to include these provisions in the Draft Decree as well in the light of current legislative reforms in Tunisia

### Recommendations

In response, ARTICLE 19 recommends the following changes to be introduced to the Draft Decree:

- The Draft Decree should explicitly recognise the protection of the right to freedom of expression and information, as well as the right to participate in election campaigning as basic principles in both election information provision and election campaigning; the Draft Decree should also include the three-part test for assessment of any restriction to these rights.
- The connection between the right to freedom of expression and the right to participate in election campaigning should be highlighted by setting out that any interference with the right to participation in election campaigning which amounts to interference with the right to freedom of expression should meet the three part-test established by the Human Rights Committee.
- Special measures should be taken to ensure that public/state broadcasters are impartial at all times, particularly during election period.
- In the absence of self-regulatory mechanisms, the Draft Decree (or other regulation) should impose a duty on the state/public media and private broadcasters to provide fair, balanced and impartial information in their reporting of news and current affairs during election campaigning. At the same time, the legislation should grant the editorial independence of broadcasters and prohibit inappropriate interference with programmes’ content from the government.
- The Draft Decree should stipulate an obligation of the Electoral Commission to carry out voter education programmes to ensure citizens are properly informed about voting process and other relevant issues, including through public media.
- The Draft Decree should explicitly state that public authorities are prohibited from interfering in activities of media outlets and media workers during election, and ensure that media can carry out their work without harassment and prosecution.
- The Draft Decree should stipulate that the media does not bear responsibility for unlawful statements made by candidates in their broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements, or where the statements are quite clearly illegal and the media outlet had an adequate opportunity to prevent their being disseminated.
- The Draft Decree (or another regulation) should provide for the independence of the Electoral Commission and stipulate its mandate and various functions in relation to freedom of expression of individuals and media outlets during election period.
- Provisions of the Draft Decree on hate speech should be amended in the light of international standards on prohibition of advocacy that constitutes incitement to discrimination, hostility or violence. This regulation should be uniform for all areas and should not be specific to election campaigning.

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- The Draft Decree should define the term “national information media”.
- The Draft Decree should explicitly guarantee the right of political parties and candidates to access state/publically owned media during the election campaign.
- The right of political parties, not only individual candidates, to access state/publically owned media should be guaranteed. Political parties should be free to decide how to use their time as they best see fit, either by airing party messages or by presenting individual candidates.
- The Draft Decree should provide that political parties and candidates have free direct access to air time on fair and non-discriminatory basis.
- The drafters should consider the introduction of guidelines for the provision of direct access programmes on private broadcasters.
- The Draft Decree should stipulate that political parties must fully disclose sources and amounts of financial contributions and the types and amounts of campaigns expenditures; these obligations should cover periods prior and after the election.
- The Draft Decree (or another regulation) should provide for transparency of the functioning of the Electoral Commission, including the openness of the meetings of the Commission on local and national levels.
- The Draft Decree should introduce clear and comprehensive system of complaints to the Electoral Commission, including on matters concerning electoral campaign, disputes and media.
- The Draft Decree should provide specific sanctions for violations of various aspects of freedom of expression and election and interference with media freedom.

ARTICLE 19 hopes that the recommendations shall be useful to the Tunisian Interim Government and experts when reviewing the text of the Draft Decree from freedom of expression perspective. We urge the Tunisian Interim Government to adopt the regulation allowing freedom of media in crucial pre-election period in order to ensure that political parties and civil society groups are able to freely participate in the electoral process. ARTICLE 19 stands ready to assist the Tunisian Government and other stakeholders in finalizing the text of the Draft Decree and other freedom of expression related regulations.