



# FREEDOM OF SPEECH IN TUNISIA: TEXTS AND CONTEXT

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## INTRODUCTION

Media is the field in which the battle for liberties is most prominently played out. It plays a crucial role as a “Fourth Estate”. Tunisian media have served, in their overwhelming majority, as one of the pillars of the authoritarian regime. Since the ousting of the former president, they have been at the heart of the democratic transition project. To measure the progress achieved, it is important to review the legacy of the previous regime.

The transition initiated in 2011 had to contend with the legacy of this repressive and reclusive regime.<sup>1</sup> The overwhelming majority of media and press organisations were instruments of the former regime, which used them as part of its propaganda system, to serve lies and denigrate dissidents and critical voices.<sup>2</sup> They discharged the dishonourable mission of falsifying the social and economic reality.<sup>3</sup>

The bribing of Tunisian and foreign media companies and journalists, through the Tunisian Agency for External Communication (ATCE), was commonplace. Depending on their allegiance to Ben Ali and his regime, media organisations were granted the right by the ATCE to publish or broadcast public sector ads. But if an organisation voiced a negative opinion on the regime, the ATCE would withdraw all public ads to drive the organisation towards bankruptcy. This is how censorship functioned under the Ben Ali regime. The Agency also paid mercenaries and foreign political figures to promote the image of Ben Ali in their respective countries. Some media organisations – bribed by the system - were used as instruments for the regime’s propaganda abroad.

In this context, the legal framework governing the media was draconian. Article 8 of the June 1, 1959 constitution stipulated that freedom of speech and freedom of the press were guaranteed, but the legislation governing the field of media and communication was repressive and arbitrary.

The 1975 law on print media was very repressive,<sup>4</sup> while audiovisual media was vulnerable to a legal vacuum that left the door open for all kinds of abuse. The rare legal texts that existed were exclusively related to national radio and television.<sup>5</sup>

In the field of print media, in general, the 1975 law functioned more like a media criminal law, due to the significant number of jail terms it provided for, despite successive amendments in 1988,<sup>6</sup> 1993,<sup>7</sup> 2001<sup>8</sup> and 2006,<sup>9</sup> including the transfer of some imprisonment provisions to the criminal code (2001) and the removal of sanctions related to the legal deposit of publications (2006).<sup>10</sup>

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<sup>1</sup> Chouikha (L.), « Propriétés et particularités du champ politico-journalistique en Tunisie », NAQD

<sup>2</sup> The truth is that this media control started with the Bourguiba regime, as early as 1956. Media organisations were considered as the voice of the state. Then, Ben Ali tightened his control of both public and private media.

<sup>3</sup> During the 2008 miners uprising and the 2010-11 revolution, no Tunisian media reported the claims and criticism against the regime.

<sup>4</sup> Law no 1975-32, dated April 28, 1975, Official Journal, issue 29, April 29, 1975, modified.

<sup>5</sup> Law no 2007-33, dated June 4, 2007, on public institutions of the audiovisual sector, Official Journal, issue 45, June 5, 2007, law no 1990-49, dated May 7, 1990, on the creation of the Tunisian Radio Television

<sup>6</sup> Organic law no 1988-89, dated August 2, 1989

<sup>7</sup> Organic law no 1993-85, dated August 2, 1993

<sup>8</sup> Organic law no 2001-43, dated May 3, 2001

<sup>9</sup> Organic law no 2006-1, dated January 9, 2006.

<sup>10</sup> Chouikha (L.), « Fondement et situation de la liberté en Tunisie » & « Tunisie, la liberté d’expression assiégée », IFEX-TMG reports, Feb. 2005, page 22.

This repressive trend was further consolidated with the introduction of the anti-terrorist law in 2003,<sup>11</sup> and the amendment of article 61 of the criminal law in August 2010.<sup>12</sup>

After the relative openness of the late 1980s, Ben Ali's accession to power led to a rapid rise in attacks against fundamental liberties, including freedom of speech and freedom of the press. This resulted in, from 1989, the disappearance of almost all independent newspapers and magazines, such as the weekly magazines *Le Maghreb*, *Le Phare* and *L'opinion*, etc.

In the 1990s and 2000s, there was certainly a multitude of publications, but they were all fully controlled by the regime, publishing its propaganda and denigrating opposition figures and human rights activists.<sup>13</sup>

Audiovisual media was also tightly controlled, with a weak public sector, consisting of two TV channels and a government radio corporation with four national channels, including one in French, plus five regional radio stations.

The private sector was no better, offering two TV channels (*Hannibal* and *Nessma*) and four FM radio stations (*Mosaïque*, *Shems FM*, *Express FM* and *Jawhara FM*), all owned by family members of President Ben Ali and their relatives, operating on a political quid pro quo and nepotism basis. Any political or news programming was prohibited.

Thus, in the absence of an independent regulation authority, the audiovisual sector was co-opted by the political authority. As for online media, the Internet was closely monitored. The legal framework set by the former regime was autocratic, oscillating between the absence of applicable law and the adoption of a legislation that appeared to be liberal, but which in reality was particularly draconian.

Tunisia was on top of blacklists of countries hostile to freedom of the press and the Internet.<sup>14</sup>

In this context, a telecommunications code and an organic law on the protection of personal data were promulgated in 2001 and 2004 respectively.<sup>15</sup>

This last text was adopted to bolster the image of the regime, just before the 2005 World Summit on the Information Society, which was hosted by Tunisia. But behind the emphatic proclamations of the principles of transparency and human rights, the right to access to information stated in the February 27, 2004 organic law on the protection of personal data was very narrow. Prohibited sensitive data, included in article 13 (personal data on offences, criminal lawsuits, indictment, preventive measures and judiciary record) and article 14 (data on origins, convictions, opinions and health) do not apply to administrative authorities and public entities.

Moreover, article 56 stipulated that citizens' access to personal data did not apply to public administrative personalities.

Article 54 of the same law exempted "public authorities, local authorities and public administrative institutions" from abiding by certain provisions, namely pertaining to the obligation of prior declaration of personal data

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<sup>11</sup> Law no 2003-75, dated December 10, 2003.

<sup>12</sup> Law no 2010-35, dated June 29, 2010.

<sup>13</sup> Only a few low circulation publications owned by opposition political parties managed to resist, despite the harassment, lawsuits, and censorship, such as *Al Mawkef*, a weekly published by the progressive democratic party, and *La Nouvelle Voie*, published by Attajdid.

<sup>14</sup> As of 1998, Ben Ali was considered as of the "10 worst enemies of the press" by the Committee for the protection of journalists. He was also seen as a major threat by Reporters without Borders.

<sup>15</sup> Official Journal, issue 10, February 3, 2004

processing for public security or national defense reasons, in case of criminal lawsuit or when necessary for the implementation of their mission, in accordance with the legislation in force.

The draconian nature of the legal framework on media freedom has worsened over the years, reaching unmatched levels during the years before the ouster of Ben Ali.

However, despite this draconian set of laws, the cyberspace has contributed, in an effective way, to boosting the uprising.<sup>16</sup>

In fact, to counter censorship and lack of coverage by the traditional national media during the revolution,<sup>17</sup> the information battle moved online. To combat this, the authorities stepped up Facebook monitoring and shut down a number of YouTube channels. Police resorted to comprehensive filtering at the level of Internet service providers. With the revolution, the media sphere was shaken up, both during the insurrection and during the transition.

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<sup>16</sup> See Ben Letaief, « Droit, administration publique et TIC en Tunisie », in Mezouaghi (M.), (dir.), *Le Maghreb dans l'économie numérique*, IRMC, Maisonneuve et Larose, Paris 2007, p. 181-201 ; « Médias, Internet et transition démocratique en Tunisie », in Lavenue (J.J.), (Dir.), *E-révolutions et révolutions, Résistances et résiliences*, Presses Universitaires du Septentrion, Lille 2016, p. 91

<sup>17</sup> December 17, 2010 to January 14, 2014

## 1.0 TRANSITIONAL REFORMS: AREAS OF CLARITY AND AMBIGUITY

After the fall of the Ben Ali regime, reforms relating to the media and freedom of speech were a top priority. The reforms introduced in 2011 achieved real progress, supported by a new constitutional system that consolidated protections of freedom of speech, despite some degree of uncertainty and ambiguity.

### 1.1 THE 2011 TRANSITION: DECREE LAWS 2011-41, 2011-115 AND 2011-116 REPRESENT A SIGNIFICANT LEAP FORWARD

Before Ben Ali fled, a strong wind of freedom blew across the country and paved the way for pluralism and unprecedented freedom. Since 2011, the media sector has been pursuing a status and role.

In the public sector, journalists wanted to shift from government to a public information service, governed by ethics, objectivity and balanced pluralism. The private sector was keen to safeguard the newly gained freedom.

At the institutional level, in the aftermath of the fall of the former president, three independent committees were created. The first was entrusted with investigating corruption and embezzlement under the former regime, the second with the violence directed towards the population during the revolt, and the third with political reforms. The mandate of the latter was expanded in early March 2011 to include legal experts, young revolutionaries from different regions of the country, civil society and representatives of major militant organisations', such as the Tunisian League for the Defense of Human Rights, the Bar Association, Magistrates' Association and the Tunisian General Workers' Union, in addition to a dozen political parties. It was later renamed High Authority for the Achievement of the Objectives of the Revolution, Political Reform and Democratic Transition. The embedded expert committee was composed of four subcommittees, including one on the reform of media.

A few weeks later, after the dissolution of the Ministry of Information and the Higher Council for Communication, a National Authority for the Reform of Media was created by decree-law no 2011-10, dated March 2, 2011. Its mission was to assess the situation, propose the necessary legislative texts, and work on the creation of independent regulatory institutions.

The subcommittee in charge of media reform within the High Authority for the Achievement of the Objectives of the Revolution worked with the National Authority for the Reform of Media to develop a joint vision on the necessity to clean up the sector and rid it from "government meddling and hegemony". This joint action spawned two major texts: one for the print media and the second for audiovisual media, namely the decree-laws no 2011-115 and 2011-116, dated November 2, 2011.<sup>18</sup> The two texts were drafted after a series of consultations, involving many experts, but also the national journalists' union and various national and international NGOs. Comparative studies were conducted, and workshops were organised to enable experience exchanges with foreign regulatory institutions, such as the Higher Audiovisual Councils in France, Belgium, the Czech Republic, Romania and the UK (OFCOM).

#### 1.1.1 PRINT MEDIA REFORM

The decree law no 2011-115, dated November 2, 2011, repeals and replaces the 1975 Press Code.

It contains 80 articles organised in seven chapters. The text includes a number of significant changes, namely:

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<sup>18</sup> Official Journal, issue 84, November 4, 2011, p. 2559 (in Arabic)

- The Ministry of Interior no longer manages the sector; all aspects of freedom of speech and freedom of the press were transferred to the justice system
- New provisions on the definition of professional journalists and the delivery of press cards were introduced (art. 7 and 8)
- The right of access to information for journalists and the right of publication were recognised
- The protection of journalists' independence against all forms of pressure and intimidation was bolstered (art. 9-14)
- The protection of the privacy of sources is ensured (art.11)
- The authorisation system operated by the Ministry of Interior has been eliminated (art. 5 and 19)
- Provisions on financial transparency of media organisations were introduced, to enable readers to be informed on the sources and modes of funding of the general information media, as a guarantee against concealed domestic and foreign influence
- Provisions on pluralism were introduced, in order to guarantee the right to plural and diversified information and to avoid abuses related to concentration and dominance (art. 31-38)
- Almost all repressive provisions of the former press code were eliminated, having been established by the fallen regime to oppress and control journalists and media. These provisions were replaced by fines for actions related to contempt and defamation
- The limitation of corporal punishment to few serious crimes, such as incitement to murder, physical violence, rape, apology for crimes against humanity, war crimes and child abuse.

#### 1.1.2 AUDIOVISUAL REFORM AND CREATION OF A REGULATORY AUTHORITY

The second text is the decree-law no 2011-116, dated November 2, 2011, on the freedom of audiovisual communication and the creation of the Independent High Authority for Audiovisual Communication (HAICA).

This law guarantees the freedom of audiovisual communication. In addition to the right of all citizens to access audiovisual information and communication (art. 4), the text upholds the fundamental principles, namely freedom of speech, equality, pluralism of opinions and ideas, objectivity and transparency.

To guarantee these rights and liberties and monitor the field, an independent High Authority for Audiovisual Communication has been created. The body has a civil personality and is financially independent.

In accordance with article 6 of the law, the High Authority is independent and carries out its mission autonomously from any other party likely to have influence on its members or activity.

##### *a. Composition of the regulatory authority*

The authority is managed by a college of nine independent personalities, with recognised experience, integrity and competence in the field of communication and news. They are appointed by decree. The composition of the authority follows an original, participative approach, as it includes two judges (one is a judicial judge and the other is an administrative judge), one of them named Vice Chairman. The body also includes two members named by the Parliament, two journalists named by the most representative press groupings, one member representing audiovisual corporations, one member representing non-journalistic staff of media organisations, and finally a

Chairperson, named by the President of the Republic, in consultation with the members of the Independent High Authority for Audiovisual Communication.

The HAICA members have a mandate of six years, with renewal of one-third of the members every two years. To guarantee the independence and impartiality of the regulatory authority, a number of incompatibilities are listed.<sup>19</sup>

#### *b. Competencies*

The competencies of the HAICA are organised in three complementary categories: decision-making, consultation and monitoring.

Decision-making attributions are listed in article 16 of the decree-law, and are mainly related to the respect of the rules and procedures of the audiovisual sector, frequency licensing, specifications drafting and adoption, licensing conventions, and monitoring. They also include the monitoring of the respect of ethics, freedom of speech, pluralism of opinions and ideas, and sanctioning violators.

As far as elections are concerned, the regulatory authority decides, in collaboration with the Higher Independent Authority for Elections, on the rules for radio and TV campaigns, based on the respect for the principles of pluralism, equity and transparency (art. 44). The authority also defines the rules and conditions for production, programmes, TV reports and segments related to electoral campaigns, as well as their programming and broadcast (art. 43).

As far as consultative activities are concerned, the mandate includes advisory opinions on legislation projects related to the audiovisual sector, and a binding opinion for the appointment of CEOs of public audiovisual institutions.<sup>20</sup>

Moreover, the HAICA may propose reforms, as required by the evolution of the sector.

The above responsibilities are complemented by a monitoring function and, ultimately, capacity to sanction. The authority may act upon request or on its own initiative, to “monitor the level of respect of the general principles governing audiovisual activities, in accordance with the legislation in force” (art.27). The authority may impose progressive pecuniary or non-pecuniary sanctions, running from an initial warning to the final withdrawal of the license. In all cases, the sanction must be proportionate to the violation, as well as to the potential benefit the violator might have earned, and cannot exceed 5% of the organisation’s turnover, after taxes, during the previous fiscal year (art. 29). The authority may also refer the case to competent jurisdictional or professional authorities.

The above reforms were frozen by the Islamist-majority government, formed after the National Constituent Assembly elections held on October 23, 2011. This government has been very reluctant to create the new independent institutions to monitor the media.

After long prevarications and multiple forms of protest, including a widely observed general strike by journalists on October 17, 2012 - the first in the country’s history - the government said it was willing to implement the two decrees and create the Independent High Authority for Audiovisual Communication.

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<sup>19</sup> Persons having held governmental, party or political functions or on the payroll of a political party, during the previous two years, or those with direct or indirect shares or financial interests in media organisations cannot be members of the HAICA.

<sup>20</sup> In accordance with the principle of procedure parallelism, ending the functions of the holders of the same positions should be submitted to the HAICA.



However, the government continued to procrastinate, and the members of the regulatory authority were not named until May 3, 2013. Ever since, it has faced multiple forms of resistance and campaigns aimed at weakening its image and undermining its capacity to act.

## 1.2 THE 2014 CONSTITUTIONAL MECHANISM: PROGRESS AND UNCERTAINTY

The new constitution, finally adopted on January 27, 2014, strengthens communication and information freedoms, and gives the regulatory authority a constitutional status. Indeed, the new constitutional text gave momentum to the 2011 reforms and paved the way for consolidated freedoms, by supporting press freedom and institutionalising it in the audiovisual field.

### 1.2.1 ENSHRINED FREEDOM

Article 31 of the new constitution states that “freedom of opinion, thought, speech, information and publication are guaranteed and may not be subject to any prior control”.

The solemn proclamation of media freedom is crucial, because other freedoms are contingent upon it.

It is, however, regrettable that there are no guarantees for the privacy of sources or the independence of media organisations.

Article 32 confirms that the “state guarantees the right to be informed and the right to access to information. The state shall make every effort in order to guarantee the right to access communication networks”. The adoption of this text is a significant progress. The scope and implications have been detailed later in organic law no 2016-22, dated March 24, 2016, on the right to access information. It provides for the creation of an independent public authority in charge of access to information.

### 1.2.2 INSTITUTIONALLY PROTECTED FREEDOM

A constitutional authority will replace the current High Independent Authority for Audiovisual Communication. In this regard, article 125 stipulates that “independent constitutional institutions’ role is to consolidate democracy. All state institutions should facilitate their mission”.

These institutions enjoy legal personality, and administrative and financial autonomy.

They are elected by a qualified majority of the Assembly of the Representatives of the People (parliament) and report to the latter. An annual report for each institution is discussed during dedicated plenary sessions of the Assembly. Their composition is defined by law, as well as the eligibility of their members, mode of election, organisation and responsibilities.

Article 127 of the constitution stipulates that “the Authority for Audiovisual Communication is in charge of regulating and developing the audiovisual sector. It upholds freedom of speech and information and promotes plural and impartial information.”

The authority enjoys regulatory powers in its field of competence, and must be consulted on any bills related to the field”.

The Authority is composed of nine independent, neutral members, who shall be competent, honest personalities, for a single mandate of six years. One-third of the members are renewed every two years.

It is stipulated that the authority's members shall be "independent, impartial, qualified and honest". The text lists the principles the authority should abide by, namely the "respect of freedom of speech and media", and "pluralism, integrity of media corporations". The legal powers it enjoys should enable it to fully play its regulatory role in the audiovisual field."

The above-mentioned progress and guarantees should not, however, be mistaken for unfettered progress. The constitutional system remains weak, risking vulnerabilities that are likely to worsen, due to an unfavourable context and a number of deviations.

One of the main weaknesses of the constitutional system lies in article 6 of the constitution itself, which describes the state as the protector of religion and custodian of the sacred (values). The article stipulates that "the state protects religion, guarantees freedom of faith, conscience and creed. It ensures the neutrality of mosques and worship locations against instrumentation by (political) parties. The state commits to disseminate the values of moderation, tolerance, protect the sacred (values), ban, prevent and fight any apostasy accusations, incitement to hatred and violence."

Some fear that when the state is proclaimed "protector of religion and custodian of the sacred", it might not be able to remain neutral and impartial. Many NGOs and civil society organisations have voiced genuine worries that this protection of the sacred may be an unacceptable, potentially dangerous, limitation to freedom of speech as it is universally recognized. They fear this provision may open the door for legislative provisions criminalising texts and speeches considered offensive to religious beliefs.

Moreover, it is also alarming to note that among the interests to protect and which, in fact, limit freedom, article 49 mentions "public morality." Admittedly, this restrictive notion is mentioned in article 19 of the International Pact on Civil and Political Rights, but in the Tunisian context, and in an environment where religious references prevail, with rising conservatism, it might be a vague notion that can be exploited in a way that limits freedom.

As for the institutional guarantee of audiovisual media by the future Audiovisual Communication Authority - and considering the mode of appointment of its members, based on the election by the Assembly of the Representatives of the People (parliament) -, a subservience by majority parties is to be feared. Members may be named on the basis of their allegiance to political parties, rather than their competence and integrity. While the risk of corporatist excesses would be mitigated, it would be replaced with something even more dangerous: party polarization.

### 1.3 POST-CONSTITUTIONAL TEXTS: ONE STEP FORWARD, TWO STEPS BACKWARDS

In this regard, two texts were passed in 2015 and 2016:

- law on anti-terrorism, repression and money laundering
- organic law on access to information

A number of projects will follow, including one that is expected to be adopted very shortly.

#### 1.3.1 ANTI-TERRORISM, REPRESSION AND MONEY LAUNDERING LAW

The organic law no 2015-26, dated August 7, 2015, introduced a series of provisions that are likely to place major limitations on press freedom when covering political events, namely government action in regard to fighting terrorism. The law lists a number of crimes and offenses in very broad terms. This ambiguous terminology opens the door for highly subjective interpretations, paving the way for unacceptable restrictions on the media and

journalists when covering events related to potential terrorist activities, or publishing stories relating to the authorities' attitude towards such activities. This might even happen when publishing or broadcasting opinions critical of government policies. Such offenses and crimes are severely punished, including jail sentences, as listed in the articles below:

- Art. 5: incitement to committing a terrorist crime
- Art. 21: Release, in bad faith, of fake news, putting at stake the security of civil planes, ships during navigation
- Art. 31: Apology of terrorism
- Art. 34: Dozens of crimes and offenses
- Art. 37: Refusing to report to competent authorities, without delay, and in the limit of known actions, any events, information, intelligence on offenses committed or planned by terrorists, in accordance with the provisions of the law herein
- Art. 58: Prohibition to reveal the real identity of an infiltrated person; violations are punishable by 6 to 20 years in jail and a fine of 15 000 to 30 000 dinars
- Art.73: Prohibition to release information on pleas or decisions likely to violate victims' privacy or undermine their reputation, punishable by one year in jail and a fine of 1000 dinars.

There are also concerns about about the potential use of part 5 of the law on "the use of particular investigation techniques" (art. 54 and following articles) against journalists and media organisations, given the very broad definition of some terrorist offenses. The use of such techniques may open the door for the surveillance of media organisations and thus undermine press freedom and violate privacy rights.

This text undeniably weakens freedoms of expression and press.

### 1.3.2 ORGANIC LAW ON ACCESS TO INFORMATION

According to article 32, access to information is a constitutional right: "the state guarantees the right to be informed and the right to access information. The state makes every effort to guarantee the right to access communication networks".

In accordance with the above provisions, organic law no 2016-22 on access to information was passed and promulgated on March 24, 2016.

With its 61 articles, this law repeals and replaces the decree-law 2011-41. In its article 1, it guarantees the right of every person or corporation to access information and compels the concerned public institutions to publish and regularly update all information in their possession.

The law also provides for the creation of an independent public committee, named "information access committee", to investigate complaints in this field and monitor the implementation of the said law. After multiple delays, the committee has finally been created. It is a financially independent public authority (article 37) composed of nine members with a single six-year mandate. Half the members shall be renewed every three years.

The most important responsibilities of the committee are to:

- Decide on appeals related to access to information

- Investigate and audit public institutions
- Enforce penalties and sanctions
- Ensure follow-up of publications released by organisations falling under this law

The adoption of this law may rightfully be considered a major leap forward in terms of freedom of speech and transparency, enabling Tunisia to be a leader in the Arab world as far as access to information is concerned.

However, the law has a number of shortcomings. In particular, exceptions to the right to access information are introduced in article 24, in matters related to:

- Security, national defense and related international relations
- Protection of private life, personal data and intellectual property.

It is also blamed for its weak and incomplete sanctions against institutions which fail to abide by the provisions of the law (art. 57 and 58), in addition to insufficient protection both for journalists and sources.

### 1.3.3 CONTROVERSIAL BILLS

In the wake of the 2014 constitution, a number of bills have been drafted or are being drafted by various stakeholders, namely the current High Authority for Audiovisual Communication, the Ministry in charge of Human Rights and Relations with Constitutional Institutions and Civil Society.

The Ministry in charge of Human Rights and Relations with Constitutional Institutions created, under former minister Kamel Jendoubi, a committee which worked on an organic law on the main aspects to set up a legal framework for audiovisual media. The project included 7 chapters and 170 articles.

The High Authority for Audiovisual Communication also developed a similar organic law on the same subject, with the same number of articles.

The two projects were very similar, except for few items, leading to tension between the two institutions.

The difference concerned the future authority on audiovisual media, namely its competence, composition, and the appointment of its members.

As far as the composition is concerned, the two projects provide for a nine-member authority, but they disagree on the profile of members, namely whether journalists should be included. In fact, the Ministry's initial version provides for the membership of one journalist, while the HAICA wanted two journalists.

The main point of divergence, however, was the mode of appointment. The Ministry proposed a free application by candidates and the election by a qualified majority at the Assembly of the Representatives of the People. The HAICA proposed a separation between the nominating organisations, which must be the organisations representative of the sectors to which the future members belong, and the voting organisation, namely the Assembly of the Representatives of the People.

The two projects are at the heart of a debate on the independence, neutrality, objectivity of the regulatory authority, and ultimately, the credibility of its work and decisions.

The procedure proposed by the Ministry may be credited for trying to prevent corporatist control, but presents a real and inevitable risk of control by political parties and parliamentary majority coalitions. This would strongly

undermine the independence of the regulatory authority, or even block its operation, as was the case for the High Authority for Elections (at the time this report was being written).

By contrast, the project proposed by the HAICA totally excluded public authorities, both legislative and executive, and seemed to ensure the independence of the regulatory authority from political powers. It might be credited for preventing political control over the authority, but risks allowing corporatist interests to prevail over public interests. The proposal could face the same dissensions and malfunctions the current HAICA is experiencing.

The second major divergence point was related to the consultative role of the future authority.

The project submitted by the Ministry rejected the binding opinion for appointment and firing of public audiovisual media managers, and suggested an alternative nomination mechanism whereby the regulatory authority proposes for appointment and holds a simple non-binding opinion for firing. The HAICA project maintained the required assent of the regulatory authority for both appointment and firing.

Evidently annoyed by the current HAICA, and in an attempt to avoid resistance, the government – through the Ministry in charge of Relations with Constitutional Institutions – decided to split the initial project into three separate texts.

The first is an organic law on common provisions for all constitutional institutions. This law has been criticised for undermining the independence of these institutions. It was voted in by parliament, but was then subject to a successful appeal for breaching constitutional provisions. The temporary authority for monitoring the constitutionality of laws welcomed the appeal and revoked article 33 (decision no 2017-4, issued on August 8, 2017). The appeal concerned article 33, which gave parliament the right to withdraw confidence from the Authority as a whole or in one of its members by qualified majority. By declaring article 33 unconstitutional, the Authority also indirectly invalidated articles 11 and 24. The temporary authority for monitoring the constitutionality of laws blocked article 33 for incompatibility with the principle of independence of constitutional institutions and violation of the principle of proportionality. The parliament has, however, challenged the authority's decision and voted in a new text, replacing the "withdrawal of confidence" with "dismissal".

The second text is a bill on the composition and part of the attributions of the regulatory authority (exclusive of the consultative attributions and sanctioning power). In losing all power to control and sanction, the authority would ultimately be stripped of its capacity to be an effective and efficient regulatory authority.

The third bill, which will be voted on later, is a compilation of the rest of provisions included in the initial project, i.e. public and private media legislation, illegal practices and sanctions.

This policy of "small steps" is potentially highly disadvantageous, risking fragmentation and incoherence of texts. It also runs counter to international best practice, whereby grouping and unification of laws are considered a means of simplification.

Overall, the Ministry projects seem regressive in comparison with the 2011 decrees, as they establish a weaker regulatory authority and directly or indirectly undermine freedoms of speech, information and communication.

As far as the legislation on print and online media is concerned, there has been no government project. A single project has been submitted by the National Journalists' Union, prepared by a group of experts. The text introduces a number of precisions and clarifications likely to reduce contradictions between texts, namely in terms of criminal matters, as well as divergent interpretations and decisions by courts of justice. The text has not been made public yet, and accordingly no further details will be given in this paper.

In terms of regulation, the same union, in collaboration with the association of newspapers' directors, is setting up a Press Council as part of efforts toward self-regulation.

Finally, it should be noted that a bill on attacks against the armed forces, drafted and submitted to parliament in 2015,<sup>21</sup> is once again on the agenda. The text is highly dangerous for human rights, since it would grant immunity and impunity to security forces, protecting them from prosecution. Article 18 of the project exempts security forces from criminal liability in cases of injury or death, including in the event of attacks against private property and vehicles. It also criminalises all forms of denigration of security forces likely to undermine public security. It provides for prison sentences of up to two years and a 10 000-dinar fine.

Articles 5 and 6 of the bill provide for prison sentences for 10 years and a 50 000-dinar fine for disclosure or publication of national security secrets. There are no protections for whistle-blowers and journalists.

The text is in contradiction with the constitution, which upholds the right to life, and is a serious threat to freedom of speech and information access.

NGOs like Amnesty International, Human Rights Watch, the Tunisian League for Human Rights and the Tunisian Organisation against Torture have regularly condemned violations perpetrated by security forces during the state of emergency, including acts of torture and arbitrary arrests, which are a threat to the democratic transition process in Tunisia. Abuses perpetrated in the name of security often go unpunished, according to these organisations. This has created a climate of impunity. Security forces consider that they are above the law and do not have to fear prosecution.

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<sup>21</sup> Bill no 25/2015 on the attacks against the reputation of armed forces.

## 2.0 THE CONTEXT

Beyond the textual gaps and limitations, the implementation of Tunisian legislation occurs in an unfavourable context, due to the persistent culture of authoritarianism, contradictions and uncertainty, related to incoherent jurisprudence and the willingness to undermine regulatory institutions.

### 2.1 THE PERSISTENCE OF OLD ADMINISTRATIVE AND POLITICAL REFLEXES

The implementation of the new legislation is hindered by a strong resistance on the part of various political forces and the persistence of old authoritarian, administrative reflexes.

Regarding access to information, opacity and retention remain challenges.

There are also multiple violations of the law and attacks against freedom of speech and information. Periodic reports by a number of institutions, such as the National Journalists' Union, Amnesty International, the Tunisian League for Human Rights and Reporters without Borders regularly report instances of such violations.

Furthermore, journalists are still prosecuted in accordance with the military justice code, the criminal code and other laws, instead of the decree law 2011-115 on the freedom of the press, printing and publishing.

Earlier in 2017, the government sought to restrict the right of journalists to access information, by releasing a memorandum (No 4) ordering ministerial departments and public institutions' communication officials not "to make any statement or intervention" or "release any official information or document to the media", without "prior and explicit authorisation" by their hierarchy. The implementation of this illegal memorandum led the Ministry of Higher Education to release an internal note blacklisting three media companies. Under strong pressure from journalists, media organisations, national and international civil society organisations, the government was forced to withdraw the memo on February 27, 2017.

On April 6, 2017, and for the first time since the fall of the dictatorship on January 14, 2011, the Ministry of Interior seized a newspaper without prior order by the justice, referring to the emergency law.

During the Human Rights Review, in May 2017, the United Nations Council for Human Rights made 10 recommendations to Tunisia, urging it to better define responsibilities when it comes to violations by security forces.

Political and administrative authorities seem to opt for restrictions, demonstrating a clear mistrust, and even fear, of free speech and information.

### 2.2 INCOHERENT LEGAL ACTION

The current threats against freedom of speech and information are aggravated by contradictory and incoherent legal interpretation and application of the legislative and regulatory system.<sup>22</sup>

This uncertainty and contradiction is the result of a number of loopholes in the existing legal texts, namely decree law no 2011-115, and the multitude of provisions on freedom of speech and information, beyond the text of law

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<sup>22</sup> See namely:

البشير المنوبي الفرشيشي و علي قبيقة و محمد المنوبي الفرشيشي ، التنظيم الجزائري لحرية الصحافة و الطباعة والنشر ، منشورات مجمع الأطرش ، تونس 2017 ، ص 515 ، مع قائمة ملاحق

no 115. These provisions are present in the criminal law, the military justice law, the childhood protection law, the telecommunications law, the postal code, and the anti-terrorism law.

Decree-law no 2011-115 has not repealed any of these provisions and neither refers to them nor absorbs them, leading to the current ambiguity and uncertainty. Judges are forced to use their discretion to interpret and combine different texts, which results in contradictory jurisprudence, judiciary insecurity and threatens freedom of speech and information.

These contradictions are the result of the coexistence of two or more different provisions on the same acts/events or similar acts/events. For example: articles 60 to 64 of the decree-law and articles 121 bis and 121 ter of the criminal code; articles 50 and 51 of the decree-law and article 220 bis of the criminal code; articles 47 and 49 of the decree-law and articles 303 bis, 303 ter of the criminal code.

There is also a conflict between provisions of the decree-law and different provisions in a number of particular texts:

- Articles 55 and 57 of the decree-law and article 86 of the telecommunications code;
- Article 60 of the decree-law and article 121 of the childhood protection law.

Furthermore, there are multiple contradictions between the decree-law and a number of articles of the military justice code and the anti-terrorist law.

The situation calls for a substantive revision of decree-law no 2011-115 to eliminate the current fragmentation, incoherence, competition and even conflict of rules and standards.

## 2.3 A WEAKENED REGULATORY AUTHORITY

The creation of the HAICA was particularly difficult. The announcement of its creation raised a storm, particularly when it came to the appointment of its first members. As E. Claus<sup>23</sup> put it, “the Tunisian union for media managers, created on May 6, 2011, whose board is mainly composed of managers of private TV channels launched under Ben Ali, proposed a counter project of a regulatory authority for both audiovisual and print media (on May 20, 2012). It was ultimately not adopted by the government, which missed the opportunity to build on the advantage of decree 116, while engaging in a number of unilateral initiatives”. After a general strike in October 2012 widely observed by journalists, the HAICA was finally inaugurated on May 3, 2013.

Ever since, the HAICA has been experiencing huge resistance and pressure from political lobbies, and has faced tremendous difficulties in imposing its authority.

It has been facing enormous resistance and overt defiance, namely by the two private TV channels created under Ben Ali, which refuse to sign the HAICA specifications. The Islamist channel Zitouna TV ripped up the text of a HAICA decision on air. In a blatant violation of the law, some TV stations are chaired by political figures, political party leaders, and have campaigned, during the legislative and presidential elections, for their owners (al-Janoubia campaigned for its owner and chairman, presidential candidate M. Ajroudi), or for candidates and political parties within which they hold leading positions (NESSMA). The HAICA has struggled against this lack of support and defiance by public authorities, based on forced and scarcely credible interpretations of the law. In this regard, the

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<sup>23</sup> E. Claus, « Les expériences marocaines et tunisiennes de régulation audiovisuelle », In Dominique Marchetti (dir.), *La circulation des productions culturelles, Cinémas, informations et séries télévisées dans les mondes arabes et musulmans*, Rabat, Istanbul, Centre Jacques-Berque, coll. « Description du Maghreb », 2017



chief of government fired two CEOs of the public TV channel - who had been endorsed by the HAICA - without referring to the authority. This was a clear violation of the principles of parallelism of procedures and of the contrary act.

The HAICA was also targeted by a defamation and slander campaign, led by managers of private TV channels created under the former regime, who reject the new legal framework and refuse to comply. These various forms of pressure and resistance show the extent to which regulation has not been integrated into national culture.

Freedom of speech still seems fragile, and the Tunisian media sphere continues to face genuine violations. This fragility is the result of a number of factors, including the persistence of laws inherited from the former regime, such as the criminal code, but also new texts such as the organic law no 26/2015, dated August 7, 2015, on countering terrorism and money laundering, in addition to the bill on the protection of the armed forces.

All these texts, in the context of terrorist threats and escalating security concerns, are potentially dangerous and increase the fragility of media freedoms.

Media companies are at a crossroads. The challenge is how to consolidate their freedom and prevent further abuses. In order to achieve this, a series of actions must be undertaken.

### 3.0 RECOMMENDATIONS

In order to fill the gaps, reduce fragility, put an end to abuses, address threats to freedom of speech and information, prevent fragmentation of texts, a number of propositions and recommendations can be put forth:

1. Prepare, adopt and promulgate new organic laws to replace decree-laws 2011-115 and 2011-116 as soon as possible, through a participative process that include all stakeholders;
2. Unify texts and eliminate fragmentation, to ensure coherence, simplification, clarity and efficiency of the legal framework;
3. Substantially revise the decree-law no 2011-115 in order to fill the gaps, eliminate contradictions, competition and conflicts with other criminal texts, mainly criminal law. Media rights should be decriminalised, and rights to information and communication and freedom of speech should be protected, as part of the process initiated in 2011. The reform should target the diverging judicial interpretations, which lead to delays, contradictions and ambiguities;
4. Develop a specific legal framework for online media, through an additional chapter in the future press code that will repeal and replace the current decree-law 2011-115;
5. Develop a precise and accurate legal framework for opinion polls and audience analytics;
6. Develop a rich legal framework for all aspects related to advertising;
7. Consolidate judicial independence and integrity to enable it to resist pressure and avoid judges being abused;
8. Ensure that any future text takes into consideration the increasingly visible convergence of media. Should we then think about and advocate a single media law?