

Online Freedom of Expression and the Legal Regulation of New Media

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This policy paper analyses the state of Internet freedom in Tunisia. It focuses on the conformity of the Tunisian legal framework governing the Internet with the international standards of the protection of freedom of expression and the right to privacy. The analysis shows that the case for reforms and amendments in this area is crucial. While the Internet is partly free in practice since the 2011 revolution, the repressive laws that formed part of the censorship routine of the Ben Ali regime remain, thus threatening the right of free speech on the Internet.

INTRODUCTION

The right to freedom of expression and protection of personal information represents one of the fundamental rights for all free and democratic societies. It is guaranteed by Art. 19 of the Universal Declaration of Human Rights, by the International Covenant on Civil and Political Rights, and in Tunisia in Art. 8 of the Constitution of 1959. During his authoritarian rule, former president Zine el-Abidine Ben Ali tried to enhance the image of a democratic Tunisia by including the above mentioned declaration in the country's constitution. However, Tunisia is still struggling from media censorship and surveillance both offline and online.

Furthermore, Tunisia's internet freedom remains threatened by a number of laws dating from the Ben Ali era, including the Telecommunications Decree and the various Internet regulations. The judiciary branch continues to censor free speech through the prosecution of Internet end-users over content posted online, mainly regarding defamation, religion, and insults to state bodies.

In this policy paper, the state of Internet freedom in Tunisia is assessed based on a comparison of the compatibility of the Tunisian legal framework governing the Internet against international and comparative standards for the protection of freedom of expression and the right to privacy. The

following sections identify international and national standards for the protection of these rights, in particular in relation to the regulation of online content, the rights of bloggers and citizen journalists, the liability of Internet Service Providers, surveillance and access to the Internet. These standards form the basis of the recommendations on how best to protect freedom of expression on the Internet in Tunisia.

INTERNATIONAL STANDARDS ON INTERNET FREEDOM

The rights to freedom of expression and information are fundamental and necessary conditions for the realization of the principles of transparency and accountability which are primordial for the protection of all human rights in a democratic society. Based on international law, all forms of expression and the means of their dissemination, including expression through on the Internet, mobile phones, or other information dissemination devices is protected by the right to freedom of expression. Any restriction on such information and communication technologies (ICTs), including Internet Service Providers (ISPs), must be legally justified as a permissible limitation on freedom of expression as already indicated.

Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of expression: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 member states to respect its provisions and implement its framework at the national level.¹ Tunisia ratified the ICCPR in 1969 and is therefore legally bound to respect and to ensure the right to freedom of expression as contained in Article 19 of the ICCPR as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all

¹ Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary

a) for the respect of the rights or reputations of others;

b) for the protection of national security or of public order, or of public health or morals.²

Fundamentally, Article 8 of the Tunisian Constitution of 1959 states: “Freedom of opinion, expression, the press, publication, assembly and association are guaranteed and exercised according to the terms defined by the law.” However, although the Constitution upholds that censorship of the freedom of expression is strictly prohibited by Article 9, serious problems remain in the case of Tunisia such as the possibility of a law which could advocate for the systematic control of the press jeopardizing the democratic quest for freedom, of restrictions on the legal basis of Article 19 ICCPR mentioned above, as well as of practices beyond the scope of rule of law.

REGULATION AND RESTRICTIONS OF FREEDOM OF EXPRESSION AND THE ROLE OF NEW MEDIA

Restrictions to the right of freedom of expression may be based on solid legal ground, and may serve their purposes to protect political stability and social cohesion. By true means, authorities are concerned with the availability of terrorist propaganda, racist or blasphemous content, hate speech, sexually explicit content, including child pornography, content critical of the government and its institutions, and content unauthorized by intellectual property rights holders. However, while the right to freedom of expression and freedom of information is for all individuals, journalists and media organizations are clearly more reliant on this right than most citizens. This is because of the very nature of the work of journalists in practicing journalism which relies on qualified information while doing investigative research, and which

involves freedom of thought and expression in the writing and publishing process. Furthermore, the media plays a crucial, pre-eminent role in a state governed by democracy and the rule of law, as has been regularly emphasized by international organizations and regional and national authorities and courts.

However, with the hyperbolic growth of the Internet and its ongoing and increasing number of users, governments have become concerned about the availability of a wide variety of online content which they cannot control. Indeed, the Internet enables its users to gain access to information and ideas beyond the restrictions of the soil in which they reside. Countries, or rather their governments, authorities and ruling elites have different views on what content is illegal or may be considered ‘harmful’ with its cultural, moral or religious traditions.

On the other hand, the advent of the Internet means that any individual can now self-publish his or her opinions and ideas on a blog or social media network. Citizen-journalists and bloggers rightfully claim their rights as journalists and disseminators of information, yet they act in the grey zone of journalists’ partly un-/ regulated profession. Taking this trend under consideration, the legal and political challenge of how journalism should be defined and what digital media is has become crucial in many transformation countries such as Tunisia. The evolution of digital media, bloggers and citizen journalists raises the question of how to redefine and to regulate journalism as a profession in appropriate legal and practical terms.³

The new notion of ‘media’ unveils that different levels of editorial control call for different levels of editorial responsibility. Therefore, any legal framework affecting bloggers and citizen journalists should recognize that they have more limited duties and responsibilities when exercising their freedom of expression than professional journalists because they do not have the same resources and technical means as conventional media. Moreover, bloggers and citizen journalists are not immune to the application of laws, e.g. defamation law.

Given that, the question arises whether or not bloggers and citizens should benefit from the same legal protections as journalists where they undertake the activity of journalism. There are no set international legal standards concerning the legal

² Quoted from Article19.org, International guarantee, <https://www.article19.org/pages/en/international-guarantee.html>.

³ In its highest form, journalism can be defined as the dissemination of accurate information and provocative commentary that puts service to the reader or audience and the common good above any special interest or economic, political or philosophical agenda.

protection to be afforded to citizen journalists and bloggers at present. However, in the same way that bloggers have a duty, like any other citizen, to obey the law, they can equally afford themselves of the defenses available in the law.

The Tunisian government has been postponing any kind of regulation or reform on online censorship, surveillance or restrictions on freedom of speech, suggesting that any criminal act should be addressed and sanctioned where it is being produced and prosecuted no matter how it is communicated (online/offline). Nor did the National Union of Tunisian Journalists (SNJT) so far address the matter of the state of freedom of information in Tunisia regarding e-journalism (journalism online). But as the Age of the Internet fully flourished in post-revolutionary Tunisia, posing ever greater opportunities for information providers and consumers alike, both the freedoms of the Internet as well as regulations for the New Media are essential for credible journalists and their organizations as well as for citizen-journalists and online information seekers who increasingly use digital media over traditional media to reflect on the contract that is implicit in the Constitution.

VIOLATIONS OF LAW ONGOING

Despite the freedom of expression and the rights of journalists and media are guaranteed by constitutional law in Tunisia, there are numerous practices and incidents reported which do show how freedom of speech and expression have been mistreated and violated by state authorities. The most infamous practices are

- Imprisonment of individuals related to expression of their opinions or media activities;
- Blocking of the distribution of books and publications;
- Blocking of websites, including news and information websites;
- Police surveillance of e-mails and Internet cafes;
- Restrictions on the freedom of association, including the right of organizations to be legally established and to hold meetings;
- Restrictions on the freedom of movement of human rights defenders and political dissidents together with police surveillance, harassment, intimidation and interception of communications;

- Use of torture by the security services with impunity;
- Lack of pluralism in broadcast ownership;
- Loyalism towards the former Ben Ali regime by public broadcasters;
- Internal press censorship and lack of diversity of content in newspapers.

TUNISIA AND THE 2016 DECLARATION ON MEDIA FREEDOM IN THE ARAB WORLD

A first step in the right direction has been done in 2016 when Tunisia has signed the Declaration on Media Freedom in the Arab World. Supported by hundreds of representatives of journalist unions, broadcasters, human rights organizations and press freedom groups, the declaration sets out 16 key principles to achieve the highest international standards of media freedom and protect and enhance journalists' rights. Among the principles in the Declaration are those covering: Freedom of expression, freedom of information, journalists' safety, media law reform, self-regulation, equality, hate speech and intolerance, independence of public service broadcasters.

After signing the declaration in 2016 some of the politicians considered it a historic day for press freedom in Tunis and the region which will clear guidelines for the law reforming of the Tunisian media. It will serve as a guide to future governments and the parliament when they start passing new media legislation, especially reforming public service media and the law on the higher independent commission of the regulation of the audiovisual sector.

But even though the declaration may seem like a breakthrough for the media sector, it does not have any reference on the matters and concerns of citizen journalists and bloggers that are followed daily on social media platforms by hundreds and thousands. Whilst taking note of the commitment to harmonize legislations and protecting internet users, progress has now being stalled, and calls are made on the government to ensure democratic freedoms are able to further flourish in the country for journalists and 'freelancers'.⁴

⁴ See for example Article19.org, Tunisia: Progress on freedom of expression stalls, 22 September 2017, <https://www.article19.org/resources.php/resource/38878/en/tunisia:-progress-on-freedom-of-expression-stalls>.

CONCLUSION AND FURTHER RECOMMENDATIONS

A legal reform in the policy field of information and communication remains crucial. While the Internet is partly free in practice since the 2011 revolution, the repressive laws that formed part of the censorship routine of the Ben Ali regime continue to threaten the right of free speech on the Internet. Therefore, the ordinary courts should have jurisdiction to hear claims of violations of rights; it should not be necessary to refer to a special constitutional court or tribunal. The Tunisian judiciary should be trained in the judicial practice and implementation of human rights law, including Tunisia's international human rights obligations. The parliament should be aware of the importance of creating new laws or amending old ones. The role of civil society organizations helps moving the cases to the masses in order for the people to feel engaged in the lawmaking process.

Moreover, a national multi-stakeholder organization approach should be developed which assembles members from the government, the private sector, the technical community, and civil society and the academia. Such a network should be focusing coordinately on improving human rights online as well as setting a code of ethics to regulate the sector from hate speeches and extremism.

Further recommendations:

- The Telecommunication Decree and the Internet regulations should ban intermediaries from monitoring content;
- The laws mentioned earlier in this policy paper should be amended to require that only courts may grant orders of blocking, filtering, or removal of contents subject to the principles of necessity made clear in the law as well as setting a multi-stakeholder group to suggest the amendment;
- Bloggers and citizen journalists should not be regulated other than by way of the same civil and criminal laws apply to non-internet users;
- Bloggers and citizen journalists should benefit from source protection;
- The Press Code should be amended to entitle bloggers to source protection.

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