



# The New Tunisian Legislative Framework: A Focus on Press and Audiovisual Media

by Joan Barata Mir

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## **The New Tunisian Legislative Framework: A Focus on Press and Audiovisual Media**

*The New Tunisian Legislative Framework* is an analysis of the two recent major laws aimed at regulating the media in Tunisia. This is a follow-up to an earlier Internews study, *Political and Media Transitions in Tunisia*, which looked at media policy and regulatory environment in Tunisia up to August 2011. Both studies are part of Internews Network's Middle East and North Africa Media Policy Initiative.

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## Introduction

This report analyzes the most important trends of two recent major laws aimed at regulating free speech and media issues in Tunisia: Decree 115 of 2011 (Decree 115/2011), on the Press, Printing and Publishing, and Decree 116 of 2011 (Decree 116/2011), on the Freedom of Audiovisual Communication and the Creation of a Supreme Independent Body of Audiovisual Communication, both dated 2 November 2011.<sup>1</sup>

The two decrees were approved by the interim government of Tunisia. While elections to the Constitutional Assembly took place on October 24, 2011, at the beginning of November the new institutions were not fully operating, thus the decisions made at that time were made by the former and provisional administrative and political structures.

Two months after former President Ben Ali's departure, on March 15, 2011, the interim government constituted the *Haute Commission pour la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique* (HC)<sup>2</sup>. In regards to the media, the HC had a technical sub-commission (*sous-commission technique*), made up of three legal experts who have been solely responsible for questions relating to the regulation of media.

The main function of the HC was to reform the

Tunisian state through a process of legislative change. In strictly legal terms, that meant a transitional process in which there would be no clean break between the previous and the emerging legal systems. Instead, the preceding structures, judicial powers and legal and constitutional framework would be used to carry out reforms that would lead to a new legal and constitutional framework.

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This reform process has produced relevant results, particularly in the field of media regulation. Some important rules in the field of access to information, political parties and the election regime have been approved during this period as well. Tunisia was the catalyst to the Arab Spring and has also been able to organize plural, open and internationally-accepted legislative elections within a reasonable time. The process to nominate the President of the Assembly, the President of the Republic and the Prime Minister has created some political controversy, and negotiations have not been easy. However, currently, the new institutional scheme is operating normally. The judiciary still retains the same structure and composition as under the former regime and reform is urgently needed. Most significantly, a new

<sup>1</sup> This is based on an unofficial translation of the two norms, so some mistakes or misunderstandings in terms of literal interpretation may be possible.

<sup>2</sup> See the August 2011 report, *Political and Media Transitions in Tunisia: A Snapshot of Media Policy and Regulatory Environment* <http://www.internews.org/research-publications/political-and-media-transitions-tunisia> for details.

constitution still has to be drafted and approved by the new democratic assembly. Thus, the process of institutional normalization is only partially complete. However, despite all political and social turbulences, in just one year Tunisia has taken very significant steps towards achieving a modern democracy.

As suggested above, the HC has attempted to introduce changes into the Tunisian legal system before the approval of the new constitution. A very delicate event should be outlined here with respect to the media. In May 2011, the technical sub-commission of the HC prepared a Project of Press Law intended to regulate this sector and to create a Higher Information Commission—a supervisory authority apparently subject to political control. This project, which had been the object of critical analysis by a number of international NGOs,<sup>3</sup> liberal political parties, journalism professionals and freedom activists, was not far from the existing *Code de la Presse* (Press Code), Law 75-82, passed in 1975, during the times of the dictatorship. As a result of the criticisms, especially from the professional journalism sector, the project was discarded a few weeks after it appeared in the public debate. The proposal was made by the aforementioned sub-commission, with no external consultation or input, disseminated unexpectedly without the consent of the members of the HC itself, and in very preliminary form. In retrospect, this was an unfortunate and negative development that did not encourage citizens to trust the interim democratic institutions.

After this experience, the HC undertook the preparation (basically from scratch) of a new proposal for a legal regulatory framework in the field of freedom of expression, press regulation and audiovisual media services regulation, including

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the creation of an audiovisual regulatory authority. The result of this work has now appeared in the official gazette of Tunisia, in the form of the two abovementioned decrees. The process of drafting these decrees was more open, transparent and participative than the earlier experience. As a result, this new regulatory framework is far more reflective of the insights provided by civil society.

Another important new institutional body involved in communications reform has been the *Instance nationale pour la réforme de l'information et la communication* (INRIC), set up at the end of February 2011 by the second provisional government through a Law Decree. The institution has only accepted a consultative role and is not seeking any kind of administrative profile. The INRIC has been presided over by journalist and human rights activist Kamel Laabidi, who, like other members of this institution, is an outstanding communication professional with democratic credentials. INRIC appears to be a less technical, less bureaucratic and more realistic organization than the sub-commission of the HC, and less vulnerable to the influence of the previous regime's thinking and operational modes. Members of INRIC have first-hand experience in the field of media and communications and take a more transparent approach. According to the recitals

<sup>3</sup> See Toby Mendel's analysis at [http://www.law-democracy.org/wp-content/uploads/2010/07/11.04.Tunisia.Prs\\_.pdf](http://www.law-democracy.org/wp-content/uploads/2010/07/11.04.Tunisia.Prs_.pdf)

of the two Decrees, both were approved after INRIC consultation.

It is important to note that an endorsement from the INRIC is very important for the legitimacy of such important norms among professionals, activists and the public generally. This means, as well, that the projects have been discussed among people with different professional and political profiles, and that amendments may have been introduced during the process. Some of the direct participants in the drafting of the Decrees have stressed that local and international experts in the field of media law were consulted in order to guarantee a “revolutionary” text in terms of “enshrining the highest level of freedom and democracy.”<sup>4</sup>

The Tunisian media sector prior to the revolution was connected, to a greater or lesser degree, to the previous regime. Founded during the dictatorship and before the revolution, media groups were inevitably obliged to work out the best way to survive and “coexist” with the Ben Ali regime. Journalists had been suffering from an almost complete lack of freedom for decades, during nearly all their professional lives. In this context, a real risk exists that the finally liberated journalist opts to become an activist instead of a reporter, i.e., a neutral observer who reports on, rather than influences, current events. Concepts such as professionalism, objectivity, rigor, adherence to professional norms and ethics, and the elaboration and assimilation of editorial rules based on professional criteria are completely new and still have not been fully understood and taken on by journalists. Thus, the first step is for the legislator to establish the basic pillars of freedom of expression and information within the framework of a modern and advanced democracy.

The two Decrees were approved before a new Constitution was adopted by an interim government and executive power with no direct democratic legitimacy (although, in its composition and formation, it was intended to represent the most important political forces assumed to be present in the country). Of course, the best scenario would have been if the approval of a series of laws regulating freedom of expression, establishing a legal regime for the press and audiovisual media, and creating the regulatory authorities needed for the enforcement of these laws had taken place *after* the Constitution was passed, freedom of expression and information were correctly recognized and protected, and a legitimate government and parliament elected by citizens was already in place. However, the situation of journalists and the media landscape right after the Jasmine Revolution was extremely delicate and urgent measures were needed.

In an effort to find the correct balance between providing immediate solutions for urgent problems and guaranteeing pure and strict democratic legitimacy of certain basic norms, the interim government put more emphasis on the first need. This does not preclude the eventual reform of such legislation by the new democratic powers (in particular, the elected Assembly) according to constitutional values and principles to be adopted in the near future. In other words, these pre-constitutional Decrees will have to fully conform to the wording of the future Constitution, which will prevail as a superior norm.

<sup>4</sup> See Mohamed Ridha Jenaya’s article, published in Arabic in the newspaper *As Sabah* on 17 November 2011.

## The new regulations on the press, printing and publishing

Decree 115/2011 has 80 articles, divided into seven chapters: 1) General provisions, 2) On intellectual, literary and artistic heritage, 3) On journalists and periodical newspapers, 4) On comments in the public streets, 5) Crimes committed through the press or any means of publication, 6) Prosecution and penalties, and 7) Transitional provisions.

The Decree aims to regulate freedom of expression (and freedom of information) in the field of publications, artistic works, books and periodicals. It includes a complete and detailed legal description of professional journalists and their rights, which outlines the requirements to become a professional journalist and to hold a national ID card; the rights of access to information and news, data and statistics; protection of journalistic sources; and legal protection from physical or moral attacks on media professionals. The Decree establishes the conditions for publishing national periodicals,<sup>5</sup> including some requirements in terms of transparency, the protection of plurality, and the exercise of correction and right of reply. A short section on posting publications and advertising campaigns in public places appears just before a long and complete regulation on criminal activities related to the press and other publications, including the prosecution procedure and penalties and a complete system of “accumulative” liability. All these elements will be explained below.

<sup>5</sup> Defined in article 2 as “any periodical publication in whatever form issued under a single heading and within close or far timeframes though irregularly published, provided that the sequencing is scheduled for an unlimited period and that the issues will be successive in numbering and publication dates. Periodicals refers particularly to daily, weekly and bi-monthly newspapers, magazines and written and image periodicals in addition to yearbooks.”

First, it is necessary to make some general comments on the title and scope of the Decree as a whole. It stands to note that Decree 115/2011 is “on the Press, Printing and Publishing,” which immediately regulates all different kinds of printed media. This scheme can be seen as controversial: most modern democracies do not have extensive regulation of these terrains for free speech, and the idea of a “press law” carries a flavor of authoritarianism. In order to correctly understand the approval of such a norm, we should be aware of the historical background of Tunisia. In particular, during the very recent and protracted period of dictatorship, printed media was subjected to restrictive rules, completely incompatible with the minimum requirements of an open and pluralistic public sphere. Before the approval of Decree 115/2011, there was still in force (at least formally, even if not in practice) the 1975 “*Code de la Presse*.” While it is impossible to describe in detail all its contents here, this law established onerous restrictions and requirements in order to publish a newspaper or any publication. The punishments for violation were extremely severe (including imprisonment) and the “protection” provided to public authorities and officials vis-à-vis “uncomfortable” information was very generous. Cases of defamation, offensive comments against public officials and other disruptions of “public order” were severely punished by criminal rules. Thus, as we can see, the interim institutions made a positive if modest step: instead of fully eliminating such a legal instrument, it has been modified and “softened” in order to conform to certain democratic principles and values. So although the “structural” elements of the law remain similar, most of its provisions have been modified in order to introduce more moderate and less intrusive legislation. These improvements are positive with respect to the historically heavy-handed regulation of the media in Tunisia, but somewhat insufficient with respect to a transition towards a more liberal regulatory regime. In the

next paragraphs we will analyze to what extent this effort to liberalize press regulation can be considered adequate in terms of democratic requirements.

In short, the existence of a “press law” is generally seen as an inappropriate and unnecessary instrument within a modern democracy. In most modern democracies, for example, print media does not need to go through any authorization process or to meet specific “internal” requirements (for example in terms of number of professionals, type of company or ownership) in order to operate. The establishment of such restrictions is viewed as a system of control of media outlets by public authorities, with no justification in terms of protection of the rights of others and/or the public interest. In other words, when dealing with print media, a general principle of freedom should apply to all their activities, with only general limits and requirements (at the constitutional level) that shall apply to any form of expression (accuracy requirements, right to reply, confidentiality of sources, etc.).

What has been said about a “press law” does not mean that general laws on freedom of expression and information cannot be approved and that those norms cannot be applied to print media as well. A number of democratic countries—primarily in Europe but also in Latin American and Africa—have laws that “horizontally” regulate access to information, lay out rights and duties of professional journalists, and place certain limits of freedom of expression (in particular in the field of protection of minors and human dignity); these laws are widely accepted and proportionally applied. These laws are equally applicable to the press sector, but only to the extent that they broadly regulate freedom of speech and freedom of information as essential rights. It is difficult to accept, at the beginning of the 21st century, a regime that has additional requirements and administrative burdens for printed media only.

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Chapter One of the Tunisian Decree includes a general definition of freedom of expression which sets out the basic framework for its protection a fundamental right. Indeed, this provision seems to be more “constitutional” than “legal,” but this is fully understandable to the extent that for the moment the former Constitution (formally still in force, but no longer applied) does not protect such a right in a proper manner. Article 1 states that freedom of expression “shall be guaranteed and exercised in accordance with the provision of the International Covenant on Civil and Political Rights and other relevant international conventions ratified by the Republic of Tunisia and the provisions of this Decree.” Article 1 also sets out a proportionality principle for restrictions on freedom of expression, which appears to meet international standards in this matter.<sup>6</sup> Finally, the article also declares that freedom

<sup>6</sup> The text of Article 1 reads: “The freedom of expression cannot be restricted except in accordance with legislative text and provided that: It aims to achieve a legitimate interest through respecting the rights and dignity of others, maintenance of public order or the protection of defense and national security. It must be necessary and compliant with the rule of democracy and without a threat to

of expression includes “freedom of circulation, publication and receipt of news, views and ideas of any kind.”

Although this article adequately represents the scope of freedom of expression as widely understood, it would have been preferable if it distinguished between, on the one hand, freedom of expression as the free dissemination of opinions, thoughts and ideas and, on the other hand, freedom of information as free communication and access to facts and news. Most modern constitutions make a clear distinction between these two fundamental rights; while they are fundamentally related, the scope of protection is slightly different. Strictly speaking, freedom of expression covers any kind of expressive, cultural and artistic communication, disseminated in any format by all citizens, whereas freedom of information covers access to certain sources and the ultimate dissemination of facts and news of public interest. Although all citizens also have the right to freedom of information, this right primarily protects the activities of media professionals and includes other fundamental rights and guarantees such as the protection of sources. In addition, freedom of information has some additional limits that do not belong to the sphere of freedom of expression, primarily accuracy and public interest of news (“facts are sacred, opinions are free”). Therefore, in terms of legal certainty it would be preferable for the Decree to establish and define the scope, limits and regime for the exercise of both freedoms in two separate blocks.

The scope of the Decree is a second matter worth considering. It covers a wide array of publications, books, artistic works and periodicals, in printed or digital format. However, this regulation takes into

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the essence of the right to freedom of expression and information.”

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consideration the “printed world,” as it includes norms that clearly apply to this specific format (including the title of the Decree). The Decree does not cover other “informal” or minority formats of expression and dissemination of information and opinions, such as small pamphlets and other unclassified printed documents. According to international principles of freedom of expression and information, and until a general constitutional provision on this issue is in force, the Decree should establish a general principle of freedom in this particular field.

Chapter Two establishes a series of norms that protect the intellectual, literary and artistic heritage of Tunisia. To do so, it states several obligations in terms of recording artistic works and depositing copies at the Prime Ministry. It specifies (in Article 6) that violations of such duties will be sanctioned with a fine ranging from 500 to 1,000 dinars (325 to 650 USD). Although the general aim of this Chapter is fully acceptable and understandable, the requirements may be onerous for some creators and authors, and the imposition of monetary sanctions in cases of non-compliance could be seen as disproportionate.

Chapter Three is particularly controversial. First, Article 7 introduces the notion of the “professional journalist” as a person who “seeks the collection and dissemination of news, views and ideas and transmits them to the public on a primary and regular basis,” holds “a BA or equivalent in science,” and “works in



an institution or institutions of daily or periodical news agencies, or audiovisual media and electronic media provided that his core resources are derived therefrom.” A national ID card should be issued by an independent committee composed of representatives of the Administrative Court, the managers of public media institutions, and the most representative organizations of journalists, Tunisian newspaper managers and audiovisual media institution managers (Article 8). These provisions can be connected with those established in Article 20, which requires that journalists who work in national periodicals must have a national ID card “and a BA degree in Press and in Information Sciences.”

These regulations do not conform to international standards. Journalism is not just an employment opportunity; rather, it implies the preeminent exercise, within a specific society, of freedom of information. Journalists play a central role in the free formation of public opinion within an open and plural public sphere, and as a result, journalism as a profession should be subjected to the lowest level of requirements and conditions. The practice of journalism requires an understanding of the role of the press in the provision of information and the formation of opinion, as well as a set of ethical and professional principles. Any other requirements placed on the profession represent an unjustified and disproportionate burden that cannot be accepted within a democratic society. Thus, although the definition established in Article 7 is correct, the requirements imposed by the Decree regarding the definition of a “professional journalist” have no justification. A particular critique should be made of the idea that “permission” to work as a journalist should be granted by an independent national committee. This procedure would only generate immense administrative burdens and bureaucracy, and presents the serious danger of restricting people from the effective exercise of their rights.

Article 10 refers to the right to access information and news, data and statistics by journalists, and according to the terms and procedures provided by the Decree num. 41, dated 26 May 2011, on access to administrative documents in public facilities as amended by Decree num. 54, dated 11 June 2011. These Decrees are very important in terms of introducing new rights to all Tunisian citizens and increasing public transparency. This being said, it would have been preferable if Decree 115/2011 had introduced additional and specific regulations that guarantee access to certain sources of information by professional journalists (whose needs in this particular area are generally greater than those of ordinary citizens): for example, access to press conferences, parliamentary sessions, and court sessions, among other privileges. The idea of the preeminent position of journalists within a democratic society is present in most democratic constitutional systems and has been stressed by international jurisprudence, especially the European Court of Human Rights.

Article 11 protects the confidentiality of the sources of journalists “unless justified by motivations of state security or national defense subject to judicial supervision.” The last paragraph of this article also states that a competent judge can oblige a journalist to reveal his sources “provided such information is related to crimes that pose a serious threat to the physical integrity of others and that access to this information is necessary to avoid the commission of these crimes. In addition, the information cannot possibly be obtained any other way.” This regulation of confidentiality of sources has several problems. First of all, it is important that the forces of the state (including the judiciary, the police, and other bodies) rely on their own resources and capabilities to obtain information related to criminal activities. If journalists were forced to provide information about their sources (even with exceptions and guarantees), they would be deprived of an essential instrument to

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provide citizens with information of public interest. Thus, motivations of state security or national defense cannot be seen as acceptable restrictions on the right of keeping sources confidential, even with intervention and supervision from the judiciary. The article's reference to information vaguely "related to" certain crimes is also problematic, as it creates a real risk of putting journalists at the service of police and criminal courts. Third, the idea of avoiding the commission of (future) crimes is not presented correctly. When a journalist receives information about the commission of a future crime, he has the legal duty (as a citizen) to inform the authorities. But this would not necessarily require him to reveal his sources, as confidentiality only applies to sources, not to facts. Finally, it is interesting to note that according to the Decree, journalists are somewhat protected in this field from pressures from public authorities, but not from private subjects, such as the owner of the media outlet or the director. Most international systems for the protection of journalists in this area include this private or "internal" perspective as well.

Articles 12, 13 and 14 include several interesting and remarkable safeguards for journalists vis-à-vis possible attacks of various kinds. There is no doubt that this is a very positive development in terms of protection of journalists and recognition of their important role in society.

Articles 15 to 22 establish the general legal regime for national periodicals. The most important provision guarantees that a periodical "shall be published freely and without prior authorization." This is a very important step in the democratization of the press and in the guarantee of full openness of the public sphere. However, Article 18 establishes a duty to file a statement before the President of the Court of Instance, prior to beginning activities, and Article 19 requires a legal deposit before the Prime Ministry. The violation of such duties will be punished with a fine of a maximum of 5,000 dinars (3,250 USD). Even if these provisions do not constitute a scheme for prior authorization, the inclusion of such burdens still seem too onerous and disproportionate, and it is difficult to justify within a democratic society that is supposed to facilitate access to the public sphere. This requirement also presents the opportunity for cases of political retaliation. The idea of filing a statement before the Court of Instance shows an implicit but clear mistrust of the media as well as fear vis-à-vis their role and social impact. The financial sanctions are too harsh as well.

Similarly, conditions established in Articles 20 and 21 regarding the internal structure of the abovementioned media outlets seem too interventionist and represent inappropriate interference in the self-organization of each media outlet.

Provisions on transparency can be found in Articles 23 to 32. The norms dealing specifically with issues of public awareness about the ownership and editorial responsibility of media outlets, advertising tariffs, and separation between editorial and advertising interests seem adequate. At the same time, the rules seeking to restrict foreign investment appear to be disproportionate and not entirely realistic and enforceable. Finally, provisions regulating the number and participation of stakeholders and the operation of the management board seem too interventionist

as well as biased towards a specific model of large national media outlet.

Articles 33 to 38 establish basic rules in the area of ownership and media concentration. Although they could constitute interesting, useful and legitimate rules, they seem to have been enacted with national media outlets in mind, not taking into consideration the reality in Tunisia: the existence of a wide range of small local media companies, primarily in the print media sphere.

Articles 39 to 42 cover correction and right to reply. The Decree's distinction between these two legal concepts, and the provision of different legal regimes to address them, is appropriate. Concerning the right to reply, however, the need to be subject to "harassment, expressed or implied, that leads to damage of personal rights" as a condition for its exercise (without prejudice of a possible inaccurate translation) seems too strict. The right to reply should be more broadly available to direct damage to fundamental individual rights. At any rate, the capacity given to certain associations to exercise the right of reply (in Article 44) is an interesting element.

Chapter Four is devoted to "comments in the public streets." Article 47 protects places devoted to posting printed texts of the public authority, stating that anyone who posts private publications in these places shall pay the fine established in Article 315 of the Criminal Code. This is clearly a very disproportionate provision. More than that, it is surprising that a law devoted to regulating general issues on freedom of expression and information dedicates an entire chapter to such a minor issue, which could be covered through local ordinances or a similar kind of legal instrument. Similarly, the content of Article 49 ("Anyone who willingly removes, covers up, tears or distorts an election poster in the allocated area or renders it unreadable in whatever manner that

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changes its contents shall pay a fine ranging from 500 to 1,000 dinars") appears to be an exaggerated protection of fair competition during election times.

Chapters Five and Six are devoted to criminal issues, establishing crimes and misdemeanors committed through the press or other means of publication, and the prosecution procedure and penalties. Criminal issues should be concentrated within a systematic and coherent Criminal Code instead of being regulated "in portions" together with other substantive provisions in related areas.

Criminal policy is the most delicate issue in a democratic society, to the extent that according to international jurisprudence and academia, criminal rules should always be the "ultima ratio." This means that criminal rules and punishments are only acceptable when strictly needed to protect certain essential and basic values.

Decree 115/2011 focuses on criminal provisions through the lens of these last remarks. It must be noted that some of the crimes seem to fall under the scope of criminal law according to comparative standards. This would be the case of incitements to crime or to hatred, or the publication of child

pornography. It is somewhat more disproportionate, however, to make it a crime to “use houses of worship for partisan and political propaganda,” even if it is true that the relationship between religion and politics has become a very delicate issue in countries like Tunisia. With regard to misdemeanors, a number of the provisions included in Articles 54 to 64 appear too vague; for example, the provision regarding “publication of false news that could affect public order.” In other cases, the inclusion of specific actions under the scope of criminal law is disproportionate, according to general international principles and jurisprudence criteria. This is the case with regard to articles that refer to publications on confirmation of progeny, divorce and abortion, and those dealing with issues of insult and defamation. This last matter is a very relevant one, to the extent that accusations of defamation have been, during the authoritarian past of Tunisia, a key instrument to fight and repress political dissent. Finally, assignation of criminal responsibilities is set out in Article 65, including not only direct authors but also managers, printers, vendors and distributors. These provisions present an excessive extension of liability; under international best practice, most of these individuals or entities should only be held liable under civil laws.

To sum up, Decree 115/2011 represents a clear improvement from the preexisting authoritarian legal regime. The most important caveat lies in that it essentially modified some of its former provisions and eliminated the most restrictive from the “*Code de la Presse*.” Thus, it should be seen as a provisional step to guarantee some degree of openness and pluralism in the public sphere before the Constitution is finally approved. It is clear that with the existence of Decree 115/2011, public debates about controversial political issues will be more democratic and participative, and that citizens will be able to express their opinions in better conditions. At this time, however, a key and unknown factor will be the way in which this new law

will be interpreted and applied by public authorities, especially the judiciary. As has been pointed out, the judiciary is the only public power that remains essentially the same in terms of structure and components as it was under the dictatorship. This situation raises many significant concerns.

## Audiovisual communication and its regulatory authority

Decree 116/2011 has 52 articles divided into five chapters and sections. They deal with the nature, definition and composition of the audiovisual independent regulatory authority (AIRA), the competence and powers that are granted to such an institution, and its functioning and financial schemes. As such, the Decree is not a substantive norm that regulates material aspects related to the provision of audiovisual media services, such as licensing, content, public service broadcasting provisions and so on. Some indirect references can be found in the text of the Decree because the future AIRA will have to address such issues, but a general and comprehensive law on audiovisual media services remains necessary within the Tunisian legal landscape.

The most important aspect of Decree 116/2011 is the fact that it creates an AIRA in Tunisia. This entity, as will be explained, is legally designed according to international standards and therefore places Tunisia at the forefront of audiovisual regulation in the MENA region. Regionally, the only other comparable institution is the *Hauté Autorité de la Communication Audiovisuelle of Morocco* (HACA), which was created in 2002 as an independent regulator as well, and has played a strong regulatory role inside and outside

Morocco in the last ten years.<sup>7</sup> The HACA has been able to exercise its competencies in a remarkably independent way, escaping immediate and compelling political pressures. This spirit of independence is particularly obvious if we take a look at the outcome of the different processes of licensing of radio and television stations in which HACA has assumed primary responsibility from beginning to end. In the field of content regulation, even though this is a very delicate and controversial issue in a country like Morocco, the regulator has performed with relative flexibility and proportionality. The Moroccan example is also being followed by several African countries within the African Communication Regulation Authorities Network.

The creation of such national regulatory entities is an important signal of democratic change. If regulation of content to protect public values and citizens' rights, performed by an appropriate independent entity, is accepted and understood by political forces, media professionals and citizens, this means that democracy is not only perceived as a formal principle, but as a day-by-day process that depends upon a pluralistic public sphere. In transitional societies, the idea of content regulation can be easily linked to recent experiences of censorship (and this continues to be a debate in Spain, after almost 40 years of democracy). Thus, the establishment of such entities should be seen as a key factor for the consolidation of democracy and as a first step towards political maturity. In the case of Tunisia, the new audiovisual regulator should gain its legitimacy, first of all, through legislation that clearly establishes its remit, its competences, and the safeguards that media outlets and professional journalists have vis-à-vis the authority during and after the decision-making process. This is the case of Decree 116/2011.

<sup>7</sup> HACA chaired the Mediterranean Network of Regulatory Authorities from 2006-2007.

Secondly, the new regulatory authority will succeed if it effectively becomes a fundamental body that guarantees plural and equal access to the audiovisual public sphere; adequate protection of specific values and principles involved in the dissemination of audiovisual content (upholding human dignity, protecting minors, imposing certain limits in commercial advertising, guaranteeing political plurality especially during election times, etc.); and, more broadly, a real safeguard for public interest and rights of citizens in the field of audiovisual media.

The Decree outlines the composition of the AIRA and the appointment of its members. According to Article 7, members are appointed by the President of the Republic, the President of the Assembly, the Judiciary, and the most representative organizations of journalists, audiovisual media companies and audiovisual media managers. It must be noted that the idea of "representation" could be incompatible with the idea of independence. In other words, if a regulatory body is composed (entirely or partially) of representatives of different sectors who perform their duties to defend their own interests, it will be hard to conclude that decisions will be made based on the law and the public interest (unless you are a fervent follower of "public choice" theories). However, in this case, although this idea of "representation" appears in the process of nomination of members of the authority, the wording of the Decree is particularly clear in stating (in Article 8) that members of the board shall exercise their functions according to the principles of independence, neutrality and service to the public interest (represented by the law).

This being said, it would be preferable if the Decree explicitly stated that only prestigious professionals with solid experience in the field of audiovisual communication can become members of the board. However, the Decree establishes stringent rules in terms of dedication and avoiding conflict of interest.

With regard to the competencies of the AIRA and its overall power, Article 15 establishes, first of all, a series of principles under which such an authority should operate. These principles include respect for democracy; preservation of the rule of law; respect for and effective application of freedom of expression as a fundamental right; protection of the right of citizens to have access to information; promotion of fair competition through control of media ownership; guarantee of pluralism and non-discrimination; promotion of quality of content and the presence of educational programs; effectiveness of universal access to audiovisual content; and promotion of national culture within the field of audiovisual content. These principles are extremely relevant and should form the bedrock of the ordinary activities of the authority.

Article 16 provides details of the specific competencies of the agency, which are in line with those normally attributed to this kind of regulatory authority in mature democracies. These competencies fall into a few primary groups: licensing (according to the parameters established by law and the authority itself, and in coordination with the authority on spectrum management); content regulation (guaranteeing that audiovisual content respects the principles and limits established by the law and the authority); pluralism (supervision and control of media concentration); and public accountability (essentially reports for the parliament regarding the agency's activities). Article 19 establishes some additional consultative competencies vis-à-vis the legislative and the executive powers.

Articles 21 to 26 focus on internal and financial aspects of the authority. The funding system is not clearly stated, so it is important to note here that a sufficient degree of financial autonomy and self-funding are key aspects in order to guarantee the effective independence of such an entity.

Articles 27 to 41 include some provisions that are especially remarkable. They establish highly developed and well-articulated procedures to predetermine the possible actions of the AIRA in cases of legal infringements, in particular in enforcement of content regulations. With regard to content regulation, a delicate equilibrium must be found between the need to protect certain values and principles (human dignity, the avoidance of certain forms of hate speech in the public sphere, rights of children, etc.), and the right to freedom of expression and due process, in particular when some immediate and urgent measures (such as interruption of broadcast service or the cancellation of specific content or program) may be required by the authority. As no official translation from Arabic has been provided yet, any detailed description and evaluation of such procedures may be inaccurate. Yet in general terms, the main principles, values and guarantees that inspire and articulate this section of Decree 116/2011 appear to be in line with the administrative procedures that are established and applied in this field by democratic regulatory authorities.

Finally, Articles 42 to 46 include a set of special provisions to be applied to audiovisual services during election periods. The established system includes the imposition of detailed and "calculated" quotas for different political forces as well as strict prohibitions concerning the use of audiovisual media for political (paid) advertising. These provisions are in line with continental European models, with the French system as perhaps the most important example. This "interventionist" model has been proven effective in different European democracies (including Spain, France, Italy and Portugal), where the fair and equilibrated presence of a wide range of different political forces (including a significant number of small political parties) should be guaranteed within a sometimes fragile and still developing media environment. Once the political system becomes

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*It would have been preferable if the Decree made a wider and stronger mention to the need that only prestigious professionals with solid experience in the field of audiovisual communication can become members of the board.*

more mature, however, this model has the potential to create significant tensions between audiovisual regulatory bodies, election commissions and political parties on one side, and media outlets and professional journalists (who want to be able to apply their own informative criteria) on the other.

Significantly, Decree 116/2011 does not include specific provisions (in this area and others) regarding the specific role and supervision parameters of the public service audiovisual media. In the current Tunisian media landscape there is still not a broadcaster that could be considered as serving the function of public service broadcaster, according to the parameters and models in modern democracies (particularly in European countries). However, Tunisia does have a state broadcaster that has been directly affected by the revolution and is now in the slow process of adapting to the new democratic culture and therefore losing its former role of instrument for state propaganda. Professionals from this state media conglomerate have been travelling and participating in seminars and courses (mostly in Europe) in order to assume the new role and to learn the capacities needed to perform a completely new set of professional responsibilities.

At any rate, the Tunisian case seems now to be the most advanced within the countries of the Arab

Spring. Apart from the case of Libya, where the current absence of modern state institutions goes far beyond public service broadcasting, in Egypt the bloatedness of the state broadcaster (with more than 45,000 employees, most of them with no professional capacities) creates serious doubt about the possibilities for the Egyptian Radio and Television company to evolve into a genuine public service broadcaster.

If and when Tunisia establishes a real public service broadcaster, the new AIRA is likely to play an important role in the supervision of its effective performance.

Articles 47 to 52 include some transitional provisions, in particular regarding the establishment and appointment of members of the AIRA for the first time, as well as the moment from which the Decree will take effect (as with Decree 115/2001, on 17 November 2011).

## General conclusions

The two Decrees that have been analyzed in this paper likely represent the first serious legislative step towards democracy in Tunisia.

The Tunisian revolution took place just one year ago and marked the start of a transition process during which the rules (from the Constitution to the smallest ordinance) formally in force have largely remained those that were enacted under the previous authoritarian regime. This presents a difficult situation because new democratic processes (the formation of new political parties, the opening of the public sphere, and the holding of pluralistic elections to the Constitutional Assembly, among others) have had to be undertaken on the basis of old-fashioned laws or with no appropriate laws at all.

Another delicate point in this transition process is related to institutional structures. The HC and INRIC, as “revolutionary” new entities, have been playing an important role “outside” traditional and remaining Ministries and various administrative offices. In particular, the HC is a complex entity that has been operating in the interim period following the revolution, and before the new “ordinary” and democratic institutions have come into force. The HC has made important efforts to become an interim “representative” body in which various democratic tendencies have been able to find a space. Of course, many problems have arisen within such a fragile framework. As democratic elections had not yet occurred at the time of the HC’s establishment, allegations of misrepresentation and threats of abandoning the prevailing climate of consensus have come from Islamist parties. In this same sense, civil society, activists and young democrats who directly participated in the revolutionary events expressed frustration that things were not evolving as quickly and as clearly as they expected.

Finally, an obvious lack of democratic civic culture has created a situation in which the HC has focused on its tasks *ad intra*, but has not taken into consideration important needs and principles in terms of public transparency and participation. It is worth remembering the difficulties and mistakes that took place during the process of drafting Decree 115/2011, keeping in mind, however, that in the second phase a special effort in terms of consultation and participation was made.

Another important thing to keep in mind in institutional terms is that Tunisia still does not have an administrative and judiciary structure ready to apply democratic laws and to perform according to non-authoritarian principles. The core of the executive power and public administration remains roughly the same. This is also the case of the judiciary,

as already mentioned. All these elements represent a significant challenge for the immediate future in order to guarantee an effective transition to democracy.

The future constitution is also a key factor for democratic consolidation and in particular, to guarantee effective protection of freedom of expression and information. As has already been said, an ideal scenario would have been to have the Constitution approved first and only then, and following its main principles and directives, approve the rest of the legislation. There is a need to confront this general desideratum with the difficulties of real political processes, like the Tunisian one. At any rate, it will be interesting to follow the Constitutional discussion process, now just started, and to see to what extent the model established by the two Decrees (and in particular Decree 115/2011) conforms to the text of that future norm.

Apart from this “Constitutional test,” the most important challenge will consist in the application of the two Decrees in the immediate future. In the case of Decree 115/2011, as I have noted, some of its provisions can be interpreted and potentially used to impede the rapid and diverse growth of new media outlets. The restrictions imposed through the definition of “professional journalist” should be kept in mind as well. This being said, Decree 115/2011, if proportionally applied, also has great potential to promote important changes within the Tunisian public sphere by making possible the appearance of new private operators, independent from former political stakeholders and Ben Ali’s network of interests.

Decree 116/2011 is remarkable to the extent that it helps prepare the terrain for flexible, proportionate, pluralistic and democratic regulation of Tunisia’s audiovisual sector. It establishes the basic rules



for the creation of an AIRA that, at least in the wording of the norm, conforms to best international practices in this field: independence, accountability, professionalism, transparent and proportionate procedures, and a clear delimitation of its remit.

The challenge ahead is to operationalize these provisions. The new entity should be established with the new members appointed following the spirit and the values that inspired the law. Political forces must be able to reach a consensus on this issue and not use this piece of the institutional system as an instrument for political domination or confrontation. Finally, the need for a complete “substantive” law on audiovisual media services in order to provide for the highest level of legal certainty should be stressed, by establishing the rules to be applied by the AIRA.

The Arab Spring has represented a complex process of change in different countries, all of them with diverse political cultures and historical backgrounds. Thus, although it has been defined and “labeled” as a regional political movement, each country in the MENA region should be analyzed separately. Of course, lessons can also be learned from comparing different transition processes (if they actually take place). The case of Tunisia is particularly interesting in this sense.

For several reasons (most of which have been pointed out in this report), Tunisia is leading democratization in North Africa, including in the media sector. While countries like Egypt have also started a process of liberalization<sup>7</sup> of the media sector (including the audiovisual sphere), in Tunisia this process has been undertaken by an adequate institutional system that has also been able to enact a legislative regime. Tunisia also offers interesting lessons for Libya, even though the post-war Libyan communications landscape has a long way to go.

We can also see liberalization and privatization of the communications sector over the last decade in “non-revolutionary” countries like Morocco or even in authoritarian regimes like Algeria (where a new audiovisual law to open up this market may be approved sometime in 2012). However, these are in many ways unique developments, as far as they are the result of a political will to establish a pluralistic and proportionate regulatory system. This has to be enforced by an independent regulatory authority.

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