INTERNATIONAL MEDIA SUPPORT & VIGILANCE

FREEDOM OF EXPRESSION IN THE MAGHREB: TENSION BETWEEN LAWS AND THE JUDICIARY PRACTICE

JANUARY 2018

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INTERNATIONAL MEDIA SUPPORT

VIGILANCE

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PREFACE

Although much of the Middle East and North Africa has seen a marked shift over the past years toward unstable authoritarianism and violent conflict following the region's popular uprisings, significant gains have however been achieved since 2011.

Many of these gains have been driven by media communities and civil society, now battling new forms of control and repression. Nonetheless, many reform-oriented actors still operate in a space that, while confined, in most cases barely existed before.

Following the 2011 uprisings, new constitutional and legal guarantees for freedom of expression and media freedoms were introduced in Maghreb countries.

Yet, the rights and freedoms the new laws affirm remain challenged by the hostility of duty-bearers and a hardly reformed judiciary practice. Moreover, those rights and their advocates are increasingly misrepresented as threats to stability and security in the MENA region and globally.

Whereas prospects of effectively reforming the media's legal framework and the judiciary practice in favour of freedom of expression and safety of journalists seem limited in the years to come, there is, however, space and determination to advance an agenda for enhancing legal and structural reforms.

The four countries concerned in this publication – Morocco, Algeria, Tunisia and Libya - each has a complex set of challenges - and opportunities - in relation to the advancement of free and independent media. Yet, they share several trends and certainly the tensions between laws pertaining to freedom of expression, political actors and the judiciary practice.

Four legal experts have taken up the challenge to briefly introduce in this study both the legal frameworks and the tension points, and to formulate key recommendations to address the deficiencies in law or practice. These recommendations are a means by which non-governmental organisations and rights defenders can pursue their critical advocacy work.

This publication is the result of a partnership between the Tunisian association Vigilance for Democracy and the Civic State, also known in Arabic as Yakadha, and International Media Support (IMS). It falls under the MENA Media Law Reform initiative (menamedialaw.org), which functions as a central forum, bringing together legal experts, civil society organisations and other stakeholders to address and advocate for much needed legal and regulatory reforms of the media.

It is an effort and a tool to bring clarity, raise broader awareness and engagement, and inform advocacy campaigns.

Kamel Labidi, President of Yakadha

Virginie Jouan, Sub-Regional Head for Maghreb, IMS

1.0 MOROCCO: FREEDOM OF EXPRESSION AND MEDIA BETWEEN THE LAW, THE PRACTICES OF POLITICAL ACTORS, AND THE JUDICIARY

By Abdelaziz Nouaydi, University professor and lawyer at the Rabat Bar

1.1 INTRODUCTION: GENERAL POLITICAL FRAMEWORK

Morocco began to open up shortly before the death of King Hassan II, who ruled undisputed from 1961 to 1999. His long reign was punctuated with years of brutal oppression of dissidents, particularly leftists who opposed his monopolisation of power and the corruption of his regime. Spanning the 1960s, 70s, and 80s, this period was known as the Years of Lead. It was documented after his death by the Equity and Reconciliation Commission, which worked between 2004 and 2006.

The opposition and independent press bore a substantial share of this repression, characterised by prosecutions of leftist leaders and critical voices, assassinations of prominent leaders (e.g. Mehdi Ben Barka and Omar Benjelloun), the erosion of rights and stiffer penalties in media law, the complete monopolisation of public media, support for the pro-regime press, and attacks on the opposition.

Shortly before his death on July 23, 1999, the King appointed Abderrahmane Youssofi, the leader of the most important leftist party at the time, the Socialist Union of Popular Forces (USFP), as prime minister, a post he held from March 1998 to October 2002. The reforms Youssofi was able to institute included relatively important amendments to the press law, most significantly: requiring press institutions to appoint a deputy director if the director enjoyed parliamentary or governmental immunity; requiring judicial authorisation for the suspension and prohibition of newspapers; requiring the interior minister to justify the seizure of a newspaper, with a compulsory, expedited judicial review within 24 hours of a legal filing; abolishing numerous prison sentences and minimising others; instituting penalties for discrimination, the publication of hate, and infringements of private life; reducing the statute of limitations from one year to six months; extending the time frame for the filing of the proof for defamation from 48 hours to 15 days; and abolishing the requirement that a newspaper manager put up the financial equivalent of fines and civil damages within 15 days of a preliminary judgment, on pain of suspension of the newspaper.

With the decline of the partisan press associated with parties in the government under the Youssofi government, the independent press made important strides, leading to the proliferation of dailies and weeklies in both Arabic and French. Some of these newspapers developed highly professional practices in newsgathering and investigative journalism, shedding light on key public interest topics such as political corruption, the monarchy and its wealth, the reality of political parties, the public and private press, economic conglomerates, the military and intelligence apparatus, and human rights violations.

These newspapers stood at arm's length from the state, parties, and financial powers, excelling at their craft. These publications, including renowned papers such as Le Journal, TelQuel, Al Ayam, and Assahifa, were run by young people whose first commitment was to the reader.

But starting in 2000, the authorities and the press, particularly the aforementioned papers, began to clash. In addition to throttling the press financially by blocking public advertising and pressuring private advertisers, the

authorities used the courts to attack the free press in several cases. The latter ended with the suspension or banning of some newspapers, suspended prison sentences for their journalists, and hefty fines. The official press was also deployed by the regime to attack the independent press. This compelled some journalists to leave the country, among them Aboubakr Jamaï, the publisher of Le Journal, Ahmed Benchemsi, the editor and publisher of TelQuel, and Ali Lmrabet, the director of Demain, who was sentenced to prison and banned from practicing journalism for ten years.[1]

This brief window of political opening began to close in 2002 when Driss Jettou, who was unaffiliated with any political party, was appointed prime minister, although Abderrahmane Youssofi's party won more votes than any other party in the September 2002 elections.

The international climate in the wake of the terrorist attacks on the US on September 11, 2001 provided a strong pretext for tightening the security grip over the country in the name of fighting terrorism, particularly after the terrorist attack in Casablanca on May 16, 2003. That attack spurred the hasty adoption of a new terrorism law on May 28, 2003, which stiffened criminal penalties and strengthened the authority of both the security establishment and the public prosecution - at the expense of defendants' rights and judicial independence. Ironically, the work of the Equity and Reconciliation Commission since 2003—tasked with investigating human rights violations, offering restitution to victims, and making recommendations to prevent a recurrence of rights violations and impunity—coincided with a brutal campaign targeting thousands of people, with arrests, enforced disappearances, torture, and swift trials resulting in harsh sentences.

This erosion of rights was accompanied by another extremely damaging political development. Even if the state is supported by a host of loyal parties that lack independence, credibility, and efficacy, but nevertheless control parliament and most institutions. Nonetheless, the state decided to create its own preferred party, perceiving the rise of Islamist movements as a looming threat. In 2008, the Authenticity and Modernity Party (PAM) was established, declaring it had been founded to fight the Islamists. Winning the most seats in the municipal elections of 2009 paved the way for a victory in the subsequent parliamentary elections. Dignitaries and people searching advance or protect their interests began joining the party in droves. PAM even absorbed other loyalist parties, boosting its seats in both chambers of parliament.

The political landscape seemed set to further deteriorate when the Arab Spring broke out in Tunisia and Egypt in early 2011, inspiring Moroccan youth, leftist forces, and the Islamist movement Al Adl Wa Al Ihssane. This gave rise to the February 20 movement, which staged demonstrations in more than 50 cities, demanding an end to corruption and tyranny. The King was compelled to announce significant constitutional reforms, which enabled him to avoid the threat of outright revolution. A new constitution was adopted in July 2011, followed by elections in November 2011. The Islamist-oriented Justice and Development Party (PJD) won those elections and subsequently led a coalition government with parties close to the palace.

The PJD continued to score electoral victories, despite all attempts to contain its rise. In 2015, it won a majority of the large and medium cities, which had previously voted for the nationalist parties; in 2016, it won nearly one-third of parliamentary seats (125 of 395), and the King appointed PJD leader Abdelilah Benkirane as head of the government. But the coalition partners with whom he was slated to form a government set several conditions designed to weaken him. After months of negotiations ended in deadlock, the impasse was used as a pretext to

[1] See Abdelaziz Nouaydi, al-Sahafa amam al-qada': dalil li-l-sahafiyin wa-l-muhamin (The Press before the Judiciary: a guide for journalists and lawyers) (Casablanca: al-Najah al-Jadida Press, 2008).

oust him. His successor Saadeddine Othmani, chosen from the same party, proceeded to accept all the conditions Benkirane had rejected, with party backing.

Presumably, the PJD opted for a course of non-confrontation given its isolation, along with international and regional developments. Seeing what had happened to President Morsi and his party in Egypt, coupled with the domestic balance of power, the party calculated that remaining a partner in the government was preferable to an opposition stance it could not adequately maintain. Since it joined the government in 2011, the PJD government has failed to end flagrant assaults on liberties committed by security forces and the Interior Ministry. The party has remained silent, and some of its ministers have even attempted to find justifications for such infringements, among them the former minister of communication and government spokesman, and the current minister of parliamentary affairs.

The regime thus killed two birds with one stone: it was able to push through repressive policies and economic decisions with adverse social impacts for the poor and middle classes, thereby eroding the popularity of the PJD, while at the same time absolving the palace of responsibility for these policies.

Since 2011, the media landscape has undergone several significant developments:

- With the proliferation of the digital press and the widespread use of social media, some press outlets have begun to pose a strong challenge to the regime, especially with the growing use of mobile phones with internet and photography capabilities.
- To counter this trend, the state has facilitated the development of a digital press to spread "facts" lauding the regime and attacking its critics or opponents.
- Law 88-13 on press and publishing was adopted on August 10, 2016. The official narrative claims that the law provides for no prison sentences for publication crimes; this will be discussed below. That same year, Law 89-13 on professional journalists and Law 90-13 creating the National Press Council were adopted.[2] Although more than a year has elapsed since the promulgation of the latter, no members of the press council have been elected or appointed.[3]
- With the mounting social crisis and growing protests in various regions, in particular the Rif protests since October 2016,[4] the authorities grew impatient with freedom of the press, especially the digital outlets that cover these events and expose excesses. It therefore went on the counterattack via trials and arrests, as discussed below.

[2] The mandate of the National Press Council includes self-regulation of the press and publication sector; the drafting of a code of professional ethics and oversight to ensure compliance by professional journalists; acting as a mediator in disputes between professional journalists or between journalists and other parties, and arbitrating disputes between professional journalists; granting press credentials and considering disciplinary cases involving press institutions and professional journalists who abandon their professional duties and breach professional ethics; offering an opinion on proposed laws and regulations related to the profession or its practice, as well as on other issues put to it by the administration; proposing measures to develop, train, and modernise the press and publication sector; and contributing to organising continuing training for journalists.

[3] The National Press Council has 21 members: 7 members elected by professional journalists from among their ranks, with due regard shown for the representation of various types of press and media; 7 members elected by press publishers from among their ranks; 7 members representing each of the following institutions: Supreme Judiciary Council, National Council for Human Rights, National Council for Moroccan Languages and Culture, Moroccan Bar Association, Federation of Moroccan Writers, a former publisher, and an emeritus journalist.

[4] The protests were set off by the death of fishmonger Mohsen Fikri, who was crushed in a trash compactor as he attempted to retrieve the fish he had just purchased, after police officials threw it in the compactor.

1.2 THE STATUTORY FRAMEWORK AND ITS LIMITS

We will first review the status of freedom of the press and media in the constitution, and then in law.

1.2.1 FREEDOM OF THE PRESS AND MEDIA IN THE JULY 2011 CONSTITUTION

The 2011 constitution was the most significant gain of the February 20 movement, despite its omissions and subsequent poor enforcement. In the preamble and particularly in Title II, it sets forth several rights, linking their exercise with laws regulating them. It also created an important mechanism for the subsequent review of these laws, allowing a litigant to challenge the unconstitutionality of any law relevant to the course of a dispute underway when it infringes the rights and liberties set forth in the constitution (Article 133).

FREEDOM OF EXPRESSION AND THE MEDIA IN THE CONSTITUTION

Regarding freedom of expression and media, Article 25 of the constitution states:

"Freedom of thought, opinion, and expression are guaranteed in all forms. Creative freedom and the freedom of publication and exhibition in the fields of literature, art, and scientific and technical research are guaranteed."

Article 28 adds:

"The freedom of the press is guaranteed. It may not be restricted by any form of prior censorship. Everyone has the right to express and publish news, ideas, and opinions, freely and without limitation, save that which is explicitly set forth in law. The public authorities shall encourage the regulation of the press sector in an independent manner and on democratic foundations, and the establishment of the legal and ethical rules related to it. The law shall establish the rules for the regulation and oversight of public media and guarantee access to these media while respecting the linguistic, cultural, and political diversity of Moroccan society. The Supreme Authority for Audiovisual Communication shall ensure respect for this diversity, pursuant to the provisions of Article 165 of this constitution."

THE RIGHT OF ACCESS TO INFORMATION IN THE CONSTITUTION

Article 27 states:

"Citizens [male and female] have the right of access to information held by the public administration, elected institutions, and the bodies entrusted with the mission of public service. The right of access to information may not be restricted except by law, with the objective of protecting matters of national defence, internal and external state security, and the private life of persons, preventing the infringement of basic liberties and rights enshrined in this constitution, and protecting the sources of information and areas specifically enumerated by law."

1.2.2 FREEDOM OF EXPRESSION AND THE PRESS AND ACCESS TO INFORMATION IN THE LAW

On August 15, 2016, the Official Gazette published Royal Edict 1.16.122, issued by the King on August 10, 2016, for the implementation of Law 88.13 on the press and publication. Although the law was widely reported to contain no prison penalties, this is incorrect (see 'a' below). In addition, the Criminal Code applies to misdemeanours that can only be committed via publication; these should have been included in the press law, which offers greater protection (see 'b' below). Despite a number of safeguards in the new press law, such as the prohibition of the suspension of a publication or pretrial detention under Article 98, these were not enforced

in the first test of the law (see Part II of this paper). Moreover, despite a multiplicity of draft laws on freedom of information, there is a lack of political will to adopt a robust, effective law that ensures compliance with international standards (see 'c' below). Finally, the existence and sustainable development of the digital press is jeopardised by new conditions included in the press law (see 'd' below).

IS THE PRESS LAW FREE OF PRISON PENALTIES?

At first glance, this seems to be the case, but some articles are flawed, and link press crimes with similar crimes defined in the Criminal Code. This allows judges to apply the criminal penalties, which may entail a prison sentence. An example is Article 71 of the press law, which states:

"The provisions of Articles 104 and 106 below shall be applied if a publication, periodical, or digital newspaper includes defamation of the Islamic religion or the monarchical order, or incitement against the territorial unity of the kingdom, or libel or slander of or an infringement of the private life of the person of the King, the Crown Prince, or members of the royal family, or an infringement of the duty to show due esteem and respect to the person of the King."

The provisions of these two articles shall similarly apply if a publication, periodical, or digital newspaper includes direct incitement to the commission of a felony or misdemeanour, or incitement to discrimination or hatred among persons.

A review of Articles 104 and 106 reveals that indeed, they only penalise the newspaper or periodical. But the person committing these acts is subject to a different, harsher penalty under the Criminal Code. Section 267-5 of the Criminal Code allows for a term of imprisonment of six months to two years, or a fine of 20,000–200,000 Moroccan dirhams (MAD), or both. For each offense against Islam or the monarchy, or incitement against Morocco's territorial unity, the sentence is two to five years imprisonment and a fine of MAD50,000–500,000, or both, if the acts are committed by means of publication.

As such, it cannot be said that publication crimes carry no prison sentences. Although the legislature has removed apparent prison penalties from the press and publication law, they have been retained in the Criminal Code. In short, a single incident of a publication crime entails one penalty for the publication itself and another for the person who committed it. The judge will not hesitate to apply both laws, since both are applicable to a specific party and do not overlap.

Recently, to resolve this inconsistency, the Ministry of Justice and the Ministry of Culture and Communication drafted a bill in October 2017, which transfers some provisions of the press law related to various publication crimes to the Criminal Code. These provisions cover incitement to a number of crimes, such as praise for terrorism, war crimes, genocide, or crimes against humanity, as well as incitement to hatred and discrimination and crimes of insulting judges, civil servants, law enforcement, or a regularly constituted state body. The danger of removing these misdemeanours from the press law is that it will subsequently make such offenses subject to the Code of Criminal Procedure, which allows for detention. Currently, the press law does not permit detention, and misdemeanours are not subject to prison sentences.

ACTS CRIMINALISED IN THE CRIMINAL CODE THAT CAN ONLY BE COMMITTED BY MEANS OF PUBLICATION

These include, for example, insulting the judiciary or civil servants, influencing the judiciary, showing contempt for judicial rulings, or praising terrorism, whenever such acts are committed in writing or via other means of publication. In addition, although praising terrorism is only subject to a fine in the press and publication law, it is also found in the Criminal Code, where it carries much stiffer penalties. The penalties and procedures differ significantly depending on whether we apply the Criminal Code or the press law. The terrorism law, which is incorporated into the Criminal Code, allows the application of a code of procedure specific to terrorism crimes, which permits suspects to be detained and placed in police custody for up to 12 days. It also invests exclusive

jurisdiction over terrorism crimes with the Rabat Appellate Court, and makes the investigating judge responsible for examining terrorism crimes to the case. The crime of praising terrorism carries stiff penalties: Section 218-2 of the Criminal Code prescribes a sentence of two to six years imprisonment and a fine of MAD10,000–200,000.

AN UNDESIRABLE RIGHT: THE RIGHT OF ACCESS TO INFORMATION

Since 2013, the government has submitted three drafts bills on the right to information, the best version being the second bill of 2013. The most recent draft, published on the website of the government secretariat on July 31, 2014, is the worst. While observers awaited the results of their proposals and comments on the second draft, government parties, among them the Secretariat of the Government and the Interior Ministry, were busy disregarding the feedback from non-governmental organisations (NGOs) and even some consultative bodies, such as the National Council for Human Rights, which became clear with the release of the third version of the bill. It did not go unobserved that such practices became more prevalent with the crackdown on civil society that began in the summer of 2014. As a result of the regressive amendments to the 2014 draft, the bill received a poor score of 65 of a possible 150, based on international standards set by organisations that assess access to information laws, such as the Centre for Law and Democracy and Article 19. These assessments cover seven areas: the right of access, the scope of the law, request procedures, exceptions, possibility of grievance and appeal, penalties and protections, and promotional measures. With this score, the Moroccan bill fell in the rankings to 83 out of 98 information laws assessed, compared to the 2013 bill, which scored 100 and was ranked 27—a substantial decline.

As this law has not yet been passed, and its content remains in flux, it will not be analysed in this paper.

THE DIGITAL PRESS: UNDER EXISTENTIAL THREAT

In 2017, the social movement in the Rif continued apace and many digital outlets covered and documented events there as well as other protests and incidents—including, for example, bribes given to officials. In response, the minister of culture and communication threatened the owners of these websites with the strict enforcement of the press and publication law against any site that did not meet the formal and substantive conditions for the professional practice of digital journalism.

Article 16 of the new press law sets forth high barriers for operators of existing websites. They must hold a BA at least, a specialised journalism degree, or a recognized equivalent diploma. They must be professional journalists based on the terms of the law.[5] They must own the press institution if a natural person, or, in contrast to the law governing corporations and the appointment of company officials, they must own a majority stake in a press institution with legal personhood.

In addition, Article 21 sets forth other conditions for the licensing of any periodical or digital outlet, which must be acquired 30 days prior to the day on which the publication will be issued. The license must be obtained from the crown prosecutor in the first-instance court in the same district in which the press institution's main office is located. The license requires the submission of a significant volume of information, including the domain or name of the website, the civil status of the publication director and editors if necessary, their nationalities and educational qualifications, with the appropriate documentation, and their criminal records, as well as the name and address of the owner of the site and the institution's registration number in the commercial registry.

[5] Press cards are granted by a committee overseen by the Ministry of Communications and are to be renewed annually. Article 12 of the law on professional journalism (Royal Edict 1.16.51 issued on April 27, 2016 in implementation of Law 89.13 on the regulation of professional journalists) states, "Any person who intentionally makes a statement containing false information with the intent of obtaining a professional press card, or uses an expired or cancelled professional card, or impersonates a professional journalist or the equivalent for a particular purpose without having obtained a professional press card, or intentionally submits cards similar to the professional press card set forth in this law shall be subject to the penalties established in the Criminal Code."

Article 125 allowed one year for compliance with the new law, with the deadline set for August 15, 2017.[6] Parliament is currently debating a law that would extend the deadline an additional year, with heavy penalties in the event of non-compliance.[7]

In addition, Article 34 of the law states that digital newspapers that fulfil these requirements shall benefit from a free domain name that uses the national press domain (press.ma). Article 35 adds, "The digital newspaper that has fulfilled the conditions of Article 21 above shall automatically benefit from a license to film, submitted by the Moroccan Cinema Center, valid for one year and renewable, for audiovisual production to serve the digital press. Any unlicensed filming is subject to the penalties set forth in this law."

In other words, one is required to obtain one-year permits from the Moroccan Cinema Center to film video clips and a one-year license from the national communications regulatory agency for website hosting.

Since these licensing organisations are under state control, they can deny or refuse to renew the license of journalists and digital outlets that take a critical stance. Dozens of digital press workers staged a protest in front of the Ministry of Culture and Communication in Rabat, following a call from the National Coordinating Committee in Defense of Press and Media. Protestors condemned what they saw as the unfair, arbitrary, and reckless trampling of media and rights gains. Other professionals, among them the National Syndicate for the Moroccan Press and the Moroccan Federation of Newspaper Publishers, see this as an opportunity to bring order to the field and clear it of hangers-on. They noted that the new law has restored the stature of journalism, which has become the chosen profession of anyone without one.[8]

Several website operators received summonses from the Public Prosecutions, which urged them to shutter their websites on the grounds of non-compliance with the new press law.

In order to comply with Morocco's international legal obligations in regard to freedom of expression, two basic conditions must be met by both website operators and the authorities: websites should be declared to the authorities to allow the latter to enforce the law if a website infringes the rights and liberties of others, in line with the limits set by Article 19 of the International Covenant on Civil and Political Rights (respect for the rights and liberties of others and protection of public security and morals as necessary in a democratic society). At the same time, the authorities should not arbitrarily block websites, because this violates the right of the public to access information and opinions and is an assault on the right of everyone to freely access, receive, and publish information, within the limits permitted under international standards.

If these punitive requirements are enforced, they will most certainly constitute an infringement of freedom of opinion, expression, and the press, and the right to access information, even if under the cloak of legality. This is a real setback in the post-independence gains made by journalists and in freedom of opinion and expression. It will also go down as one of the major grievances held against the PJD and its allies in government and parliament in the period of 2012–2016.

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[6] sawtsouss.com/archives/46155

[7] Article 24 of the law states, "A fine of 2,000 to 10,000 dirhams shall be assessed against the owner of the periodical or digital newspaper or the lessee operating them, or absent them the publication director, or absent him the printer, or absent him the distributor of the periodical or the host of the digital newspaper, who does not hold a license pursuant to the requirements of Articles 21 and 22 above, or relied in publication on a license that is void pursuant to the requirements of Article 23 above. The publication of the periodical or digital newspaper may not continue until after compliance with all the procedures set forth in Article 21 above. In the case of non-compliance with the aforementioned procedures, the persons enumerated in the first paragraph above shall be jointly subject to a fine of 20,000 dirhams, to be paid for every new, unlawful publication, and to be calculated based on every issue published starting from the date of the pronouncement of the judgment, if issued in presence, or from the third day after it to allow notice of the judgment, if issued in absentia, even if there is an appeal. The digital newspaper, if its establishment was not licensed, is subject to the penalty set forth in the first paragraph above, as well as blocking, pending compliance with the procedures set forth in Article 21 above."

[8] http://assabah.ma/244919.html

1.3 POLITICAL AND JUDICIAL PRACTICES

Since 2014 in particular, the crackdown on civil society has increased, after the interior minister made a statement in the parliament accusing some Moroccan rights movements of acting as foreign agents, receiving foreign funds, harming national interests, and hindering the operation of the security establishment by propagating what he considered lies about torture and human rights abuses in the kingdom.

The repression intensified, striking a severe blow against freedom of the press and expression with the arrest of journalists, activists, and rights advocates. Journalists were also arrested in connection with the movement in the Rif, as were young people affiliated with the JDP due to Facebook posts, part of the increased harassment of the party that, ironically, leads the government (see section 1 below).

In the same context, barriers to the establishment of independent associations, including investigative journalism initiatives, have persisted. Activists were monitored, while the loyalist press was mobilised to serve these repressive tendencies and attack human rights activists and dissidents. Political motivations lay behind most violations of freedom of expression and the press, and the judiciary and judicial means were employed as cover, in a flagrant distortion of sound legal interpretation and in violation of fundamental rights (see section 2 below).

1.3.1 ARREST OF JOURNALISTS, PARTY ACTIVISTS, AND RIGHTS ADVOCATES

A number of journalists have been arrested and prosecuted because of their advocacy or media activities critical of the authorities and their management of public affairs. Several examples are discussed below.

THE CASE OF ALI ANOUZLA

On September 17, 2013, journalist Ali Anouzla was arrested for publishing a story taken from the Spanish El País, which contained a link to an al-Qaeda video. The Moroccan authorities arrested him at his home and confiscated equipment and computers from the website offices. He was taken to the headquarters of the National Brigade in Casablanca for questioning. After he was taken into custody, the Public Prosecution issued a notice, dated September 24, 2013, stating that it had petitioned the investigating judge to conduct an investigation into three crimes: 1) intentionally providing assistance to those involved in terrorist acts; 2) providing material for the execution of terrorist crimes; and 3) praising acts constituting terrorist crimes.

These crimes are set forth in the Moroccan Criminal Code under Sections 218-2 and 218-6, all of them part of the 2003 counterterrorism law.

Crucially, the method used to commit these alleged crimes was publication on the Lakome website, so they necessarily fall into the category of publication crimes. Logically, any prosecution should have been based on the press and publication law of 1958, amended in 2002, rather than the terrorism law. Following a campaign and numerous legal writings that found no legal basis for his detention or even prosecution,[9] on October 25, 2013, Anouzla was released after spending 40 days in prison; legal action continued against Anouzla while he was free on his own recognisance. The case is still pending before the first-instance felony chamber of the Rabat Appellate Court.

THE CASE OF HICHAM MANSOURI

Mansouri is a young journalist who also works as teacher with the Education Ministry. He was the primary assistant to historian Maati Monjib at the Ibn Rochd Center, which is engaged in various dialogues between

[9] Abdelaziz Nouaydi, "Hal yujid nass fi-l-qanun al-Maghribi yasmah bi-mutaba'at 'Ali Anuzla?" (Is there a statute in Moroccan law that permits the prosecution of Ali Anouzla?) Akhbar al-Yawm, Oct. 5–6, 2013, https://www.maghress.com/lakome/30874.

secular and Islamist political forces and also conducts training activities for investigative journalists. Hicham Mansouri was placed under surveillance, and his home was raided in February 2015 by an entire police unit in civilian clothing. He was stripped naked and photographed as evidence, and led to the police vehicle as he attempted to cover himself with a blanket, a clear attempt to further smear and humiliate him. He was tried with a woman who had been visiting him, all based on fabricated reports and files prepared by the judicial police, which at times plays a political role. A report of the moral division of the judicial police in Rabat alleged that the police had obtained information from Mansouri's neighbours and the building doorman, who apparently stated that he was using a furnished flat in the building for the purpose of prostitution, which had disturbed the peace of other residents. The report also stated that a field investigation had been conducted, confirming that Mansouri had indeed rented the furnished flat to engage in corrupt practices. Despite testimony from building residents, who stated they had filed no complaint and that Mansouri was an ideal neighbour, and from the building doorman, who courageously testified in court denying the charges against Mansouri, the first-instance court in Rabat on March 31, 2015 sentenced him to ten months in prison on charges of adultery.[10]

Prior to his release in January 2016, Mansouri was prosecuted in the fall of 2015 in connection with another case, which also involved Maati Monjib and several journalists, some of whom had received training in investigative journalism through the centre.[11] These included journalist Samad Ait Aicha and Hisham Khribchi with the Association for Digital Rights; Mohamed Elsabr, president of the Moroccan Association for Youth Education; and Rachid Tarek and Maria Moukrim, with the Moroccan Association for Investigative Journalism. The first five defendants were charged with infringing national security, punishable by one to five years in prison and a fine of MAD1,000–10,000. The charge, set forth in Section 206 of the Criminal Code, punishes "any person who receives, directly or indirectly, from a foreign person or group, any form of grants, gifts, loans, or any other benefits designated or used in whole or in part to facilitate or finance an activity or advocacy liable to infringe the unity, sovereignty, or independence of the Kingdom of Morocco or to undermine the allegiance of citizens to the Moroccan state and the institutions of the Moroccan people."

In addition, Maati Monjib was charged with misappropriating funds, while Rachid Tarek and Maria Moukrim faced charges of receiving funds from foreign bodies and international organisations in violation of Articles 5 and 6 of the associations' law, which do not apply in their case. The case has been pending before the first-instance court in Rabat since October 2015, having been delayed several times, most recently on October 11, 2017. Hicham Mansouri and Samad Ait Aicha were forced to leave the country and seek political asylum in France, where following preliminary approval, they are awaiting the final decision. Hicham Khribchi, also known as Hiham Almiraat, the founder of the Association for Digital Rights (which was unable to obtain a license) was also compelled to seek asylum abroad. He is among the accused in the case of Monjib and the other activists. His association, in concert with Privacy International, published a report on the surveillance of activists and journalists in Morocco.[12]

THE CASE OF HAMID AL-MAHDAOUI AND SEVERAL JOURNALISTS DETAINED IN CONNECTION WITH THE RIF MOVEMENT

Mahdaoui is the director of the Badil website, which publishes videos exposing instances of injustice, abuse of authority, and bribery, especially in the judiciary and high administration. He also publishes stories of arbitrary actions endured by citizens, and occasionally does on-the-ground investigations highlighting the wretched

[10] As part of Mansouri's defense counsel, I submitted briefs and arguments to the court, but the court disregarded them.
[11] The trials of these activists and journalists was related to their participation in training workshops organized with the support of the Dutch NGO, Free Press Unlimited, in Marrakech. A police force raided the workshop, confiscated the participants' smartphones, and transferred them to the police center in Casablanca, where many of them were questioned. Ultimately, seven activists were prosecuted.
[12] Jesús García Luengos and Laurence Thieux, Les medias en ligne au Maroc et le journalisme citoyen: analyse des principales limites à un environnement favorable, p. 41.

conditions in some areas. He strongly supported the social movement in the Rif, a series of peaceful demonstrations that erupted in the wake of the death of fishmonger Mohsen Fikri on October 28, 2016. Fikri was crushed in a trash compactor while attempting to retrieve a large quantity of fish thrown there by police.

For the region's residents, the incident exemplified the contempt, repression, and marginalisation they had endured for decades. The Rif area still bears the scars of wounds inflicted since the end of 1950s, having been a stronghold of anti-colonial resistance in the 1920s, in the revolution led by local hero Mohammed Ben Abdel-Karim al-Khattabi against the Spanish and French.

In the wake of Fikri's death, numerous young people organised demonstrations that drew thousands of people and drafted a list of demands to end the region's marginalisation, including fighting unemployment, creating a cancer hospital in the region, building a university, and encouraging investment. The authorities responded aggressively, arresting some 50 activists in the summer of 2017, most significantly leader Nasser al-Zafzafi, and charging them with infringing state security and numerous other crimes. The defendants were then transferred for trial from Al Hoceima in the north to Casablanca, about 600 km away. As the protests continued, the repression intensified, and hundreds of young people were arrested and tried in Al Hoceima, most of them sentenced to prison. The trials were still ongoing in Casablanca as of mid-January 2018.

In this context, journalist Hamid al-Mahdaoui was arrested in Al Hoceima while covering a march that local residents had planned for July 21, 2017. After his arrest on July 20, the prosecutor with the Al Hoceima Appellate Court issued a notice that Mahdaoui was arrested for inciting people to demonstrate despite a ban by the competent authorities.

Although the press law does not permit the detention of journalists during prosecution and does not entail a prison sentence for inciting to participation in a demonstration, Mahdaoui was sentenced to three months in prison. On appeal, on September 11, 2017, the sentence was increased to one year, pursuant to Section 299-1 of the Criminal Code,[13] an amendment introduced in tandem with the adoption of the press and publication law. This provision was applied, despite claims by the then-minister of communications that the press code would apply to publications and journalists, and did not provide for any prison penalties.[14]

Mahdaoui was transferred from prison in Al Hoceima to an investigating judge in Casablanca, where he is being prosecuted on another charge related to failure to report an infringement of state safety (Section 209 of the Criminal Code[15]), punishable by two to five years in prison and a fine of MAD1,000–10,000. This charge is based solely on phone calls Mahdaoui received from a person he did not know, claiming he intended to bring weapons into Morocco, including tanks, to stage a revolution. While the journalist accorded the claims no importance based on their lack of credibility, he is nevertheless being prosecuted on this serious charge. His trial is underway. In the latest development on October 24, 2017, the Public Prosecution asked to join his case to that

[13] Section 299-1 states, "In cases other than those of participation as set forth in Section 329 of this law, and whenever the law does not provide for stricter penalties, a sentence of three months to one year imprisonment or a fine of 5,000 to 50,000 dirhams, or both, shall be levied on anyone who directly incites a person or several persons to commit a felony or misdemeanor if such incitement has no subsequent effect, and this by means of speeches, shouting, or threats voiced in public places and assemblies, or by means of postings displayed in public, or by any means that meets the condition of public accessibility, including electronic, print, and audiovisual. If the incitement to the commission of felonies or misdemeanors has a subsequent effect or such incitement resulted only in an attempt to commit a crime, the penalty shall be one to five years imprisonment or a fine of 5,000 to 100,000 dirhams, or both."

[14] Mustafa al-Khalfi, "Mashru' qanun 73/15 la yudakhkhil al-sahafa li-l-majal al-jina'i!?" (Draft Law 73/15 [the law that added Section 299-1] does not make the press criminally liable!?). See: www.tanja40.com/%D8%B7%D9%86%D8%AC%D8%A9-4694-43.html

[15] Section 209 makes not reporting an infringement of state safety punishable by two to five years imprisonment and a fine of MAD1,000–10,000, to be levied against "any person who learns of plans or acts whose objective is to commit acts punishable as a felony under the provisions of this title, and who despite this does not immediately notify the judicial, administrative, or military authorities upon learning of them."

of detainees with the Rif movement in Al Hoceima. The court granted the request, despite objections from the defense.

It should be noted that several other journalists have been detained for covering news of the Rif movement on their websites. These include Rabie al-Ablaq, a correspondent for Badil Info, which was run by al-Mahdaoui; he has launched a life-threatening hunger strike. Five other journalists are also being detained.[16] The National Syndicate for Moroccan Journalism has demanded their release, noting that they had been subjected to security interrogations in a city far from their homes and all manner of severe criminal charges, including insulting a regularly constituted state body, inciting unauthorised gatherings, undermining citizens' allegiance to the Moroccan state, inciting violations of national security, and collecting donations without authorisation.[17]

TRIAL OF PJD YOUTH

On December 22, 2016, six young members of the JDP were arrested on charges of praising terrorism after publishing posts on Facebook in the wake of the killing of the Russian ambassador in Turkey and the death of his killer. Some of them wrote of the killer, "May God have mercy on you, hero," as some of the youths saw the incident as retribution for the Russian role in the Syrian conflict and its support for the regime of Bashar al-Assad.

The young men were sentenced to one year in prison on July 13, 2017 by the first-instance felony court in Salé, which has jurisdiction over terrorism cases.

While some of the Facebook postings do constitute praise of terrorism, the circumstances of the case and trial require several observations:

1. Section 218-2 of the Criminal Code was applied, which carries a sentence of two to six years in prison and a fine for praising terrorism. They were also prosecuted on charges of inciting to the commission of a terrorist crime under Section 218-5, which carries a sentence of five to ten years in prison and a fine. In contrast, Article 72 of the press and publication law criminalises praising terrorism and is punishable only by a fine of MAD100,000–500,000 ($10,000–50,000). The judge denied the motion to apply the press law, as required by Section 6 of the Criminal Code, which states, "If several laws are in force from the date of the commission of the crime and the final judgment, the law most favourable to the defendant must be applied." In addition, Article 95 of the press and publication law states, "All prosecutions related to publication shall be subject to the procedures set forth in this law." Article 98 of the law prohibits "arresting the suspect or subjecting him to pretrial detention."
2. The young men were members of the PJD, whose secretary-general, Abdelilah Benkirane, was tasked at the time with forming the government, following his appointment as head of the government on October 10, 2016. His efforts were met with numerous obstacles for several months, due to the impossible conditions for a coalition government set by the party close to the palace, although the PJD won the most votes in the October 2016 elections. This was clearly a message to the party.
3. After Benkirane was relieved of his duties, ostensibly for his failure to form a government, replaced by Saadeddine Othmani, and after the PJD accepted the conditions it had previously rejected, a royal amnesty was issued for the PJD youth. This took place on Throne Day, July 29, 2017, after they had spent more than seven months in prison.

[16] These are Houssein Al-Idrissi, a photographer with the Rif Press website; Mohamed El Asrihi, the manager of the Rif 24 website; Jawad Sabiri, a photographer with the Agraw.tv website; Fouad Assaidi, who works with the Araghi.tv website; and Abdelali Haddou, the director of the same website.
[17] http://lakome2.com/politique/media/28236.html

1.3.2 OBSTRUCTING THE FREEDOM TO ESTABLISH ASSOCIATIONS AND ENCOURAGING SMEAR CAMPAIGNS

OBSTRUCTING THE FREEDOM TO ESTABLISH ASSOCIATIONS

The Moroccan authorities habitually obstruct the establishment of independent civic associations, either by refusing to accept their registration papers or refusing to give them a receipt once the file is deposited. (The receipt is vital for opening a bank account, signing a lease, or organising a public activity.) As a consequence, associations often opted to file their papers with the help of a bailiff, who would guide the filing process, and file a report in the event of refusal of the administration for use in the administrative courts. Now, however, many bailiffs refuse to assist associations with this task, citing other obligations. In fact, they simply want to avoid giving an official statement against the authorities, although the law authorises them to fulfil this mission. However, the authorities encourage the establishment of associations whose objectives and activities they can oversee and control.

In this context, the association Freedom Now was created on April 25, 2014 by a core group of researchers, academics, journalists, and artists who were on the committee for solidarity with Ali Anouzla. The association's objectives include monitoring violations of freedom of opinion and expression in Morocco, defending media figures, intellectuals, and artists, mobilising defence for victims and providing support, and proposing reforms to guarantee the rights of free expression and opinion.

As required by the law on associations, the group of activists filed their registration papers with the local authority—the Rabat province—on May 9, 2014. The provincial official responsible for receiving such files refused to accept the application, although he was legally required under Article 5 of the law to accept the papers and immediately provide a dated and time-stamped receipt. The association officials petitioned the administrative court on June 18, 2014, appealing against what was effectively a rejection of their registration application. The Rabat Administrative Court denied the appeal on July 22, 2014, on the grounds that the association did not yet possess the standing to independently file suit and had not followed proper procedure, by having the founders who possess standing file the suit. The ruling cited Article 5 of the associations law, which requires the granting of "a temporary receipt stamped and dated immediately." It adds, "The final receipt must be granted within 60 days. If it is not granted within this time period, the association may begin to operate in accordance with the objectives set forth in its laws." The logic of the ruling is that the association should have waited 60 days to acquire official legal standing before filing suit. Yet, the ruling did not preclude all possibility of a suit, to be filed either by the founders of the association or 60 days after filing for the license.

In addition to Freedom Now, the authorities also refused to grant a registration receipt to the Association for Digital Rights, and prosecuted the group's founders. In 2016, authorities refused to accept the establishment papers submitted by the founders of the Association of International Journalists in Morocco, although they had met all legal requirements.

ENCOURAGING SMEAR CAMPAIGNS[18]

It has become common practice for a number of printed and online newspapers to engage in smear campaigns against the political opposition or critics of the authorities, whether individuals, political groups or rights-based organisations. Rights activists are particularly vulnerable to this type of attack. The most prominent example is Khadija Al-Ryadi, the former president of the Moroccan Association for Human Rights (AMDH), the coordinator of the Maghrebine Coordinating Committee for Human Rights, and the recipient of a UN human rights award. Smear campaigns also target writers, journalists, and academics, as well as businessmen and activists known for

[18] My analysis is based on a set of defamatory articles collected and classified by student Abd al-Latif al-Hamamouchi, based on dozens of press articles from both print and digital outlets.

their criticism of the regime and who have both domestic and international connections. These are people who exercise public influence, including but not limited to Maati Monjib, Aboubakr Jamaï, Fouad Abdelmoumni, Abdellah Hammoudi, Prince Moulay Hicham, Karim Tazi, Abdelhamid Amin, and Ali Anouzla. Even foreign journalists such as Ignace Dalle and Ignacio Cembrero have not escaped unscathed. Such campaigns have also targeted members of the PJD, such as Abdelali Hamidine, Abdelaziz Aftati, and Abdullah Bouano, the head of the party's parliamentary bloc.

These defamation campaigns can be precisely and narrowly framed. For example, Maati Monjib is consistently described as an anti-Semite in the Francophone media, to erode his credibility with Western public opinion, while the Arabic-language media calls him a Zionist, aiming to tarnish him among the generally pro-Palestinian Moroccan public.

Organisations as well as individuals are targeted, first and foremost the Islamist-oriented Al Adl Wa Al Ihssane and Annahj Addimocrati, which has been labelled a leftist party. Some platforms and writers have devoted themselves to smearing the PJD, particularly its ministers and its secretary-general Abdelilah Benkirane, although the party leads the government and does not criticise the regime (and indeed, has been silent on various rights abuses).

Certain human rights organisations with strong credibility are also subject to these campaigns, which affects public opinion. The most prominent example is the AMDH. In the wake of reports released about human rights violations in Morocco, international NGOs have also been attacked, in particular Amnesty International and Human Rights Watch.

Defamation campaigns combine political allegations with personal insults and innuendo. On the political front, human rights activists and democratic secularists have been implicated in alleged relationships with the Polisario Front or Algeria and accused of treason or lack of patriotism. Some are said to be in the employ of Prince Moulay Hicham, a cousin of the King who is suspected of wanting to usurp the throne. Some are said to be anti-monarchists or to have republican tendencies, while others are accused of being communists and atheists. Such people are typically accused of receiving foreign support from anti-Moroccan organisations and countries, and using this funding in a fraudulent manner. Finally, they are accused of tarnishing Morocco's image abroad when they speak of human rights violations or the lack of democracy, or of undermining secret counterterrorism agencies and asking questions about their work.

Smear campaigns that target the private lives of individuals are generally directed at Islamist movements or parties, but occasionally at others as well. Islamists are typically accused of extramarital affairs or involvement in homosexuality and sometimes corruption, especially if they are PJD elected figures. Non-Islamists may be accused of adultery or homosexuality; or of not fasting during Ramadan, or of using drugs and alcohol. They are also accused of misappropriating funds granted by foreign agencies or NGOs.

Some activists have been compelled to file suits abroad against some press outlets for their defamatory claims, having despaired of obtaining justice through the Moroccan courts.[19]

1.4 CONCLUSIONS AND RECOMMENDATIONS

This paper concludes by presenting a set of conclusions, each of which is accompanied by a recommendation to address the deficiency in law or practice. These recommendations are directed at relevant body, either with the direct competence to implement the change, or able to influence the direction of implementation. The recommendations concern first and foremost the public authorities, including the government, parliament, and

[19] This is the case of historian and rights activist Maati Monjib, who filed suit in France against the Le360 website.

judiciary. They are also relevant for the bodies that oversee compliance with international human rights conventions and standards, whether these are treaty-based agencies, bodies with thematic mandates such as special rapporteurs and working groups, or the UN Human Rights Council within the framework of its Universal Periodic Review. Finally, these recommendations, based on an analysis of the law and practice, are a means by which NGOs can pursue their advocacy work in regard to all these stakeholders.

Conclusion 1: Although the right of freedom of expression and access to information is enshrined in the constitution, the legal regulation of press and media freedoms allows for the application of the Criminal Code and for high fines.

Conclusion 2: Several publication crimes still exist in the Criminal Code (i.e. acts which can only be committed by means of publication). These must be moved to the press and publication law. These include crimes related to praise for terrorism, contempt for judicial rulings, offenses against the Islamic religion or the monarchy, incitement against the territorial unity of the kingdom, libel, slander, or infringement of the private life of the King, the Crown Prince, or members of the royal family, infringement of the duty to esteem and respect the person of the King, and incitement to the commission of a felony or misdemeanour, or discrimination or hatred.

Recommendation: The press and publication law must incorporate all misdemeanours that can only be committed by way of publication such that defendants may not be detained during prosecution. It should be noted that some publication crimes can carry prison penalties, such as incitement to the commission of felonies, discrimination, hatred; or the commission of war crimes, crimes against humanity, or genocide. In these cases, if the press code is applied, the sentence is only executed once the judgment is final.

Conclusion 3: There is no law guaranteeing the right of access to information, and the authorities have revealed their intention to establish strict controls that fail to uphold international standards.

Recommendation: A law guaranteeing the right to access to information must be passed, as per Article 27 of the constitution, in consultation with civil society organisations and with due regard for international standards.

Conclusion 4: The press and publication law enacts severe restrictions on the right to issue newspapers or establish new websites, while also jeopardising the continuation of existing websites.

Recommendation: Although the authorities have the right to regulate newspapers and websites, regulation should not entail conditions that hinder freedom of opinion or expression, except for legitimate restrictions based on international standards. The most important condition is the need to register the person responsible for publications, to enable the enforcement of the law in the event of any infringement of the rights and liberties of others or legitimate interests that must be protected in any democratic society. The National Press Council, which oversees, inter alia, journalism ethics, should be established as an independent and representative body.

Conclusion 5: A number of print and online publications are encouraged to attack and smear critical or independent voices, including human rights activists and democracy advocates, political opponents and independent organisations critical of the management of public affairs.

Recommendation: The authorities and decision makers must end the practice of encouraging and protecting newspapers and websites that engage in such defamation and other negative behaviours.

Conclusion 6: Journalists and bloggers are prosecuted under the Criminal Code in a selective and at times retaliatory manner, and the courts are complicit in arbitrary interpretations of the law.

Recommendation: There must be stronger guarantees for judicial independence, and judges' organisations must ensure that judges are bound by all laws and interpret them in a way that ensures justice and full respect for the rights of defendants and the right of defense.

Conclusion 7: The Public Prosecution and the judiciary rely on reports from the judicial police, which often do not respect guarantees designed to inform persons of their rights (contacting an attorney, notifying the family, the right to remain silent, the right to read the interrogation minutes prior to signing them). Interrogation reports are written in a way that guarantees confessions of alleged crimes, and such reports are probative in misdemeanour cases until proven otherwise. Reports may be disallowed in cases of torture confirmed by medical experts, but this rarely happens.

Recommendation: Security governance must be reformed to grant protection to judicial police officers for the refusal to follow unlawful orders. They should be subordinate to the judiciary alone, not their administrative superiors. The law should be changed to make judicial police reports in misdemeanours purely informative and not binding on the judge, in accordance with the principle of the freedom to determine means of proof. It must also be explicitly stated that an attorney should be present from the first moment a person is taken into custody, and especially when his client signs police interrogation minutes.

Conclusion 8: The establishment of independent associations, including those that defend freedom of the press, faces arbitrary obstructions.

Recommendation: The terms of the association law must be respected, and criminal penalties should be established for infringement of a fundamental democratic freedom.

2.0 FREEDOM OF SPEECH AND INFORMATION IN ALGERIA: THE LEGALITY AND THE REALITY

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2.1 INTRODUCTION

Just like political pluralism and judicial independence, media pluralism and press freedom are the pillars of any democratic system. Media pluralism and freedom of expression are prerequisites for any democratic transition. The role of media is to inform the public and illuminate the facts that lie at the heart of political debate. The principles of tolerance, peaceful transfer of power and popular sovereignty are all contingent on political and media pluralism.

The introduction of Media Law no 90-07 dated April 3, 1990, together with two government memos (March 19, 1990; April 4, 1990) on the creation of private newspapers, made press freedom in Algeria a reality. These laws applied to everyone – the authorities, media professionals, and the public at large. It was the end of media monopoly. Readers can now choose from a wide range of newspapers. The new reality of media pluralism became a mirror of the country's political pluralism.

The 1990 laws, however, entered into force in dramatic circumstances, namely the death of more than 100 journalists, murdered by terrorist Islamist groups. The Maison de la Presse (House of the Press) in Algiers, host to nearly all of the independent newspapers, was also targeted with a car bomb, which caused many casualties. Despite the high price already paid by journalists, they also faced significant legal pressure. Many were tried and jailed for libel, in accordance with the penal code and Media Law 90-07, also known as the "Penal Code Bis".

In early 2011, a wave of panic swept through the Algerian regime as the events of the Arab Spring shook the region and led to the collapse of "brotherly" regimes, with media environments very similar to Algeria's. In response to the upheaval in the Arab region, Algerian leaders felt compelled to push through rapid political reforms to mitigate the consequences of rising national protests.

In this context, President Abdelaziz Bouteflika delivered a speech to the nation on April 14, 2011, from the city of Setif. The famous address was considered a genuine democratic turning point. The president announced the government's willingness to engage in "political reforms to strengthen the democratic process". He implied that he was likely to resign from office, and was ready to urge the whole "historical legitimacy" generation to do the same. Specifically, he said that the "new parliament would be entrusted with the mission to finalize the adaptation of the national judiciary and regulatory system, in accordance with the political reforms, giving priority to constitutional revision. This would enable the country to enter a new era for promoting good governance, modernizing institutions and enlarging the scope of rights and liberties, in order to embrace the evolution of society and fulfil the requirements of development, and best serve citizens' interests[20]".

Accordingly, after the state of emergency was lifted in February 2011, a number of laws on freedoms of speech, assembly and demonstration were passed by parliament.

[20] http://www.algerie-focus.com/2012/05/discours-integral-de-bouteflika-a-setif/

In 2016, a new constitution was voted in, and several constitutional principles were introduced and/or modified. However, this "constitutional revolution", as it has been described, has not as yet been followed by any implementing decrees.

The principle of media pluralism, supported by a number of legislative and constitutional texts, as well as various international treaties signed by Algeria, should not conceal the existing judiciary, political and administrative obstacles. In the 2017 Reporters Without Borders' report, Algeria ranks 134 in terms of press freedom. According to the report, "Media freedom has seen a sharp decline in Algeria. Many subjects, including corruption, the assets of the country's leaders, and the president's health, are still off limits and the economic throttling of independent media outlets continues[21]".

In light of this evaluation, it is useful to examine existing laws on press and media freedom (section 1.0) and then, in the second part, assess the implementation of such texts in judicial, political and administrative processes (section 2.0).

2.2 CRITICAL EXAMINATION OF EXISTING JUDICIAL MECHANISMS

2.2.1 LAWS DESCRIBED AS PART OF THE POLITICAL REFORMS

Before embarking on any critical analysis of these laws, it is important to note that these bills were passed without any consultation or public debate, a procedural failing criticised by the chairperson of the National Consultative Committee on the Promotion and Protection of Human Rights in a statement released on December 5, 2011.

The central text on freedom of speech and media is organic law no 12-05, dated January 12, 2012.

This law, which replaces the 1990 Media Law no 90-07, provides for partial decriminalisation of press violations (replacing imprisonment with fines) and the liberalisation of the audiovisual sector, which had long been under state monopoly. However, closer analysis of the new text reveals regressive trends, limiting press and media freedom in contravention of the international conventions signed by Algeria. This is mainly due to the use of vague and imprecise terminology, which broadens executive prerogatives and impose additional restrictions when it comes to dealing or collaborating with foreign media. It also replaces the declarative system with a pre-authorisation process.

In accordance with the new law, information is no longer a right for all citizens, who are entitled to obtain complete and objective information, as provided for by the previous media law. National law no longer protects the right and freedom to seek, receive and impart information and ideas of all kinds, as stipulated by Article 19 of the International Covenant on Civil and Political Rights (ICCRP), signed by Algeria on September 12, 1989. In the new text, information is defined as an activity.

This change in the definition is an indicator of the legislator's will to limit freedom of speech and media. Moreover, the article describes information as an activity to be practiced freely – but, crucially, contained by respect for 12 principles. These principles are mentioned in very broad terms, and are incompatible with paragraph 3 of Article 19 of the ICCRP; namely "national identity and cultural values of society", "security and defence requirements", "missions and obligations of national public service" and "economic interests of the country".

[21] https://rsf.org/fr/algerie

Due to their vague and imprecise nature, these limiting principles are likely to encourage censorship or self-censorship, not only by journalists, who publish the information, by also by citizens who share "news, facts, messages, opinions, ideas and knowledge, through written, audiovisual or electronic platforms open to the public or to specific audiences[22]."

In addition to the above principles, which apply to all media, professional journalists are also bound by 11 other principles set forth in article 92, in similarly vague and as imprecise terms. These open the door for subjective and dangerous interpretations as far as freedom of speech is concerned; namely "respecting the state's attributes and symbols", "refraining from undermining national history", "refraining from disseminating or publishing immoral images or statements, or hurting citizens' sensitivity".

The fundamental rights of journalists to seek and impart information and ideas of all kinds, which in turn help citizens realise their right to receive information, are thus limited by a legal framework constructed on deliberately imprecise and confusing terminology.

Subsequently, and to help consolidate this restrictive trend, the text upholds the status of journalists, providing for their right to have a written employment contract, a life insurance subscribed by the employer should they undertake jobs in dangerous locations, and the creation of a journalist national ID card.

As far as print media is concerned, the new text solemnly endorses the approval system, replacing the declarative system. Thus, any new periodic publication is subject to a prior declaration by the managing director to the Regulatory Authority for Print Media (instead of the public prosecutor in the previous law) against a receipt delivered immediately. After 60 days (instead of 30 in the previous law), an approval is issued by the Regulatory Authority. In the event of a rejection, the Authority must provide the reasons for its decision, which may be appealed before the competent authority.

The printing of the first issue of the publication is contingent on the presentation of the approval to the printing house.

A series of other conditions and formalities create a more burdensome approval process for new publications. For example:

- The managing director of any periodic publication must have at least 10 years of experience in the field of general news media. For scientific, technical or technological publications, five years of experience are required in the area of specialisation.
- Direct or indirect material support by a foreign party is forbidden and violators will incur a fine of Da100 000 to Da300 000, plus the temporary or final suspension of the publication. Any publication or media organisation director who receives funds or accepts benefits from a public or private foreign organisation will incur a fine of Da100 000 to Da400 000.
- The managing director of any periodic publication must be Algerian, which excludes publications owned by foreign publishing corporations from the approval procedure. The printing of such publications in Algeria is subject to authorisation by the Ministry of Communication, while their import is subject to prior authorisation by the Regulatory Authority of Print Media.
- The Regulatory Authority of Print Media, created in accordance with the new law, is composed of 14 members, three of whom are appointed by the President of the Republic, including the Chairperson,

[22] Article 3 of organic law 12-06 on information

whose vote counts double. Two non-parliamentary members are appointed by the National Assembly Speaker, and two non-parliamentary members by the Popular Assembly Speaker, while seven members are elected by absolute majority among professional journalists having at least 15 years of experience in the field. The said Authority has extensive prerogatives, which might arbitrarily hinder the freedom of speech and opinion. It “promotes information plurality”, “monitors the quality of media messages, promotes all aspects of national culture”, and “issues approvals”.

As far as audiovisual media is concerned, the text endorses the mission of public service entrusted to audiovisual activity and opens the field to Algerian corporations. This is however limited by the obligation to obtain an authorisation granted by decree to create any thematic audiovisual organisation, operate a TV or Radio cable broadcast service or use radio frequencies.

Moreover, the text creates an unincorporated, financially independent audiovisual regulatory authority. The mission, attributes, composition and operation of the said authority are detailed in Audiovisual Law no 14-04, dated February 24, 2014.

As a reminder, the law states that audiovisual activities may only be exercised by duly authorised Algerian institutions and corporations, whose shareholders and capital are exclusively and totally Algerian. In accordance with this law, the authorisation process is managed by the Audiovisual Regulatory Authority, through an application system and public auditioning of accepted applicants, after payment of applicable fees.

The operation of a radio or TV service is subject to the respect of contractual specifications, which include around 30 terms and conditions, which are described, once again, in very broad terms, such as: “the obligation to conform to the national religious reference”, “respect for the principles and values of society”, “respect for national values and state symbols as described in the constitution”, “respect for requirements related to public morality and public order”, etc. Failure to comply with these terms and conditions will result in a formal notice, followed by a financial penalty ranging between 2% and 5% of the gross turnover of the latest fiscal year, calculated on a 12-month basis.

The newly created Audiovisual Regulatory Authority is composed of nine members. Five members are appointed by the President of the Republic, including the Authority Chairperson, who has two votes. Two others are appointed by the National Assembly Speaker, and two by the Popular Assembly Speaker. The Authority has a broad mandate in terms of authorisation, control and sanction. Such attributions are likely to impose arbitrary restrictions on freedoms of speech and belief.

Recently, a bid to authorise seven private thematic TV stations was launched in accordance with a decree dated July 31, 2017, but subsequently withdrawn for “falling short.”

As far as online media is concerned, Organic Law no 12-06 defines online media activity, both written and audiovisual, as the production of original content of general interest, regularly updated, including news information treated in a journalistic manner. Such provisions are very broad and may be interpreted in a restrictive way, especially that the said law applies the same requirements mentioned above to both activities.

The new laws show strong evidence of political influence, passed under the pretext of reform. These include the electoral law, the empowering of women to give them better access to elected assemblies, the political parties law, media law and the associations law (Organic Law no 12-06, dated January 12, 2012). The content of these various laws was no surprise; as with previous texts, they mark a clear regression in terms of respect for human rights.

The new law establishes a prior approval system for the creation of associations. An application may be rejected if it is deemed that the goals or objectives of the association are "in contradiction with national principles and values, public order, good morality, rules and legal provisions". Such criteria are extremely vague and imprecise, and allow administrative authorities to block the creation of a range of associations.

The new law prohibits associations from receiving donations, subsidies or any other form of contribution from any "foreign legation or non-governmental organisation". Funding of associations is subject to prior approval by competent authorities (article 30), and the creation of foreign associations is virtually impossible.

As far as freedom of assembly is concerned, the applicable law is no 91-19, dated December 2, 1991, which modifies and completes law no 89-28, dated December 31, 1989, on public meetings and demonstrations. This came back into force after the state of emergency was lifted in February 2011.

Under no 91-19, meetings are subject to a prior notice to the Wali (appointed governor), at least three days before the event. Public demonstrations are also subject to a prior approval request, to be sent to the Wali at least eight days before the date of the demonstration. Any unauthorised demonstration is considered a riot, in which case organisers and participants may be jailed for three months and/or fined Da3000 to Da15 000. The same sanction is applicable to meetings and demonstrations considered in violation of national principles or which may undermine the symbols of the November 1 revolution, public order or public morality.

Furthermore, a decree issued back in 2001 bans any assembly, demonstration or march in the capital, Algiers. This decree remains in force, despite the lifting of the state of emergency.

2.2.2 FREEDOM OF SPEECH AND MEDIA IN THE 2016 CONSTITUTION

Amid a general feeling of disappointment in the wake of the political reform laws, and in order to boost its image abroad, damaged by a fourth mandate for a gravely sick and physically diminished president, the Algerian regime launched a constitutional reform project. The process – which took place in the absence of any public consultation – resulted in the promulgation and the adoption by both houses of parliament, in a joint meeting, of law no 16-01, dated March 6, 2016 on constitutional changes.

The new text introduced amendments to two-thirds of the previous constitution and added new articles, three of which were dedicated to freedom of speech and media.

Thus, article 48 states that freedom of speech, association and meeting is guaranteed for citizens.

Article 50 announces two very interesting principles, according to which "freedom of print, audiovisual and online media is guaranteed and shall not be restricted by any form of prior censorship", and "press offences cannot be sanctioned by an imprisonment sentence".

These principles partially – which decriminalise press offences and liberalize audiovisual media and which existed in the media law- have been constitutionalized.

Article 51 introduces a new right, namely the freedom to obtain information, documents and statistics, and the freedom of their circulation.

Before tackling the implementation of both principles and their translation into legislative and executive texts, it should be pointed out that their scope is limited by the constitution itself:

- As far as freedom of the press is concerned, paragraphs 2 and 3 of article 50 clearly warn that press freedom "cannot be used to undermine the dignity, liberty and rights of others, and that the free dissemination of information, ideas, images and opinions is guaranteed within the framework of the law and the respect of religious, moral and cultural values and principles of the nation".

  This is a familiar pattern: giving the right with one hand, and limiting it with the other, by including requirements that violate international standards, in very vague terms likely to be interpreted subjectively and in a restrictive way. The legislator also refers to statutory law to define the modalities of application of the same right, which obviously limits its scope most of the time.

  What are the cultural, moral and religious values and principles of the nation? Where can one find precise definitions of these ambiguous notions, under which all possible and imaginary restrictions can be introduced in order to limit freedom of belief and news circulation?

  The answer is nowhere.

  As shown above, the law that is intended to bring precision to the constitutional text and the modalities of its implementation draws on broad notions, granting larger powers to executive and judiciary branches in order to limit freedoms of speech and press.

- Regarding access to information, article 51 of the constitution stipulates that this is a guaranteed right for all citizens. However, it also warns that "the exercise of this right should not undermine private life, others' rights, legitimate corporate interests, or national security requirements. The law shall define the modalities of exercise of this right".

- Reporters without Borders underlines that "national security provisions or the nation's moral values is extremely disturbing because of the lack of precision in these restrictions. International law does not recognise "legitimate corporate interests" as grounds for restricting freedom of expression. "National security requirements" are legitimate, but must be explicitly provided for by law and must be necessary and proportionate to the legitimate goal pursued".

- As far as the partial decriminalisation of press offences is concerned: decriminalisation consists of not treating an event as a criminal offence. Press offences are all violations perpetrated through print media, audiovisual media, or via information networks. It is a crime of opinion using media. That is to say that every time a media platform is used for the expression of an offence, the latter becomes a press offence as long as the matter is related to a crime of opinion.

- It is clear that the sanctions under this law apply not only to media professionals, but also to anyone who uses a media platform to violate the law.

However, there is no definition of a press offence in Algerian law (although it is mentioned in the constitution). The "information code", the legal framework that is supposed to give a definition of a press offence, is effectively silent on the issue. As a result of this legal vacuum, journalists have no specific criminal status and are subject to common law.

According to organic law on media, "civil and public action lawsuits in matters related to print, audiovisual or online media are prescribed after six months from the date of occurrence". In practice, however, as demonstrated below, courts have no consideration for this constitutional principle in the absence of any definition of a press offence.

Press offences are provided for and punished by the criminal code provisions, as modified and completed by law no 06-23, dated November 20, 2006. In addition to libel and insult, a contempt offence has been introduced, with new criminal liability for both author and the publishing platform. Three new provisions govern media offences: contempt and violence against a civil servant, defamation, and consideration for private life and disclosure. Prison sentences range from two months to five years, and fines run from Da1000 to Da500 000.

In practice, tribunals rarely refer to media law or constitutional provisions, preferring to resort to the criminal code in cases involving the press.

Since the day the new constitution was adopted, no legal text or regulation has been modified to ensure compliance with the new constitutional provisions. Other areas related to the media are not covered by any legislation. This has given rise to a legal vacuum that enables the authorities to pursue a policy of muzzling the few remaining independent journalists and outlets.

This includes:

- Organic media law has not been modified to comply with the new constitutional principles, namely when it comes to: (i) the definition of press offences and the non-application of criminal code provisions to journalistic content, whatever media is used; (ii) the limitation of restrictions to press freedom to those mentioned in the constitution, giving a precise definition of each restriction; and (iii) the return to the declarative system for any new periodic publication.
- Access to information law, as a right recognised by the constitution, has not been promulgated, despite promises by several officials over the last four years. This hinders journalists' access to information and data sources, which is fundamental to citizens' access to information.
- The absence of a law on advertising gives full discretion to the national agency for publishing and advertising, a state-funded organisation, in terms of distributing public sector ads among the media. This situation precludes any possibility for ensuring the principles of equity and fair distribution of public ads, in order to prevent favouritism that would benefit pro-government newspapers and sanction critical voices.
- The absence of regulatory texts has prevented the creation of the Media Regulatory Authority, and the establishment of a national press ID card. This has also led to total freeze of the Audiovisual Regulatory Authority, created in June 2016, which still has no legal status, funding or adequate means for operation, as recognised by the Authority Chairman himself.
- Neither the organic law on associations, nor the law on public meetings and demonstrations has been modified, in order to ensure the constitutional freedoms of assembly and association.

2.3 ADMINISTRATIVE AND JUDICIARY PRACTICE

In addition to the shortcomings of the texts pertaining to freedoms of speech and media, as far as international standards are concerned, there is also a huge gap between texts and practice. This is despite the fact that Algeria has signed nearly all relevant international conventions.

The best illustration of this is the long standing administrative and judiciary hurdles facing independent media organisations, perpetrated by the new constitution and political reform laws. Media outlets continue to play the role of a medium of communication between the state and the citizens. In this context, private print media,

created through the democratic opening up during the 1990s, has always been a point of reference when it comes to assessing freedoms of expression and media in Algeria.

2.3.1 POLITICAL AND ADMINISTRATIVE PRESSURE AND ATTACKS AGAINST MEDIA ORGANISATIONS

Print and audiovisual media organisations are regularly subject to pressure and/or attacks, aimed at maintaining a climate of tension and fear to encourage self-censorship and show allegiance to the state.

These attacks have sometimes been closer to intimidation and verbal threat campaigns, such as the one led by former Prime Minister Abdelmalek Sellal and his Information Minister Hamid Grine. This campaign, labelled "Lack of professionalism and non-respect of ethics", targeted a portion of the media critical of regime figures. Examples include:

- The sudden interruption of the TV programme "El Djazairia Weekend", after the discussion of the property assets of the Prime Minister's daughter in Paris. The following day, the programme director, Karim Kardache, was summoned by the Audiovisual Regulatory Authority and received a verbal warning for "sarcasm and mockery against state symbols, in violation of professional ethics".
- The revocation of the accreditation of the Al-Sharq Al-Awast correspondent in Algiers, Boualem Goumrassa, because he was critical towards the President and the Communication Minister on a foreign TV programme. This was considered a violation of the non-existent Code of Ethics for foreign correspondents.

Furthermore, the state has exercised significant financial and economic pressure on media organisations considered hostile, in various ways:

- In the absence a law on advertising, the national agency for publishing and advertising has absolute control over the distribution and repartition of public ads. This repartition is not governed by any clear criteria, but responds to political instructions, which tend to favour publications "close to the government". Advertising revenues are also used to boost small publications reliant on public ads, in order to counter the influence of critical newspapers, as part of a game of manipulation which often involves journalists engaged in media campaigns funded by public advertising money. Examples of such campaigns are those which have been launched by some websites ("1, 2, 3 viva l'Algérie" and "Radio Trottoir") against the editor of "Algérie Focus", who published an article on the allocation of a staff villa to the son of the Minister of Housing and Urban Planning.

  The authorities followed a similar process when they carried out abusive tax controls. Public printing houses also used the significant payments owed by newspapers to pressurize them, including via blackmail. El Khabar and El Watan newspapers had to engage in very costly tax adjustments due to a series of tax controls. El Fajr had to suspend publication for almost a month because of an administrative decision by a public printing house regarding non-payment of an instalment.

  In this regard, no means has been spared. The executive director of a private advertising company talked about a meeting with the Communication Minister, with other advertisers – including foreign ones. During this meeting, the Minister requested that some newspapers be discarded when purchasing ad space, otherwise advertising companies would face administrative difficulties or risk being excluded from public

bids. In 2015, “Tout sur l’Algérie” complained that it was facing a ferocious campaign by the Trade Minister, who asked advertisers not to buy any ad space from the website.

This situation has created serious financial problems for more than 26 daily newspapers and 34 weekly publications, all of which have been forced to close over the last three years, as confirmed on October 9, 2017 by the Communication Minister and former Executive Director of the National Agency for Publishing and Advertising, Djamel Kaouane. On October 21, 2017, he however stated: “the law on advertising is not on the agenda”.

- Regarding audiovisual media, after the field was opened to private companies in 2012 and the media organic law was promulgated, some 50 TV channels have been launched. However, all of them are operating in a legal “grey zone”, as they are based abroad and broadcast via foreign satellite operators, such as Nilesat and Hotbird. Only five channels have managed to obtain licenses to open offices in Algeria - in April 2013 - but their licenses have not been renewed since.

  This lack of clarity renders the channels entirely dependent on the authorities and deprives them from their right to appeal, in the absence of any clear legislation. In fact, in 2015, El Watan TV was closed manu militari because of a statement made by a former terrorist emir, who was himself never questioned. In 2016, the satirical programmes “Djornane el Gosto” and “Ki Hna Ki Ennass”, aired on El Djazairia TV and KBC, were taken off air by the National Gendarmerie, which expelled the crews and sealed the studios, ostensibly due to lack of authorisation. In March 2014, authorities simply shut down Atlas TV, because the private channel covered opposition protests against the re-election of President Bouteflika.

- Regarding online media, to which the media law dedicates a whole chapter, the absence of specific legislation creates a legal vacuum when it comes to the nature of the activity, the form of activities for which online media must register, their status and funding. On October 15, 2017, online media editors (from the 10 most important online media organisations in Algeria) issued a joint statement to condemn the blocking of the website “Tout Sur l’Algerie” (TSA), considered “an act of censorship undermining fundamental freedoms related to speech, press and business”. In the statement, they regret the absence of a legal framework for online media, which creates a “judicial risk for our media organisations, which are not recognised by authorities, as well as for our journalists, who don’t have a press card. This prevents their economic development and makes it impossible to develop Algerian online content”.

- As for foreign media, it is purely a case of censorship. Broadcast bans, accreditation withdrawal and visa refusal are amongst the most common practices use to restrict foreign media.

2.3.2 INSTRUMENTATION OF JUSTICE

In addition to the fact that the Algerian constitution clearly states that press offences cannot be punished by prison sentences, this principle – as demonstrated above - is further supported by media law provisions, which remove all prison sanctions against journalists.

However, the situation is unfortunately different in judicial practice, as courts prefer to refer to criminal law in order to jail journalists, as well as regular citizens, for exercising their right to free speech and opinion.

A number of lawsuits against journalists and citizens for offences linked to the right to information, namely libel, contempt and insult, have been filed:

- Mehdi Benaissa, Director of KBC TV, owned by Al-Khabar Arabic media group, and Ryad Hartouf, Production Manager for "Nass Stah" program, were both arrested on June 24, 2016, for "false statements" on shooting authorisation for the program. Mounia Nedjai, a Ministry of Culture staffer, was also indicted for "complicity" in abuse of office. The authorities arrested the KBC Director for shooting "Ki Hna Ki Nass" and "Nas Stah" in a studio that had been closed by the authorities, pursuant to the shutdown of Atlas TV in 2014. The same studio was used by another TV station without any problem. The Algiers Tribunal sentenced the first two to six months in prison, and the latter to a one-year suspended jail term.

- They were charged under article 223 of the criminal law, relating to false statements for obtaining administrative documents, and articles 33 and 42 of law no 06-01 on corruption.

- In July 2016, independent journalist Mohamed Tamalt was sentenced to two years in prison and a Da200 000 fine for contempt of the President and the public institutions, due to posts on his Facebook page and blog on the corruption and nepotism of senior government and military officials. He was indicted on the basis of criminal law articles 144, 144 bis and 146 on (i) contempt with the intention to undermine the honour and respect due to a magistrate, civil servant, public officer, commander or agent of authority, through words, threatening gestures, shipping or delivery of an object, written document, or undisclosed drawing; (ii) offending the President of the Republic, Parliament or one of its two chambers, jurisdictions, national popular army or public institution, through outrageous, insulting or defamatory statements, be it in written, drawing or statement, through any image, electronic device, computer or information media.

  The sentence was confirmed by the court of appeal in a trial during which Mohamed Tamalt accused his prison guards of beating him. He began a hunger strike at the end of June 2016, and died in hospital in December, in unclear circumstances. Official explanations for his death were rejected by his family.

- Journalist and human rights militant Hassan Bouras was sued and sentenced to one year in jail for complicity in contempt of agents of authority and a constituted body, after a private TV channel aired a video in which he condemned judges and police corruption in the city of El Bayadah.

- He was indicted for contempt of judges and agents under criminal law articles 144 and 146, but also for misuse of a regulated professional activity, under criminal law article 243, for filming an interview aired on a private TV channel without authorisation. The three interviewees were also sentenced to the same jail term.

- Community activist Slimane Bouhafs was sued and sentenced to five years in prison on August 7, 2016. The sentence was reduced to three years on appeal. He was accused of insulting the prophet and denigrating the principles and precepts of Islam, because of posts he shared on Facebook.

- He was condemned under criminal law article 144 bis, for insulting the prophet (peace be upon him) and god's messengers, and denigrating the precepts and doctrines of Islam in a written document, drawing, statement or any other medium.

- Computer programmer Youcef Dada was indicted on June 3, 2014, for "publishing photos and videos undermining national interest" and "contempt of constituted body", for filming three policemen in blatant theft in the commune of El Guerrara, in Ghardaia, and sharing the video on Facebook. The police officers took advantage of the chaos in the region during the events witnessed by the southern Wilaya (governorate). The same video was later aired by a private TV channel close to the regime, and there was no lawsuit.

- In November 2015, caricaturist Tahar Djehiche was sentenced to six months in jail and fined Da500 000 for “offending the President of the Republic” and “encouraging a rally”, after he shared on social media a drawing of the Algerian President Abdelaziz Bouteflika in an hourglass, almost covered by the pouring sand. The idea of the drawing was to draw attention to environmental issues related to the exploitation of shale gas in Algeria.

- Said Chitour, a fixer who collaborated with several international media organisations, including the BBC and the Washington Post, was arrested on June 5 2017, at the Algiers international airport and transferred to El Harrach prison. He was accused of delivering confidential documents to foreign diplomats and could face a life sentence for gathering intelligence, objects, documents or processes which may harm national defense or the economy, in accordance with criminal law article 65.

  He is still awaiting trial and his mother warned, in a letter to the President of the Republic, that his health had seriously deteriorated.

In addition to the numerous trials above, which are only examples to illustrate a wider pattern, the judicial system has been instrumental in silencing independent and critical media, considered hostile by authorities.

On July 15, 2016, the Algiers’ tribunal cancelled the sale by El Khabar group – in a transaction carried out before a notary - of 90% of its shares to Ness Prod, a subsidiary company of Cevital, owned by Algerian businessman Issad Rebrab, after the Communication Ministry filed a plea on the basis of the media organic law anti-concentration articles.

Regardless of the fact that the Ministry is not entitled to file such a plea (an exclusive prerogative of the Print Media Regulatory Authority – not yet inaugurated), and of the issue around direct or indirect ownership of the news publications concerned, the action of the Communication Ministry is problematic in terms of equality before the law. In fact, several businesspersons close to the regime hold shares in a number of media organisations, with no action being filed against them based on the applicable media law.

The political opposition has provided little support in response to these attacks and the systematic pressure applied by the authorities. This relative inaction is based on an understanding that in the Algerian political system, organized and structured opposition is conditioned by the evolution, blockage, advances and setbacks of the regime.

2.4 CONCLUSIONS AND RECOMMENDATIONS

The political reforms launched by Algeria are undeniably important timely, but the legislation is undermined by a series of loopholes and shortcomings, which seriously impinge on freedom of speech and freedom of the press. Ongoing negative practices further jeopardise this right.

In order to uphold the right to freedom of speech and freedom of press, and to strengthen the foundations of democracy in Algeria, in a constructive spirit the following measures are recommended:

TO ALGERIAN AUTHORITIES

- Guarantee the freedoms of speech, belief and press, namely by upholding journalists’ independence and ensuring access of all citizens to media;

- Update Algerian legislation to comply with the International Covenant on Civil and Political Rights, namely article 19;
- Revise the 2012 media law, namely certain provisions, to comply with Algeria's international obligations;
- Revise the 2014 audiovisual law to enable private providers to cover political topics without fearing censorship, in addition to reviewing the nomination process of members of the Audiovisual Regulatory Authority, to ensure its independence, in particular when it comes to issuing radio and TV licenses;
- Put an end to intimidation and other forms of pressure in dealing with journalists in order to end the practice of self-censorship;
- Cease all forms of restriction to the right to be informed which may constitute state censorship;
- End state monopoly on advertising and delegate the management of the sector to an independent authority operating in accordance with transparent and clear criteria;
- Ensure the independence of the Print Media Regulatory Authority;
- Pass a law on specific mechanisms for access to public information;
- Facilitate the processing and issuance of visas and accreditations for foreign reporters;
- Allow the importation and distribution of foreign media without prior authorisation by authorities;
- Repeal criminal code provisions on press offences and libel;

TO JUDGES

- Stop referring to criminal law and end the use of arbitrary detention and abusive judiciary procedures to curb and criminalise press freedom and independent journalism.

TO THE AUDIOVISUAL REGULATORY AUTHORITY

- Implement the principles of equity, pluralism, diversity, transparency in the licensing process and radio frequencies approval in order to ensure public access to independent media;
- Respect and promote the plurality of opinions in public media, which should be open to opposition parties;
- Ensure greater transparency in media ownership to avoid concentration and conflicts of interest.

TO THE INTERNATIONAL COMMUNITY

- Urge Algerian authorities to end repression and censorship of professional and non-professional journalists, in particular as those working for or with online media;
- Support civil society organisations advocating for press freedom in the country, in order to promote the existence and development of free and independent media, including associative media;
- Urge Algeria to comply with the recommendations included in the Universal Periodic Review on media freedom.

3.0 FREEDOM OF SPEECH IN TUNISIA: TEXTS AND CONTEXT

By Mustapha Ben Letaief, Professor at the Law Faculty, University of Tunis El Manar

3.1 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.[23] 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.[24] They discharged the dishonourable mission of falsifying the social and economic reality.[25]

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,[26] 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.[27]

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,[28] 1993,[29] 2001[30] and 2006,[31]

[23] Chouikha (L.), « Propriétés et particularités du champ politico-journalistique en Tunisie », NAQD
[24] 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.
[25] During the 2008 miners uprising and the 2010-11 revolution, no Tunisian media reported the claims and criticism against the regime.
[26] Law no 1975-32, dated April 28, 1975, Official Journal, issue 29, April 29, 1975, modified.
[27] 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
[28] Organic law no 1988-89, dated August 2, 1989
[29] Organic law no 1993-85, dated August 2, 1993
[30] Organic law no 2001-43, dated May 3, 2001
[31] Organic law no 2006-1, dated January 9, 2006.

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).[32]

This repressive trend was further consolidated with the introduction of the anti-terrorist law in 2003,[33] and the amendment of article 61 of the criminal law in August 2010.[34]

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.[35]

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 (Mosaique, 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.[36]

In this context, a telecommunications code and an organic law on the protection of personal data were promulgated in 2001 and 2004 respectively.[37]

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.

[32] Chouikha (L.), « Fondement et situation de la liberté en Tunisie » & « Tunisie, la liberté d'expression assiégée », IFEX-TMG reports, Feb. 2005, page 22.
[33] Law no 2003-75, dated December 10, 2003.
[34] Law no 2010-35, dated June 29, 2010.
[35] 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.
[36] 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.
[37] Official Journal, issue 10, February 3, 2004

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 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.[38]

In fact, to counter censorship and lack of coverage by the traditional national media during the revolution,[39] 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.

3.2 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.

3.2.1 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

[38] 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

[39] December 17, 2010 to January 14, 2014

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.[40] 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).

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:

- 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

[40] Official Journal, issue 84, November 4, 2011, p. 2559 (in Arabic)

- 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.

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.[41]

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).

[41] 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.

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.[42]

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 sanctioni. 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.

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.

3.2.2 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.

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,

[42] In accordance with the principle of procedure parallelism, ending the functions of the holders of the same positions should be submitted to the HAICA.

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.

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.

3.2.3 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.

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.

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 audition 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.

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 dissentions 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,[43] 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

[43] Bill no 25/2015 on the attacks against the reputation of armed forces.

organisations. This has created a climate of impunity. Security forces consider that they are above the law and do not have to fear prosecution.

3.3 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.

3.3.1 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.

3.3.2 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.[44]

[44] See namely:

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 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.

3.3.3 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[45] 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

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

[45] 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

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 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.

3.4 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;

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?

4.0 LIBYA: FREEDOM OF EXPRESSION IN LAW AND PRACTICE

By Thomas Ebbs, Director of Research, Lawyers for Justice in Libya

4.1 INTRODUCTION

Libya's legal framework is, at present, inconsistent and at times contradictory. The legal framework contains many provisions that grant the Libyan State (the State) too much discretionary power to limit and criminalise expression that is considered legitimate under international law. As a result, there is an urgent need for the State to amend or repeal existing laws which restrict expression in a manner that is inconsistent with the 2011 Constitutional Declaration and Libya's international human rights obligations.

This chapter sets out the current legal framework governing freedom of expression in Libya, including restrictive pre-2011 laws that remain in force and in use, and examines freedom of expression in practice.

4.2 THE LEGAL FRAMEWORK

4.2.1 PRE 2011 - RESTRICTIVE LAWS STILL IN PLACE

THE LIBYAN PENAL CODE (1953)[46]

The Libyan Penal Code criminalises various forms of expression in a manner which is largely inconsistent with Libya's international human rights obligations and the Constitutional Declaration. These include those which: insult public officials,[47] the Libyan nation[48] or the Libyan flag;[49] initiate a civil war in the country, fragment national unity or cause discord;[50] aim to overthrow the political, social or economic system of the State;[51] offend or attack religions;[52] are indecent in nature;[53] insult a person's honour;[54] or, harm or prejudice the February 17 Revolution.[55] While these limitations are provided by law, they fail to meet the thresholds of being sufficiently clear, necessary or in pursuit of a legitimate aim as required by international law.

The Libyan Penal Code also imposes severe penalties, including the death penalty.[56] Article 439 prescribes a minimum term of six months for "attacks against anyone's reputation by defamation." Article 203 imposes the death penalty for "aiming to initiate a civil war in the country, or fragmenting national unity, or seeking to cause discord." Article 207 also prescribes the death penalty for promoting "any views or principles" that aim to overthrow the political, social or economic order of the state. Article 291 renders blasphemy an offence, stating

[46] The Libyan Penal Code (1953) consolidated with amendments (2014)
[47] The Libyan Penal Code (1953), Article 178
[48] The Libyan Penal Code (1953), Article 205
[49] The Libyan Penal Code (1953), Article 245
[50] The Libyan Penal Code (1953), Article 203
[51] The Libyan Penal Code (1953), Article 207
[52] The Libyan Penal Code (1953), Article 290 and 291
[53] The Libyan Penal Code (1953), Article 421
[54] The Libyan Penal Code (1953), Article 438
[55] The Libyan Penal Code (1953), Article 195, amended by General National Congress Law 5 of 2014
[56] The Libyan Penal Code (1953), Articles 203 and 207

that anyone who publicly attacks the state's religion or blasphemes against God or his Prophet shall be punished by a penalty of detention for a period not exceeding one year, or a fine.

LAW 76 OF 1972[57]

The activities of media within Libya were previously governed by the Law 76 of 1972 (the Publications Act). The Publications Act restricted expression, allowing only lawful publications that were considered to be within "the framework of the principles, values and objectives of society".[58] This allowed tight state control over media in Libya. The Publications Act was heavily criticised by the United Nations Human Rights Committee.[59] Although Libya stated its intention to amend the Publications Act[60] and superficially loosened some of its control over publication rights,[61] the law remained largely unchanged.

Independent media expanded rapidly after the 2011 uprising and the Publications Act's incompatibility with the Constitutional Declaration has led many, including the Libyan State,[62] to declare the act as abrogated. However, media authorities have recently sought to issue orders and decrees, including the banning of publications, on the basis of the Publications Act.[63] Although the application of the Act in these cases is likely to be unlawful, the consequences for free expression are no less real and dangerous.

LAW 20 OF 1991

"The Promotion of Freedom Act" was ostensibly enacted to provide a domestic interpretation of Libya's civil and political human rights obligations under international law. In Article 8, it codifies the right of Libyan citizens to express opinions and ideas with people's congresses and through the media.[64] As such, it is a limited recognition of a right to expression, empowering a particular class of individuals (citizens) within a limited number spaces (people's congresses/media). This limited conception conflicts with the character of freedom of expression, which is defined as an inalienable entitlement of all humans to impart and receive information of all kinds, regardless of frontier or form.

The act sets out ambiguous limitations on the Libyan State's guarantees of free expression. For example, it states that expression "detracting from the people's authority"[65] is not protected. As a result, many types of expression that are vital for human dignity and good governance, such as joining political parties, being critical of government activities, or engaging in peaceful protest, are not protected under the Promotion of Freedom Act.

[57] Law No. 76 of 1972 on Publications ("the Publications Act")
[58] The Publications Act, Article 1
[59] For example, 15th Session Report of the Human Rights Committee (3 October 1995) A/50/40 Para 123-143, "the application of provisions of the Publications Act (1972) which are incompatible with article 19… should be immediately suspended and that steps should be taken for its revision"
[60] Libya Country Report to the ICCPR (2007) CCPR/C/LBY/4, Para 23
[61] Two private newspapers formed in Libya, however they remained closely affiliated with Saif al-Islam Gaddafi. Some foreign satellite television stations, such as al-Jazeera, were also allowed to be broadcast in Libya as part of the State's modernisation efforts
[62] Libya Universal Periodic Review Country Report to United Nations Human Rights Council (2015) A/HRC/WG.6/22/LBY/1 Para 82
[63] Mat Nashed "Libya's Banned Book", Libya Chronicles (8 September 2017) - https://magazine.zenith.me/en/culture/young-writers-speak-their-libya (last accessed 28 September 2017)
[64] The Promotion of Freedom Act, Article 8 states: "Every citizen has the right to express and publicly proclaim his opinions and ideas to the people's congresses and the information media of the Jamahiriya. No citizen shall be answerable for his exercise of this right unless he exploits it with a view to detracting from the people's authority or for personal ends. It is prohibited to advocate ideas or opinions clandestinely or to attempt to disseminate or impose them on others through enticement, force, intimidation or fraud."
[65] The Promotion of Freedom Act (1991), Article 8

The Promotion of Freedom Act also expressly prohibits specific forms of expression, including secretly advocating ideas and attempting to impose thoughts through enticement, force, intimidation or fraud.[66] The prohibition of secretly advocating ideas does not seem to follow a legitimate aim, as required by Libya's international obligations, and seems to conflict with the protections of sanctity and secrecy of correspondence offered by the Constitutional Declaration. Limiting expression that seeks to use enticement, force, intimidation or fraud may be more consistent with meeting the required pursuit of a legitimate aim, as outlined in international law. However, the wording of the Promotion of Freedom Act fails to be consistent with the International Covenant on Civil and Political Rights (ICCPR), as it does not provide sufficient legal detail or consider the necessity of stipulated sanctions.

4.2.2 POST 2011 - REPETITION OF THE PAST

THE 2011 CONSTITUTIONAL DECLARATION

The Constitutional Declaration states that expression will be guaranteed in accordance with the law.[67] It does not, however, explicitly state the need for restrictions to expression to pursue a legitimate aim or necessity as required by international law. Article 14 of the Constitutional Declaration offers protection for various freedoms, including "Freedom of opinion for individuals and groups, freedom of scientific research, freedom of communication, liberty of the press, printing, publication and mass media..."[68] The Constitutional Declaration does guarantee other rights which may, on occasion, need to be balanced with the right to freedom of expression. These include the right of citizens to a private life;[69] to secrecy of correspondence;[70] and to intellectual property.[71]

DECREE 15 OF 2012

The decree placed a blanket ban on media discussion of religious opinions (fatwas) issued by the national council of Islamic Jurisprudence (Dar Al-Iftaa). The decree remains untested in relation to its compliance with the Constitutional Declaration and has largely been ignored by media organisations. There remains a danger that it will be used in the future to suppress legitimate debate.

RESOLUTION 13 OF 2012

The resolution abolished the Higher Media Council, established in 2012, and ultimately considered to lack independence and to have failed to protect media diversity. A Ministry of Media was established in its place. The GNC was mandated to oversee it via the creation of specialised committees, but these failed to materialise in any meaningful way. Instead, the GNC continued to play a direct role in media regulation.[72]

LAW 3 OF 2014[73]

"The Law on Combatting Terrorism" criminalises "terrorist acts" which include expression that "disrupts public order or endangers peace of the society".[74] The law also criminalises the "disclosure of information directly or

[66] The Promotion of Freedom Act (1991), Article 8
[67] The Constitutional Declaration (2011) Article 14 makes reference to the right being guranteed "in accordance with the law" which may be interpreted to allow the State to use law to restrict to freedom of expression rights without reference to legitimate aims or necessity
[68] The Constitutional Declaration (2011), Article 14
[69] The Constitutional Declaration (2011), Article 12
[70] The Constitutional Declaration (2011), Article 13
[71] The Constitutional Declaration (2011), Article 8
[72] Notably, it passed GNC Decree 5 of 2014
[73] "Law on Combatting Terrorism" Law 3 of 2014
[74] Law on Combatting Terrorism (2014) Article 2

indirectly for the benefit of terrorist organisation or people that have ties to terrorist organisations".[75] The law also makes it illegal to engage in advertising, promoting or misinforming anyone on committed terrorist acts, in a manner which is publicly accessible.

The overly broad definition of terrorist acts leads to concern that the law could be used illegitimately to restrict freedom of expression, including participation in peaceful protests.[76] In addition, the disproportionate punishments, including life imprisonment for some acts, may breach international requirements for necessity.

The law may, as a result, fail to adhere to the standard required by the Constitutional Declaration and Libya's international human rights obligations. In addition, the legitimacy of the House of Representatives, while internationally recognised, remains the subject of contentious debate.[77] Consequently, many would consider the Law on Combatting Terrorism to be void and unenforceable.

LAW 5 OF 2014

Law 5 of 2014 amended the Penal Code to criminalise "any action, which may harm or prejudice the February 17 Revolution, as well as insulting remarks publically directed at the executive, judiciary, or the legislature of any of their members, or insulting the nation's flag".

DECREE 5 OF 2014[78]

The decree sought to ban television and radio stations if they broadcast viewpoints that were considered "hostile to the February 17 Revolution and whose purpose is the destabilisation of the country or the creation of divisions amongst Libyans".[79]

4.2.3 THE 2017 CONSTITUTIONAL DRAFT

The most recently proposed Constitutional draft (the Draft),[80] issued by several members of the Constitutional Consolidation Committee,[81] may indicate the future treatment of freedom of expression within Libya's legal framework.

The Draft offers safeguards for freedom of expression and freedom of publication, noting that the state shall take "necessary measures" to protect private life and prohibit incitement to hatred, violence, and racism based on ethnicity, colour, language, gender, birth, political opinion, disability, origin, geographic affiliation, or any other reason whatsoever.[82] It also prohibits a form of hate speech known as *takfir*[83] (declaring someone to be an unbeliever or apostate). The Draft also attempts to offer protection for the right to information, stating that "the

[75] Law on Combatting Terrorism (2014) Article 11

[76] "Libya: Amend Counterterrorism Law" Human Rights Watch (13 May 2015). https://www.hrw.org/news/2015/05/13/libya-amend-counterterrorism-law (last accessed 28 September 2017)

[77] The Libyan Supreme Court issued a ruling on 6 November 2014, which may be interpreted to have invalidated the elections that resulted in the appointment of the House of Representatives.

GNC Decree 5 of 2014 "Concerning the Cessation and Ban on the Broadcasting of Certain Satellite Channels"

[78] GNC Decree 5 of 2014 "Concerning the Cessation and Ban on the Broadcasting of Certain Satellite Channels"

[79] There are unverified reports that this Decree has been the subject of legal challenge and deemed as unconstitutional by a judicial decision. An addendum to this report will follow if verified.

[80] "Proposal of a Consolidated Draft Constitution" (6 April 2017), Constitutional Consolidation Committee, Beida

[81] For more information on the issues facing this please see "Constitutional Drafting Assembly to vote on dangerous constitutional draft without public consultation", Lawyers for Justice in Libya, 6 May 2017: http://www.libyanjustice.org/news/news/post/276-constitutional-drafting-assembly-to-vote-on-dangerous-constitutional-draft-without-public-consultation

[82] Proposal of a Consolidated Draft Constitution (2017), Article 38

[83] Proposal of a Consolidated Draft Constitution (2017), Article 38

State shall develop the necessary measures for transparency and shall ensure the freedom of receiving, sending, exchanging, and examining information from multiple sources".[84]

Whilst these are progressive steps and would likely strengthen the protection of freedom of expression, they still fall short of international legal standards. The Draft's provisions neither specify that the State's measures restricting the right to freedom of expression must be provided for in law, nor list the exhaustive legitimate aims provided in international law, instead providing specific examples of prohibited expression.

The Draft's provisions which guarantee the freedom and independence of the press and media[85] are not consistent with international minimum standards. They potentially limit this right to citizens, rather than anyone within Libya's territory and jurisdiction. In addition, the Draft allows for judicial authorities to ban and revoke an individual's access to the right, without reference to the requirements of international law for necessity of the restriction or pursuit of a legitimate aim.

The Draft establishes the need for a law, to be passed by the Libyan government, which regulates "the Higher Council for Media and Press". The Draft stipulates that this law must adhere to the constitution's other provisions, but that the law will be free to determine the compositions, competences, and work systems of the Higher Council for Media and Press.[86]

4.2.4 INTERNATIONAL AND REGIONAL TREATIES

The right to freedom of expression is guaranteed by a number of international and regional human rights treaties. The strongest protections that apply to Libya are included in the International Covenant on Civil and Political Rights (ICCPR)[87] and the African Charter on Human and People's Rights (ACHPR), ratified by Libya in 1976 and 1986 respectively.[88]

4.3 FREEDOM OF EXPRESSION IN PRACTICE - POLITICAL AND JUDICIAL ACTIVITY

4.3.1 JUDICIAL INTERPRETATION

The Libyan legal system makes international treaties that are ratified by the State and published in the Official Gazette directly binding and enforceable by the domestic judiciary. Any interested party may invoke their rights

[84] Proposal of a Consolidated Draft Constitution (2017), Article 47
[85] Proposal of a Consolidated Draft Constitution (2017), Article 39

[86] Proposal of a Consolidated Draft Constitution (2017), Article 164
[87] The International Covenant on Civil and Political Rights (ICCPR) (1966) Article 19 states: "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 kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The ICCPR also places an obligation on Libya to "respect and ensure all individuals within its territory and subject to its jurisdiction" to legislate where necessary to give effect to the rights recognised in the ICCPR; and to ensure individuals who have experienced a right violation have effective remedy.
[88] The African Charter on Human and People's Rights (1981) Article 9 states: "1. Every individual shall have the right to receive information; 2. Every individual shall have the right to express and disseminate his opinions within the law." The African Commission on Human and Peoples' Rights held, in Communication 102/93 against Nigeria (1998) that authorities should not enact provisions which limit the exercise of the freedom guaranteed under Article 9 of the African Charter in a manner that breaches constitutional provisions or undermines the fundamental rights guaranteed by other international human rights documents, such as the ICCPR

and petition the judiciary to implement the provisions of such international treaties and conventions.[89] However, due to the current incapacity of the Libyan judiciary, the ability of individuals to secure accountability for violations of freedom of expression is principally limited to the complaints mechanisms established by human rights treaties.

However, the Libyan Supreme Court has ruled that some laws which restrict expression are unconstitutional. In June 2012, the Libyan Supreme Court ruled that Law 37 of 2012, which sought to criminalise and provide prison sentences for acts which "harm the state" such as "the glorification of the dictator, his regime, his ideas or his sons" as well as publishing any news, propaganda or rumours which "harm the 17 February revolution", was unconstitutional.[90] In doing so, the Libyan Supreme Court demonstrates that providing for a restrictive measure in law is, in itself, insufficient to constitute a constitutionally compliant restriction. The Libyan Supreme Court referenced the need for laws that criminalise expression to be clearly defined to avoid additional acts, not intended by lawmakers, from being criminalised. This is consistent with the requirement of the ICCPR for laws to meet reasonable standards of clarity and precision.[91]

Beyond the need for greater clarity and specificity in criminal laws, it remains unclear whether other laws that restrict expression are consistent with the Constitutional Declaration. The Libyan State's communications at the international level suggest that some laws have been immediately abrogated due to lack of compliance with the Constitutional Declaration.[92] One possible inference is that the Constitutional Declaration may only allow restrictions that adhere to Libya's international human rights obligations.

4.3.2 RESTRICTIVE ENVIRONMENT

Libya was ranked 163 of 180 countries in the 2017 World Press Freedom Index published by Reporters Without Borders.[93] The restrictive legal framework allows the State to bring about prosecutions under the illegitimate provisions outlined in section 1. During the General National Congress elections in 2012, Ali Tekbali and Fathi Sagar were detained for their alleged use of illegal posters during their campaign for the Libyan National Party. The prosecution claimed that a character in the poster depicted the Prophet Muhammad in a satirical fashion. They were charged with several offences, including those detailed in Articles 203, 207 and 291 of the Libyan Penal Code and, as a result, punishable by death. The defendants were acquitted in March 2014. In addition to the disproportionate offences put to them, the length of their detention marks a significant and unacceptable delay, in breach also of their right to due process. In addition, as a result of the attempted prosecutions, the headquarters of the Libyan National Party were shut down by order of the general prosecutor, hindering the party's capacity to continue its election campaign.

Another example is that of the case of Amara Al-Khitabi, editor of the newspaper Al-Umma. Al-Khitabi was arrested in November 2012 for the publication of a list of 87 judges and prosecutors suspected of corruption and charged with "insulting of constitutional or popular authorities", which carries a 15-year prison sentence under Article 195 of the Penal Code. He was later sentenced to five years in prison and fined.

In August 2017, a group of 27 young Libyan writers of a book entitled Sun on Closed Windows were subjected to threats, including death threats, persecution and intimidation, following accusations that Sun on Closed Windows contains language "contrary to public morals". The Head of the General Authority for Printing and Publications

[89] Libya Country Report to the United Nations Human Rights Committee - (2007) CCPR/C/102/Add.1 Para 31
[90] Constitutional Challenge 59/5, the Libyan Supreme Court
[91] ICCPR (1966), Article 19 (3)
[92] Libya Universal Periodic Review Country Report to United Nations Human Rights Council (2015) A/HRC/WG.6/22/LBY/1, Para 82
[93] https://rsf.org/en/libya

under the General Authority of Culture of the GNA, Al Mabruk Alghali Al Mabruk, released a statement condemning the content of the book as "dangerous for public morality and threatening to the integrity of Islam." The GNA referred to the Publications Act in banning the book and ordered the confiscation of all copies, claiming they had been smuggled into Libya illegally. The use of the Publications Act is particularly worrying due to its obvious incompatibility with the Constitutional Declaration, and the Libyan State's previous declaration that the law had been abrogated.[94]

Alongside the legal disruptions to their work, the hostile environment places freedom of expression stakeholders at serious risk. They are frequently subject to harassment, threats and attacks, often carried out by non-state actors in retaliation for criticism of their actions. Key freedom of expression stakeholders, including journalists, activists and lawyers, have been targeted, including Muftah Abuzied, Nasib Karnafah, Adbulsalam Al-Mesmar, Salwa Bugaighis and Tawfik Bensaud, all of whom were killed in retaliation for their work. The State has failed to protect civilian targets from these attacks and to bring their perpetrators to justice. It has, in fact, supported the existence of these groups by enabling their impunity and providing some with financial support or outsourcing public functions to them. Earlier this year, two radio stations in the East were arbitrarily and suddenly shut down by a security force and militia respectively.[95] Meanwhile, Annabaa television channel in the West was subject to an arson attack by an armed group which later published a list of the television channel's employees.[96]

The legal, political and security environment has led to increasing self-censorship and polarisation of the media. There has been an escalation of hate speech and incitement of violence, which has destroyed plurality, fuelling division within Libyan society through misinformation and even encouraging attacks and assassinations of individuals.

4.3.3 CURRENT REGULATION OF THE MEDIA

Currently, the Ministry of Media[97] (MoM) holds the mandate for media governance under the Government of National Accord (GNA). In 2016, the MoM published several communications relating to media conduct via its Facebook page. These communications have called on all media outlets to provide the MoM with their permissions, licenses, sources of funding and relevant audits[98] and to register with the MoM.[99] The MoM has issued public communications ordering individual agencies to comply with these orders, making reference to the Publications Act.[100] The MoM has also issued communications forbidding the broadcast of materials that depict the prophet Mohammed and his companions, apparently in compliance with *fatwas* issued by Dar Al-Ifta.[101]

The legitimacy of the MoM's communications is a contentious topic, not least due to the current political and legal fragmentation of the Libyan State.[102] In addition, the communications issued by the MoM may have exceeded its

[94] Libya Universal Periodic Review Country Report to United Nations Human Rights Council (2015) A/HRC/WG.6/22/LBY/1 Para 82
[95] https://rsf.org/en/news/rsf-decries-closure-two-radio-stations-libya
[96] https://rsf.org/en/news/rsf-and-lcfp-create-joint-crisis-unit-annabaa-tv-journalists
[97] The MoM refers to itself as the Ministry for Information in English, but should not be confused with the other Ministry of Information which is concerned with providing data and statistics for public use.
[98] Ministry of Media Communication 29/2016 - Referencing President of Council of Ministers Decision No 239 of 14 Jan 2016 (26 Jan 2016)
[99] Ministry of Media Communication 11/156 2016 (28 July 2016)
[100] Ministry of Media Communication 136/2016 (5 May 2016)
[101] Ministry of Media Communication Communication 1708 (13 October 2015)
[102] The Beida Based Government has established competing media regulatory bodies, currently represented by the Information and Culture Authority and The General Authority for Media, Culture and Civil Society. At present no full record is available of relevant regulations passed by these bodies, but an addendum will follow once the information has become available. They have, however,

legal mandate and violated supreme law (including the Constitutional Declaration). These have not yet been subject to judicial review.

4.4.4 REGULATION OF ONLINE CONTENT

Prior to the 2011 Uprising, the General Postal and Telecommunications Company (GPTC), was the sole authority for domain name registration and issued "the Terms of Service" governing the use of the Libyan ".ly" registry.

Transitional governments subsequently removed the GPTC and established the Libyan Post Telecommunications and Information Technology Company (LPTIC) and the General Authority of Telecommunications and Informatics (GATI).[103] LPTIC is a holding company for all telecommunications service providers in the country, while GATI is responsible for policymaking and regulations. Responsibility for Libya's top level domain ".ly" is currently that of Libya Telecom and Technology (LTT),[104] with Libyan Spider handling registration requests.[105]

LTT has continued to recognise the Terms of Service issued by the GPTC. The Terms of Service prohibit domain names that are "obscene, scandalous, indecent, or contrary to Libyan law or Islamic morality words, phrases or abbreviations". The Terms of Service also do not permit the use of Libyan domains by sites which are "for any activities/purpose" not permitted under Libyan law. LTT may delete registered domains if they consider registrants to be in violation of any of the Terms of Service, or if LTT receives an order from a Libyan court.

In February 2015, LTT blocked access to the news site, Alwasat, which published views critical of the GNC and affiliated militias, apparently in response to a court order.[106] The LPTIC subsequently published a statement saying that the website blocking was unintended, and had been the result of LTT facilities being taken over by "outlawed groups" acting illegitimately and issuing false statements.[107] The block on Alwasat has since been lifted.[108]

4.5 CONCLUSIONS AND RECOMMENDATIONS

Despite the initial hopes following the 2011 uprising, freedom of expression remains in a precarious position in Libya. Accessing legal protections, such as human rights, remains nearly impossible for individuals.

While the Constitutional Declaration offers theoretical protection, its provisions and its intentions have increasingly been disregarded; draconian laws such as the Publications Act, once believed to have been repealed, are being used once again to ban the sale of books. In addition to the use of pre-2011 laws, transitional governments have repeatedly attempted to introduce new measures that limit and criminalise expression, especially that which is critical of their authority. Further, despite repeated calls from Libya's nascent media sector, current drafts of the future constitution continue to enable the regulation of the media by central government.

RECOMMENDATIONS

issued public comments, such as supporting the use of the Publications Act (1972) to ban "obscene" publications. See statement of 6 September 2016 by The General Authority for Media, Culture and Civil Society.

[103] "Freedom on the Net 2016", Freedom House (2016), page 7 - https://www.justice.gov/eoir/page/file/916901/download (last accessed 28 September 2017)

[104] "Freedom on the Net 2016", Freedom House (2016), page 7 - https://www.justice.gov/eoir/page/file/916901/download (last accessed 28 September 2017)

[105] Accessed through http://register.ly/ (last accessed 28 September 2017)

[106] "Organizations and media figures and human rights condemns blocking" [in Arabic] Alwasat News, April 8, 2015

[107] "Alwasat News" on LPTIC, Facebook Post, February 25, 2015, http://on.fb.me/1GdNeGm; (last accessed 28 September 2017)

[108] "Freedom on the Net 2016", Freedom House (2016), page 7 - https://www.justice.gov/eoir/page/file/916901/download (last accessed 28 September 2017)

- Any legal limitation to the activities of media practitioners must be specific in scope, address a legitimate aim and be considered necessary for the respect of the rights or reputations or others, or for the protection of national security, public order, public health or morals. Accordingly, existing limitations - such as those found in Law 76 of 1972, Decree 5 of 2014, or Law 5 of 2014 which arbitrarily allow the state to restrict media activities on grounds that they are not "within the principles of the revolution", are "hostile to the February 17 Revolution", or may "harm or prejudice the February 17 Revolution" - must be abolished. Further, limitations violating the international legal principles of legitimate purpose and necessity, such as Law 15 of 2012 which prohibits discussion of fatwas issued by Dar Al-Iftaa, must also be abolished.

- The state must ensure a diverse and pluralistic media by establishing an independent, self-regulatory media body free from political, economic or other undue influence. This body must work to end hate speech and media polarisation by promoting an informed and representative debate in order for the media to fulfil its role of ensuring accountability and transparency. Further, there should be no licensing or registration system for the media, and there should be no licensing of individual journalists or entry requirements for practicing the profession.

- The state must take active steps to safeguard the right of journalists, activists and media entities to carry out their work and to end the resulting self-censorship and loss of plurality caused by the hostile environment. In particular, the state must work to end the impunity with which attacks against media practitioners are carried out, by investigating, pursuing accountability, and ensuring that remedies are available to the victims and their families for such crimes.

- The future constitution must provide a framework for freedoms of expression, information, association and assembly, and media which safeguards and encourages a pluralistic media. It must prohibit prior censorship and ensure that any legal limitations to these rights and to the activities of media practitioners conform to the exhaustive legitimate aims established by Libya's international legal obligations. The new constitution must also lay the foundations for independent media self-regulation.