



Note on Freedom of Expression provisions in Latest Draft of Tunisian Constitution

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Work on preparing a new constitution for Tunisia, following the revolution which overthrew the Ben Ali regime in January 2011, has been ongoing for some time now. This Note provides comments on the latest draft, dated 1 June 2013, from the perspective of international standards.

Guarantees of freedom of expression

A number of provisions in the new draft Constitution are relevant to the protection of freedom of expression. Article 23 focuses on privacy, but also protects the confidentiality of correspondence and communications. This provision is perhaps particularly relevant in light of the ongoing current debate about the monitoring of correspondence in countries around the world, sparked by revelations about such monitoring in the United States by the National Security Agency.

Article 30 contains the main guarantees for freedom of expression. It states:

The freedoms of opinion, belief, expression, information and publication are guaranteed. The freedoms of expression, information and publication may only be restricted by a law which protects the rights, reputations, security or health of others.

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Subjecting these freedoms to prior control is forbidden.¹

Article 31 guarantees the right to information (or right to access information held by public authorities), as follows:

The right of access to information is guaranteed subject to the condition that it does not compromise national security or the rights guaranteed by this constitution.²

Article 32 guarantees academic freedom and freedom of research. Finally, Article 48 provides generally for restrictions on rights in the following terms:

Any restrictions on the rights guaranteed by this Constitution shall be determined by law, provided that they shall not deny the essence of the right. No law restricting rights shall be adopted other than to protect the rights of others or for reasons of public order, national security or public health. The courts shall protect rights and freedoms against any violation.³

These guarantees are very welcome and are largely in line with international standards. At the same time, they fail to comply fully with international standards in this area. The main problem is the scope of restrictions on these rights that these proposed provisions would permit. A first point is that it is not good practice to provide for special restrictions on the rights to expression, information and publication, as found in Articles 30 and 31, while also subjecting these rights to the general regime of restrictions on all rights, found in Article 48. The inclusion of specific restrictions on the freedoms of expression, information and publication in Articles 30 and 31, while still subjecting them to the general restrictions found in Article 48, gives the unfortunate impression that it is particularly necessary to restrict these rights. The Constitution should only provide for one regime for restrictions on freedom of expression. If there is a specific regime of

¹ This and other provisions have been translated informally by the Centre for Law and Democracy. The English translations are, in turn, based on an informal French version from the Arabic original, conducted by Democracy Reporting International (DRI). The French version of Article 30 is as follows:

Les libertés d'opinion, de pensée, d'expression, d'information et de publication sont garanties. Les libertés d'expression, d'information et de publication ne peuvent être limitées que par une loi qui protège les droits des tiers, leur réputation, leur sécurité et leur santé. Il est interdit de soumettre ces libertés à un contrôle préalable.

² The DRI French version is as follows:

Le droit d'accès à l'information est garanti à condition de ne pas compromettre la sécurité nationale ou des droits garantis par la Constitution.

³ The DRI French version is as follows:

La loi détermine les restrictions relatives aux droits et libertés garanties par la présente Constitution et de leur exercice, sans que cela ne porte atteinte à leur essence. La loi n'est adoptée que pour protéger les droits d'autrui ou pour des raisons de sécurité publique, de défense nationale ou de santé publique. Les instances juridictionnelles veillent à la protection des droits et libertés de toute violation.

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restrictions set out in the guarantee for freedom of expression, the right should not also be subject to the general regime for restrictions on rights.

Otherwise, the combined operation of Articles 30, 31 and 48 allows laws to restrict the freedoms of expression, information and publication to protect the rights and reputations of others, national security, public order and public health. This is consistent with international standards insofar as it requires restrictions to be provided for in a law, and as regards the interests which it recognises as needing protection (rights and reputations of others and so on). However, there is no specific stipulation that the right to information, as guaranteed by Article 31, may only be restricted by a law.

All of these provisions are problematical, however, inasmuch as they do not impose any conditions on laws which restrict these rights, other than ruling out prior censorship and complete denial of the essence of the right. This allocates a very wide measure of discretion to lawmakers to limit rights. In contrast to this, international law requires any restrictions on the right to freedom of expression to be 'necessary'. This is a very important limitation on restrictions, and the large majority of international cases on freedom of expression are decided on the basis of this requirement of 'necessity'.

Courts have identified three aspects of the requirement of necessity. First, restrictions must be rationally connected to the interest they seek to protect, in the senses that they are carefully designed to provide the protection and that they are not arbitrary or unfair. Second, restrictions must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). Third, restrictions must be proportionate. This involves comparing two factors, namely the likely (negative) impact of the restriction on freedom of expression and its benefits in terms of protecting the interest. Where the harm to freedom of expression is greater than the benefit, the restriction is not legitimate.

Different national constitutions in democracies use different terms to define the 'necessity' limitation on restrictions, but some sort of limitation is always either explicit or implicit. For example, section 1 of the Canadian Charter of Rights and Freedoms allows rights to be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Article 36 of the Constitution of South Africa provides for a more detailed set of constraints for any law which restricts rights:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

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(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

As these examples show, different formulations may effectively protect rights in line with international standards. But the almost complete absence of any constraint on laws which restrict freedom of expression in the proposed Constitution is very problematical.

Recommendations:

- The constitution should only provide for one regime for restrictions on freedom of expression and information.
- It should be clear that any restrictions on the right to information should be provided for by law, as is the case for restrictions on other rights.
- The standard of ‘necessity’ or a similar standard should be imposed on any restrictions on the rights to freedom of expression and information.

Institutional structures

Chapter VI of the proposed Constitution envisages the creation of a number of Constitutional bodies which, pursuant to Article 122, shall be independent and seek to support democracy. Article 122 also provides for these bodies to be elected by, and to be accountable to, the National Assembly. The specific manner by which members of these bodies shall be appointed, along with their powers and organisational structures, shall be established by law.

Article 124 provides for the ‘information commission’, as follows:

The information commission is responsible for the regulation and development of the information sector, and it shall guarantee freedom of expression and information, the right to access information and the establishment of a pluralistic and integrated media environment.

The Commission must be consulted on draft laws in its area of competence. The commission shall have nine members who shall be independent, neutral, competent, experienced and honest, and who shall be appointed for a single period of six years, with a third of the members being appointed every two years.⁴

⁴ The DRI French version is as follows:

L’instance de l’information est chargée de la régulation et du développement du secteur de l’information, elle veille à garantir la liberté d’expression et d’information, le droit d’accès à l’information et l’instauration d’un paysage médiatique pluraliste et intègre.

L’instance est obligatoirement consultée pour les projets de lois relatifs à son domaine de compétence. L’instance se compose de neuf membres indépendants, neutres, compétents, expérimentés et intègres qui effectuent leur mission pour un mandat unique de six ans avec renouvellement du tiers de ses membres tous les deux ans.

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There has been a lot of debate about the appropriateness of this body. There are two problems with its scope in terms of how democracies approach regulation of the information sector. First, it combines media regulation with oversight of access to information (i.e. the right to access information held by public bodies). These are two entirely different functions and no democracy combines them in one body. Instead, democracies have two different bodies, one to regulate the broadcast media and one to provide for oversight of the right to information.

A few examples of how democracies approach this issue are as follows:

- In France, the Conseil supérieur de l'audiovisuel (CSA; Superior Council for Broadcasting) regulates broadcasting, while the Commission d'accès aux documents administratifs (CADA; Commission for Access to Administrative Documents) provides oversight of the right to information.
- In Indonesia, the Komisi Penyiaran Indonesia (KPI; Indonesia Broadcasting Commission) is responsible for broadcast regulation, while the Komisi Informasi Pusat (KIP; Central Information Commission – there are also state-level information commissions) provides oversight of access to information.
- In Canada, the Canadian Radio-television and Telecommunications Commission (CRTC) regulates broadcasting, while the Information Commissioner provides oversight of access to information.
- In South Africa, the Independent Communications Authority of South Africa (ICASA) regulates broadcasting, while the Information Protection Regulator, soon to be established through the Protection of Personal Information Act, will provide oversight of both protection of personal data and access to information.

Combining the broadcast regulation and information oversight functions in one body is likely to create many problems, which is why this has been avoided in other countries. Among other differences, the right to information applies to everyone, whereas regulation of broadcasting is a much more specific, media-related function. The primary responsibility of a right to information oversight body is to review refusals by public bodies to disclose information, while the primary role of a broadcast regulator is to license broadcasters (and ensure that they respect their licence conditions). These two functions thus address completely different sets of actors, and relate to completely different types of information activity.

Second, international law recognises the very different ways that different media sectors – including print, broadcast and the Internet – function and requires States to take that into account when regulating these sectors. A 2003 Joint Declaration by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression states:

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Regulatory systems should take into account the fundamental differences between the print and broadcast sectors, as well as the Internet.⁵

The large majority of democracies do not have statutory bodies to regulate the print media sector, instead leaving this sector to regulate itself and, so far, no democracy has established a general body to regulate the Internet. In a few democracies, statutory press councils have been established, but this is legitimate only where the print media sector has failed to establish its own self-regulatory systems. In Tunisia, the print media should be given more opportunity to establish its own self-regulatory system, taking into account the fact that some efforts in this direction have been made, before any statutory system is imposed.

Recommendations:

- The Constitution should envisage two independent bodies in the information sector: a broadcast regulator and an access to information oversight body.
- The print media should be given an opportunity to regulate themselves.

⁵ Adopted 19 December 2003. Available at: <http://www.osce.org/fom/66176>. Starting in 2006, the newly created African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information has also participated in these Joint Declarations.

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