UNESCO comments: constitution of Tunisia

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

June 2013

UNESCO commends the Tunisian people for work on preparing a new constitution for the country, and one which will consolidate and entrench the democratic gains of the revolution and prevent any future concentrations of power, whether in single institutions or in single personalities.

This Note provides comments on the latest draft, dated 1 June 2013, from the perspective of international standards. It draws in part from an analysis by the Centre for Law and Democracy. However, responsibility for the suggestions herein lies solely with UNESCO’s Communication-Information division, and these suggestions are made in full respect for the sovereignty of the Tunisian people for deciding on their own constitutional arrangements.

UNESCO represents 195 Member States and, inter alia, works to advance its founding mandate to promote the free flow of ideas. Over the years, UNESCO’s member states have developed and adopted international standards for freedom of expression and press freedom. These standards are elaborated in the Windhoek Declaration (for a free, pluralistic and independent media), and the Media Development Indicators. The comments below are framed on the basis of this international experience, and are offered as technical observations for the consideration to the National Constitutional Assembly as it continues its deliberations.

Guarantees of freedom of expression

Three key provisions in the new draft Constitution are relevant to freedom of expression.

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 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 provisions are positive, although at the same time, there are some important gaps which mean that some amendments could be made to bring them into closer alignment with international standards.

- Usually, in international standards, the term “Freedom of Expression” includes all the separate aspects referred to in Article 30 (“freedoms of opinion, belief, expression, information and publication”). At present, it is not quite clear what the difference is between Article 30 which mentions “freedom(s) of … information” and 31 which refers to “the right to access information”. This could be made more clear.

- There is a three-fold reference to restrictions: in Articles 30 and 31, while also in Article 48. This can imply that, somehow, freedom of expression is a right where

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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limitations specially need to be underlined. It sends out a signal that freedom of expression is being treated differently to other rights, which is not in accordance with international standards.

The mixing of the right and the limitation in the same Article, also seems to suggest that Tunisia is emphasising limitations nearly as much as the rights themselves. However, in international standards, the issue of rights should be the norm, and the issue of limits refers to the exceptions. With Tunisia’s recent history, the Constituent Assembly may prefer to put the emphasis on the rights first, and keep references to limitations later. In other words, the Constituent Assembly may want to consider the references to the rights in 30 and 31 as standalone points, and separate out the limitations so as to put these in a separate and subsequent article.

One solution would be to have a single point in the constitution to refer to the limitations issues, such as the current Article 48. Here, could be combined together the issue of limitations - which indeed apply broadly to *all* rights. As it stands, Article 48 does already cover limits as regards: the protection of the rights of others (which will automatically include the right to reputation); national security; public order; and public health. So there is no need to have duplication in Articles 30 and 31; the limitations referred to in 30 and 31 are already covered by 48.

The current wording, which spreads restrictions across three different places, also has the effect of implying that the restrictions referred to in Article 31 concerning the right to access information, could be implemented without any need to have a law that sets out the conditions. By contrast, Article 48 has the advantage of pointing out the need for *all* limitations to be governed by laws.

- Where the Articles fall most short of international standards is that the envisaged limitations (wherever placed) are missing the key condition that they should be ‘necessary’ in a democracy. This is a very important boundary for what limitations are legitimate, and gives law-makers and the courts guidance when assessing if a given law is constitutional. For example, in regard to a law on defamation which limits freedom of expression. If the law criminalises defamation and provides for prison penalties, the question to assess then is whether a criminal record and jail sentence are indeed necessary in a democracy, or whether other forms of redress would suffice. “Necessity” covers the need for limitations to be logically linked to the right at stake, for them to be narrowly formulated, and for them to be proportionate in terms of likely results. In these ways, the reference to “necessary” in a democracy, keeps any limitations from serving to violate the fundamental right itself.
The current absence of reference in the Article 48 to “necessity” (and “democracy”) in regard to the issue of limitations falls short of international standards.

**Recommendations:**

- The Constitutional Assembly should consider clarifying Article 30, possibly with alternative wording about the freedom of information, so as to make clear its difference to right to access information as is covered in Article 31.
- The constitution could be improved by locating in one place (Article 48), the general issue of limitations, rather than repeating these in Article 30 and 31.
- *If* the limitations are kept in the existing three places, it should be clear in the case of the right to information (Article 31), that limitations here should also be provided for by law.
- Wherever the limitations issue is placed, the standard of ‘necessity’ and “democracy” should be included, in order to give more guidance on the boundaries applying to any laws that could limit the right to freedom of expression (including 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.  

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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 intégré.
From the point of view of international standards, this proposal falls short in two ways.

- **First**, it mixes in one single institution two very diverse functions: i.e. media regulation, and oversight of access to information held by public bodies. Normally, these functions are performed by different institutions for reasons of principle and practice.

- **Second**, the information commission is not in line with international standards in regard to the envisaged regulation of print, broadcast and the Internet. To be aligned, it should be confined to broadcasting. Tunisia is to be commended for establishing the HAICA to regulate broadcasting, and this model (i.e. excluding print and online) meets international standards.

The rationale for a statutory regulatory body for broadcasting is that this particular medium depends on using a limited public resource, i.e. the airwaves. This character justifies why a public authority should decide on the allocation of licences concerning who may use these airwaves, and, furthermore, decide on what conditions (eg. of ownership, language requirements) are attached to these licences.

The nature of print and online media is completely different in that they do not depend on using limited public property, which means therefore that there is no legitimate rationale to have a licensing body for these sectors.

It can be noted that the existence of a statutory regulatory body to cover the licensing of broadcasting can go hand in hand with a voluntary self-regulatory body for broadcasters which, like print, deals with ethical issues and public complaints. A country like South Africa has both instances: (i) the statutory Independent Communications Authority of South Africa which mainly deals with licenses and adherence to licence conditions on the one hand and (ii) the self-regulatory Broadcasting Complaints Commission of South Africa in which broadcasters administer a code of conduct through a peer-dominated system, on the other.

- **Another aspect in the Constitution concerning the “information commission” which could be amended to align more closely with good practice in international standards is the appointment system for this regulatory body. Article 122 provides for bodies like the “information commission” to be “independent”, and at the same time to be elected by, and to be accountable to, the National Assembly. The issue at stake here is “independence”. A regulatory body dealing with licensing issues with freedom of expression implications needs to be independent of the government of the day, and...**

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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 intégrès qui effectuent leur mission pour un mandat unique de six ans avec renouvellement du tiers de ses membres tous les deux ans.
make decisions that are not politically influenced in terms of awards and policing of licences.

The issue in Article 122 is that this provision concentrates appointment power of a regulator in a single body (parliament). Although this body represents the public and the public interest, it will also have its own institutional interests. Examples are cases where there has been malpractice in parliament (such as mis-spending of MPs allowances). The proposed appointment provision, whereby only parliament appoints the “information commission” can also result in party-politicisation of the appointed body. Such a scenario reduces the possibility for the full reflection of the diversity of public views and opinions. In these ways, the centralised appointment system through parliament can fall short of the wider public interest in independent management of public resources (whether the airwaves spectrum, or even of access to public information).

In this light, several ways to enhance “independence” can be suggested for the constitution. One is to allow for additional appointing bodies besides parliament, which dispensation can provide more balance to the institution. For example, a law could follow which provides for a certain quota of the total appointments to be made directly by representative societal institutions and constituencies (for example, a nomination by University principals, another from the Chamber of Commerce, etc). This diversified appointment mechanism can make for greater independence of the regulator. Another constitutional provision that could allow for laws to explore diverse roles in appointment processes, is to recognise that the Presidency could also have a role. An example, from South Africa’s immediate period after democracy, is that parliament (after a transparent and participatory process) provided a list of names to the President where the total number of names was greater than the number of positions to be filled. The President then selected from within these.

A further way to strengthen the independence of a regulator is if a constitution refers to appointment mechanisms that are appropriate. This provision could then underpin a law that elaborates strong security of tenure of appointees. Another elaboration in law could be a provision that the expiry of terms of office is differentiated, so that only some of the appointees to the regulator can be replaced at any single time. When there is not this phased approach to new appointments, it becomes possible to foresee situations where independence could be weakened through a complete “sweep” of all positions at a single point in time. In contrast, if only a portion of new appointees can be introduced at any given time, the independence (and continuity) of the institution is enhanced.

Recommendations:

- The Constitution could provide for two independent bodies in the information sector: a broadcast regulator and an access to information oversight body.
- Print media and online media do not require licensing by a regulator.
- Independence can be strengthened if the Constitution allows for an alternative formulation than the current Article 194 which provides for exclusive appointment by parliamentarians. Recognition that other constituencies, and the Presidency, also have a role to play in directly making a number of appointments will allow for flexibility in law-making as to what the best configuration could be for a given body.
- Another mechanism for strengthening independence is to indicate in the constitution that independence is underwritten by appropriate appointment mechanisms.