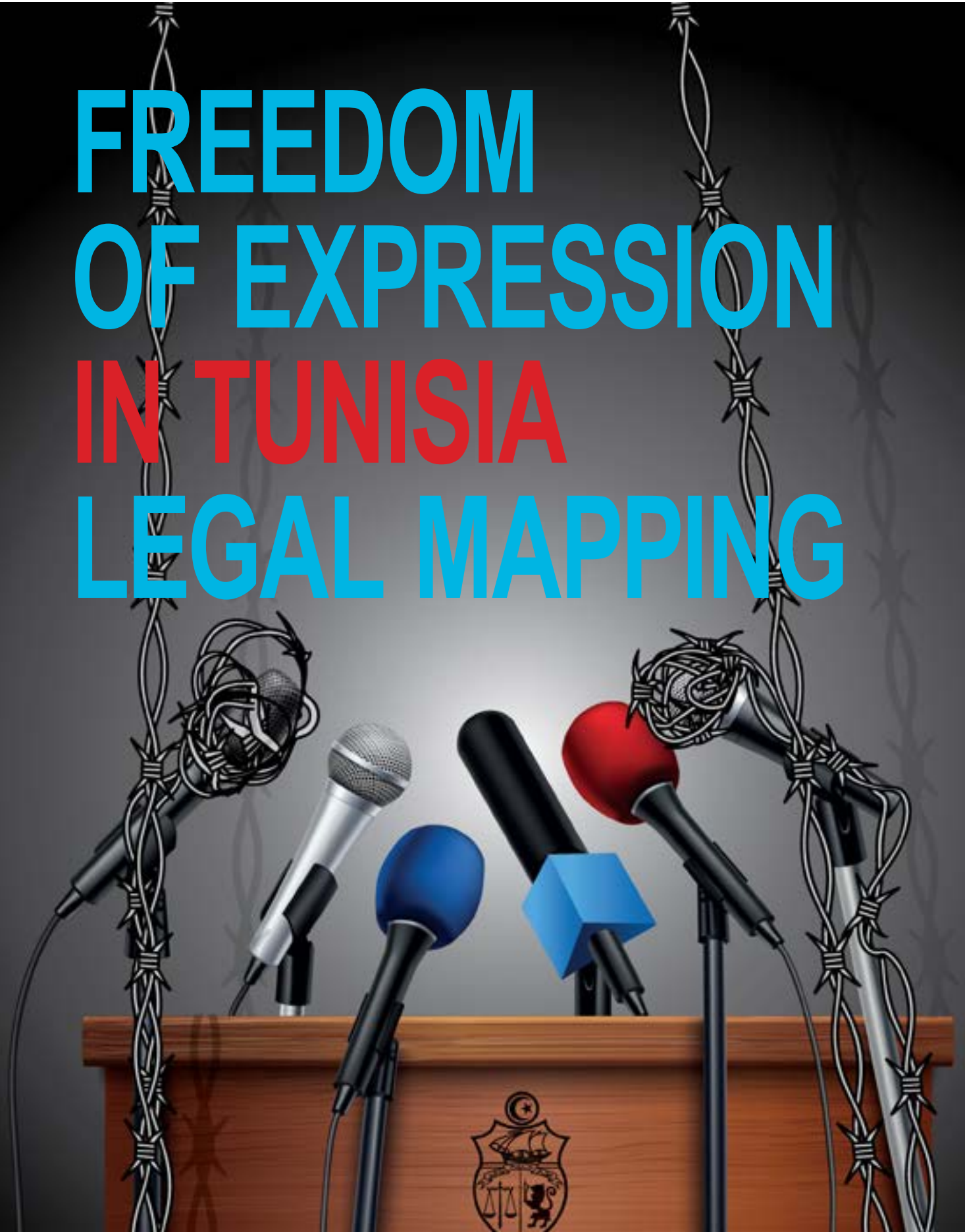


# FREEDOM OF EXPRESSION IN TUNISIA LEGAL MAPPING



This report maps and analyzes the laws and policies that impact freedom of expression in Tunisia

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# 01 INTRODUCTION AND METHODOLOGY

*Freedom of expression is a basic requirement of a vibrant democracy where members of society can take part in societal and political debates. It enables people to acquire knowledge, form their own opinions and exercise their human rights.*

Over the last decade, Tunisia witnessed a major turnover after the fall of the 23-year-rule of autocratic Ben Ali rule. Since then, Tunisians have been participating in unprecedented, heated debates and expressing their opinions about politics and society through protests, publications, art performances, and other forms of expression.

However, the country's heavy history of oppression and censorship necessitated an urgent reform of the legal arsenal. The calls to reform and revoke repressive laws started as early as 2011 with the interim government suspending Tunisia's 1959 constitution. Later in January 2011 a political reform committee was established and assigned the task of reviewing the legal system in order to remove its authoritarian nature and the legal mechanisms of tyranny. In March 2011, this committee merged into a supreme body to achieve the objectives of the revolution, political reform, and democratic transition. Several decrees were adopted later on in 2011 regarding freedom of expression, freedom of association, and other rights.<sup>1</sup> Yet, a decade after, many legal texts that violate human rights remain in effect and are still used to prosecute journalists, bloggers, political activists, and human rights defenders over opinions they express in political and public affairs.

It is, therefore, crucial to map and analyze the laws and policies that impact freedom of expression, notably those that regulate the press, the telecommunication channels, and state of emergency period. This analysis can inform strategic litigation and advocacy for legislative and policy reforms to protect freedom of expression in Tunisia.

## METHODOLOGY

This report examines the legal texts and policies regarding Freedom of Expression in Tunisia. Besides setting out the regulatory landscape and associated prosecutions, the report provides a contextual analysis of how legislation potentially casts a chilling effect on rights and freedoms. This report has been produced based on desk research examining legal analysis and literature review of media reports of events, reports by different organisations, academic works, and government documents.

This report was drafted, taking on board key insights from the multi-stakeholder dialogue sessions organized throughout the project and expert interviews.

## ABOUT THE PROJECT

The 36-month project, titled "Promoting Freedom of Expression & Information in Tunisia," seeks to bolster ongoing initiatives aimed at enhancing legal and regulatory frameworks in the country. The primary focus is on empowering journalists and media practitioners to effectively exercise their rights to Freedom of Expression. The project strives to foster a participatory and inclusive approach in developing and implementing a robust legal framework safeguarding freedoms of expression and access to information. Additionally, it aims to enhance public understanding and support for Freedom of Expression and Access to Information. In collaboration with Tunisia's main Journalist Union, the National Union of Tunisian Journalists (SNJT), and other pertinent stakeholders in the media sector, the project comprises three main objectives. These include ensuring journalists produce accurate content and can exercise their constitutional rights, fostering collaboration among policymakers, public officials, media outlets, and civil society organizations for improved legislation, and raising awareness among citizens about the significance of Freedom of Expression and access to information in the democratic process, encouraging them to hold those in power accountable for creating a conducive environment for freedom of expression.

1 Decree Law No. 87 of 2011 on the Regulation of Political Parties, Decree Law No. 2011-41 of 26 May 2011 regarding access to the administrative documents, Decree Law No. 88 of 2011 on the Regulation of Associations, Decree Law No. 115 of 2011 on Press, Printing, and Publishing and Decree Law No. 116 of 2011 on the Freedom of Audiovisual Communication.

# 02 APPLICABLE STANDARDS FREEDOM OF EXPRESSION

## APPLICABLE INTERNATIONAL AND REGIONAL STANDARDS ON FREEDOM OF EXPRESSION

The right to freedom of expression is protected under the Universal Declaration of Human Rights (UDHR)<sup>2</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> as well as in regional human rights treaties, including the African Charter on Human and Peoples' Rights<sup>4</sup> and the Arab Charter on Human Rights<sup>5</sup>. Since freedom of expression form a basis for the full enjoyment of a wide range of other human rights<sup>6</sup>, it is enunciated in most human rights instruments and treaties, including those dedicated to the protection of the rights of specific groups and minorities.<sup>7</sup>

Under the ICCPR, freedom of expression is referred to as the "freedom to seek, receive and impart information and ideas of all kinds". The United Nations Human Rights Committee's (UNHRC) General Comment No. 34 further explains that the right to freedom of expression includes, for example, political discourse, commentary on one's own affairs and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.<sup>8</sup>

While the right to freedom of expression is a fundamental right, it is not absolute. Under international standards, a state may exceptionally limit the rights to freedom of expression. The restrictions must be strictly and narrowly tailored and may not put the right itself in jeopardy. Under Article 19(3) of the ICCPR, limitations of the right to freedom of expression are only permissible if they pass the test of legality, legitimacy, necessity and proportionality. This test applies to limitations of the right to freedom of expression under the ICCPR and other legal instruments, including the African Charter.

International human rights law places legal obligations on states to protect, promote, and fulfill human rights set out in the international human rights conventions they ratify. Non-state actors including business enterprises also have a responsibility, though usually not legally binding under international treaties<sup>9</sup>, to respect human rights including the right to freedom of expression as acknowledged by the Guiding Principles on Business and Human Rights, endorsed by the United Nations Human Rights Council in June 2015.<sup>10</sup> Therefore, companies are responsible for respecting and protecting these rights, that is, 'to refrain from infringing human rights and addressing the negative impacts on human rights in which they have some involvement'.<sup>11</sup>

2 G.A. Res. 217 (III) A, UDHR, art. 19 (Dec. 10, 1948).

3 G.A. Res. 2200A (XXI), ICCPR, art. 19 (16 December 1966). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

4 OAU, African Charter on Human and Peoples' Rights, art 9 (27 June 1981). <http://www.african-court.org/wpa/wp-content/uploads/2020/04/AFRICAN-BANJUL-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf>

5 Council of the League of Arab States, Arab Charter on Human Rights, art 32 (23 May 2004). <http://www.lasportal.org/ar/legalnetwork/>

6 General Comment No 34, CCPR/C/GC/3, para. 4. <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

7 G.A. Res 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art 5 (21 December 1965). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>. G.A. Convention on the Elimination of All Forms of Discrimination against Women, art 7 (18 December 1979). [ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women](https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women)

8 General Comment No 34, CCPR/C/GC/3, para. 11. <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

9 J.Ruggie, "The corporate responsibility to respect human rights : an interpretive guide", United Nations Human Rights Office of the High Commissioner. 2012. [https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2\\_En.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf)

10 Res 17/4, UNHRC, (16 June 2011). [https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

11 Res 17/4, UNHRC, (16 June 2011). [https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

# 03 INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

## INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF TUNISIA

Tunisia is a party to 14 United Nations human rights treaties, including the International Covenant on Civil and Political Rights and its first Optional Protocol, which guarantees freedom of expression. On a regional level, in 1983, Tunisia has ratified the African Charter on Human and Peoples' Rights which guarantees individuals the right to receive information as well as the right to express and disseminate information.<sup>12</sup>

The Tunisian constitution establishes the state commitment to international treaties approved and ratified by the Assembly of the Representatives of the People. Before accepting a new commitment under an international treaty, Tunisia will have to ensure that it is consistent and compatible with its constitution. Article 74 of the Constitution also establishes the primacy of international treaties over domestic legislation, but not over the constitution itself.<sup>13</sup> The Human Rights Committee expressed concerns that the Tunisian courts apply such treaties only very rarely.<sup>14</sup>



12 Article 9 of the African Charter on Human and Peoples' Rights <https://www.achpr.org/legalinstruments/detail?id=49#:~:text=of%20these%20freedoms.-ARTICLE%209,his%20opinions%20within%20the%20law>.

13 Article 74 of the 2022 Constitution

14 Concluding observations on the sixth periodic report of Tunisia, Human Rights Committee, March 27, 2020 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRICAqhKb7yhshMktQJn68GxgXXtdAYdq%2ftwMVHhGRP3qV-L6wOK3YX6MZZqQmxEb2zWM7SDcgF%2bAsrTCdzimayBB05%2f9feUIKejNt7OszprXjfceSMUNC%2fQ>

# 04 NATIONAL LEGAL FRAMEWORK

## THE CONSTITUTIONAL FRAMEWORK

On 25 July 2022, Tunisia voted in favor of a new constitution via a national referendum. The vote was held one year after President Kais Saied assumed exceptional powers, dismissed the government and dissolved the parliament. The 2022 constitution came to replace the 2014 constitution which was negotiated and approved in the wake of the 2011 revolution, provided for freedom of expression and freedom of the press and prohibited prior censorship.<sup>15</sup> The referendum is also part of a political road map outlined by the President on 13 December 2021.

The second chapter of the 2022 Constitution (the Constitution), entitled "Rights and Freedoms", enumerates a number of civil, political, social, economic, and cultural rights. The judiciary is mandated to protect from all violations. Additionally, the state is responsible for guaranteeing freedoms and individual and collective rights to all citizens.<sup>16</sup>

## FREEDOM OF EXPRESSION IN THE TUNISIAN CONSTITUTION

Freedom of opinion, thought, expression, information and publication are guaranteed under the Constitution and may not be subject to any prior monitoring.<sup>17</sup> The State is also required to guarantee the right of information, the right to access information and the right to access communication networks.<sup>18</sup>

No amendment may undermine the human rights and freedoms guaranteed in the Constitution. However, restrictions on these rights may be imposed. These restrictions have to fulfill balancing checks. First, any restrictions imposed on constitutional rights must meet the test of being "what is required by a democratic regime to protect the rights of others, for the needs of public security, national defense, or public health." Second, any "restrictions must not affect the essence of rights and liberties guaranteed by this constitution, and must be justified by their aims, and proportionate to the causes that gave rise to them".<sup>19</sup>

The judiciary institutions are required to ensure that rights and freedoms are protected from all violations. The Constitution also establishes a Constitutional Court, which can review and nullify existing and draft laws that the court deems to be in violation of the constitution, including its human rights provisions.<sup>20</sup> While the establishment of the Constitutional Court can be a pillar in safeguarding human rights, the unilateral control of the President over its composition<sup>21</sup> in particular and the judiciary in general may jeopardize these rights.<sup>22</sup>

The fifth article of the Constitution has raised concerns over its vague wording and potential use to undermine freedoms.<sup>23</sup> It stipulates that Tunisia "belongs to the Islamic Ummah" and says the state is required to "achieve the purposes of Islam in preserving [people's] souls, money, religion, and liberty." Such language could act

15 Constitute Project, "Tunisia's Constitution of 2014," August 13, 2019 [https://www.constituteproject.org/constitution/Tunisia\\_2014.pdf](https://www.constituteproject.org/constitution/Tunisia_2014.pdf).

16 The Constitution, art 22.

17 The Constitution, art 37.

18 The Constitution. art 38.

19 The Constitution, art 55.

20 The Constitution, art 127.

21 The members of the Constitutional courts are nine judges serving in other high courts and are appointed by the president. see The Constitution, art 125-120

22 "Tunisia: Draft Constitution dangerous backwards step for human rights", Article 19, 22 July 2022. <https://www.article19.org/resources/tunisia-draft-constitution-dangerous-backwards-step-for-human-rights/>

23 A.Guellali, "The Problem with Tunisia's New Constitution". Human Rights Watch. February 3, 2014, <https://www.hrw.org/news/2014/02/03/problem-tunisia-new-constitution>

as a constitutional restriction on freedoms and be used to criminalize speeches considered offensive to religious beliefs on the grounds that they are alleged to contradict religious principles.<sup>24</sup> Human rights organizations also warned against using article 5 as grounds for legal amendments that aim to align Tunisian legislations pertaining to human rights and equality with certain religious principles.<sup>25</sup>

### MEDIA AND PRESS RELATED LEGISLATION

A free and pluralistic media is a pillar of the society's right to know and a means to sustain open deliberation and encourage the exchange of diverse views.<sup>26</sup> Media freedom is therefore an integral part of freedom of expression. Media could take different forms including print, broadcast or online media. This section will examine the legislations regulating different media and the provisions that may impact freedom of expression.

### DECREE-LAW NO.115 ON FREEDOM OF THE PRESS, PRINTING AND PUBLISHING

On November 2, 2011, decree-Law No.115 on Freedom of the Press, Printing and Publishing<sup>27</sup> was issued on with the aim "to regulate freedom of expression"<sup>28</sup>. It replaces the 1975 Press Code. While decree 115 brought a series of significant positive improvements, it still contains several flaws including problematic provisions and unclear language.

The first article of the decree starts by defining freedom of expression to include the free circulation of ideas, opinions and information of all kinds, their publication, receipt and exchange. It emphasizes that "freedom of expression shall be guaranteed and exercised in accordance with the provisions of the International Covenant on Civil and Political Rights, other relevant treaties ratified by the

Republic of Tunisia and the provisions of this decree-law." In accordance with the article 19(3) of the ICCPR, decree 115 requires that interferences with freedom of expression are legitimate only if they are prescribed by law; pursue a legitimate interest, and are "necessary and proportionate in a democratic society". It describes legitimate interests to include: respect for the rights and dignity of others, the preservation of public order, or the protection of national defense and security.

The decree also outlines the requirements to become a professional journalist. Article 7 defines a "professional journalist" as a person holding a bachelor's degree who "seeks the collection and dissemination of news, views, and ideas" to disseminate to the public on a regular basis. A journalist is also defined as a person whose employment "in an institution or institutions of daily or periodical news agencies, or audiovisual media and electronic media" is their main source of income. An independent commission is set to deliver the professional journalist national card to any person who meets these conditions.<sup>29</sup> Therefore, the decree does not provide bloggers and citizen journalists, unless they fulfill mentioned requirements, with the same protections afforded to professional journalists.

Decree 115 recognizes a list of principles and rights for journalists and defines their limitations:

- The Right to access information, news, data, and statistics is guaranteed by article 10.<sup>30</sup>
- The protection of the confidentiality of sources is ensured, in article 11 of the decree, "unless justified by motivations of state security or national defense under the supervision of a judicial authority".
- The protection of journalists' independence against all forms of pressure and intimidation was emphasized. Decree 115 also punishes whoever attacks a journalist during the performance of his functions, with the penalty

24 "Tunisia: New draft constitution undermines independence of Judiciary and weakens human rights safeguards", Amnesty International, 5 July 2022. <https://www.amnesty.org/en/latest/news/2022/07/tunisia-new-draft-constitution-undermines-independence-of-judiciary-and-weakens-human-rights-safeguards/>

25 "Tunisia: New draft constitution undermines independence of Judiciary and weakens human rights safeguards", Amnesty International, 5 July 2022. <https://www.amnesty.org/en/latest/news/2022/07/tunisia-new-draft-constitution-undermines-independence-of-judiciary-and-weakens-human-rights-safeguards/>

26 I.Khan, "Reinforcing media freedom and the safety of journalists in the digital age– Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression", 20 April 2022. <https://www.ohchr.org/en/documents/thematic-reports/ahrc5029-reinforcing-media-freedom-and-safety-journalists-digital-age>

27 Decree-Law No.115 on Freedom of the Press, Printing and Publishing <https://haica.tn/wp-content/uploads/2020/02/Decret-Loi-N%C2%B02011-115-ar.pdf>

28 Article 2 of Decree-Law No.115 on Freedom of the Press, Printing and Publishing <https://haica.tn/wp-content/uploads/2020/02/Decret-Loi-N%C2%B02011-115-ar.pdf>

29 Article 8, Decree Law No 115

30 Article 10 of Decree-Law No.115 on Freedom of the Press, Printing and Publishing <https://haica.tn/wp-content/uploads/2020/02/Decret-Loi-N%C2%B02011-115-ar.pdf>

of attack on a quasi-public official<sup>31</sup>.

Other positive provisions of this decree are related to pluralism in order to guarantee the right to plural and diversified information<sup>32</sup>. Also, provisions on financial transparency of media organizations were introduced, to enable readers to be informed on the sources and modes of funding.

Chapters Five and Six are devoted to criminal issues, establishing crimes and misdemeanors committed through the press or other means of publication, and their sanctions.

### PUBLICATION OF FALSE NEWS THREATENING PUBLIC ORDER CHARGES:

Publication of false news threatening public order charges: Article 54 of the decree 115 sanctions the "intentional publication of false news threatening public order" through the means mentioned in article 50 with a fine ranging from 2000 to 5000 TND. On the basis of article 54, in 2014, the public prosecutor filed charges against a social media user N.F who published a post on Facebook alleging potential election fraud, which she warned could lead to bloodshed and an outbreak of violence. After receiving numerous critical replies, she apologized and deleted the post. The Court of Appeal, then supported by the Court of Cassation, found that social networks do not constitute electronic media within the meaning of the Decree-Law 115. The court also found that the act of deleting the incriminating post neutralized the required criminal intent for prosecution.<sup>33</sup>

### INCITEMENT CHARGES:

Articles 50 and 51 of decree 115 differentiated incitement into two categories: incitement crimes followed with action as in article 50 of the decree and incitement to commit a crime of homicide, bodily harm, rape not followed by action as in article 51. Both articles necessitated that the incitement has to be direct and either by speech, words or threats in public places, or by means of printed matter, photos, sculptures, signs or any other written or photographic form displayed for sale or public view in public places or public meetings, or by any other means of audiovisual or electronic information.

31 Article 14 of Decree-Law No.115 on Freedom of the Press, Printing and Publishing <https://haica.tn/wp-content/uploads/2020/02/Decret-Loi-N%C2%B02011-115-ar.pdf>

32 Articles 31 to 38 of Decree-Law No.115 on Freedom of the Press, Printing and Publishing <https://haica.tn/wp-content/uploads/2020/02/Decret-Loi-N%C2%B02011-115-ar.pdf>

33 "Attorney General v. N.F.", Case Number 52620-18, January 2018 <https://globalfreedomofexpression.columbia.edu/cases/attorney-general-v-n-f/>

34 "الواعظ الديني الذي قال 'الموت للسيسي' : هذا ما قررته محكمة التعقيب في حقه". December 2016. <https://assiyassi.net/2016/12/20/%D8%A7%D9%84%D9%88%D8%A7%D8%B9%D8%B8-%D8%A7%D9%84%D8%AF%D9%8A%D9%86%D9%8A-%D8%A7%D9%84%D8%B0%D9%8A-%D9%82%D8%A7%D9%84-%D8%A7%D9%84%D9%85%D9%88%D8%AA-%D9%84%D9%84%D8%B3%D8%A8%D8%B3%D9%8A-%D9%87/>

Under article 51, if the incitement is followed by an act, the maximum of the penalty is increased to five years in prison. In 2015, the appeal court sentenced preacher Habib Bousarsar to 3 months of postponed imprisonment and 1000 TND fine for direct incitement to murder through speech in public places on the basis of articles 50 and 51 of the decree. Bousarsar had called in a speech on Habib Bourguiba Street in the capital on March 25, 2012 for Beji Caid Essebsi's death.<sup>34</sup>

### 'INCITING DISCRIMINATION' AND 'OFFENDING RELIGION' CHARGES:

Article 52 sanctions with one to three years of prison and 1000 to 2000 TND fine for "directly calling for hatred between races, religions, and populations by inciting discrimination and the use of hostile means or violence or spreading ideas based on racial discrimination". Article 53 sanctions with fines from 1000 to 2000 TND anyone who "intentionally offends authorized religions" or uses places of worship for political and partisan speeches. In July 2020, Emna Chargui, social media user, was convicted under Articles 52 and 53 of Decree 115 for sharing a photo on her Facebook profile containing a text that imitated the format of a Quranic verse. Tunis Court of First Instance sentenced her to six months in prison and a 2000 TND fine.

### DEFAMATION AND INSULTS CHARGES:

Articles 55 and 56 of the decree criminalize defamation, requiring proof of direct and personal harm to the defamed person, with fines from 1000 to 2000 TND. Article 59 of the Decree-Law specifies that in cases of defamation where the accusations made concern public affairs, the burden of proof of the veracity of the accusations lies with the defendant. Under international standards, in cases involving public authorities or other matters of public interest, the plaintiff should bear the burden of proving the falseness of the claims in question.

Article 57 of the Decree-Law defines insults as "any expression that offends dignity, or any term of contempt not involving the accusation of anything specific" and provides for a fine between 500 and 1000 TND.

Under articles 50, 52, and 57, the Imam of Sidi Ali Ben Salah was sentenced to 4 months of imprisonment and 500 TND fine for insulting the chief of police office in a public speech and accusing him of surveillance.<sup>35</sup>

While decree 115 came with major improvements to enhance freedom of expression in Tunisia, referring to it remains limited due to several reasons. First, while the decree explicitly replaced the old press code, it did not explicitly repeal contradicting or incoherent provisions in the Penal code or other texts. The decree itself references the penal code on multiple occasions. Second, the vagueness and absence of definitions of certain crimes add to the confusion around the text. Finally, while the decree still presents imprisonment sanctions, prosecutors continue to bring charges under the penal code for harsher sentences.

### DECREE-LAW 116 OF 2011 RELATING TO FREEDOM OF AUDIOVISUAL COMMUNICATION AND THE CREATION OF AN INDEPENDENT HIGHER AUTHORITY FOR AUDIO-VISUAL COMMUNICATION

Decree-law 116-2011 dated November 2, 2011, on the freedom of audiovisual communication and the creation of the Independent High Authority for Audiovisual Communication consists of five chapters and 52 articles. It guarantees the freedom of audiovisual communication and the right of all citizens to access audiovisual information and communication. Article 5 of the decree upholds fundamental principles, namely freedom of speech, equality, pluralism of opinions and ideas, objectivity, and transparency. The decree also consecrated the respect of the rights and reputation of others, and in particular, respect for human dignity and private life, respect for freedom of belief, protection of childhood and public health, as well as protection of national security and public order as provided for in treaties and international conventions.

The decree establishes the High Authority for Audiovisual Communication as an independent body. The competencies of the HAICA are organized 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. The mandate includes a proposition role for reforms and advisory opinions on legislation

projects related to the audiovisual sector and a binding opinion for the appointment of CEOs of public audiovisual institutions.

In the event of a serious offense constituting a violation of the provisions of article 5 which may cause serious harm, the HAICA under article 30 of the same decree, may decide to immediately suspend the program in question, by reasoned decision, after having and notified invited the offender to present their defense. Most of the decisions of the Haica have been based on articles 5 and 30 of the decree including request of content removal, fine sanctions and decisions to stop programs on tv and radio that did not respect provisions of article 5. For example, in February 2022, the council of HAICA issued a decision to stop the broadcasting of a TV show on Carthage +, a private TV channel after observing "serious violation of human dignity, honor and private life". The Council also called on the TV channel not to rebroadcast the episode, the subject of the decision, and to withdraw it from the channel's official website and from all its social media pages. In the event of non-respect of this decision, the HAICA council can impose further penalties stipulated in Decree 116.<sup>36</sup>

An additional basis to HAICA decisions resides from the conditions booklets to obtain licenses to create and exploit a tv or radio, private or associative. The conditions provide for numerous provisions requiring the respect of general principles such as respect for the dignity of the individual, privacy, and freedom of belief, or the protection of children, women, elderly or vulnerable people. In addition, any person with responsibilities within a party can not apply for a license, or put all or part of the TV channel or radio station at the service of party propaganda.

For instance, provisions of article 24 of the conditions booklet relating to obtaining a license and the exploitation of a private television channel require to adhere to: "Preventing defamation and insults towards persons, whether by journalists working in the media institution or by guests of programs broadcast by the institution, whether recorded or direct, with the qualification of journalists to withstand It is their responsibility to address such abuses". Similarly, the provisions of article 25 of the conditions booklet related to obtaining a license to create and exploit a private radio channel, states that "the license holder is obligated to ensure, in particular: to prevent the dissemination of false news".

The licensing conditions also regulate the field of commercial advertising with regard to the same principles.

<sup>35</sup> "حزبة التعبير بين المأمول وأحكام المجلة الجزائرية" سلوى الشرفي، "ماتوية المجلة الجزائرية: الماضي، الحاضر، المستقبل"

<sup>36</sup> "الهبة تقرر إيقاف برنامج "هل تجرؤ؟" على قناة "قرطاج"، HAICA, February 7, 2022, <https://haica.tn/ar/16565>

The advertising of certain categories of products or services deemed harmful or illegal like tobacco, alcohol, weapons, esotericism and clairvoyance is also prohibited as well as misleading advertising and any message "exploiting the ignorance or lack of experience of certain categories of consumers".

### ORGANIC LAW NO. 2015-37 OF SEPTEMBER 22, 2015, RELATING TO REGISTRATION AND LEGAL DEPOSIT

This law establishes the conditions and procedures for registration and legal deposit. The materials concerned by these procedures include all writings, printed documents, graphics, photographs, sound, audiovisual and multimedia, drawings, maps, images, digital arts, abstract words or other content made available to the public, electronic sites and interconnected information; – Musical compositions in printed or recorded format; cinematographic films; – Sound and audiovisual works, books, non-periodical publications and posters; periodical publications in particular, daily, weekly and semi-monthly newspapers, magazines, periodicals as well as reviews.<sup>37</sup>

### CRIMINAL LAWS

#### PENAL CODE

The Tunisian penal code prescribes prison terms and fines for charges of defaming or offending state institutions, public officials, religions, and religious groups.

#### DEFAMATION AND INSULTS CHARGES:

The Tunisian Penal Code defines defamation in article 245 as "any allegation or public imputation of a fact that harms the honor or the esteem of a person or official body." In article 247, the code provides a penalty of six months in prison and a fine of 240 TND for defaming an individual or state institution.

Article 128 sanctions any person who accuses a public official of illegal acts, unless they can prove the truth of their accusations with two years imprisonment and a 120 TND fine.

In February, 2017, Walid Zarrouk, a police union activist, was sentenced to one year in jail for criticizing members of a counterterrorism unit on Facebook. The charges were

<sup>37</sup> Article 4 of law 37-2015

<sup>38</sup> Freedom on the Net 2017 - Tunisia Country Report, <https://www.refworld.org/docid/5a547cfa.html>

<sup>39</sup> Freedom on the Net 2020 - Tunisia Country Report <https://freedomhouse.org/country/tunisia/freedom-net/2020>

<sup>40</sup> Article 125 of the Penal Code

<sup>41</sup> Article 126 of the Penal Code

<sup>42</sup> Article 67 of the Penal Code

<sup>43</sup> Freedom on the Net 2020 - Tunisia Country Report <https://freedomhouse.org/country/tunisia/freedom-net/2020>

based on under article 128 of the penal code.<sup>38</sup> In 2020, blogger Anis Mabrouki was charged under articles 316 and 128 for posting a video on his Facebook page of a crowd of people protesting in front of the closed mayor's office in the town of Tebourba and criticizing the local public officials for failing to distribute the financial aid promised by the government during the COVID-19 lockdown.<sup>39</sup>

Article 125 of the code sanctions anyone who insults a civil servant in the course of or in connection to the exercise of his duties, with a fine and one year of imprisonment<sup>40</sup>, doubled if the offense was committed at a judicial hearing<sup>41</sup>. The crime of "Committing a despicable act against the head of state" is punishable by three years in prison and a 240 TND fine.<sup>42</sup>

Article 125 has been often used by authorities to silence critics. For instance, in 2020, blogger and social media user, Hajer Awadi, was charged with "insulting a civil servant" and "causing noises and disturbances to the public" under Articles 125 and 316, respectively, of the penal code after she posted a video on her personal Facebook account criticizing government corruption and the poor distribution of basic foodstuffs in her region, Tajerouine. Hajer was sentenced to a two-month suspended prison sentence.<sup>43</sup>

#### 'PUBLIC MORALITY' AND 'PUBLIC INDECENCY' CHARGES:

Article 226 and 226 II of the Penal Code relate to defaming public morality and public indecency, and provide for prison terms of up to six months for such offenses. Article 121(3) carries a prison sentence of up to five years for those who "distribute, offer for sale, publicly display, or possess, with the intent to distribute, sell, display for the purpose of propaganda, tracts, bulletins, and fliers, whether of foreign origin or not, that are liable to cause harm to the public order or public morals." Article 316 sanctions "causing noises and disturbances to the public" with a 20 to 200 TND fine.

These provisions have been used to criminalize conduct linked to the exercise of the right to freedom of expression. The interpretation of these articles has been left to the courts in the absence of a precise definition to the term "public morals". For instance, on 28 March 2012, a trial court in Mahdia convicted two Internet users for

posting writings deemed offensive to the sacred values of Islam and sentenced them to seven-and-a-half years of imprisonment. The charges were "publishing material liable to cause harm to public order or good morals", "for harming others through these publications" and for "assaulting public morals", under Articles 121 and 226 of the Penal Code, and Article 86 of the Telecommunications Code.<sup>44</sup> The Court of Cassation upheld the verdict in 2014.<sup>45</sup> Article 226 was also the basis of the court of appeal decision in the case of the rapper Weld el 15. He was sentenced to 6 months of suspended imprisonment for the content of a song (lyrics and gestures) he released online.<sup>46</sup>

### SECURITY-RELATED LEGISLATIONS

The protection of national security or of public order is recognized as the ground for restriction of freedom of expression listed in paragraph 3 of article 19 of the ICCPR. The United Nations Human Rights Committee's General Comment No. 34 proceeds to require States parties to take extreme care to ensure that provisions relating to national security, whether are crafted and applied in a manner that also conforms to the principles of necessity, proportionality, and legality.<sup>47</sup>

### ORGANIC ACT NO. 26 OF 2015 RELATING TO THE FIGHT AGAINST TERRORISM AND THE SUPPRESSION OF MONEY LAUNDERING

In 2015, the Tunisian parliament adopted organic law no 2015-26, dated August 7, 2015, relating to the fight against terrorism and the suppression of money laundering which repealed and replaced the 2003 antiterrorism law.<sup>48</sup> In January 2019, organic Act No. 9 amended the organic Act No. 26 of 7 August 2015.

The 2015 Counter-terrorism law introduced provisions protecting Human rights including the right of journalists to protect their sources<sup>49</sup> and criminalizes unauthorized government surveillance<sup>50</sup>. It explicitly emphasizes the requirement for public authorities applying the provisions of this law to respect constitutional provisions and

international, regional, and bilateral agreements ratified by Tunisia regarding human rights, the protection of refugees, and international humanitarian law.<sup>51</sup> Despite the positive safeguards, challenges remain in the language of this law and its use.

The definition of terrorism contained in the 2015 Law is overly broad, ambiguous and fails to comply with international human rights standards of legal certainty. The danger of using vaguely worded terms in such a legal text is that it opens doors to criminalize a broad spectrum of acts of a non-violent nature, including the right to freedom of expression.

For instance, the law considers a crime to be a terrorist act if it is "part of an individual or collective enterprise aiming at intentionally spreading terror among the population or forcing the government or an international organization to accomplish an act or abstain from so doing". It also considers as terrorist offenses the act of "prejudicing private and public property, vital resources, infrastructures, means of transport and communication, IT systems or public services."

Furthermore, the risk of over-broadening of the definition of terrorism extends to several provisions in this law. Article 5 prohibits incitement to terrorism and article 31 prohibits the "praising and justification of terrorism". Atonement "Takfir", calling for it, inciting hatred between races, religions, and sects, or is also considered a terrorist act. In accordance with article 31 of the counter-terrorism law, any person who is found to have "publicly and clearly praised" a terrorist crime, the perpetrator of a terrorist crime, an organization or an alliance connected with terrorist crimes, their members or their activities, is guilty of a terrorist offense and is sentenced from one to five years in prison and a 5000 to 10000 TND fine.

The Human Rights Committee, in its sixth periodic report of Tunisia, expressed concerns over the broad and imprecise definition of an act of terrorism in this law and warned against the improper use to criminalize conduct linked to

44 "Release Tunisian prisoner of conscience Jabeur Mejri", Amnesty international, December 6, 2013, <https://www.amnesty.org/fr/wp-content/uploads/2021/06/mde300192013en.pdf>

45 In October 2011, Mejri was released by a presidential pardon.

46 Attorney General v. Weld el 15, <https://globalfreedomofexpression.columbia.edu/cases/attorney-general-v-weld-el-15/>

47 General Comment No 34, CCPR/C/GC/3, para. 30. <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

48 Law No. 2003-75 of December 10, 2003, relating to support for the international effort to combat terrorism and prevent money laundering.

49 Article 37, law No. 26/2015

50 Article 64, law No 26/2015

51 Article 2, law No. 26/2015

the exercise of the right to freedom of expression.<sup>52</sup> In his report visit in 2017, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stressed that "Tunisia should ensure that national counter-terrorism legislation is limited to the countering of terrorism as properly and precisely defined on the basis of the provisions of international counterterrorism instruments and is strictly guided by the principles of legality, necessity and proportionality."<sup>53</sup>

Additionally, the counter-terrorism law also imposes restrictions on press coverage, false information sanction, and journalists protection. Anyone who "maliciously" conveys fake news causing physical injury can be sanctioned by imprisonment for up to a lifetime and a fine of up to one hundred and fifty thousand dinars.<sup>54</sup> The law allows trial judges to close hearings to the public but fails to define the narrow criteria that must be met before any portion of a trial is closed. Article 73 prohibits the release of 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. 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 is sanctioned under article 37 of this law. However, the article highlights that journalists are entitled to protect the confidentiality of information to which they had access during the course of their professional work, according to the provisions of Decree No. 115. These exceptions do not apply if the notification to the authorities may prevent the commission of terrorist crimes in the future.

Section 5 of the law, entitled "the use of particular investigation techniques", puts surveillance under the oversight and authority of judicial power. An Investigative Judge or the Prosecutor of the Republic can issue the judicial order. Section 54(5) indicates that the order must identify the specific types of communications subject to interception and/or monitoring, for a period that cannot exceed four months, and that can only be renewed once with a reason. Data can be collected by the Technical Telecommunication Agency, ATT, and from the servers of telecom operators and internet service providers. The law requires investigators to keep a written record of their

surveillance operation at all times, and are protected by the data protection law. Government agents are subject to a one-year prison sentence if they conduct surveillance without judicial authorization.

Criminal prosecutions and investigations had been initiated against journalists for reporting on terrorism related events. Despite the fact that the terrorist charges were eventually dropped, these investigations fostered an atmosphere of fear among Tunisian journalists. For example, on May 18, 2021, the investigative judge at the Anti-Terrorism Judicial Pole investigated Borhan Al Yahyaoui, the correspondent of Mosaïque FM radio, as a defendant in a case on the basis of the 2015 Anti-Terrorism Law. Al Yahyaoui was investigated based on his reporting of security and military operations against terrorists in Kasserine. In a statement, the SNJT described this incident as "a real setback in the judiciary's handling of media content that is produced in accordance with the ethics of the journalistic profession."<sup>55</sup>

### MILITARY JUSTICE CODE

The 1957 Code of Military Justice grants military courts the right to try civilians under specific conditions<sup>56</sup> on crimes including public insult of "the flag or the army" and "criticism of the actions of army officials which undermines their dignity".<sup>57</sup>

Decrees 69 and 70 of July 2011 amending the 1957 Military Justice code did introduce important elements such as the establishment of a military court of appeals. These reforms remained insufficient to protect freedom of speech and the right to a fair trial.

Guidelines from the African Commission on Human and Peoples' Rights, which is mandated to interpret the African Charter on Human and Peoples' Rights, that Tunisia has ratified in 1983, state that military courts should not "in any circumstances whatsoever have jurisdiction over civilians."

In regard to freedom of expression related cases, Article 91 of this code has been particularly used to charge social media users and journalists. The article states that: "Is punished from three months to three years of imprisonment, whoever, military or civilian, in a public place and by the word, gestures, writings, drawings,

52 Concluding observations on the sixth periodic report of Tunisia, Human Rights Committee, March 27, 2020 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshmkTQJn68GxgXXTdAYdq%2fttMVHhGRP3qV-L6wOK3YX6MZzqQmxEb2zWM7SDcgF%2bAsrTCdzimayBB05%2f9feUjKejNt7OszprXjfceSMUNC%2fQ>

53 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/40/52/Add.1](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/52/Add.1)

54 Under article 21 of the 2015 law

55 النقابة الوطنية للصحفيين التونسيين Snjt, Facebook, May 18, 2021 <https://www.facebook.com/snjt.tunisie/posts/2878447672429242>

56 Article 8 of the 1957 Code of Military

57 Article 91 of the 1957 Code of Military

photographic reproduction or by hand and films, is guilty of insults to the flag or the army, attack on the dignity, reputation, morale of the army, acts liable to undermine military discipline, obedience and respect due to superiors or criticisms of the action of the superior command or of the leaders of the army, thereby undermining their dignity.”

### PROSECUTIONS UNDER THE MILITARY JUSTICE CODE:

A number of journalists and bloggers were investigated and, in some cases, charged under the Military Justice code. On October 3, 2021, police forces arrested journalist Ameer Ayed and MP Abdellatif Aloui following their statements criticizing the decisions of the president in “Hassad 24,” a TV program on Zitouna TV. The military court had charged Ayed with calling for an insurgency, degrading the morale of the military, committing a denigrating act against the head of state, and attributing illegal matters to a public official.<sup>58</sup>

Social media users have also been targeted by these restrictive laws. On November 12, 2021, the Permanent Military Court of Appeal in Tunisia sentenced Slim Jebali, a blogger and administrator of a well-known Facebook page, to six months of prison based on his Facebook posts. Jebali faced many charges, including committing a despicable act against the head of state based on Article 67 of the penal code, attributing illegal matters to a public official related to his job without providing proof, based on Article 128 of the penal code, and humiliating the army, harming its dignity, reputation, and morale, weakening the spirit of the military regime in the application of Article 91 of the Code of Military Justice.<sup>59</sup>

### TELECOMMUNICATION-RELATED LEGISLATION

Digital technology has enabled pathways for information to be created, disseminated and amplified by various actors at a scale, speed and reach never known before. In consequence, public debates, expression of opinions, exchanges of information and content increasingly take place online. Therefore, most major international institutions and organizations have developed normative instruments regarding freedom of expression on the internet. For instance, in a 2016 resolution, the UN Human Rights Council affirmed that:

*“[T]he same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”<sup>60</sup>*

Similarly, the African Commission on Human and Peoples’ Rights called on states to respect and to take legislative and other measures to guarantee, respect and protect citizens’ rights to freedom of information and expression through access to internet services.<sup>61</sup>

### TELECOMMUNICATION CODE

This section examines legal texts specific to the telecommunication sector and cyberspace.

The Tunisian telecommunication code initially adopted in 2001 has been ratified multiple times in 2002, 2008, and 2013. The Telecommunication code is used to prosecute social media users. Article 86 of the Telecommunications Code of 2001 states that “whoever who intends to offend others or disturb their comfort through public telecommunications networks is punishable with imprisonment for a period ranging from one to two years and a fine from one hundred to one thousand dinars.”

### ENCRYPTION AND THE RIGHT TO ANONYMITY UNDER THE TELECOMMUNICATION CODE:

The Special Rapporteur on Freedom of Expression recognized encryption and anonymity, as “today’s leading vehicles for online security, provide individuals with a means to protect their privacy, empowering them to browse, read, develop and share opinions and information without interference and enabling journalists, civil society organizations, (...) and others to exercise the rights to freedom of opinion and expression.”<sup>62</sup> Therefore, any restrictions must satisfy the three-part test permitting the limitation of the right to freedom of expression under international law.

Articles 9 and 87 of the telecommunications code ban the use of encryption without prior authorization and provide a sanction of six months to five years in prison and a fine of one thousand to five thousand dinars or of either of these two whoever “uses, manufactures, imports, exports, holds for sale or distribution or offers for sale or sells the means or cryptology services without authorization”. The ban imposed by the telecommunication code does not comply with the international standards.

### PROSECUTIONS UNDER THE TELECOMMUNICATION CODE:

Article 86 of the Telecommunication code has been used to prosecute 16 of the 40 cases that Amnesty International reviewed of individuals summoned for investigation or prosecuted between 2017 and 2020 in relation to peaceful online speech.<sup>63</sup> The charges under article 86 of the Code usually are paired with other charges of the Penal Code or other texts. On November 2020, the first instance court of Tunis sentenced blogger Wajdi Mahouechi over a video he shared on Facebook for “accusing public officials of crimes related to their jobs without furnishing proof,” under article 128 of the penal code; “knowingly harming or disturbing others via public telecommunications networks” under article 86 of the telecommunications code, “public calumny” under article 245 of penal code; and “insulting a public officer during the performance of their duties,” under article 125 of the penal code.<sup>64</sup>

### DECREE N° 2022-54 RELATING TO THE FIGHT AGAINST CRIMES RELATED TO INFORMATION AND COMMUNICATION SYSTEMS

On 13 September 2022, presidential decree n° 2022-54 relating to the fight against crimes related to information and communication systems was adopted.<sup>65</sup>

Under article 24 of the decree, the creation, promotion, publication, transmission or preparation of false news, hate speech, data containing personal data, or forged documents using networks and information and communication systems is sanctioned with five years in prison and a fifty-thousand-dinar fine. The sanction doubles to ten years in prison and a one-hundred-thousand-dinar fine if the victim is a public official.

The actions need to be committed with the aim of “infringing the rights of others, defaming them, distorting their reputation, or harming them materially or morally, or inciting attacks against them or harming public security or national defense, or spreading terror among the population”.

The prescribed criminal sanctions are excessively strict, harsh and disproportionate and can have a chilling effect on freedom of expression. Additionally, the decree does not define with sufficient precision what constitutes false information or what harm it seeks to prevent, nor does it require the establishment of concrete and strong nexus between the act committed and the harm caused. The vague and broad nature of the used terminologies could open the possibility for abuse and arbitrary use against journalists, political opponents and human rights defenders including those residing outside of the country. Article 34 of the decree that sanctions also apply to actions committed outside the national territory by Tunisian citizens, or against Tunisian citizens or residents or Tunisian interests or third parties based in Tunisia. Decree 54 also jeopardizes the right of journalists to protect the confidentiality of sources in contradiction to decree 115. Under articles 9 and 10 of the decree, the judge or other authorities can order the journalists to provide their information, access electronic information, track and surveil communications and request internet service providers for stored data.

58 Yosr Jouini, “Tunisia: New prosecutions resurrect shadow of dictatorship”, Global Voices, December 16, 2021 <https://globalvoices.org/2021/12/16/tunisia-new-prosecutions-resurrect-shadow-of-dictatorship/>

59 Yosr Jouini, “Tunisia: New prosecutions resurrect shadow of dictatorship”, Global Voices, December 16, 2021 <https://globalvoices.org/2021/12/16/tunisia-new-prosecutions-resurrect-shadow-of-dictatorship/>

60 UNHRC, ‘Resolution on the promotion, protection and enjoyment of human rights on the internet’, A/HRC/32/L.20 (2016) at para 1

61 ACHPR, ‘Resolution on the right to freedom of information and expression on the internet in Africa’, ACHPR/Res.362, (2016) (accessible at: <https://www.achpr.org/sessions/resolutions?id=374>).

62 OHCHR, A/HRC/29/32: Report on encryption, anonymity, and the human rights framework, can be accessed at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc2932-report-encryption-anonymity-and-human-rights-framework>

63 “Tunisia: Criminal Prosecutions of Online Speech”, Amnesty international, 2020 <https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE3032862020ENGLISH.pdf>

64 “Tunisia: Harsh Sentence Against Blogger”, Human Rights Watch, November 24, 2020 <https://www.hrw.org/news/2020/11/24/tunisia-harsh-sentence-against-blogger>

65 Decree n° 2022-54 relating to the fight against crimes related to information and communication systems [http://www.iort.gov.tn/WD120AWP/WD120Awp.exe/CTX\\_4796-78-XXhckAKDSH/PageDernierParu/SYNC\\_1934787844](http://www.iort.gov.tn/WD120AWP/WD120Awp.exe/CTX_4796-78-XXhckAKDSH/PageDernierParu/SYNC_1934787844)



Other provisions of the decree including those related to copyright material, and internet service providers' data retention obligations may jeopardize the enjoyment of other human rights, contribute to amplifying misperceptions and foster fear.

### DECREE NO. 2013-4506 OF 6 NOVEMBER 2013, RELATING TO THE CREATION OF THE TECHNICAL TELECOMMUNICATIONS AGENCY AND FIXING ITS ADMINISTRATIVE AND FINANCIAL ORGANIZATION AND THE MODALITIES OF ITS OPERATION

Decree No 4506 of 2013 was adopted to create the technical telecommunication agency, ATT. The ATT's mandate is to provide technical support to judicial investigations and coordinate with telecommunications network operators and internet service providers in relation to its work. The decree noted that the agency should conduct its duties while respecting international human rights conventions and Legal frameworks related to the protection of personal data. However, concerns were raised over the vagueness of the used terms, the transparency and accountability of the agency, and its independence from the executive branch.

### VAGUE LANGUAGE AND LACK OF PRECISION:

Under Article 2 of the decree, the agency is tasked with "providing technical support to judicial investigations into information and communication crimes," but fails to define these crimes nor refers to those mentioned in the penal code. Additionally, Article 4 requires the ATT to undertake "any other mission linked to its activity that is assigned by the ministry of information and communications technology" which is broad and raises concerns. The decree does not make any reference to the principles of necessity, and proportionality on communications surveillance.

### LACK OF TRANSPARENCY:

The decree does not put in place transparency mechanisms over the agency's activities. While Article 24 of the decree requires the submission of annual reports by the agency's general director to the ICT ministry, there are no requirements for it being published to the public. Lack of mechanisms to guarantee user rights: The decree does not provide for the user subject to surveillance notification prior, during or after surveillance which undermines an individual's ability to oppose or challenge the ATT actions.

### THE LACK OF INDEPENDENT OVERSIGHT MECHANISMS:

As provided for by Article 1 the ATT is under the control of the Ministry of Information and Communications Technology and Article 4 provides for its Director to be appointed by governmental decree based on a recommendation by the same Ministry. While the ATT was set up to provide technical support to judicial investigations the agency itself is not subject to judicial control. Section 2 of the decree established the creation of a committee to follow up on the work of implementation of the ATT. With the exception of one judge, the Committee is composed of representatives from various ministries and government agencies including the data protection authority.

### DECREE NO. 4773 OF 2014 FIXING THE CONDITIONS AND PROCEDURES TO GRANT THE AUTHORIZATION FOR THE ACTIVITY OF SUPPLYING INTERNET SERVICES

The internet service providers, ISPs, have the duty, according to Article 11(3-4) of the Decree<sup>66</sup>, "to meet the requirements of the national defense, security and public safety in accordance with the legislation and regulation in force" and to "provide to the relevant authorities all the means necessary for the performance of his duties, in that context, the provider of Internet services shall respect the instructions of the legal, military and national security authorities". The ISPs may be required, therefore, to cooperate with the public authorities as needed and this may imply divulgence of customers' information or imposing some restriction on Internet navigation. The Decree imposes on the ISPs the obligation to "respect the international convention and treaties ratified by Tunisia".

### EXCEPTIONAL MEASURES LEGISLATION

While according to international standards derogations of certain rights - including the right to freedom of expression - are permitted in the event of a "public emergency" that "threatens the life of the nation"<sup>67</sup>, emergency powers measures should only be applied in conformity with the provisions of article 4 of the ICCPR and the Committee's general comment No. 29. First, '[t]he State party must have officially proclaimed a state of emergency' and formally notified the UN Secretary General of their intent to derogate. Second, the measures derogating certain rights must meet strict tests of necessity and proportionality. The OHCHR and the Human Rights Committee emphasize that measures "suspending rights should be avoided when

<sup>66</sup> Decree No. 4773 of 2014 Fixing the Conditions and Procedures to Grant the Authorization for the Activity of Supplying Internet Services, [http://www.intt.tn/upload/txts/fr/d%C3%A9cret2014\\_4773.pdf](http://www.intt.tn/upload/txts/fr/d%C3%A9cret2014_4773.pdf)

<sup>67</sup> ICCPR, art 4

the situation can be adequately dealt with by establishing proportionate restrictions or limitations on certain rights."<sup>68</sup> Additionally, the state is required to ensure that derogation measures don't interfere with other international human rights obligations and are applied in a manner that is not discriminatory.<sup>69</sup> Finally, the state's predominant objective must be the restoration of the state of normalcy.<sup>70</sup>

### STATE OF EXCEPTION UNDER THE 2022 CONSTITUTION

Article 96 of the Constitution permits the President to establish exceptional measures in the event of "an imminent danger threatening the republic, the security of the country and its independence". The article does not stipulate any possibilities for remedy or any time limit to return to the normal functioning of state institutions and services

### DECREE NO. 78-50 OF 26 JANUARY 1978 REGULATING THE STATE OF EMERGENCY

Under this decree, the President of the Republic may declare a state of emergency of up to 30 days, renewable, in response to serious disturbances to the public order. The decree also gives the Interior Ministry and regional governors the authority to restrict fundamental rights and freedoms such as the freedom of assembly, assembly and the right to protest. Since 2015, Tunisia has been in a permanent state of emergency. Violations of the provisions of this decree are punishable by imprisonment of six months to two years and a fine of 60 to 2,500 dinars or only one of these penalties.<sup>71</sup>

The Human Rights Committee expressed concerns over the regular extension of the state of emergency since 2015, without a notification specifying the provisions from which the State party has derogated and the reasons for doing so.<sup>72</sup> The committee also criticized the lack of

adequate judicial review of these executive orders, thus depriving the persons subject to them of their right to challenge the legality, necessity and proportionality of such measures.<sup>73</sup>

### PRESIDENTIAL DECREE NO. 2021-117 OF SEPTEMBER 22, 2021, RELATING TO EXCEPTIONAL MEASURES

Decree 117 of September 22, 2021<sup>74</sup>, includes several major measures: It suspended the 2014 Constitution with the exception of its preamble and the first two chapters, relating to general provisions and to rights and freedoms; It gave the possibility for the President of the Republic to legislate in all areas with the impossibility of appeal for the unconstitutionality of decree-laws.

Article 5 of the decree states that the president assumes the prerogative to enact the laws governing information, the press and publishing. The measures enshrined in this decree grant the President of the Republic unprecedented confiscation of power, in the absence of institutional checks and balances.

### ELECTORAL LAWS

During the electoral process, a vibrant open media landscape, in both the traditional and digital media sectors, is crucial to allow for open questioning and debate between political leaders, candidates and the public. While states are required by international laws to provide voters with access to comprehensive, accurate and reliable information about parties, candidates and the wider electoral process, restrictions on freedom of expression in certain specific areas such as political polling immediately preceding an election are legitimate to maintain the integrity of the electoral process.<sup>75</sup> However, any restrictions on freedom of expression that apply during election periods

<sup>68</sup> OHCHR, Emergency Measures and COVID-19: Guidance (2020). [https://www.ohchr.org/sites/default/files/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/sites/default/files/Documents/Events/EmergencyMeasures_COVID19.pdf)

<sup>69</sup> UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 April 2020, para. 2.

<sup>70</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6Qk-G1d%2FPPrICaQhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPvrcM9YR0iix49nlFOsJPO4oTG7R%2Fo7TSsorth-wUUG%2By2PstlYr5BldM8DN9shT8B8NpbsC%2B7bODxKR6zdeSeXkjlLnNU%2BgQ%3D%3D>

<sup>71</sup> Article 9 of the Decree No. 78-50 of 26 January 1978 regulating the state of emergency <https://legislation-securite.tn/fr/law/41237>

<sup>72</sup> Concluding observations on the sixth periodic report of Tunisia, Human Rights Committee, March 27, 2020 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICaQhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPvrcM9YR0iix49nlFOsJPO4oTG7R%2Fo7TSsorth-wUUG%2By2PstlYr5BldM8DN9shT8B8NpbsC%2B7bODxKR6zdeSeXkjlLnNU%2BgQ%3D%3D>

<sup>73</sup> Same previous source

<sup>74</sup> Décret Présidentiel n° 2021-117 du 22 septembre 2021, relatif aux mesures exceptionnelles, <https://legislation-securite.tn/law/105067>

<sup>75</sup> General Comment No 34, CCPR/C/GC/3, para. 37. <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

must comply with the international law three-part test requirements of legality, legitimacy of aim and necessity.<sup>76</sup> The United Nations Human Rights Committee's General Comment No. 34 further explains that such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote.<sup>77</sup>

### ORGANIC LAW NO. 16-2014 OF MAY 26, 2014, RELATING TO ELECTIONS AND REFERENDUMS

and amending decrees:

- Decree No. 2022-34 of June 1, 2022 amending and completing the Basic Law No. 2014-16 related to elections and referendum
- Decree No. 52022-55 of September 15, 2022 amending and completing Basic Law No. 2014-16 related to elections and referendum

The organic law No 16-2014<sup>78</sup> states principles for electoral campaigns including the impartiality of the national media, fairness and equal opportunity between all candidates.<sup>79</sup> These principles apply to audiovisual media, their websites, electronic media and to any message addressed to the general public by electronic means.<sup>80</sup>

The elections instance, as well as the Independent High Authority for Audiovisual Communication, determine, by joint decision, the campaign rules specific to the audiovisual media as well as its procedures and the conditions relating to the production of programs, reports and sections relating to election campaigns. The two authorities determine the duration of the broadcasts and programs dedicated to the various candidates or lists of candidates and parties, as well as their distribution, their schedules of passage in the various audiovisual media on the basis of respect for plurality, equity and transparency. The election instance

<sup>76</sup> OHCHR, Joint Declaration on Freedom of Expression and Elections in the Digital Age. [https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/JointDeclarationDigitalAge\\_30April2020\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf)

<sup>77</sup> General Comment No 34, CCPR/C/GC/3, para. 28. <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

<sup>78</sup> Loi organique n° 2014-16 du 26 mai 2014, relative aux élections et aux référendums <https://legislation-securite.tn/fr/law/44286>

<sup>79</sup> Article 52 organic law No 16-2014

<sup>80</sup> Article 68 organic law No 16-2014

<sup>81</sup> Article 67 organic law No 16-2014

<sup>82</sup> "Le pluralisme dans les médias audiovisuels pendant les élections législatives et présidentielles", HAICA. January 21, 2015. <https://haica.tn/fr/le-pluralisme-dans-les-medias-audiovisuels-pendant-les-elections-legislatives-et-presidentielles/>

<sup>83</sup> Article 70 organic law No 16-2014

<sup>84</sup> Article 57 and 58 organic law No 16-2014

<sup>85</sup> Decree No. 55 of 2022 dated September 15, 2022 amending and completing Basic Law No. 16 of 2014 dated May 26, 2014 related to elections and referendum. [http://www.iort.gov.tn/WD120AWP/WD120Awp.exe/CTX\\_4492-24-OkbbnHGpOW/AfficheJORT/SYNC\\_1950576172](http://www.iort.gov.tn/WD120AWP/WD120Awp.exe/CTX_4492-24-OkbbnHGpOW/AfficheJORT/SYNC_1950576172)

<sup>86</sup> "Freedom of expression: A fundamental human right underpinning all civil liberties", UNESCO. [https://en.unesco.org/70years/freedom\\_of\\_expression](https://en.unesco.org/70years/freedom_of_expression)

is responsible to set the campaign rules specific to print and electronic media.<sup>81</sup>

As far as electoral offenses, the law distinguishes<sup>82</sup>: Offenses relating to the dissemination of the results of polls during the electoral campaign or during the period of electoral silence<sup>83</sup>, offenses relating to the dissemination of political advertising<sup>84</sup>, offenses relating to the violation of electoral silence by the use of propaganda for the benefit of candidates or the attempt to influence voters. offenses relating to the violation of the principles of neutrality and respect for the physical integrity of candidates and their dignity, offenses relating to the violation by the candidates of the ban on the use of foreign media which broadcast to the Tunisian public. In this regard, the HAICA, has to inform the ISIE about the use of foreign audiovisual media by candidates, in accordance with article 73 of the electoral law. Decree 55 -2022 added in its 161bis article a two to five years of imprisonment sentence against any candidate who deliberately undermines the "honour, dignity, or regional, local or family affiliation" of another candidate. The elections authority may also cancel the votes obtained by the candidate committing the violations.<sup>85</sup>

### FREEDOM OF EXPRESSION AS A PRECONDITION FOR OTHER HUMAN RIGHTS

The right to freedom of expression is closely linked to other human rights, such as the rights to access to information, privacy, freedom of association and assembly, and freedom of religion, among others.<sup>86</sup> This section focuses on the intersection of the right to freedom of expression and other human rights and analyses relevant legislations.

### FREEDOM OF EXPRESSION AND THE RIGHT TO ACCESS TO INFORMATION

The right to access information is inherently related to the right to freedom of expression as it encompasses the right of every individual to seek and obtain information. In its 27th principle, the ACHPR Declaration on Freedom of Expression and Access to Information in Africa affirms that access to information laws shall take precedence over any other laws that prohibit or restrict the disclosure of information.<sup>87</sup>

#### 1. LAW NO. 2016-22 ON THE RIGHT OF ACCESS TO INFORMATION:

Organic law no 2016-22 on Access to Information was passed and promulgated on March 24, 2016. This law is composed of 61 articles. 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. Articles 57 and 58 of the law sanction with a fine ranging from 500 to 5000 TND, and disciplinary proceedings if the offender is a public official, anyone who intentionally blocks access to the information within the bodies subject to the provisions of the law.

The law presents a number of exemptions for which public agencies could refuse to release administrative documents in response to a request, including in matters related to national security, international relations, or the protection of private life, personal data, and intellectual property.<sup>88</sup> The law also provided the creation of a financially independent public authority composed of nine members, including a journalist, to decide on appeals related to access to information Investigate and audition public institutions, enforce penalties and sanctions and ensure follow-up of publications released by organizations falling under this law.

#### 2. CIRCULAR NO. 19 REGARDING THE GOVERNMENT'S COMMUNICATION WORK RULES:

The circular calls on ministers to coordinate with the Presidency of the Government regarding the content and form of each media appearance. It increased the reluctance of officials to make statements or declarations for the benefit of the media.

Similarly, In April 2021, Tunisian Ministry of Health issued a ministerial order threatening sanctions against doctors

<sup>87</sup> Declaration on Freedom of Expression and Access to Information in Africa, para 27, ACHPR, 2019. <https://www.achpr.org/legalinstruments/detail?id=69>

<sup>88</sup> Article 24 of Organic Act No. 22 of 24 March 2016 on the right of access to information [https://www.bct.gov.tn/bct/siteprod/documents/Loi\\_2016\\_22\\_en.pdf](https://www.bct.gov.tn/bct/siteprod/documents/Loi_2016_22_en.pdf)

<sup>89</sup> Amnesty International Tunisia: Rescind ministerial order censoring health workers over Covid-19 (2021) <https://www.amnesty.org/en/latest/news/2021/04/tunisia-rescind-ministerial-order-censoring-health-workers-over-covid-19/> (Accessed on 15 January 2022)

and health workers issuing unauthorized statements about the COVID-19 pandemic in the media or online. The order faced backlash from Civil Society actors, who accused the government of censorship and of attempting to falsely portray the country's public health situation.<sup>89</sup>

### FREEDOM OF EXPRESSION AND THE RIGHT OF ASSOCIATION, ASSEMBLY

Freedom of expression is an enabler and a necessary component of the rights to freedom of assembly and association when people join together for an expressive purpose.

#### 1. DECREE NO. 88 OF 2011, DATED SEPTEMBER 24, 2011 CONCERNING THE ORGANIZATION OF ASSOCIATIONS:

Decree No. 88 aims at ensuring the freedom of establishment of associations, the freedom to join associations, and the freedom to carry out activities within its framework, strengthening the role of the civil society organizations and maintaining their independence. Associations are required to respect, in their statutes, activities and financing methods, the principles of the rule of law, democracy, pluralism, transparency, equality, and human rights. They are prohibited from calling for violence, hatred, intolerance, or discrimination in all forms.

#### 2. DECREE NO. 87 OF 2011 CONCERNING THE ORGANIZATION OF POLITICAL PARTIES:

Decree No. 87 lays the foundation for the freedom of political association, supporting the development of political pluralism, and establishing transparency in the financing of political parties. The political parties are required, under articles 3 and 4 of the decree, to respect, in their statutes and financing rules, the principles of the Republic, the rule of law, democracy, pluralism, peaceful transfer of power, equality, the impartiality of the administration, the worship places, public facilities, independence of the judiciary, human rights, and the international conventions ratified by Tunisia. Decree No. 87 prevents political parties from adopting, in their activities, calls to violence, intolerance, or discrimination on a religious, sectarian, sexual, or regional basis.

### FREEDOM OF EXPRESSION AND "OTHERS RIGHTS"

Article 19 of the ICCPR in its third paragraph provides that freedom of expression may be limited where those

limitations can be demonstrated to be necessary for ensuring 'respect for the rights and reputations of others'. The range of rights that may present possible justifications for limitations on freedom of expression includes freedom from discrimination (article 2 of the ICCPR), freedom from arbitrary interference with home, family, correspondence or reputation privacy (article 17 of the ICCPR). Whether particular restrictions on freedom of expression which are designed to protect these rights are justifiable will depend on more specific consideration of the restrictions concerned. In this section, we will examine relevant legislations protecting these rights and focus on provisions that may present legal grounds to such restrictions.

### 1. ORGANIC ACT N° 2004-63 OF 27 JULY 2004 ON THE PROTECTION OF PERSONAL DATA:

Provisions of article 27 of the organic Act n° 2004-63 of 27 July 2004 on the protection of personal data (the data protection law) requires a written consent from the concerned person for the processing of their personal data. A penalty of two years imprisonment and a fine of ten thousand Dinars are applicable to violation of the provisions of article 27.<sup>90</sup> The intentional spread of personal data<sup>91</sup> can be sanctioned with three months of imprisonment and a fine of three thousand Dinars.<sup>92</sup>

Distinction between protected personal data and information related to public life:

Ruling No. 68182 of the Cour de cassation (Court of cassation) on 13 October 2020 reaffirmed the distinction between protected personal data and information related to public life in favor of a social media user who denounced in a Facebook post the service of a seller and the hygiene of his store.<sup>93</sup> The court justified its ruling by considering the information shared in the Facebook post to fall under the right to freedom of expression and not as personal data protected under the data protection law.

90 Organic Act n° 2004-63 of 27 July 2004 on the protection of personal data, art 87.

91 Under article 4 of the data protection law, personal data is defined as "any information whatever its origin or its means relating to an individual who can be identified, directly or indirectly, with the exception of any information related to public life or considered public life by law".

92 Organic Act n° 2004-63 of 27 July 2004 on the protection of personal data, art 93.

### 2. LAW NO. 58 OF 2017 ON COUNTERING VIOLENCE AGAINST WOMEN:

In 2017, Tunisian legislators adopted law No. 58 of 2017 on countering violence against women which mandates the state's engagement in prevention, prosecution of perpetrators and providing support for victims.

Article 11 of the Law prohibits the advertising and dissemination, by all means and media, of materials containing stereotyped images, scenes, words, or acts prejudicial to the "image of women", or materializing the violence against them. The High Independent Authority for Audiovisual Communication is required by the same article to take the measures and sanctions provided for by law to combat these violations.

Article 17 of this law sanctions with a 500 to 1000 TND fine anyone who voluntarily "interferes with a woman in a public place, by any act, word or gesture likely to undermine her dignity, her consideration or affect her prudence".<sup>94</sup>

### 3. LAW NO. 2018-50 CONCERNING THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION:

In October 2018, the Tunisian parliament passed the Elimination of All Forms of Racial Discrimination Act — a law that defines and criminalizes racial discrimination. The penalties for acts of racial discrimination, including use of racist language, are imprisonment of one month to one year and a fine, which are doubled in cases where the victim is considered more vulnerable due to being a minor, disability or migration status. Penalties increase if the acts are proven to incite hatred or if one is found to praise, form groups or support activities that promote racial discrimination. Article 5 of Law 50 explains that victims have the right to medical, psychological, and social assistance, legal protection and "fair and proportionate judicial compensation for physical and moral damage caused by racial discrimination."

93 "قرار تعقيبي عدد 68182 بتاريخ 13 أكتوبر 2020 التمييز بين المعطيات الشخصية المحمية والمعلومات المتصلة بالحياة العامة" [http://www.cassation.tn/fileadmin/user\\_upload/68182.pdf](http://www.cassation.tn/fileadmin/user_upload/68182.pdf)

94 Law No. 58 of 2017 on countering violence against women. <https://legislation-securite.tn/fr/law/56326>

# 05 KEY FINDINGS AND RECOMMENDATIONS

## REPRESSIVE, VAGUELY-WORDED LEGISLATION

Many Tunisian legal texts resort to vague terms, such as dignity or reputation opening the door to arbitrary interpretation that often risks curbing freedom of expression and limiting citizens' rights to express themselves freely. Additionally, loopholes in the existing legal texts have led to contradictory and incoherent legal interpretations and applications of the law. These provisions are present across many texts namely decree-laws no 115 and 116, the military justice law, the penal code, the telecommunications law, and the anti-terrorism law. These legal flaws gave the veneer of legality to authorities to restrict freedoms, interfere in the judicial process, and repress any political opposition.

## RECOMMENDATIONS

The Tunisian authorities are called to:

- Undertake a participatory and inclusive process of repeal or amendment of legislation and decrees that unwarrantedly restrict the right to freedom of expression, in line with international human rights standards and Article 19 of the International Covenant on Civil and Political Rights.
- Provide all guarantees of editorial independence for media outlets by revising public advertising regulations, professional memberships requirements among others.
- Protect the independence of the media regulatory bodies on financial, operational and structural levels.
- Revoke administrative obstacles and internal circulars impeding the right to access to information and media plurality principle.

The civil society organizations and media professionals are called to:

- Raise awareness among all citizens and particularly media professionals of the right to freedom of expression and the protection provided by law.
- Consolidate the proactive and inclusive efforts to oppose the adoption of laws and decrees hindering the right to freedom of expression.

## GROWING RATE OF INTIMIDATIONS AND PROSECUTIONS

Over the last decade, intimidation, harassment, and arbitrary detention of human rights defenders, journalists, and activists have been continuously reported. Such practices prompt more citizens to practice self-censorship. Moreover, the intimidations are not necessarily restricted to legal prosecutions. Gender-based violence and hate speech continue to target minorities, women activists, and politicians, in the absence of accountability, and appropriate referrals for victims.

## RECOMMENDATIONS

The Tunisian authorities are called to:

- Develop and implement an effective strategy to combat impunity for attacks and violence and build an enabling environment for journalists and media workers to practice their profession freely and safely.

## THE ESTABLISHMENT OF AN INDEPENDENT JUDICIARY

The independence of the judiciary system and the safeguards to free trial are two key guarantees for protecting freedom of expression. Both civilian and military courts underwent partial reforms in the last ten years. However, the national laws such as decree 11-2022 grant the executive branch broad control over the composition of the High Judicial Council and the management of the career of judges including their appointment, promotion, transfer, suspension and removal.<sup>95</sup>

## RECOMMENDATIONS

The Tunisian authorities are called to:

- End any executive interference in, or control over all aspects related to the judiciary independence.
- End the use of military courts to try civilians, and guarantee the full and unhindered exercise of the right to freedom of expression in accordance with international law and standards.

95 Décret-loi n° 2022-11 du 12 février 2022, relatif à la création du Conseil supérieur provisoire de la magistrature

