

Spring into Winter? Fragile achievements and exceptional challenges for Tunisian free expression defenders



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About IFEX-TMG: Since preparations began for the World Summit on the Information Society (WSIS), held in Tunis in 2005, the IFEX-TMG has been leading a campaign to monitor and document Tunisia's standards of human rights – in particular freedom of expression and related rights. The IFEX-TMG is composed of 21 IFEX members and coordinates activities with local partners. For more on IFEX-TMG, visit <http://ifex.org/tunisia/tmg/> or find IFEX-TMG at <http://www.facebook.com/IFEXTMG> and on Twitter @IFEXTMG

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Introduction

Spring into Winter? Fragile achievements and exceptional challenges for Tunisian free expression defenders is the final report published by the International Freedom of Expression Exchange Tunisia Monitoring Group (IFEX-TMG) as part of a three-year project launched in January 2010, *Monitoring & Advocacy in Support of Independent Human Rights Defenders in Tunisia*, funded by the European Union and Oxfam Novib, and managed by Index on Censorship with the IFEX Clearing House. The project addresses three pivotal issues including the detention of Tunisian prisoners of opinion, the use of administrative sanctions to punish dissident views and the obstruction of the emergence of an independent judiciary; restrictions on freedom of association for peaceful purposes and the right of all civil society groups to be legally established and hold meetings in Tunisia; and censorship of the Internet, the arts, books and periodicals by legal, administrative and extrajudicial means in Tunisia.

The project has monitored, reported and launched a series of campaigning activities on these three themes. Mission reports were published prior the revolution¹, including a report under this project which mainly focused on the need for an independent judiciary to reverse its worsening record on human rights, as well as shortly after the revolution, which argued for the necessity of a free and independent media and a strong and democratic civil society for the success of the revolution².

This final report serves to briefly outline the status of each of the three themes covered in the project as well as put forth recommendations that can help propel the transformation process towards consolidation. It is hoped that these recommendations will benefit policy-makers as well as international organisations seeking to partner and support local groups, as it is based on a series of consultations with Tunisian stakeholders throughout the project.

The first chapter outlines the status of free expression in the country, delineates the legal and structural reforms to the media sector, which have taken shape after the revolution and suggests further steps needed to empower the media to play a role in consolidating democracy. The legal and constitutional guarantees required to safeguard free expression as well as pave the way for the right to access information is then discussed in chapter two. The third chapter describes the status of freedom of association in Tunisia as well as the de-facto obstacles newly-founded NGOs and associations are facing. Finally, the fourth chapter reviews the critical issue of judicial reform in

¹ *Behind the Facade: How a Politicised Judiciary & Administrative Sanctions Undermine Tunisian Human Rights*, Report from the seventh IFEX-TMG mission to Tunisia (6 June 2010) http://ifex.org/tunisia/2010/06/07/tmg_report/

² *Scars of oppression run deep in the country's media: Assessing the critical requirements for freedom of Expression in Tunisia's democratic Transition* (16 June 2011)

http://ifex.org/tunisia/2011/06/21/scarsofoppressionrundeepifextmg_eng.pdf

Tunisia after decades of politicisation of the judiciary, and subjecting it to the executive branch of government. This section briefly describes the reforms that have already been enacted as well as the campaigns and demands for the rule of law by the judges and associations that were long sidelined during the Ben Ali era.

The report concludes with a series of concise recommendations that will be shared with the Tunisian government as well as Constitutional Assembly members in the hope that the aspirations of Tunisia's civil society will be met both in theory and in practice.

I. Freedom of Expression

The 14 January 2011 revolution took leaders and citizens around the world by surprise. Tunisians fought their way out of dictatorship in the name of dignity and fundamental freedoms, including freedom of expression. What was inconceivable until 14 January became possible leaving people with high expectations: the whole region and the world were watching.

Ben Ali was ousted, but the regime of oppression he had installed over decades would neither vanish nor be dismantled overnight. Severe violations of the right to freedom of expression - including censorship applied to the arts, books and news media; harassment and jailing of journalists, freedom of expression advocates and opponents of the regime; surveillance of the Internet, social media and communications; State media acting as tools of propaganda and attacks - this was a reality that would take a long time to mend.

Despite the determination of Tunisians to achieve their right to freedom of expression, scars left by the former regime proved deep. Concerns rapidly surrounded the capacity of the Tunisian media to safeguard the gains of the revolution and to be able to play the vital watchdog role required in this period of transition.

“In Algeria, they killed journalists. In Tunisia, they went further: they killed the profession of journalism. The press remains in the hands of those who have never written a real article. This horde claim to be revolutionaries, but are instead contributing to the whitewashing of the present system,” asserted Taoufik Ben Brik, journalist and author, to an IFEX-TMG mission in April 2011³.

With the revolution, came the need to fundamentally reform the media sector in Tunisia. In the course of 2011, the Interim government prepared new, progressive, albeit imperfect, media legislation, which would replace restrictive laws inherited from the Ben Ali regime and facilitate the country's democratic transition. (These decrees are discussed in detail in section two of the report.)

By providing legal guarantees for free broadcasting during the post-revolutionary period, the Higher Independent Authority for Audiovisual Communication (HAICA) promised to strengthen the foundations of Tunisia's emerging democracy. However, the government led by Prime Minister Hamadi Jebali, Ennahda's Secretary General who was appointed in December 2011, has failed to pass the application decrees. Eighteen months after the ousting of Ben Ali, distrust remains deep in the media sector, while resistance to most needed reforms seems to prevail.

³ The Scars of Oppression Run Deep: Assessing the Critical Requirements for Freedom of Expression in Tunisia's Democratic Transition, *IFEX-TMG Mission Report*, 9 – 16 April 2011



“Despite public promises made by Prime Minister Hamadi Jebali in January 2012 to implement these decrees... the failure to abide by decrees passed under the former transitional government and run by the official gazette thus far is alarming,” Kamel Labidi, President of the National Authority to Reform Information and Communication (INRIC), told the IFEX-TMG in February 2012. “It is shocking to see the government inclined to yield to pressure groups which were close to the country's fugitive dictator and unwilling to conform to international standards for media broadcasting regulation,” he added.

Furthermore, in January, the government made controversial appointments giving media personnel close to the deposed President key positions in the public service media, in what seemed like a revival of old corrupt practices and patronage appointments of cronies of the former regime. Most of these appointments, were later revoked after protests organised by the National Union for Tunisian Journalists (SNJT)⁴. One of them, Watanya 1 TV director-general Sadok Bouabène, was not dismissed until recently when the new heads of nine state radios were announced, prompting accusations of a lack of transparency in the appointment process, reported Reporters Without Borders⁵.

"Rather than transform the public media into free, independent and professional institutions after it had served for years as merely a tool in the hands of the Ben Ali regime, the government's appointments have honoured Ben Ali's men in the media sector by awarding them key posts in the public service media. Many have perceived these appointments as the authority's attempt to instate individuals it can control in its effort to domesticate the media," journalist Fahem Boukadous of the Tunisian Centre for Freedom of the Press (CTPJ) told the IFEX-TMG.

The government's decision was indeed flawed and disturbing, as public service media exist to serve the public rather than political agendas, and those who lead public media must be nominated for their very ability to develop and defend independent information and programming.

Further confusion and acts of violence followed the statement by Ennahda leader Rached Ghannouchi in April 2012 about the possibility of “taking radical measures in the news media domain including, possibly, privatising the public media.”

Newspapers also have been facing turmoil and hardships, with individuals close to the old regime still active in the industry. The manner in which institutional and public advertising is distributed has remained opaque and arbitrary despite the near-dissolution of the Tunisian External

⁴ Interim government revokes some recent appointments in the media sector, 9 January 2012 <http://www.tap.info.tn/en/en/media/9074-interim-government-revokes-some-recent-appointments-in-media-sector-snjt.html>

⁵ State media independence threatened by non-transparent radio appointments, 3 July 2012 <http://en.rsf.org/tunisia-state-media-independence-03-07-2012,42937.html>



Communication Agency (ATCE). Furthermore, both printing and distribution of newspapers are still highly problematic.

While many new titles emerged when restrictions were lifted in 2011, few were sustainable, as no proactive policy promoting the emergence of a professional, free, independent and pluralistic press was put in place.

Overall, the renewal of the media landscape in Tunisia is yet to come. New voices have been struggling to be heard, as the sector remains characterised by a legal vacuum, the dominance of media established by the Ben Ali regime and serious violations and breaches of journalistic ethics and media independence.

The status of journalists is still precarious, both editorially and economically. Moreover, police brutality against journalists did not take long to resume. As early as May 2011, journalists, bloggers and photographers were targeted while covering demonstrations, and this pattern of abuse by law enforcement has continued to this date.

At the same time, police seemed to regularly fail to protect the right to freedom of expression, like when violent protesters broke into a Tunis cinema in June 2011 which was showing a controversial documentary, *Secularism, If God Wills*, or when university professors were assaulted by Salafists in January 2012 for teaching a subject the Salafists deemed “offensive to God.”

Attacks carried out by Salafists have targeted artists, including a theatre group performing on Habib Bourguiba Avenue in Tunis in March and an arts exhibition at the Abdellia Palace in La Marsa in June. In addition, Salafists have targeted academics, notably from the Manouba University, and journalists as well as media personnel and institutions, including Nessma TV.

Instead of protecting the artists or the gallery, the Tunisian Minister of Culture, Mehdi Mabrouk, declared that some of the artworks exhibited in La Marsa do in fact violate Islamic holy symbols, which the artists deny. He has also said that some of these artworks are now under investigation. At a press conference held on 12 June, the Minister announced that the government would likely present a bill to the National Constituent Assembly which would allow criminal charges to be brought against anyone who offends “the sacred.” Blasphemy laws are a clear violation of freedom of expression and would present a serious setback to human rights in Tunisia.

Not all violations of the right to free expression have been motivated by religious doctrine. On 24 March, Al-Jazeera journalist Lotfi Hajji was attacked while reporting from a meeting organised by supporters of the former Interim Prime Minister Béji Caid Essebsi.

In this context of legal uncertainty, contradictory signals from those in power, and a resurgence of moralising censorship and acts of violence, the courts have continued prosecuting journalists using the 1975 press code and the criminal code.

Director of the privately-owned Nessma TV, Nabil Karoui, was prosecuted on charges of "violating sacred values, good morals and disturbing public order" for the screening of the animated film *Persepolis*, which contains a scene depicting God, in October 2011. The trial was postponed several times and on 3 May 2012, World Press Freedom Day, Karoui was fined 2400 Tunisian dinars (1184 Euros).

In February 2012, Nasreddine Ben Saida, general director of the daily newspaper *Attounissia*, became the first media executive to be jailed in the post-Ben Ali era. He was held in pre-trial detention under the old criminal code, following the publication of a front-page photo of Real Madrid football player Sami Khedira covering the breasts of his naked girlfriend. On 8 March, he was fined 1000 Tunisian dinars (500 Euros).

In another disturbing development, Ghazi Ben Mohamed Beji and Jaber Ben Abdallah Majri were both sentenced on 28 March 2012 to over seven years in prison for publishing online satirical writings about Islam and the Prophet, materials deemed "liable to cause harm to public order or public morals." Majri has been in prison since 5 March, while Beji, who fled to Europe where he is seeking political asylum, was convicted in absentia. During an appeals hearing on 25 June 2012, the court upheld Majri's prison sentence, while Beji's case was not heard on appeal.

The sentences against Beji and Majri also contradicted the statement by Minister for Human Rights and Transitional Justice Samir Dilou that "the Internet was a partner in the revolution so the government would not punish this partner." The Minister made this comment before the UN Human Rights Council on 22 May in Geneva, where he led the Tunisian delegation at the Universal Periodic Review of Tunisia.

The cases of Nessma TV, *Attounissia* daily and the social media users have demonstrated the readiness of the Tunisian authorities to bring charges for speech deemed offensive to Islam or morality, using Ben Ali-era laws.

While all citizens reserve the right to protest against speech or an act they deem offensive, obstructing or interfering with fellow-citizens' rights to express their views is a violation of free expression, an intrinsic right and a basic building stone for any democracy.

"Beyond formal guarantees of the right to freedom of expression and information in the Constitution and international instruments, what is key in today's democracies is the case law. Indeed, in front of notions as vague as public morals, national security and public order, precedents established over decades have enabled the protection of fundamental rights. Yet, in Tunisia, such



positive case law is lacking. There is no doubt that legal instruments should be set to prevent vague notions to undermine otherwise protected fundamental rights, including that to freedom of expression,” Riadh Guerfali, a lawyer and co-founder of the participatory website Nawaat, told IFEX-TMG in June 2012.

“With regard to the Internet, there is no doubt either that the right to access information online will soon be recognised as a fundamental right. Tunisia could be in the vanguard by enshrining this right in the new Constitution,” he added.

Today, while the Internet may be partly free in practice, the repressive legal framework governing the Internet set up under Ben Ali remains. The Tunisian Internet Agency (ATI), the web censor under Ben Ali, was ordered by a military tribunal in May 2011 to filter five Facebook pages criticising the army. In early 2012, there were demands to enforce a blanket ban on access to pornographic websites, which eventually was overruled by Tunisia’s highest court. The new ATI leadership itself had spoken out against such censorship.

“It is about whether we want to delegate the power to the state to decide, rather than to citizens,” media sociologist Riadh Ferjani stated in this context. “The debate is being conducted in an erroneous fashion. We are talking about ideology, driven by passion, and not facts. We put morals everywhere,” he added.

An independent judiciary is key to institutionalising free expression in Tunisia and preventing people from being harassed or jailed for exercising their right to free expression. Ending impunity for those who attack free expression is critical as well.

“Tunisians are clearly aware of the heavy responsibility they hold with regard to the future of democracy in the region. They do know that the entire world is watching carefully, that their success, or failure, will have a significant impact in the Arab world. It is here, indeed, that the democratic renewal of the Arab world is unfolding,” journalist and human rights activist Sihem Bensedrine wrote in *Fleeting Words: An Anthology of Revolution*.⁶

Tunisians have paid a high price to enjoy and exercise their full right to free expression. Neither the increasing adversity or the complexity and length of the transition process should lead them to accept a downgraded version of this right.

The following section further delineates the constitutional reforms required to safeguard free expression in Tunisia, and discusses the legal reforms already introduced, as well as the challenges hindering the reform process.

⁶ Launched on 3 May 2012, *Fleeting Words* was edited by Naziha Rjiba (Om Ziad), President of PEN Tunisia. It is published in cooperation with PEN Tunisia and Atlas Publications, with the support of the IFEX-TMG.

II. Constitutional and Legal Reforms

The Tunisian so-called “Jasmine revolution” of January 2011 has crystallised hopes in the Arab world and beyond; democratic aspirations of millions, suppressed for years, regained weight and legitimacy in the face of unpopular regimes who ruled their countries with an iron fist.

The demise of the autocratic regime of Zine El Abidine Ben Ali has ushered in a new area in the lives of Tunisians who were long subjected to humiliating restrictions and the denial of fundamental human rights. The regime had long boosted economic performance and downplayed respect for human rights. For many decades, the government had operated with a free hand without significant checks and balances; the national representation, the security services, the judiciary and the media were all controlled by the executive. The pockets of resistance by civil society groups, some independent journalists and legal professionals have been severely targeted and human rights activists, independent and critical voices were persecuted and violently attacked over the years.

In the aftermath of the revolution, Tunisians reclaimed their rights and pushed for reforms that could enable them to safeguard their rights and outlaw arbitrariness and undue restrictions on their rights to freedom of expression and association.

Freedom of expression and association were solemnly recognised by the new authorities and all illegal bans lifted in the early weeks following the revolution, these pronouncements were followed by a more elaborate legal reform.

In the year 2011, a series of significant measures were taken by the transitional government to consult key stakeholders and gather their input with regards to the reform of priority sectors including the electoral, associations, media laws and others.

The reform agenda coordinated by the High Instance for the Realisation of the Objectives of the Revolution, Political Reform and the Democratic Transition (Haute instance pour la réalisation des objectifs de la révolution, la réforme politique et la transition démocratique) encompassed many sectors and individuals from all walks of life. It has created a media sub-commission to provide guidance on the media laws and policies. Views of national and external experts were sought in the process; this was a major shift from the ways policies were formulated in the past. INRIC played a pivotal role in supporting the reform and preparing a framework to begin the liberalisation of the airwaves.

Given the role played by certain media groups and journalists to perpetuate the regime of Ben Ali and to discredit human rights defenders and regime dissenters on the one hand and the oppression faced by many journalists and media houses on the other hand, the reform of the media sector



faced lots of resistance. The old guard and anti-democratic forces opposed to the transformation of the sector had in many instances used subtle means of pressure to frustrate the reform and limit its scope and depth.⁷

Despite the challenges, a new legal framework that could guarantee fundamental freedoms especially freedom of expression and access to information, though not comprehensively, has been adopted.

1. Key milestones of legal reform

The transitional government had initiated important reforms to repeal the restrictive legal regime that governed the media and free expression in the past. Major pieces of legislation were adopted in 2011.

- **Decree 2011-41** (as amended by Decree 2011-54) concerning access to administrative documents symbolises the beginning of a new culture of transparency.
- **Decree 2011-115** (also known as the new press code) opened a new page in Tunisia's history. It guarantees the protection of journalists from harassment and abolishes prison sentences for criminal defamation and a number of other speech offences. Decree 115 supersedes any previous and relevant provisions or laws, especially the 1975 press code.
- **Decree 2011-116** laid the ground for a newly independent broadcasting media with the creation of the Independent High Authority for Audiovisual Communications (HAICA).

The adoption of these pieces of legislation sent a clear and positive message that Tunisia was progressively moving away from the regime of censorship and secrecy that were the hallmarks of the Ben Ali era. It also signalled the country's commitment to democracy and respect for human rights. Despite these important steps; these decree laws do not go far enough and need to be expanded so as to transform the media landscape in a manner that would serve the interest of the Tunisian public. Indeed, a more comprehensive media reform is needed to bring Tunisia fully in line with its international obligations under international human rights law.⁸

2. Unfinished business

2.1 Lack of implementation of existing decrees

The new Tunisian government was expected to respect and implement the media laws adopted by the transitional government, and put in place adequate mechanisms to ensure the establishment and functioning of the HAICA to regulate broadcasting. Instead, hesitation and contradictory

⁷ http://ifex.org/tunisia/2011/06/16/deep_scars/

⁸ <http://www.article19.org/data/files/medialibrary/2944/Final-Analysis-Press-Code-November.doc>



statements and actions on the part of the authorities and the judiciary have drastically limited the impact of the reforms.

One striking example is the continued use of the old press code against journalists, despite the fact that Decree 115 specifically states that it supersedes the 1975 press code⁹. In the case of Nessma TV, charged for broadcasting the film *Persepolis*, the Prosecutor relied on provisions of the criminal code, which are inconsistent with the spirit of the new press code, and clearly in breach of international standards of freedom of expression. The complaints against Nessma TV, which cited articles 44 and 48 of the former media law regarding “disturbing public order” and article 121 of the penal code which holds a penalty for material that causes “offence to religions” and “affront to public decency”, is a case in point¹⁰.

The other shocking example is the recent threat by the government to privatise the state broadcaster. This measure is another major setback and regression because an independent public broadcaster is key for social cohesion and nation-building. In addition, since the adoption of Decree 116, the Tunisian government has not established the independent broadcasting authority, the HAICA.

On 4 July, INRIC announced that it was closing down, citing its inability to fulfill its mandate, and accusing the Islamist-dominated government of reverting to “censorship,¹¹” and failing to apply decrees 115 and 116. Implementation of the country’s freedom of information law has also not been done. It is unclear what administrative procedures the government has put in place to give access to administrative documents.

2.2. Internet freedoms

Internet users have more freedom and cyberspace is considered to be partly free since the revolution, however, the repressive laws that formed part of the censorship apparatus remain.

Several provisions of Decree No 97-501 of 14 March 1997 concerning value-added telecommunications services (‘Telecommunications Decree’) and the Regulations of 22 March 1997 concerning the specifications for setting up and operating value-added Internet telecommunications services (‘Internet regulations’), are in clear breach of international law. In particular, the decree and regulations make Internet Service Providers (ISPs) liable for third-party content without any exceptions. Most disturbingly, they impose an obligation on ISPs to monitor and take down content contrary to public order and ‘good morals’. Other problematic provisions include the obligation of ISPs to submit a list of their subscribers on a monthly basis and the ban on

⁹ ARTICLE 19 analysis on the Decree on Access to the Administrative Documents of Public Authorities of Tunis: <http://www.article19.org/resources.php/resource/2208/en/tunisia:-access-to-the-administrative-documents>

¹⁰ Director charged for broadcasting *Persepolis* 26 January 2012
http://www.ifex.org/tunisia/2012/01/26/persepolis_trial/

¹¹ *Tunisia media authority shuts down, citing censorship* (AFP, 4 July 2012)
<http://english.ahram.org.eg/NewsContent/2/8/46891/World/Region/Tunisia-media-authority-shuts-down,-citing-censors.aspx>



the use of encryption technologies without prior approval from the authorities. In addition, it is worrying that the new Press Code, which also applies to online expression, continues to criminalise defamation, and that the hate speech provisions are too vague. ARTICLE 19 has conducted a thorough analysis of the Internet regulation¹².

Despite gains made on the free expression and access to information front on paper, the failure thus far to implement the relevant decrees passed under the former transitional government has led to a legal ambiguity and uncertainty, which can prove detrimental to rule of law as well as those fundamental rights.

¹² <http://www.article19.org/data/files/medialibrary/3014/12-04-03-ANAL-ICT-tunisia.pdf>

III. Freedom of Association

Without a doubt, the ability to carry out human rights activities and the right to form associations and organisations completely differs from the situation under the regime of the deposed dictator, when freedom of association and the founding of any organisation for the defence of often-violated human rights was barred, and activists were subject to violations and imprisonment.

During interviews with Tunisian human rights activists, all were in agreement that the situation today, where democracy has begun to flourish, is entirely different than the past. Indeed, in stark contrast with the situation before the revolution, civil society and the human rights field has developed and organisations are free to be formed and freely and publicly engage in society.

NGOs and rights activists before the revolution

Before the revolution, there were two kind of civil society organisations. There were a few independent organisations such as the National Syndicate of Tunisian Journalists (SNJT), the Tunisian League for Human Rights (LTDH), founded on 7 May 1977, Tunisian Association of Democratic Women (ATFD), Association of Tunisian Women for Research and Development (AFTURD), National Council for Freedoms in Tunisia, Association of Tunisian Magistrates (AMT) and the Tunisian Lawyers' Association. These associations and groups used to work in a narrow and stifling atmosphere, with some such as the journalists' syndicate, the AMT and the human rights associations facing coups from within. The remaining organisations, dubbed *Organisations Véritablement Gouvernementales* (OVG) or Truly Governmental Organisations, were penetrated by the ruling party or were effectively branches or "backdoors" for the now-dissolved Constitutional Democratic Rally (RCD) party. These OVGs - as opposed to the genuine NGOs - profited from state support whereas the independent organisations were financially blockaded and restricted.

NGOs and Tunisian activists after the revolution

Since the revolution, and as per Decree number 88 of 24 September 2011, a notification suffices for establishing an organisation and is regarded as administrative approval. Previously, NGOs had to send in applications. If they did not receive a rejection within three months, it meant that they were allowed to carry out their work.

Due to the amendments that came about following the revolution, the process of forming associations and NGOs has been made easier, and everyone in any field, including foreigners resident in Tunisia, has the right to register an association, which is an important development. This has led to the sprouting of 600 new associations between October 2011 and March 2012 alone,



according to the *EU's Diagnostics Report on Tunisian Civil Society*,¹³ published in March 2012, which consulted 150 Tunisian civil society organisations and 40 civil society actors.

Among other important improvements to the new law vs the old law (Law 59- 164 of 7 November 1959), is the removal of sentences of up to one year in prison for non-compliance with the law.

Tunisian activists also pointed to the fact that many organisations that were loyal to Ben Ali have altogether disappeared or been replaced by new ones.

According to Salwa Jebali, a young activist who was able to register a new organisation with her colleagues, "Before the revolution, there were no NGOs or even civil society. There was only one belonging to the family of Ben Ali's wife, the "Trabelsi Mafia". After the revolution, there are more than 1000 NGOs working on social, charitable, medical and other fronts. There is no comparison."

Still, there is a need to publish implementing provisions that can help minimise confusion and the use of other restrictive laws. One aspect that is yet to be implemented according to the *EU's Diagnostics Report on Tunisian Civil Society*, is the effective implementation of some mechanisms such as VAT exemption for civil society organisations.

Nonetheless observers remain optimistic about the right to free association in Tunisia and the possibility for the emerging civil society organisations to work in a variety of fields and to contribute to the financial, social, professional, cultural, intellectual and political spheres.

Challenges facing activists in forming associations after the revolution

This, however, does not preclude the fact that several independent organisations continue to face obstacles after the revolution. According to the *EU's Diagnostics Report on Civil Society in Tunisia*, while the important role civil society can play in political dialogue is recognised, the mechanisms and practical procedures are not yet in place. Concerns documented in the report reveal that an overwhelming majority believe coordination between the state and civil society organisations is weak, due to a lack of institutional framework which would allow for consultation and collaboration between state actors and civil society organisations. The lack of cooperation, synchronisation and communication which is sometimes due to rivalry and competition amongst CSOs was also cited as a hindrance afflicting CSOs in addition to logistical and financial obstacles, which were deemed the most severe. Finally the report stressed the importance of supporting rural regions in Tunisia as opposed to only focusing on cities and coastal areas¹⁴.

¹³ *Rapport de Diagnostic sur la Société Civile Tunisienne* (Fr.) March 2012

http://eeas.europa.eu/delegations/tunisia/documents/projets/rapportdiagnostic_stecivile_mars2012_fr.pdf

¹⁴ *Rapport de Diagnostic sur la Société Civile Tunisienne* (Fr.) March 2012

http://eeas.europa.eu/delegations/tunisia/documents/projets/rapportdiagnostic_stecivile_mars2012_fr.pdf



Other concerns voiced to the IFEX-TMG include the migration of qualified cadres from the field of non-governmental work towards the political realm. Under Ben Ali, organised political work was nearly impossible, thus pushing a number of individuals from across the spectrum - be they leftists, centrists or even Islamists - towards political work under the guise of NGO work. The revolution made the establishment of political parties and political organisations possible. Previously the fact that political and opposition activities were carried out under the guise of NGOs led to some confusion about the role professional, civil or political organisations should play.

Journalist Neji El-Bgouri, member of INRIC and former head of the SNJT, expressed fears that the government may once again control civil society. “Just as there were OVGs during the dictatorship serving as the right hand of the government in civil society, these organisations have returned after the dictatorship, for the leading party Ennahda has founded hundreds of organisations belonging to it and working as charities,” Bgouri told IFEX-TMG.

While the line between political and civil work is a hazy one, there is a need for Tunisian civil society, as the EU report argues, to achieve more independence from the political sphere rather than work in parallel to it.

Furthermore, the oppression of civil society and its activists and the human rights violations that the Tunisian people endured under Ben Ali, eroded some of these actors' credibility with people uncertain about the importance of civil society. Indeed, one of the challenges facing these organisations today is restoring credibility, which requires a deliberate strategy for the campaigns being launched and the activities undertaken for development and defending human rights principles.

Indeed, according to Hassan Hajebi, an activist and vice president of an NGO in Sidi Bouzid, “the difficulties today are not in relation to the political authority but to the media... most activists don't have funding sources nor the experience... thus rendering activities and achievements limited.”

Despite some inevitable obstacles, such as capacity-building and network-building as well as funding, members of Tunisian civil society striving to fulfil their desire for human rights, citizenship, voluntary work, and respect for diversity and minorities, after decades of oppression are fully aware of the important role their associations can play in the success of democracy and by extension the revolution.

IV. Independence of the Judiciary

From Egypt to Tunisia, a demand repeatedly sounded before, during and after the revolution was the need to purify the judiciary, due to its importance in the functioning of a democracy and in the protection of human rights including free expression.

Indeed, long before the Tunisian revolution in January 2011, independent judges from the Association of Tunisian Magistrates (AMT), amongst others, often condemned the political interference in their work, despite the risks of retribution by the Ben Ali regime.

In an open letter dated 6 July 2001, Judge Mokhtar Yahyaoui alerted President Ben Ali, who also served as Chair of the Superior Council of Magistrates (*Conseil supérieur de la Magistrature*), about the diminishing margin of independence available to the Tunisian judiciary.

Judges like Yahyaoui, who challenged the status-quo and protested against the interference in their work, were often penalised by being transferred to distant posts, harassed, placed under surveillance by the police, refused passports and even having their salaries slashed. Kalthoum Kennou, Secretary General of the AMT, was sent to Kairouan, Wassila Kaâbi, member of the Board, was appointed to Gabes, Essia Labidi and Leila Bahria, members of the administrative commission, were moved to Kasserine. Noura Hamdi, active member of the association, was moved to Médenine. Furthermore, Bahria, a member of the AMT discovered that every two months a third of her salary was withheld and like Kaabi she was not promoted for years. Meanwhile Judge Yahyaoui was subsequently denied his right to travel with the non-renewal of his passport. His daughter, residing abroad, was also denied a renewal of her passport. The AMT's democratically-elected board was also dismissed by the government in 2005.

In addition to the punitive measures imposed on magistrates who "refused to take orders"¹⁵, free expression and human rights cases also lacked judicial protection due to the political interference rendering the judiciary an institution subject to the executive branch of the government and its whims.

Despite a series of international and local legal safeguards guaranteeing - at least on paper- the independence of the judiciary, the judiciary was in effect made subservient to the executive branch, paving the way for its infiltration, thereby paralysing its role.

As the elected members of the National Constituent Assembly, with which an IFEX-TMG delegation met in January 2012¹⁶, work on drafting a new constitution, there is hope that the gaps in the past

¹⁵ Kalthoum Kennou's remarks on International Women's day 2010 published in the IFEX-TMG anthology "Fleeting Words" http://www.ifex.org/tunisia/2012/05/04/fleeting_words/

¹⁶ IFEX-TMG delegation meets members of the Constituent Assembly http://www.ifex.org/tunisia/2012/01/27/constituent_assembly_meeting/, in which the IFEX-TMG emphasised the



constitution, which some argue paved the way for the infiltration of the judiciary and its paralysis, can be avoided.

A brief overview of the constitutional articles and laws pertaining to the judiciary follows. The 1959 constitution's preamble¹⁷ pledges to "establish a democracy founded on the sovereignty of the people, and characterised by a stable political system based on separation of powers."

- Article 64 stipulates "Judgments are made in the name of the people and are carried out in the name of the President of the Republic."
- Article 65 stipulates "The judiciary authority is independent; the magistrates are subjected in the performance of their duties only to the authority of the law," and the judiciary was not regarded as a separate power "thereby limiting their independence to the independence of the judges with no guarantees."¹⁸
- Article 66 stipulates that "Magistrates are appointed by a decree of the President of the Republic on a proposition from the Superior Council of Magistrates. The methods of their recruitments are laid down by the law."
- Article 67 on the Superior Council of Magistrates, whose composition and powers are defined by law, ensures respect of the guarantees granted to judges regarding appointment, promotion, transfer and discipline.

Furthermore, Tunisia has signed, ratified or is party to many national and international obligations including the African Charter of Human and People's Rights¹⁹, the Universal Declaration of Human Rights (1948) whose Articles 8, 9, and 11 guarantee all citizens access to an equitable and fair justice system and recognise the presumption of innocence, as well as the International Covenant for Civil and Political Rights (ICCPR) ratified in 1969²⁰.

The difference between the "de jure" and the "de facto" was often labelled as the Tunisian paradox, despite the fact that law n° 67-29 of 14 July 1967 modified by the organic law 2005-81, 4 August 2005, which establishes the Superior Council of the Magistrates, its composition and mission, placed it under the authority of the President. This led to a council where the overwhelming majority of its 36 members was appointed or dismissed by the executive power. Furthermore, that same law unconstitutionally prohibited "members of the judiciary to go on strike or undertake any joint action likely to disturb, stop or block the functioning of the jurisdictions."

important of enshrining free expression in the constitution, which would allow for a free and independent media, supported by an independent judiciary

¹⁷ Available here in English <http://confinder.richmond.edu/admin/docs/Tunisiaconstitution.pdf>

¹⁸ Open letter to the Tunisian National Constituent Assembly from the executive office of the AMT on 27 April 2012.

¹⁹ The African charter of Human and People's Rights was adopted on 26 June 1981 by the 18th Summit of the Organisation of African Unity and came into effect on 21 October 1986. It was ratified by Tunisia on 16 March 1983. Article 7 of the charter guarantees the right to be heard, which includes access to a qualified judge, right to defence, the presumption of innocence and the impartiality of justice.

²⁰ Article 14 of the ICCPR underscores the necessity of State parties to uphold the independence of the judiciary so as to ensure the proper administration of justice. "In the determination of any criminal charge against him, or of his rights and obligations in a suit as law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."



While the revolution in January 2011 unleashed a feeling of optimism that the “dark” period under Ben Ali was over and done with, Interim Prime Minister Béji Caid Essebsi²¹ was right in pointing out that “the revolution is not yet a democracy.” Despite, the successful elections held in October 2011²², the adoption of a provisional constitution²³, and the formation of the National Constituent Assembly, the transformation into a consolidated democracy is ongoing, with some concerns that there may be an attempt of “sidestepping of the revolution,²⁴” as framed by the current President of the AMT, Judge Kalthoum Kennou.

“The political parties have used the independence of the judiciary as slogans but have not put their promises to effect,” she added. To that effect the judges including from the AMT have launched a series of activities in 2012 to pressure the Constituent Assembly members to make good on their promises. In addition to judges wearing red armbands since 18 April 2012 to express their dismay at the lack of political will to push forth reforms, judges have protested repeatedly and the AMT published an open letter to the Assembly on 27 April 2012.

The main demands are constitutional guarantees that would elevate the judiciary to the position of a separate estate rather than a body subject to the executive branch in government; establishing an interim independent judicial committee, which would be charged with taking over the duties of the Supreme Council of Magistrates²⁵, which would have its role and authority stipulated by law en route to establishing a fully independent body; and finally putting in place a framework and mechanism allowing the continuous discussion between the judiciary and the Assembly regarding judicial reforms. All these, argued the AMT in its open letter, will allow the judiciary to defend rights and freedoms, and contribute to strengthening the rule of law and building democracy.

The judiciary is also angling for a transparent and functioning election model for the Council of Magistrates as well as guarantees and means to decide on matters of promotions, relocation and discipline. In an attempt to pressure the government to make good on its words, the AMT announced a three-day strike starting on 13 June 2012²⁶.

²¹ Essebsi served as interim Prime Minister from 27 February 27 to 24 December 2011. He is facing charges of torture for his service as Minister of Interior under Habib Bourguiba.

²² Tunisia election ‘free and fair’ <http://www.europeanvoice.com/article/imported/tunisian-election-free-and-fair-/72419.aspx>

²³ Tunisian assembly adopts provisional constitution, Al-Jazeera, 11 December 2011 <http://www.aljazeera.com/news/africa/2011/12/201112115101550490.html>

²⁴ Kalthoum Kennou, in an interview with IFEX-TMG's Sarah El Richani on 3 May 2012.

²⁵ The infamous Supreme Council of Magistrates was headed by the President and responsible for appointing, moving, and disciplining Tunisian judges under the Ben Ali regime.

²⁶ Al-Jareeda, 14 June 2012 “AMT strike protests absence of minimum guarantees for judicial independence” (Ar.) <http://www.lejournalcom.com/ar/?p=6261>

In an effort to restore credibility to the judiciary as well as part of holding the corrupt under Ben Ali's regime accountable, the Minister of Justice Nourredine Bhiri announced on 26 May 2012²⁷, the dismissal of 82 judges for "corruption". While many 'independent' judges concur there is an urgent need for greater transparency²⁸ and for the removal of "corrupt, inefficient... instrument of dictatorship [judges]"²⁹, the Union of Tunisian Judges, in particular, took issue with the procedure. The head of the Union, Raoudha Laâbidi³⁰ said "the dismissal of judges is contrary to the foundations of transitional justice that require people to reveal the truth and judge those who have violated human rights, while ensuring fair trials, and especially the right to defense," and announced a strike. The strike was later suspended after a meeting with the Minister of Justice on 30 May 2012. The parties agreed to lift the strike, expedite the formation of the temporary independent judicial committee and allow the dismissed judges three days to appeal the decision³¹.

Although revising the constitution seems to be the judges' associations and union's principal goal rather than enacting laws that could be easily harmonised with the constitution later, veteran activist and President of INRIC Kamel Labidi believes "the constitution is not enough." "There is a need for independent oversight mechanisms as well as laws," he added, "that will protect the independence of the judiciary and the media not just from the executive branch of government but also from political, business, and other interference."

As the struggle for the right of a free and independent judiciary, Kennou acknowledged there is a need to improve on human rights. "We need to consecrate it in our work and not only in our rhetoric," she said thereby echoing the view of Lebanese lawyer Nizar Saghiyyeh, who argues for interpreting the law in line with social and human rights and international conventions. "We have to create this awareness and redefine the role of the judge in society accordingly" as opposed to the "narrow" view which regards judges as "pure servants of the law" or "mere technocrats."

"The ideal result", he added, would be to create a junction between a rights movement and an independent judiciary.³²

²⁷ "Massive Dismissal of Tunisian Magistrates" Tunisia Live Courtney Joline, 27 May 2012 <http://www.tunisia-live.net/2012/05/27/massive-dismissal-of-tunisian-magistrates/>

²⁸ In the IFEX-TMG's last report "The Scars of Oppression Run Deep" published in June 2011 Ahmed Rahmouni, President of the AMT is quoted stating that "The revolution itself demanded the purification of the judicial system in order for it to fight corruption.... there is still a need for certain figures to disappear from public life in order for there to be true reform." http://ifex.org/tunisia/2011/06/21/scarsofoppressionrundeepifextmg_eng.pdf

²⁹ Ahmed Rahmouni quoted in "Tunisians go to polls haunted by ghosts of the old regime" The Guardian 22 October 2011 <http://internationalnewsmag.info/article.php?i=108431>

³⁰ Tunisian judges on Strike North Africa United 31 May 2012 http://www.northafricaunited.com/Tunisian-judges-on-Strike_a1595.html

³¹ Judges' Strike Lifted Following Agreement with Ministry of Justice Hend Hassassi Tunisia Live 31 May 2012 <http://www.tunisia-live.net/2012/05/31/judges-strike-lifted-following-agreement-with-ministry-of-justice/>

³² We Are Not Accomplices to Power! A New Role for the Judiciary Interview with Nizar Saghih conducted by Layla Al-Zubaidi, 14 March 2011 http://www.lb.boell.org/downloads/Perspectives_02-37_Interview_with_Nizar_Saghih.pdf



The sprouting of a plethora of NGOs, protests, political parties and interest groups, has led some judges to believe that civil society has forgotten about the importance of their demands. This claim however has been rejected by renowned activists and journalists including Naziha Rejiba and Fahem Boukadous who argued that “the independence of the Judiciary is a key demand, which in addition to media and police Ben Ali used to govern.”

Labidi on the other hand said that “more should be done by the judges to raise awareness and clarify to the general public the importance and national benefit of having an independent judiciary. They need a media strategy.”

Whether it’s a media strategy to help the wider public ascertain the importance of the judiciary in a country where “rule of law” is to govern, transforming the judiciary into a fully independent estate, as well as adopting a wider “social” role where human rights are reflected in decrees rather than simply strict interpretation of the laws, it appears that the post-revolution “journey will be a long one” with perhaps one consolation which Boukadous emphasises: “the Tunisians broke the barrier of fear and they will not capitulate their rights.”

Conclusion and Recommendations

As outlined above, the transition process is hardly over, and there remains a long and thorny journey ahead. On all fronts, whether freedom of expression, association, or the independence of the judiciary, activists and stakeholders are struggling to promote and pass the necessary constitutional guarantees and legislation, which would safeguard these fundamental rights.

In addition, activists are also campaigning for the rule of law and the implementation of these laws and decrees. The legal decrees put forth by INRIC after months of deliberation, and which were passed under the former transitional government and published in the official gazette, are yet to be implemented³³.

Furthermore, a decree passed by the Constituent Assembly in December 2011³⁴ regulating public authorities and containing an article necessitating the establishment of a temporary independent judicial committee has suffered a similar fate, despite a meeting between the Minister of Justice, the AMT and the Prime Minister on 23 June to resolve the differences regarding this issue³⁵.

Meanwhile, civil society organisations are facing more practical hindrances which are primarily financial and logistical.

Despite these setbacks, as well as a series of violent attacks by groups as well as prison sentences passed for free expression cases, a vigilant and active civil society has thus far ensured that at least their demands remain loud, clear and on the agenda. Strikes, protests and public campaigns are just some of the methods activists are resorting to ensure that reluctant officials and groups in the public sphere do not succeed in circumventing the revolution by domesticating the media, the judiciary and civil society, at large.

To this effect, the IFEX-TMG has sought to prepare this report to remind policy-makers of the key demands put forth by its partners in Tunisia, in the hope that these will be taken into consideration by the National Constitutional Assembly.

³³ The decree which stipulates the establishment of a HAICA and the decree on the press drafted by the media sub-committee of Higher Authority to Achieve the Goals of the Revolution and Political reform and democratic transition, in cooperation with INRIC and the SNJT and the General Syndicate of Information and Culture. They appeared in the official gazette, *Erraid Ettunsi*, on 2 November 2011.

³⁴ *Tunisian Judges Accuse Constituent Assembly of Obstructing Judicial Reform*, 7 May 2012 <http://www.tunisia-live.net/2012/05/07/tunisian-judges-accuse-constituent-assembly-of-obstructing-judicial-reform/>

³⁵ *Government, AMT exchange views on creation of provisional judiciary committee*, TAP, 23 June 2012 <http://www.tap.info.tn/en/en/politics/16030-government-amt-exchange-views-on-creation-of-provisional-judiciary-committee.html>



The IFEX-TMG would like to emphasise the following recommendations, while calling on continuing genuine consultations between authorities and stakeholders to:

Freedom of expression

- Guarantee freedom of expression, media independence and access to information, including online, in the Constitution, including the independence of public service media and that of the High Authority for Information and Audiovisual Communication (HAICA). The principles of equality and non-discrimination in exercising freedom of expression must be recognised and prior censorship, licensing or registration system for the print media, individual journalists should be prohibited.
- Support a legal and institutional framework that allows the emergence of a media landscape in step with the political, economic and social challenges facing Tunisia and capable of supporting the emergence of free and independent media, supported by an independent judiciary.
- Dismantle the complex system of censorship established under Ben Ali and prevent its resurgence especially in the name of morality, including through proposed blasphemy laws.
- Decriminalise press offenses while strengthening adherence to journalistic ethics and promoting self-regulation.
- Respect and apply the provisions of the three Decrees (115, 116 and 41), and take immediate action to fully implement them.
- Initiate the drafting of a broadcasting law, to complement the HAICA law, with the aim of strengthening the legal framework for licensing, spectrum assignment, content regulation and media diversity and pluralism.
- Review the governance structure of the public service broadcasters with the view of strengthening guarantees of their editorial independence and their responsibility to serve the public interest; and adopt clear mechanisms for its financing.
- Review the legal and regulatory framework for the assignment of radio spectrum in line with the principle of three tiers and the provision of distribution services for broadcasting with the view to assuring the right of broadcasters to own and operate their own transmission systems.
- Put an end to monopolies and ownership concentration that inhibit the development of audiovisual and print media. Establish a fund to support community radio and adopt indirect subsidies to support the development of independent newspapers. Media pluralism must be supported.
- Ensure a clear and transparent distribution of public and institutional advertising and a break with the era of the Tunisian External Communication Agency (ATCE).



- Support digital culture and its promoters, whose efforts for change have been - and remain - crucial.
- Support the reform of institutions providing journalistic education and mid-career training.

Access to Information

- Adopt a comprehensive law on access to information to address the shortfalls of Decree 2011-54 including the absence of clear mechanisms to facilitate access such as an independent oversight body.

Freedom of Association

- Enshrine freedom of association and the right to assemble in the constitution.
- Publish implementing provisions that can help minimise confusion and the use of other restrictive laws.
- Establish an institutional framework which would allow regular consultation and collaboration between state actors and civil society organisations.
- Improve the cooperation between civil society organisations as well as their capacity to secure their financial sustainability and consolidate their independence.

Independence of the Judiciary

- Safeguard judicial independence under the Constitution, including promoting mechanisms that will shield the judges from the pressure of the executive branch, in their appointment, discipline and assignment to cases, and that does not give to the executive branch a decisive power over the career path of sitting judges.
- Train of judges on human rights instruments, as well as adopting a more social role in their interpretation of the law.
- Strengthen “the junction³⁶” and cooperation between the rights movement and an independent judiciary.

³⁶ *We Are Not Accomplices to Power! A New Role for the Judiciary* Interview with Nizar Saghie conducted by Layla Al-Zubaidi, 14 March 2011 http://www.lb.boell.org/downloads/Perspectives_02-37_Interview_with_Nizar_Saghieh.pdf