

CONFERENCE JUSTICE FOR FREE EXPRESSION 2016

A review of global freedom of expression jurisprudence in 2015

Litigation developments in Tunisia 2015

I. Brief view on general context

Throughout 2015 Tunisia continued to mark **progress** in the area of human rights, rule of law and transitional justice. Promotion and Protection of Freedom of opinion and expression form a crosscutting national challenge in these great areas. However, the **security challenges** which culminated in two deadly terrorist attacks in Tunis Capital and Sousse in March and June 2015 respectively caused devastating consequences on the Tunisian vital tourism industry and prompted the new government to opt for significant security measures.

Thus the challenge for the authorities, including mainly the judiciary, were and will continue on how it will **respond to these threats** and incidents while **respecting Tunisia's international human rights obligations** including protection of freedom of opinion and free speech. During his first visit to Tunisia in April 2015, the **UN High Commissioner for Human Rights** noted: *“When the Bardo museum in Tunis was attacked on 18 March, 23 lives were senselessly lost and Tunisia’s young democracy faced a major test. Would it succumb to the temptation to risk its hard-won human rights gain and respond, blinded by rage, with a brash war on terror? Or would it respond with maturity and respect for the victims, a renewed commitment to uphold the values of human rights and justice, and a strong condemnation of the poisonous, revolting rhetoric of the terrorists?”*

In fact, following the two attacks, the state of emergency was decreed on 5 July 2015 and ended on 4 October 2015. Two months after, on November 24, a suicide attack on a bus killed 12 presidential guards and wounded 20 others, including four civilians prompted the government to decree once again the state of emergency. The later empowered authorities to ban strikes or demonstrations deemed to threaten public order, and to prohibit gatherings *“likely to provoke or sustain disorder.”*

Following the declaration of state of emergency, there has been increasing number of alleged **acts of offences** against journalists by security officials. Certain **legislative measures** have raised **concerns** in the aftermath of the attacks. Namely, the law on counter-terrorism and money laundry which has been /and would be potentially misused to the detriment of freedom of opinion and expression, press freedom, right to access to information...but also freedom of association and peaceful assembly, fair trial etc.

With regards to **the socio-economic situation**, there has been a growing sense of frustration and social discontent, in particular in the south and southwest of the country, **calling** for employment, equal economic opportunities, and transparent wealth distribution. During the state of emergency, peaceful demonstrations mainly those aiming to claim employment and solution for the social degrading situation, have been cracked down through an excessive use of force by the police.

The reform of the justice system continued to be slow despite some advancement. This includes mainly the **High Constitutional Court** (law adopted in July 2015). But the Court is not established yet waiting for the establishment of the **Supreme Council of the Judiciary (SCJ)**. The latter's law was adopted on 23 March 2016, at a term of a long process that had started in 2014. Under the transitional provisions of the Constitution, the Law on SCJ was to be adopted with 6 months after the legislative elections of October 2014. The promulgation of the law has sparked negative reactions from organizations of the Judges who had repeatedly criticized the various versions of the draft law for lack of recognition of organic independence to the SCJ, arguing that it is unconstitutional.

This said, the adoption of these two important laws are an important step in the creation of the judicial power provided in the constitution

II. What are the key issues addressed by Courts in 2015?

Issues were so related to the transitional political and social context but also to the national security context. In 2015, authorities prosecuted several people for alleged defamation or "*insult*" of state officials and on charges of "*harming public order*" or "*public morals*." Authorities also used counter-terrorism law and measures as well as executive prerogative under the State of emergency to prosecute or interview some journalists and bloggers for publishing information or expressing their opinions.

Key issues can be listed as follow considering the number of related cases in a decreasing order:

1. Publishing false information related to public issues
2. Defamation of public officials
3. Disturbance of public order (challenging the right to peaceful demonstrations)
4. Glorification of terrorism and incitement to terrorism.
5. Assault on public moral.

III. What were the most new important challenges in Courts in 2015?

Answering two important and embarrassing questions:

- 1.** Shall we protect freedom of opinion and expression while countering terrorism and violent extremism or shall we scarify it to safeguard national security?
How to protect freedom of expression while countering terrorism acts?
Is free space more important than free speech? **The response was clearly YES.**
- 2.** Shall we ensure **individual liberties** -recognized by the new constitution- when they enter in conflict with some provisions of the penal code? Or when they represent a very controversial by large part of the society, in particular **sexual liberties** and LGBT rights? **The response was courageously YES.**

NB: It was not so easy for courts to decide. The long time spent by the courts to take the decisions is a great sign. It is noteworthy that the role of CSOs and HRDs was crucial to support and defend such decisions.

IV. What are the decisions with the greatest influence?

- 1. Abdelfattah Saied V. Public Prosecution (Criminal Chamber, Appeal Court of Tunis , 05 February, 2016)**

Facts: *Abdelfattah Saied*, is a Tunisian math teacher and a cyber activist. He had been arrested by Tunisian counter-terrorism police on 7 July 2015 for posting on his page Facebook, a video that accused the security forces of planning the Sousse attack and duping the principal perpetrator into carrying it out. The video explains that the attack

was orchestrated by the security forces to crack down on the government's opponents and close down mosques.

He was charged under Article 18 of the 2003 counterterrorism law which imposes a prison sentence of 5 up to 12 years for “*anyone who provides members of an organization, agreement or people in relation to terrorist offenses with a meeting place, helps to accommodate or hide them or favour their escape, or shelter them, or ensure their impunity or benefit from their crime.*” He was also charged with “*defaming a public official*” (Art 128/penal code) and “*publishing false information in order to incite others to think the existence of a crime*” (Art 306/Penal code).

Proceedings: On 06 November 2016 the Judicial Pole for countering terrorism dropped the terrorist and defamation charges but sent *Abdelfattah Said* before the First Instance Court of Tunis to be judged for “*publishing false information in order to incite others to think the existence of a crime*” (Art 306/Penal code). The Judicial pole judged that “*the analyse of the terrorist attack that M. Said prepared and published on his Facebook page is a rereading for the event despite its contrary to the facts and the truth and cannot be judged under the article 18 of the counter-terrorism law*”¹.

On 27 November, the First Instance Court of Tunis sentenced M. *Said* for one year in jail for “*publishing false information in order to incite others to think the existence of a crime*” (Art 306/Penal code).

The defence invoked a political trial arguing that M. *Said* was simply expressing his opinion related to public affairs and that “according to the Tunisian constitution, freedom of opinion and expression applies to all forms of opinions, including those that offend shock or disturb the government”.

Court decision: On 5 February, 2016, the Appeal Court of Tunis dropped all charges against M. *Said*. The Court founded *Abdelfattah Said* innocent of publishing false information in order to incite others to think the existence of a crime (Art 306/Penal code). Following that decision M. *Said* was freed from prison after almost seven months of detention.

¹ Judicial Pole for countering-terrorism, case n° 13/37846.

Relevance of the decision: The acquittal of *Abdelfattah Said* enforces the protection of freedom of opinion and expression in this case, the right to publicly criticize officials and institutions.

2. *Shams* association V. Tunisian Government (First Instance Court of Tunis, Civil Chamber, Appeal decision n°60753, February 2016.

Facts: “*Shams*” is a local NGO registered with the Government’s Secretary General (GSG) in May 2015, as an organization working to support sexual minorities. On December 29, 2015, the First Instance Court of Tunis decided to suspend *Shams* activities for 30 days². The association appealed the decision and won the case on 23 February³.

On May 2015, the GSG sent a warning to *Shams* association demanding to cease alleged “violations of the law on association” within 30 days.⁴ On 15 December the GSG logged a complaint to the First Instance Court of Tunis alleging that the association “*deviated from its stated aim*” asking for the suspension of the association activities for one month.⁵

The SGS complaint quoted a media statement by the association’s members to the effect that *Shams*’s aim is to “defend homosexuals.” The complaint claimed that the wording violates article 16 of the law on associations, which requires associations to notify the authorities of any changes to its statutes, its aims in *Shams* case. The complaint argued that “the term sexual minorities do not necessarily includes homosexuals”

Proceedings: During the trial hearings before the First Instance Court of Tunis, the defence, argued that, the law on associations, requires associations to “*respect the principles of the rule of law, democracy, plurality, transparency, equality and Human Rights,*” as these are set out in international conventions that Tunisia has ratified, and

² First Instance Court of Tunis, Civil Chamber, 29 December 2015, decision n°62869.

³ First Instance Court of Tunis Civil Chamber, 23 February 2016, Appeal decision n°60753.

⁴ The organisation of associations is governed by the Law-Decree n°88 adopted by the transitional Government in 24 September 2011.

⁵ According to the article 45 of the Law-Decree n°88 of 24 September 2011, the SGS has the mandate to oversee CSOs activities. In the case of any violation of the association law, the SGS warned the concerned association.

“prohibits incitement to violence, hatred, intolerance, and discrimination based on religion, gender, or region.”

The defence, further, argued that *Shams*'s statute is based on these principles, stating that its aim is *“to support sexual minorities and to press peacefully for the reform of discriminatory laws”*.⁶ The defence invoked that the decision of suspension was a reaction of the government on *Shams* opinion since the association has drawn criticism from government officials due to its outspoken support for repealing article 230 of the penal code which criminalizes sodomy and punishes it up to three years in prison.

The Court decision: the Court quashed the First Instance Court's decision of suspension and authorized the association to resume its activities. The Court affirmed that the work of *Shams* association for the protection and promotion of sexual minorities' rights is conducted within the legal framework, judging that *“the administration (SGS) failed to clearly demonstrate the difference between the two categories: sexual minorities and homosexuals [...] and didn't demonstrate that homosexuality is not included in the category of sexual minorities”*

Relevance of the decision: The Court's decision should be considered a step forward in preserving the LGBT community' rights in Tunisia and ensuring their human rights are protected as a whole. It gives also gives prominence to the association's work in defending that community's rights and ensuring they are able to continue their activity within the protection of an established legal framework.

V. What shall we watch out for in 2016?

1. Interpretations by part of the judiciary may not be necessarily in favor of freedom of expression in particular in treating with apology of terrorism. Therefore an amended press code would be needed to consolidate judicial best practices and close the door to any interpretation not in line with international standards.

⁶ Among the objectives of the association, listed in the article 3 of its statute, we note *“to provide moral, material and psychologic support to sexual minorities [...] and to work peacefully in order to abolish discriminatory laws against sexual minorities and to defend the Human right to live in dignity regardless his orientations and differences with the majority”*.

2. The national challenge to fight against violent extremism and terrorism and the unsettled political situation in neighbouring states such as Libya may bring more of apology to terrorism, glorification of terrorism, incitement to terrorism and incitement to hatred law suits before Courts. The implement of the law provisions related to freedom of expression and information should be monitored.
3. Since homosexuality is criminalized by law⁷, the fact of expressing support or promoting of homosexual or LGBT rights could be considered as gross indecency behaviour according to article 226/Penal code.⁸ It is noteworthy that Tunisian penal code was enacted on January 1914. Some of its provisions need to be revised and codified based on the new Constitution of 2014 precisely the chapter on freedom and liberties.

⁷ Article 230 of the penal code criminalizes sodomy and makes it punishable up to three years in prison.

⁸ Article 226 of the penal code stated that “*gross indecency committed publicly and intentionally is punishable by an imprisonment of six months and a fine of 200 francs*”. These forms include indecency through gesture or speech.