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Media matters – can Tunisia walk the tightrope between a free press and regulation?

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Tunisia's Independent High Authority for Audiovisual Communication (HAICA) was announced in 2011 amidst revolutionary fervour. After numerous postponements and procrastination, it began its work in May 2013. Since then, each of its initiatives has provoked debate. With its legitimacy challenged, HAICA finds it difficult to impose itself as the regulatory authority of Tunisia's media sector.

HAICA is meeting resistance because of Tunisia's lack of regulatory tradition, and there are concerns that the body might mean a setback in terms of media freedoms. The resistance is also motivated by the authoritarian nature that some attribute to HAICA's members. Such criticism emanates mainly from press magnates who favour a liberal model that could allow for the development of monopolies and for radio and television channels owners to control political debate .

While HAICA seems to have succeeded in its mission to keep an eye on media activity during the presidential and parliamentary elections in late 2014, conflicts with illegally operating radio and television channels have reopened the debate over its purpose and limits.

It has become increasingly evident that HAICA will not be able to make its mark by issuing unbreakable constraints, but it may be able to do so as a moral and consensual authority. To that end, it needs to separate itself as much as possible from partisan issues.

Introduction

Like most of the authorities created during the two periods of Tunisian political transition since 14 January 2011, the Independent High Authority for Audiovisual Communication (HAICA) has not escaped criticism. Such criticism ranges from suspicions over its independence from political forces, to calling into question its usefulness. Caught between partisan, corporate passions and tactics, HAICA often finds it difficult to impose its will on a

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media sector in which freedom of speech and enterprise are stretched, even if they are detrimental to the code of ethics or the predefined rules of competition.

The lack of a regulatory framework and tradition has put HAICA at the centre of opposing interests in a media industry characterised by a certain level of anarchy. Of the 35 radio stations on Tunisian territory, 10 are illegal, as are three of the 14 television channels. Major debates frequently go through a stage of discussion, power struggles and the exchange of threatening communications.

Given this context, how can HAICA ever function autonomously and efficiently? The role of ‘guardian of fairness’ that it assumed during the 2014 parliamentary and presidential elections should have augured well for the adoption of this institution by Tunisians. However, the fact that several of its decisions were rebuffed is a warning against drawing hasty conclusions. For example: live on air, a television presenter ripped up the HAICA decision to fine his employer, a private channel, for broadcasting adverts for a political party during the electoral period!

A difficult start

HAICA was both needed and wanted by all actors – from industry professionals to politicians – so as to put an end to a media paradigm that was damaging and considered co-responsible for the alarming state of affairs concerning media freedoms. However HAICA was difficult to establish.

The weighty legacy of the authoritarian regimes

The media sector, bequeathed to Tunisia by its successive authoritarian and repressive regimes, had undoubtedly suffered damage. It had been controlled both politically – through direct editorial interference by the prevailing powers and economically, since the sector had attracted the financial interests of Ben Ali’s family during his final years in power.

Add to this a statist, bureaucratic and vote-catching tradition – which is the common denominator in the way administrative authorities are managed in Tunisia – and the result was a sector closed with double locks. The first lock controlled access to the sector, which was closed to newcomers unless they pledged allegiance to the rulers, and they were the senior members of one of the influential circles of Ben Ali’s family, or were direct relatives of his family. This was the case with Shems FM, a private radio station belonging to his daughter C. Mabrouk, and Radio Zitouna, which also belonged to his son-in-law, S. El Materi.

The second lock concerned freedom of expression. During Ben Ali’s final days in power, the instances of censorship, intimidation, imprisonment or physical assault of journalists were too numerous to count. Media freedoms had deteriorated to the point that self-censorship had become the norm. Marginal liberties were granted to some parts of the printed press, and especially to the partisan weeklies, and information did continue to circulate after a fashion on the internet despite formidable censorship. The media sector in all its ostensible diversity, however, was very tightly controlled.

The reluctant government troika

HAICA began its work in May 2013 with its main purpose to regulate the Tunisian media sector.¹ Its creation, wished-for by industry professionals, was stipulated by statutory order 116, which had been proposed by the first transition government and passed by the Constituent Assembly in November 2011.² HAICA was tasked with guaranteeing the freedom, pluralism and diversity of media communications. Its remit was to be a decision-making, consultative, monitoring and judicial body. After various debates and polemics, HAICA was approved by Tunisia's new constitution of 27 January 2014.

That approval came almost a year-and-a-half after the statutory order had been announced and HAICA effectively established. This delay demonstrates the procrastination of the Troika government, an alliance between the Ennahda Movement's Islamists and two secular parties, the Congress for the Republic (CPR) and Ettakatol (FDLT). The President of the Republic and the President of the Constituent Assembly were from the CPR and FDLT, respectively. One can also interpret the delay as signalling a lack of eagerness on the part of the new rulers to establish a dialogue that went beyond references to the "legitimacy of the ballot box". Opponents of this approach, which they consider exclusive, highlight the exceptional nature of transitional periods, when the pursuit of consensus must take precedence.

The joint resignation of the members of the National Authority for the Reform of Information and Communication (INRIC) in 2012 was proof of this block. Created by statutory decree in March 2011,³ INRIC was tasked with "producing proposals on reforming the information and communications sector while respecting international norms regarding the freedom of expression". It decided to cease its activities in July 2012 in protest against the government's indifference to the reform proposals in its general report.⁴

This lack of will to establish a dialogue with INRIC – one of the emblematic institutions of the revolution (which had among other things insisted on the necessity of creating HAICA) – was criticised by a large number of national and international actors. In an open letter made public on 25 March 2013 and addressed to the three presidents (the Tunisian President, President of the Constituent Assembly and the Prime Minister), the National Union of Tunisian Journalists (SNJT) and the general association for culture and information joined INRIC in drawing attention to the fact that the government's decision to unfreeze the HAICA dossier was only taken after the threat of a general strike by Tunisian journalists⁵ and civil-society protests. In the same letter, the signatories also protested against what they called "the procrastination and declarations of intent and promises", which were increasing while HAICA had still not seen the light of day. They further objected, among other things, to the fact that the Troika's representatives had put together a group of representatives from the ruling parties

¹Statutory decree 2011-115 of 2 November 2011 on the freedom of the press, printing and publishing, is the reference in matters of free expression. It is considered the new Press Code. There is no regulatory body for the written or digital press.

² Statutory decree 2011-116 of 2 November 2011, regarding the freedom of media communications and providing for the creation of an Independent High Authority for Audiovisual Communication (HAICA).

³ Statutory decree 2011-10 of 2 March 2011, providing for the creation of an independent national body for reforming the information and communication sector.

⁴ http://www.inric.tn/rapports/ar/INRIC_Rapport_final_ar_intro.pdf (last viewed on 3 July 2014).

⁵ The strike was held on 17 October 2012.

to examine applications for posts on the HAICA board – in complete contradiction of the stipulations of statutory order 116. According to the open letter, this group “abused its powers by evaluating the applications according to purely political and ideological criteria.”⁶

The appointments of HAICA board members and its president also reopened the debate over its independence from the executive and legislative. The debate was especially tense because the successive postponements of HAICA’s creation were undeniably caused by political pressure. The Troika systematically tried to decrease the substance of authorities put in place by the transitional Beji Caid Essebsi government (27 February to 24 December 2011). It viewed HAICA as hostile and its proposals as equivocal, which led some ruling-party leaders to invoke the spectre of the privatisation of public media which, it was claimed, were concocting “a permanent conspiracy against the people”. The same response made these parties indefinitely postpone the issuing of appointments, a delay that fanned the fires of suspicion over the independence of the future of High Authority, despite the President’s explanations that it was caused by the search for consensus on HAICA’s composition.

Neither the precautions taken by the authors of decree 116, which created HAICA, nor the latter’s interventions aimed at carving out an autonomous realm for itself, have sufficed to quell criticisms or concerns about a potential instrumentalisation of HAICA for other ends.

While HAICA is now settling into its role as one of the actors of the media landscape, it is becoming increasingly clear that in the face of strategies of misrepresentation and routinisation, it will have to make a convincing case for its existence.

Is independence possible?

The procedure that resulted in the current composition of HAICA was supposed to guarantee, that HAICA would be independent from the powers that be. This might have been conceivable under circumstances where democratic traditions were well-established and political disagreements not exacerbated. However, Tunisia has experienced two political assassinations, acts of violence committed by groups belonging to takfirist movements and, above all, confrontation between two societal models in a public sphere that is characterized by a lack of trust between the parties - a situation which has been exacerbated by the weight of the past.

Article 7 of decree 116 concerning the composition and organisation of HAICA proposed multiple sources for designating its board members, so as to prevent the concentration of power over the appointments process. The text is emblematic of its time of writing (before the October 2011 elections), in its determination to achieve consensus in a political arena that was in development, and where the pressures of the “street” and civil society were still very powerful. Article 116 weakened the power to appoint the nine HAICA board members (president included) by spreading it over six bodies: the legislative and executive (3 members, with the President of the Republic appointing the president); magistrates (2 members);

رسالة مفتوحة حول إنشاء الهيئة العليا المستقلة للاتصال السمعي البصري
⁶ http://www.inric.tn/index.php?option=com_content&view=article&id=160%3A2013-04-02-07-03-34&catid=1%3Ainric-actualites-recentes&Itemid=156&lang=ar

journalists (2 members); non-journalist professionals of the media sector (1 member); and the owners of information and communication companies (1 member).

This system of appointments seemed to guarantee HAICA's independence, which was further strengthened by its inclusion in the Tunisian constitution (in Chapter 6, Article 127 concerning independent constitutional authorities). But the experience of other democracies has shown that the credibility of their media watchdogs is also – and in fact especially – based on establishing a relationship of trust, which is built up over time and depends on coherent and transparent actions.

HAICA has struggled to impose its will and project the image of an institution that has emancipated itself from partisan stakes.

Contested actions

Since taking office, HAICA has tackled three major trials: the publishing terms of reference for media communications, implementing a monitoring system for media programmes, and the appointment of the directors of public television and radio.

Turmoil over the terms of reference

The terms of reference were drawn up with the participation of professionals from the media sector and experts from various disciplines (economics, law, information sciences, etc.), and it attempted to create a “pluralist, diversified and balanced” media sector. They set down the ethical and financial rules of the game, aiming primarily to prevent excessive concentration of ownership, collusion between the political sphere and the media, and the transgressions it can result in. Several commentators had warned against such transgressions and the danger they posed to Tunisian media because of the increasing number of media outlets created and managed by entrepreneurs who are closely involved in politics.

The four sets of terms of reference for obtaining a media operating licence (radio and television) were published in the official journal of 8 April.⁷ They set down the rules for applications, financial issues, intellectual-property obligations, contents, programming, the right to reply, election campaigns and financial transparency. The terms of reference also provided a framework for advertising (by limiting the amount of time per hour allotted to advertising, and by prohibiting all political advertising).

Reactions to the publication of the terms of reference stemmed from three sources. Under the guidance of the Tunisian Federation of Media Directors (STDM), press magnates were the first to enter the fray by rejecting the terms of reference, calling them “a dangerous indication the media will be subjugated and their assets hit”. They had five essential grievances:

1. HAICA had not involved or consulted STDM when drawing up the terms of reference.
2. HAICA had exceeded its remit by limiting the trading of shares, which violated shareholders' financial freedom and infringed upon the prerogatives of the competition council.

⁷ The four terms of reference are available for consultation on the HAICA website.

3. HAICA had restricted the freedom of enterprise guaranteed by law in banning a promoter from owning more than one channel.
4. The duration of an operating licence, set at seven years, was considered too short.
5. The amount of time allowed for broadcasting advertising was considered too short (a reproach also made by the federation of advertising agencies, the *Chambre Syndicale des Agences de Communication Publicitaire*).

While it is not surprising that owners of television channels joined the ranks of the discontented, questions might be raised as to why the second source, journalists, stepped into the breach as well. Some trade unions protested against the controls on the financing of private media, which they claimed would jeopardise recruitment policies for journalists. However, it is a well-known fact that the law imposed on editorial boards, a quota of professionals and graduates of the Press Institute, is rarely complied with.

Politicians formed the third source of those who contested HAICA's actions, including the leaders of the two main parties in Tunisia. Beji Caid Essebsi found the terms of reference "excessive", while Rashid al-Ghannushi worried about the future of pluralism and democracy in the long shadow cast by the authority's regulatory aims!

The reaction of the Nessma TV owner, Nabil Karoui, whose programmes have played host to all of these politicians, was symptomatic in its virulence: he considered the legislation scandalous and significantly more repressive than it was before the revolution. The matter was taken to court, where the application to have HAICA's terms of reference annulled was rejected.

However, the debate continued, with STDM publishing a communication dated 23 July 2014, which stated that the administrative court's refusal to suspend the terms of reference was not a victory for HAICA since legal recourse was possible and worth considering. STDM also reminded readers that its members had unanimously demanded that the terms of reference not be allowed to come into force.

As evidence of HAICA's dysfunctional nature, STDM cited the resignation of one of its members, Mohsen Riahi, on 8 July 2014. His resignation was chiefly motivated by HAICA's lack of effectiveness (a result of statutory order 116 not being applied), HAICA rulings that infringed the law, and non-transparent procedures for awarding and regularising licences to create television channels or radio stations.

HAICA President Nouri Lajmi responded to the STDM's criticisms in an interview with *Le Quotidien* newspaper. He described STDM's reservations as part of a deliberate campaign to prevent the terms of reference from coming into force. This campaign, led by certain private financial initiatives is, for him, motivated by their private interests. However, they overlooked that, given their nature, such rules are also rules of general-interest. This rejection could be explained by the refusal of some to "distance politics and media from each other". Lajmi also argued that the terms of reference did not in any way clash with freedom of speech.⁸

Building legitimacy through impartiality

⁸ *Le Quotidien*, 26 April 2014, p.7.

HAICA's neutrality was challenged by Mohsen Riahi's resignation, by the reservations of three HAICA members over procedures for choosing the president director-general of public television and radio (which they made public because they did not wish to participate in "legitimising a flawed procedure"),⁹ and by the unceasing criticism – exacerbated by the context of tense political polarisation – that sanctions were being applied selectively. However, this neutrality is crucial if HAICA is ever to demonstrate its autonomy and establish its legitimacy.

While HAICA has certainly scored some points in this regard, it is still subject to vocal criticism. Those who reject regulation of the media sector, meanwhile, appear to be motivated by: concerns about a return to the former repressive system; mistrust of the true political motivations of certain HAICA members; uncertainty, with regulation being a novelty in the Tunisian media landscape; and the hegemonic financial interests of certain advertising executives.

Many political candidates were also worried that HAICA would prevent them from repeating the performance of Aridha Chaabia (Popular Petition), which won the second most seats in the Constituent Assembly elections, largely due to the campaign run by its leader's London-based television channel.

It is clear that the transitory nature of institutions does not work in their favour. For instance there may well be an Authority for Audiovisual Communication (ICAV) elected by the future parliament to replace HAICA, but this will not solve the issues of recognition and legitimacy, despite what people think.

Recommendations

- Legislation should be revised to block the many legal loopholes that allow media laws to be circumvented.
- More weight should be given to journalists' associations in appointing authority board members.
- Civil society and professional associations should be encouraged to take on the role of inspectors. In a young democracy, where any progress made in freedom of expression tends to be fragile, ensuring that inspectors come from diverse sources is essential.
- Priority should be given to consultation and dialogue at the expense of coercive discourse.
- A fair way should be found to give political parties visibility on public channels, which would defuse tensions and neutralise the temptation to control channels indirectly. The transformation of the media sector into distinct areas does not serve debate, which is a necessity in a democracy.
- The sources of financing for media channels should be more tightly controlled.

⁹ In the words of HAICA board member Riadh Ferjani.

Conclusion

While HAICA has managed to position itself as an indispensable actor in the Tunisian media sector, it nonetheless struggles to impose itself, for the reasons already examined. Its current crisis against Zitouna TV speaks for itself: the channel's managers refuse to submit to the HAICA injunction and remedy the situation. The support that the channel's managers have received from certain federations, "friendly" political parties and even some civil society figures, who reproach HAICA for its hegemonic and repressive tendencies, raises questions not so much about the longevity of this kind of body, but about its effectiveness.

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