THE LEGAL FRAMEWORK ON FREEDOM OF EXPRESSION IN MOROCCO

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ARTICLE 19
MIDDLE EAST AND NORTH AFRICA

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This report was prepared within the framework of the project "Promoting the effective implementation of a legal framework conducive to freedom of expression, association and assembly in Morocco", and has been implemented since July 2017 by Adala, an NGO dedicated to the right to a fair trial, IREX Europe, Article 19 MENA and the Communication and Information Sector of the UNESCO Office in Rabat.

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Table of contents

Overview

Freedom of expression is a fundamental pillar of any democratic system, and the two are intimately linked. In fact, it is impossible to speak of a democratic system in the absence of freedom of expression.

The exercise of the freedom of the press raises real issues, both in practice and in terms of its relationship to the law. While such freedoms and rights may be enshrined in a country's constitution and its laws, they may not be protected in practice, causing them to be violated repeatedly. Sometimes, they are guaranteed by the constitution and the law, but ambiguously so, in such a way that they are restricted by the enforcement of administrative censorship.

In Morocco, the Press and Publishing Code, notwithstanding its positive elements, still contains many provisions that legal professionals and human rights defenders consider restrictive for freedom of the press and publishing. And in practice, the government has persecuted journalists, media outlets and bloggers during the past decade.

Freedom of expression and the right of access to information are enshrined in many provisions of the 2011 Constitution. Article 28 stipulates that "freedom of the press is guaranteed and may not be limited by any form of prior censorship. To the extent expressly provided for by law, everyone has the right to free expression and dissemination of information, ideas and opinions».

This report on "the legal framework on freedom of expression in Morocco" is part of the project on "Promoting the effective implementation of a legal framework conducive to freedom of expression, association and assembly in Morocco", and has been implemented since July 2017 by Adala, an NGO dedicated to the right to a fair trial, IREX Europe, Article 19 MENA and the Communication and Information Sector of the UNESCO Office in Rabat.

On this occasion, Adala (an NGO dedicated to the right to a fair trial) and its partners would like to express their deepest thanks to Mr Jocelyn Grange, an expert in public international law and fundamental freedoms, who has produced this report and contributed to the organisation of the seminar where it was presented. We would also like to thank all those whose contributions and participation in the debate have helped to enrich this project.

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for the right to a fair trial

Summary

The Constitution adopted by referendum on July 1, 2011, marks a break with previous constitutions that were very restrictive in their conception of freedom of expression and opinion. Put briefly, they did not mention either freedom of the press or freedom of artistic and literary creation, and their protections were limited to Moroccan citizens only. The new Constitution now explicitly sets out these rights and freedoms and guarantees them without regard to nationality, in accordance with human rights principles and commitments. In addition, the new Constitution enshrines the principle of the primacy of international law, since "the Kingdom undertakes to accord primacy over the country's domestic laws to international conventions that it has duly ratified, and to harmonise the relevant provisions of its domestic legislation accordingly". However, this primacy is only partially recognised. The compatibility of Morocco's international commitments remains conditional on adherence to the "Kingdom's immutable principles": the monarchical form of government, the role of Islam, its territorial integrity and respect for the King – sensitive subjects that are collectively known as "red lines".

These limitations are difficult to reconcile with the obligations under the 1966 International Covenant on Civil and Political Rights (ICCPR), which Morocco ratified in 1979. The United Nations Human Rights Committee, which is responsible for monitoring the implementation of the ICCPR, maintains that the protection of a state's constitutional form, of a religion or a public authority does not justify undue restrictions on freedom of expression. However, in July 2016, Morocco introduced amendments to the Criminal Code under which speech crossing the "red lines" is punishable by imprisonment – in addition to the other "crimes of expression" that were already included in the Criminal Code. Some of these offences do not fall within the scope of the restrictions on freedom of expression provided for in the ICCPR and should therefore be removed. Others are based on legitimate grounds set out in the Covenant, but their wording is very general and does not meet the clarity and precision criteria of the permissible limitations. This interpretative flexibility allows the judiciary to criminalise forms of expression in an arbitrary and abusive manner. This is the case, for example, with the offence of justifying terrorism, which in the recent past has been used as a pretext for criminal proceedings against journalists who have interviewed persons linked to terrorist groups, or who have published relevant material on the subject.

This reinforcement of the Criminal Code has raised concerns among Moroccan stakeholders – including human rights NGOs and professional media organisations – that the new Constitution's promise of liberalisation will either be stifled by laws and regulations, or produce nothing but cosmetic reforms on the most important issues. This fear is fuelled, in particular, by the shortcomings of the law on the right of access to information adopted at second reading by the House of Representatives on February 6, 2018. The government has touted this text as a "legal revolution", given that Morocco's current legislation on the topic is characterised by an outright ban

on the disclosure of information. The law indeed comes close to international standards in many respects, but falls short on essential issues such as how information that has been obtained may be used, or what types of information may be exempted from the right of access to information.

The new Press Code, promulgated in August 2016, similarly suggests that there is a threshold of freedom of expression that the authorities are not yet ready to cross. Admittedly, the new Code contains definite advances compared to the previous version dating from 2002. Some of these include the abolition of all prison sentences, the possibility for journalists to invoke good faith in defamation proceedings, and the recognition of digital media. Despite these advances, however, stakeholders believe that no significant progress has been made on many other important markers of freedom of information. They also criticise that decriminalisation is not what it appears to be. The wording of the punishable offences in the new Press Code is identical to that of the 2016 Criminal Code, and no judicial or procedural safeguards have been introduced to restrict the possibility of using the Criminal Code to punish media offences. In July 2017, the editor of the online news website Badil, Hamid El Mahdaoui, was sentenced by the Al Hoceima Court of First Instance to three months in prison, which was increased to one year by the Court of Appeal. Mr El Mahdaoui, who was about to cover a peaceful march in the Rif region banned by the authorities, was convicted of "inciting citizens to break the law" on the grounds that "his actions went beyond his work as a journalist".

The new criminal law system also curbs the development of freedom of expression on the internet. Citizen journalists, bloggers and other influencers are the primary targets. While the UN Human Rights Committee recommends that they enjoy the same legal protection as journalists, this idea has met with resistance in Morocco, particularly on the part of the Moroccan Federation of Newspaper Publishers (FMEJ) and the Moroccan National Press Union (SNPM), which oppose it on the grounds that non-professional information actors do not know or respect the ethics of the profession.[1] On the other hand, legislation aimed specifically at regulating freedom of expression online is neither desirable nor desired by the relevant stakeholders, who rejected the draft "Digital Code" published by the Ministry of Commerce and the Digital Economy in 2013. The government shelved this project after it was denounced as "Morocco's Patriot Act". In general, international human rights organisations are opposed to the enactment of specific legislation on freedom of expression on the internet for the dangers it may pose, and argue that rules which are applicable offline should also apply online. For example, as part of its debates on the reform of the Audiovisual Media Services Directive (AVMSD), the European Parliament

[1] http://urlz.fr/6LUf;https://lematin.ma/journal/2017/les-editeurs-de-journaux-et-le-syndicat-de-presse-s-rsquo-associent-pour-defendre-le-metier/277458.html; http://www.leseco.ma/medias/59711-loi-de-la-presse-le-syndicat-et-la-federation-des-editeurs-en-rangs-serres.html

has proposed that online service operators who publish AVMS be subject to the same rules as broadcasters, in particular with regard to hate speech and the protection of minors.[2]

In the case of Morocco, this would require clarification of the scope of the limitations on freedom of expression provided for by the law on audiovisual communication. The High Authority for Audiovisual Communication (HACA), created on August 31, 2002, one month before the adoption of the Decree Law abolishing the state monopoly on radio and television broadcasting,[3] constitutes a significant bulwark against possible abuses. This institution, which was elevated to the status of a constitutional good governance agency in 2011, can issue opinions on the regulations and impose sanctions for violations. But these sanctions are merely of an administrative nature, and individuals who have been sanctioned remain liable to criminal or civil proceedings. Consequently, bringing the Criminal Code into line with ICCPR standards remains the most important factor in any liberalisation of the right to free expression in Morocco. The various media laws offer a certain level of protection to practitioners, but without exempting them from the Criminal Code, which remains applicable to all forms of journalism, whether professional or not, as well as to all forms of literary, artistic or religious expression. The same will apply to any community radio stations that may be established in the coming years. For the time being, the establishment of such radio stations is hampered by the law on audiovisual communication, which restricts the right to set up a television channel or radio station to legal persons that are incorporated as a public limited company.

[2] It should be noted, however, that the revision of the AVMS Directive is a complex issue. Extending the rules for audiovisual media to online operators who provide audiovisual media services (such as Netflix, for example) does not pose any major difficulties for freedom of expression. On the other hand, the rules envisaged for "video sharing platforms" in relation to hate speech and the protection of minors are more problematic, and they are therefore opposed by many European civil society organisations.

[3] Decree Law No. 2-02-663 of September 10, 2002.

THE CONSTITUTIONAL FRAMEWORK ON FREEDOM OF OPINION AND EXPRESSION

The 1962 Moroccan Constitution and its four successors (1970, 1972, 1992 and 1996) proclaimed "freedom of opinion and expression" only in a summary manner.[4] It mentioned neither the right of citizens to access information, nor the freedom of artistic and literary creation, or even the freedom of the press. It thus provided no constitutional safeguards against laws and regulations restricting the work of the media and of journalists.

The wording of the article on freedom of expression also expressly restricted this freedom to Moroccan citizens only.[5] This therefore excluded Moroccans who had forfeited their citizenship rights, such as individuals sentenced to prison terms, including suspended sentences, and foreigners residing in Morocco, even if they were born in the country. This restrictive approach, which for instance made it possible to require any foreigner living in Morocco to obtain permission from the Prime Minister to set up a media organisation, was contrary to international law. Under international law, freedom of expression is considered a human right, i.e. a "natural" right whose protection must be guaranteed by all UN member states in a non-discriminatory manner, regardless of status and nationality.[6]

In addition, the Constitution made only very limited reference to international law. It merely "subscribed to the principles, rights and obligations arising from the charters of international bodies",[7] without, however, recognising the legal primacy of Morocco's international commitments, despite the fact that in 1979, the country had ratified the 1966 International Covenant on Civil and Political Rights (ICCPR), the cornerstone of international law in the field of freedom of expression.

In all these respects, the Constitution adopted by referendum on July 1, 2011 represents an important step forward:

First, the new Constitution establishes a mechanism dedicated to freedom of expression that is much more exhaustive than its predecessors, in particular through the principles and commitments stipulated in its preamble, which spell out Morocco's commitment to all universally recognised human rights.[8] It also contains three articles specifically devoted to freedom of expression:

[4] Article 9 of the 1996 Constitution: "The Constitution guarantees to all citizens (...) freedom of opinion, freedom of expression in all its forms and freedom of assembly".
[5] Ibid. See also Ahmed Hidass's article, "Quand ' l'exception ' confirme la règle. L'encadrement juridique de la liberté de la presse écrite au Maroc", L'Année du Maghreb, 15 | 2016, 29-44.
[6] Articles 2 and 19 of the Universal Declaration of Human Rights and the Preamble to the International Covenant on Civil and Political Rights of December 16, 1966 ("Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms").
[7] Paragraph 3 of the preamble to the 1996 Constitution: "Aware of the need to act within the framework of international organisations, of which it is an active and dynamic member, the Kingdom of Morocco subscribes to the principles, rights and obligations arising from the charters of those organisations and reaffirms its commitment to all universally recognised human rights".
[8] "The Kingdom of Morocco, a united, fully sovereign state belonging to the Greater Maghreb, reaffirms and undertakes to do the following: (...) To protect and promote the provisions of international human rights and humanitarian law and to contribute to their development as indivisible and universal (...)".

- Article 25, which "guarantees freedom of thought, opinion and expression in all its forms" but also "the freedom of creation, publication and exhibition in the fields of literature and the arts";
- Article 27, which introduces the "right to access information held by the public administration, elected institutions and bodies with public service missions";
- and Article 28, which affirms the freedom of the press by prohibiting any form of prior censorship.

Moreover, it can be reasonably concluded that the right of the press to "freely express and disseminate information, ideas and opinions" also applies to audiovisual media, insofar as Article 28 of the Constitution makes reference to Article 165, which establishes the High Authority for Audiovisual Communication (HACA) as a constitutional body with the task of "ensuring respect for the pluralist expression of opinion and thought and the right to information in the audiovisual field". On the other hand, the Constitution remains silent on the subject of freedom of expression on the internet. This omission is potentially problematic since the Constitution guarantees freedom of expression "in all its forms" (oral, written and artistic), rather than protecting all possible means of expression.[9]However, this is a minor omission given, that the ICCPR, to which the Constitution gives primacy, states that all media – including the internet – are covered by the right to free expression.

Secondly, the 2011 Constitution no longer limits the freedom of thought, opinion and expression to Moroccan citizens. Indeed, these freedoms are now considered general rights under Moroccan law, since Article 25 "guarantees" them without any consideration of status or nationality.[10] This change of wording also opens the possibility of extending this guarantee to legal persons, which was not necessarily possible under the previous constitutions. The new Constitution thus, for the first time, grants the opposition "freedom of expression and airtime in the public media, proportional to its parliamentary representation" in order to "enable it to properly carry out its mission relating to parliamentary work and political life" (Article 10).

Finally, the preamble to the new Constitution for the first time explicitly recognises the principle of the primacy of international law. As such, "the Kingdom undertakes to (...) accord primacy over the country's domestic laws to international conventions that it has duly ratified (...), and to harmonise the relevant provisions of its domestic legislation accordingly". However, this recognition of the primacy of international law is only partial. The compatibility of Morocco's international commitments remains conditional on adherence to the "Kingdom's immutable principles": the monarchical form of government, the role of Islam,its territorial integrity and respect for the King – sensitive subjects that are collectively known as "red lines".[11]

[9] Ahmed Hidass, "Quand ' l'exception ' confirme la règle. L'encadrement juridique de la liberté de la presse écrite au Maroc", L'Année du Maghreb, 15 | 2016, 29-44.
[10]Article 25: "Freedom of thought, of opinion and of expression in all their forms shall be guaranteed. The freedom to create, publish, and display literary and artistic materials and to conduct scientific and technical research shall be guaranteed". The third paragraph of Article 30 of the Constitution also stipulates that "foreigners shall enjoy the fundamental freedoms accorded to Moroccan citizens, in accordance with the law".
[11] Article 64 of the Constitution is also unequivocal on this matter: "Members of parliament may not be prosecuted or searched,

These restrictions are problematic under international law. Admittedly, there are many constitutional monarchies in the world, and many states whose constitutions proclaim the integrity of their territory. However, this should not result in provisions that are incompatible with the international commitments undertaken by the states concerned. The United Nations Human Rights Committee, which is responsible for monitoring the implementation of the ICCPR, specifically reiterated this in its General Comment No. 31 on "The nature of the general legal obligation imposed on States parties to the Covenant":[12] "Although article 2, paragraph 2, allows States parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty".[13]

A review of the 2011 Constitution and the laws on freedom of expression adopted in recent years shows that there is a desire in Morocco – at least at the level of the public authorities – to develop a legal framework under which the "Kingdom's immutable principles" and international standards can co-exist. However, in order to achieve a result that is acceptable from the point of view of international law, this approach requires that the limitations imposed by respect for the Kingdom's immutable principles be precisely defined to ensure that they do not go beyond the restrictions provided for in the ICCPR. Spain, also a constitutional monarchy, achieves this balance by means of the following provision in its constitution: "The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". (Article 10(2)).

THE LEGAL FRAMEWORK ON FREEDOM OF OPINION AND EXPRESSION

THE CRIMINAL CODE

In July 2016, the government enacted a series of amendments to the Criminal Code that introduced prison sentences for incitement to hatred or discrimination (Article 431(5)), as well as for speech against Morocco's monarchical form of government, Islam, and the country's territorial integrity (Article 267(5)).[14] These new custodial sentences were added to the existing "offences of expression" under the Criminal Code: offences, insults or privacy violations committed against the King or members of the royal family and failure to display the respect and reverence due to the King (Article 179); the promotion of acts of terrorism (Article 218(2)); the

arrested, detained or tried in connection with an opinion or vote expressed by them in the exercise of their functions, except in cases where the opinion expressed challenges the monarchical form of the state or the Muslim religion, or constitutes an attack on the respect due to the King". Omar Bendourou, a professor at the Faculty of Law at Mohammed V University at Souissi, also notes that "international conventions which are in contradiction with Islam, which is one of [the] essential components [of Moroccan national identity], have no place in domestic law, as is the case, for example, with the Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979 and ratified by Morocco with reservations related to Muslim law". Omar Bendourou, "Les droits de l'homme dans la constitution marocaine de 2011 : débats autour de certains droits et libertés", La Revue des droits de l'homme 6| 2014.

[12]General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (80th Session), UN Doc. HRI/GEN/1/Rev.7 (2004).

[13] Point 4 of General Comment No. 31,

[14] Dahir No. 1-16-104 of July 18, 2016 promulgating Law 73-15 amending and supplementing certain provisions of the Criminal Code. Official Bulletin No. 6491 of August 18, 2016.

defamation of judicial decisions with intent to undermine the authority or independence of the judiciary (Article 266); the defamation of public bodies and public officials in the performance of their duties (Article 263).

The authorities consider this new system to be less repressive than the previous one: on the one hand, because imprisonment is now optional for certain offences, whereas it was previously mandatory, and on the other hand, because some penalties have been reduced.

However, this legislation raises a number of compliance issues with regard to international law, in particular those provisions of the ICCPR that limit the scope of restrictions that may be placed on freedom of expression. These are laid down in the third paragraph of Article 19[15] and in Article 20,[16] which stipulate that each restriction must meet the following "triple test" in order to be legitimate:

1. The restriction must be provided for by law
2. The restriction must be in accordance with one of the grounds set out in Article 19(3) or Article 20
3. The restriction must be necessary for the intended purpose.

In its General Comment No. 34,[17] the United Nations Human Rights Committee has elaborated on these three criteria:

1. Any restrictions provided for by law must be clear, precise and accessible to all, so that individuals who are subject to the law may be aware of the consequences of their actions. If laws do not meet this criterion, the resulting interpretative flexibility gives those charged with its execution discretionary powers that may lead to arbitrary decisions.[18] The Committee argues, for example, that offences such as "encouraging terrorism" as well as "praising", "glorifying" or "justifying" terrorism should be precisely defined in order to ensure that they do not result in unjustified or disproportionate interference with freedom of expression.[19]

2. The law must pursue one of the objectives set out in the third paragraph of Article 19. In particular, the Committee affirms that "States parties should not prohibit criticism of institutions, such as the army or the administration", and recommends that a uniform system of anti-defamation legislation be established, since civil servants and public officials should not be afforded better protection than private individuals. It considers that "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition". Consequently, "the mere fact

[15] Restrictions must be "expressly prescribed by law and necessary to respect the rights or reputation of others, to safeguard national security, public order, public health or public morality".
[16] Article 20 obliges states "to prohibit by law all propaganda in favour of war as well as any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".
[17] 102nd session, July 11-29, 2011
[18] Point 25 of General Comment No. 34: "For the purposes of paragraph 3, a norm, to be characterised as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not".
[19] Point 46 of General Comment No. 34

that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant".[20]

3. The law must demonstrate the necessity and proportionality of the restrictive measure for the stated purpose, in particular by establishing a direct and immediate connection between the expression and the threat.[21] The criteria that apply to "necessity" and "proportionality" are defined elsewhere in international law. According to the Johannesburg Principles,[22] for example, restrictions on freedom of expression based on national security grounds are only applicable to speech that constitutes incitement to violence or the use of force.[23] Similarly, according to Article 5 of the Council of Europe Convention on the Prevention of Terrorism, there must be an immediate and direct connection between expressions of speech and acts of violence or potential acts of violence[24]

On the basis of these criteria and their interpretation, Moroccan stakeholders and international human rights organisations have formulated various reservations and recommendations with regard to the new Criminal Code, which can be grouped into two categories.

- The first concerns offences that do not fall within the scope of the ICCPR restrictions and which establish specific anti-defamation rules for a number of public institutions and officials. The stakeholders believe that these offences should either be removed from the Criminal Code or reformulated into a single anti-defamation law, or, at a minimum, that they should only be punishable by simple fines. This includes contempt of public bodies and some of the offences provided for in the amendments adopted in July 2016.[25]

[20] Point 38 of General Comment No. 34. The Committee is also concerned about "laws on such matters as, lese majesty, desacato [contempt of a person in a position of authority], disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials". Further down (in point 48), the Committee also states that "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant". Restrictions are possible, but it is not "permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith". On this point, see also the Joint Statement of the Special Rapporteurs of December 10, 2008: "The concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own".

[21] Point 35 of General Comment No. 34.

[22] TThese principles were adopted on October 1, 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19 in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. They are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgements of national courts), and the general principles of law recognised by the community of nations.

[23] Principle 6: "expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence".

[24] According to Article 5 of the Convention, "'public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed". The same article recommends that the member states of the Council of Europe adopt the necessary measures to criminalise public provocation to commit a terrorist offence "when committed unlawfully and intentionally".

- The second category concerns offences under the Criminal Code that pursue objectives recognised as legitimate by Articles 19(3) and 20 of the ICCPR, but which do not meet the other criteria laid down by these articles. These offences should be narrowly and clearly defined to ensure that the wording is (1) precise enough for citizens to be able to behave accordingly, and (2) narrow enough to punish only incitement to violence, or to respond to any of the other requirements of a democratic society. This concerns, in particular, offences against public officials in the performance of their duties (Article 263),[26] speech that demeans judicial decisions and is likely to affect the authority of the judiciary or its independence (Article 266)[27], and the justification of terrorism (Article 218(2)).

The wording of Article 218 was the subject of intense debate during the introduction of the bill to amend the Criminal Code and the system of criminal proceedings relating to the fight against terrorism. These amendments, adopted at first reading by the House of Representatives in January 2015, added "mobilisation of terrorist groups" to the list of acts constituting terrorist offences under Article 218, paragraph 1(1). A new subclause was added to paragraph 2, which also criminalises "acts relating to the advocacy, justification or promotion of terrorist entities, organisations, gangs or groups".[28] This provision, if definitively adopted, will apply to "anyone who, by any means whatsoever, persuades, incites or induces others to commit any of the [terrorist] offences prohibited by law" (Article 212(5)). According to the stakeholders, this wording does not clarify what exactly is meant by the term "justification", a vague concept already included in the Criminal Code that has been used as a basis for legal proceedings against journalists who have interviewed people linked to terrorist groups or who have published relevant material on the topic of terrorism. In fact, the bill even aims to broaden the scope of the crime of justification of terrorism by adding additional synonyms (propaganda, promotion).

Therefore, the stakeholders have recommended that the word "justification" be replaced by the more precise term "public incitement to commit a terrorist offence", and that in defining its precise scope, the government should be guided by the provisions of Article 5 of the Council of Europe Convention on the Prevention of Terrorism.[29]

This article states that only speech that constitutes incitement to commit acts of terrorism should be punished. Any legislation to this effect should therefore specify that criminal incitement must entail a real risk that the act in question will be committed and expressly refer to two

[25] Speech attacking the monarchical system of government, the Islamic religion and the territorial integrity of Morocco (Article 2675).
[26] In general, stakeholders believe that parliament should redefine this offence so that it cannot be used to sanction peaceful criticism of public officials and institutions, however virulent it may be.
[27] In this context, the stakeholders argue that the article should protect the right to criticise and comment on both court verdicts and the judiciary as an institution, as long as the speech in question does not represent a deliberate attempt to influence a verdict outside the courtroom.
[28] Article 218-2 of the unrevised Criminal Code stipulates that "Anyone who advocates acts constituting terrorist offences, by means of speeches, shouts or threats made in public places or meetings, or in writing, in printed documents that are sold, distributed or displayed in public places or meetings, or in public announcements in the various audiovisual and electronic media is liable to imprisonment from 2 to 6 years and a fine from 10,000 to 200,000 dirhams".
[29] This is expressed, in particular, in Point 10 of the "Opinion on Draft Law 86.14 amending and supplementing the provisions of the Criminal Code and the criminal procedure relating to the fight against terrorism" issued by the National Human Rights Council (CNDH). http://www.cndh.org.ma/sites/default/files/avis_cndh_projet_de_loi_86_14_lutte_contre_le_terrorisme.pdf

intentional elements, namely the intent to communicate such a message and the intent that the message leads to the commission of a terrorist act.[30]

THE LAW ON THE RIGHT OF ACCESS TO INFORMATION

Law No. 31-13, which defines the terms and conditions for the implementation of the right of access to information recognised by Article 27 of the 2011 Constitution, was adopted at second reading by the House of Representatives on February 6, 2018.

The recognition of the general principle of citizens' right of access to information constitutes a "legal revolution", given that Morocco's current legislation is characterised by an outright ban on the disclosure of information. In fact, administrative law prohibits civil servants and public officials in principle from providing information or sharing administrative documents or papers with others. This rule derives from Article 18 of the General Statute of the Civil Service and applies very broadly, with only a few exceptions that partially recognise the public's right of access to administrative information in certain areas[31].

Law No. 31-13 was drafted following public consultations involving both national and international stakeholders. According to these stakeholders, the text comes close to international standards in many respects, such as the special emphasis on the active disclosure of information; the broad scope of application that encompasses a wide range of public and private bodies performing public functions; relatively simple procedures for requesting information; and the establishment of an administrative body specifically tasked with appeals procedures – the National Commission on the Right of Access to Information.

Nevertheless, the bill still has many weaknesses, the most notable of which are outlined below:

- The right of access to information is granted only to Moroccan citizens (Article 3) and to foreigners residing in Morocco (Article 4). This limitation, which excludes non-resident foreigners, raises a problem of compliance with the third paragraph of Article 30 of the 2011 Constitution, which stipulates that "foreigners shall enjoy the fundamental freedoms accorded to Moroccan citizens, in accordance with the law". Nor is it consistent with international law, which recognises a universal right to information that must be guaranteed to all persons, regardless of citizenship or place of residence. This right is recognised by several countries in the region, such as Tunisia and Lebanon, and is one of the fundamental principles enshrined in the Model Law on Access to Information in Africa adopted by the African Commission on Human and Peoples' Rights.

- The right to make use of the information obtained is too restrictive. Article 7 of the law imposes three conditions: the information must be used for a "legitimate reason", without "alteration or distortion" and without "prejudice to the public interest or other rights". The vague wording of these provisions is likely to discourage potential users from publishing any

[30] See also – on a different but related topic – the six criteria of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence: https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

[31] Dahir of February 24, 1958 on the General Statute of the Civil Service.

information they have obtained for fear of criminal sanctions, especially if that information is harmful to "powerful" individuals or institutions. The law should therefore explicitly guarantee that information to which a requester has been granted access is in the public domain and can therefore be published. This principle is also recognised by the Model Law on Access to Information in Africa adopted by the African Commission on Human and Peoples' Rights.

- Article 7 lists thirteen categories of information that may be exempted from the right of access to information. The majority of these categories are those generally found in this type of law ("national defence", "internal security", "private life", etc.), but the law merely lists them without precisely defining their scope. This enables the authorities to apply the restrictions in an arbitrary and abusive manner, for example by refusing access to information whose disclosure would not constitute a serious threat to the country's interests or to an individual's fundamental rights. The law should therefore define the protected interests more precisely, as is the case, for example, in the provisions on information relating to national defence and internal security of the Model Law on Access to Information in Africa[32].
The law should also subject all exceptions to a test of substantial harm (disclosure of the information must cause real harm to the protected interest) and introduce the primacy of the public interest (the potential harm must significantly outweigh the public interest in the disclosure of the information in question).

- The independence of the National Commission on the Right of Access to Information is not sufficiently guaranteed. It should have the power to investigate and to impose sanctions, in particular the right to order the disclosure of evidence, to examine any information that is subject to a request for disclosure, and to compel individuals to testify, in addition to the right to sanction, inter alia, the failure to publish proactive information or to respect deadlines, and the destruction or alteration of information.

THE PRESS AND PUBLISHING CODE

The new Press Code, in force since 2016, consists of Law 88-13 on the press and publishing, Law 89-13 on the status of professional journalists, and Law 90-13 on the establishment of the National Press Council.

The first Press and Publishing Code, introduced in 1958, was relatively liberal, both in the Moroccan context and for its time. Article 1 proclaimed the freedom of "bookshops and printing"

[32] This law stipulates that "information officers may refuse access to information if granting access would cause substantial damage to the security or defence of the State.
(2) For the purposes of this section, security or defence of the State shall mean: (a) tactics or strategies or military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention, suppression or limitation of subversive or hostile activities; (b) intelligence concerning: the defence of the State; the detection, prevention, suppression or limitation of subversive or hostile activities; (c) scientific or technical methods and equipment for the assessment or management of the information referred to in paragraph (b); (d) the identity of a confidential source; or (e) the quantities, characteristics, capabilities, vulnerabilities or deployment of any materiel being designed, developed, manufactured or considered for use as weapons or any other equipment, including nuclear weapons. (3) For the purposes of this section, subversive activities or hostile action shall mean: (a) an attack on the State by a foreign element". http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_fra.pdf

and established the requirement to notify the authorities of the creation of a new press body in advance (as opposed to a much more restrictive "system based on authorisation"). However, the law contained highly repressive provisions, in particular regarding sanctions (including numerous custodial sentences), cases of defamation and seizures without court order. The Code was revised more than ten times between 1958 and 2002, but in a manner that caused it to move further away from international standards, given that the new revisions provided for increased penalties and prison sentences.

Beginning in 2012, the government embarked on a process of revising the Code to harmonise its provisions with the new constitutional framework and, according to the Ministry of Communication, "on the basis of the observations and recommendations of the Human Rights Council and the European Troika in the context of the second session of the Universal Periodic Review [of the international conventions on press freedom] in 2012".[33] This draft revision was prepared in consultation with a number of Moroccan professional bodies, which were able to submit memoranda, while several international human rights organisations also formulated their observations and recommendations.[34]

In its 2014 annual report on "efforts to promote press freedom", the Ministry of Communication argued that the final version of the new Code contains significant progress with regard to international standards, including the following:

- Article 1 refers to "commitments arising from international conventions ratified by Morocco" with which the Code must comply.
- Custodial sentences have been abolished and replaced with alternative sentences and fines, the amounts of which have been reduced for most offences.
- Journalists now have the right to invoke good faith in defamation proceedings, coupled with the right to present evidence throughout the trial.[35]
- The freedom of digital media has been recognised and a number of legal guarantees now protect the exercise of that freedom.
- The principle that the establishment of a newspaper requires only prior notification has been strengthened and extended to electronic information sites which, once registered, are entitled to use the national domain ending in "press.ma" free of charge.[36]
- The authorities' powers to prohibit, block or confiscate newspapers have been greatly reduced and now fall within the purview of the courts.
- The mandatory character of state aid for newspapers is recognised in accordance with the principles of transparency, equal opportunities and neutrality.[37]
- The Code enshrines principles such as the confidentiality of sources[38] (which can only be revoked by a court decision), the right of access to information[39] and the state's obligation to protect journalists from violence.

[33] Page 11 of the report prepared by the Moroccan Ministry of Communication: "Les Efforts pour la promotion de la liberté de la presse 2014", Edition Ministère de la Communication 2015.
[34] Reporters Without Borders, Human Rights Watch, Article 19.
[35] Article 86 and Article 91.
[36] Chapter VI: Electronic Media Services.
[37] Article 7.
[38] Article 5.
[39] Article 6.

- A "self-regulatory mechanism" has been set up with the creation of the National Press Council, which governs access to the profession through the granting of press cards (a matter that was previously within the purview of the government), and acts as a mediator and arbitrator in disputes.

Despite these advances, however, the stakeholders believe that no significant progress has been made on many other important markers of freedom of information. In particular, they argue that the turn towards decriminalisation is deceptive, since it does not completely exclude the possibility of criminal proceedings against media professionals. While Article 17(4) of the Press Code states that "the provisions of other legislation shall not apply to all matters expressly provided for in the Press and Publishing Code", this guarantee constitutes but a fragile and incomplete safeguard. On the one hand, journalists may still receive prison terms under the Criminal Code for non-violent forms of expression that are not covered by the Press Code (justification of terrorism, defamation of judicial decisions), or that are included but under a different label (the so-called "red lines").[40] On the other hand, no judicial or procedural safeguards have been set up to regulate the power of the courts to use the Criminal Code against journalists on the grounds that they were not acting in performance of their duties when committing the offence in question. In July 2017, the editor of the online news website Badil, Hamid El Mahdaoui, was thus sentenced to three months in prison by the Al Hoceima Court of First Instance, which was increased to one year by the Court of Appeal. Mr El Mahdaoui, who was about to cover a peaceful march in the Rif region banned by the authorities, was convicted of "inciting citizens to break the law" on the grounds that "his actions went beyond his work as a journalist". This approach, which seems to give the judiciary full discretion to assess what does and does not qualify as journalism, is all the more problematic under international law since the ICCPR's criteria for limitations on freedom of expression not only protect individual exercises of that right, but also contain a "positive obligation" to protect this freedom when it is exercised through the press, given the status of journalists as potential whistle-blowers".[41]

The stakeholders have also raised a number of other issues with regard to the new Press Code, which are enumerated below, together with the proposed measure for addressing them.

Regarding the general principles

- Article 3 of the Code, which sets out the legal framework for "freedom of the press, publishing and printing", should incorporate the wording of Article 19(3) of the ICCPR to introduce the principle of the legitimacy, necessity and proportionality of any limitation to freedom of expression. In this regard, Tunisia could serve as a model, which enshrined this principle in Article 1 of its Decree Law on Freedom of the Press, adopted in 2011.[42]

[40] On this subject, see in particular the report published by Human Rights Watch, "The Red Lines Stay Red: Morocco's Reforms of its Speech Laws", May 2017, page 10.

[41] Clause 19 of Commission on Human Rights Resolution 2002/48 calls on all states "To create and permit an enabling environment in which training and professional development of the media can be organised in order to promote and protect the right to freedom of opinion and expression and can be carried out without threat of legal, criminal or administrative sanction by the State, and to refrain from the use of imprisonment or the imposition of fines for offences relating to the media which are disproportionate to the gravity of the offence and which violate international human rights law".

- The presumption of good faith provided for in Articles 86 and 91 of the Code is limited in scope since it only concerns the publication of information on cases pending before the courts. The inclusion of an article recognising the presumption of good faith in the general provisions would make it possible to establish this as a key principle in determining the legal interpretation of any provision governing the exercise of the freedom of the media.[43] This would also make it possible to give this principle the status of an "interpretative clause" and thus to allow the courts to define its exact scope.[44]

Regarding the protection of sources

- Article 5 guarantees the confidentiality of sources, but the cases in which journalists may be required to disclose them at the request of a judge areframed far too vaguely. Under international law, the confidentiality of sources may only be lifted for reasons of public interest and if disclosure is considered absolutely necessary. The European Court of Human Rights has produced an extensive body of case law on the interpretation of these criteria, which has led many countries to adopt legislation that very narrowly defines the cases in which judges may compel journalists to reveal their sources.[45]

Regarding the protection of journalists

- In accordance with the United Nations Plan of Action on the Protection of Journalists and the Question of Impunity,[46] Article 7(4) of the Press Code commits the public authorities "to establish legal and institutional safeguards to protect journalists against all forms of violence or threats in the course of their professional activities". To date, no measures have been adopted for the protection of journalists and, according to Morocco's National Press Union (SNPM), impunity for attacks and threats continues to be the norm.[47] The protection envisaged in the Press Code also covers only journalists who are in possession of a press card and therefore excludes other publishers of information such as citizen journalists and bloggers.

Regarding the directors of publications

- Article 15 of the Press Code imposes an excessive number of restrictions on individuals who may act as director of a publication. The diploma requirement is discriminatory because it excludes self-taught individuals and those who have gained equivalent professional experience. Article 15 also poses a problem in terms of the right to be forgotten and the reasonable limitation period for the loss of civil rights, since it excludes from the right to act as

[42] http://www.inric.tn/fr/Decret-loi_relatif_a_la_liberte_de_la_presse.pdf
[43] See also the principles on defamation outlined by the international NGO Article 19.
http://bit.ly/2DZKQDf
[44] In French case law, for example, there are four traditional elements of good faith: a legitimate ground for obtaining the information, the seriousness of the investigation, the prudence of one's tone and the absence of personal animosity.
[45] One of the most advanced pieces of legislation in this field is the Belgian law of April 7, 2005, Article 4 of which provides that persons enjoying the right to protect sources may only be required to provide sources of information at the request of a judge if the information relates to crimes that constitute a serious threat to the physical integrity of one or more persons, and only if two cumulative conditions are met: that the information requested is of crucial importance for the prevention of these crimes, and that the requested information cannot be obtained in any other way.
[46] https://en.unesco.org/sites/default/files/un-plan-on-safety-journalists_en.pdf
[47] See the latest SNPM Annual Reports.

director of a publication "any person who has been convicted of an offence or a crime in a case of embezzlement, corruption, abuse of power, rape, the corruption of minors or terrorist acts". The stakeholders argue that no other profession in Morocco is subject to so many limitations.

Regarding the system of prior notification

- While the system of prior notification of the establishment of a press organisation has been maintained, the conditions laid down in the Press Code are too numerous. The joint declaration adopted in 2003 by the Special Rapporteurs on Freedom of Expression and Media of the United Nations, the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation of American States (OAS) states that "Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided". An analysis of recent developments regarding the notification procedure for the establishment of newspapers in other countries also shows a clear trend towards the elimination of this procedure.[48] By aligning itself with this trend, Morocco would be able to rule out any risk of abuse.

Regarding electronic media

- The Press Code requires electronic media, under threat of sanctions, to comply with the pre-publication notification system. This obligation could lead to the disappearance of a very large number of online media managed by citizen journalists who perform a public service by providing the population with local news.[49] In Point 43 of its General Comment No. 34, the Human Rights Committee reiterates that "Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3" of Article 19 of the ICCPR.

- The right of electronic publications to produce audiovisual content is subject to "obtaining a shooting permit". This document is issued by the Moroccan Cinema Centre and is valid for one year. This condition, and the validity period of the permit, are too restrictive by international standards because they place the "sword of Damocles" on electronic media, which could impede the independent exercise of their information mission. In Point 43 of its General Comment No. 34, the Human Rights Committee points out that "Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3" of Article 19 of the ICCPR.

[48] In France, for example, Law No. 2012-387 of March 22, 2012 (on the simplification of the law and the streamlining of administrative procedures) amended two articles of the Law of July 29, 1881 on freedom of the press in a more liberal manner: Article 7 (which specified the modalities of the notification procedure) and Article 5, which now provides that "any newspaper or other periodical may be published without prior authorisation or deposit of a guarantee".

[49] According to a study conducted under the aegis of NOVA - CENTRE PER LA INNOVACIÓ SOCIAL as part of a joint project with the Moroccan Human Rights Association (AMDH), in 2017 the Moroccan Ministry of Communication counted around 400 electronic information sites in the country as a whole. http://novact.org/wp-content/uploads/2017/09/OSF-Finale.pdf A report on online media in the countries of the southern Mediterranean published in 2015 by Canal France International (CFI), the French media cooperation agency, put the number of purely digital media players in Morocco at between 500 and 1000 http://www.cfi.fr/sites/default/files/panorama-medias-version-longue-BD_3.pdf

Regarding sanctions

- In addition to falling outside the scope of the restrictions permitted by the ICCPR, the offences provided for in Article 71 that may constitute an "offence against the Islamic religion or the monarchical form of government" have not been defined. The same applies to the "offences against the dignity of heads of state and foreign diplomatic agents" provided for in Articles 81 and 82. In the absence of such a definition, it is impossible to establish if forms of expression are subject to permissible restrictions or to impermissible ones, thereby opening the door to the arbitrary decisions on the part of those responsible for ensuring compliance with the law.

- Articles 71 and 84 establish insult and defamation procedures that apply specifically to certain public institutions and civil servants. This system is contrary to international standards which recommend the establishment of uniform anti-defamation procedures, as civil servants and public figures should not be better protected than individuals.

- Article 104 stipulates that the offences provided for in Articles 71, 72 and 73 may result in the suspension of a periodical or the blocking of an electronic newspaper for a period of one month in the case of a daily, weekly or bi-monthly publication, or two consecutive editions in the case of a monthly or quarterly publication. However, according to the Human Rights Committee, "the specific circumstances of the application of paragraph 3 [of the ICCPR] may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3".[50]

- Although the role of the judiciary in the seizure and blocking of newspapers has been considerably strengthened, the new Code retains the possibility of seizing or blocking a newspaper by administrative ordinance (Article 106) for offences under Article 71. It also appears that public prosecutors retain the power to request the seizure of foreign publications for offences under Article 71 (Article 31) and the closure of information sites for offences under Articles 73 (incitement to pimping, prostitution or sexual abuse of minors), 75 (violation of the confidentiality of investigations and the presumption of innocence), 76 (respect for the confidentiality of judicial proceedings held in camera) and 81 (violation of the person and dignity of senior politicians from foreign countries).

Regarding foreign media

- The foreign media, which under the Press Code includes any publication published in Morocco that is more than one-third foreign-owned, is subject to a system of prior authorisation. The authorisation for publication (Article 30) and printing (Article 45) is issued by the Prime

[50] Point 39 of General Comment No. 34.

Minister's Office, and that for distribution (Article 51) by the Ministry of Communication. This mechanism creates a discriminatory legal regime against the foreign press and is therefore incompatible with international standards.[51]

Regarding the law on the status of professional journalists

- Article 5 in fact establishes the primacy of domestic law over international law: journalists are subject to the "international conventions on the press, freedom of opinion and expression adopted by Morocco (...), but without prejudice to the Kingdom's constitutional and legislative provisions".

- The power to grant press cards is vested in the National Press Council, but the authorities still have the power to withdraw them (for a period not exceeding three months) in the event of a violation of the law or the code of ethics of the profession (Article 29). In addition, judges also have the power to permanently withdraw press cards in cases related to journalistic activities.

- Article 1 stipulates that access to the journalistic profession requires a diploma. This therefore excludes self-taught journalists who, in many countries, make up a significant part of the profession. It also excludes individuals engaged in unpaid public information activities, such as citizen journalists, bloggers and community radio volunteers who perform editorial functions. This restriction is not in keeping with recent developments in international law. The Human Rights Committee has stated that "bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere" qualify as individuals performing journalistic functions. The obligations arising from the ICCPR therefore also apply to them.[52]

- In Morocco, obtaining a press card generally continues to be an administrative precondition for claiming the title of journalist. As a result, anyone who carries out public information activities without such a card is deprived of protection. However, according to the International Human Rights Committee, "general State systems of registration or licensing of journalists" are only compatible with the obligations arising from the ICCPR to the extent that they provide rights rather than constituting a prerequisite for journalistic status.

THE REGULATION OF AUDIOVISUAL COMMUNICATION

In September 2002, Morocco ended the state monopoly on radio and television broadcasting[53] and created the High Authority for Audiovisual Communication (HACA).[54] This regulatory body, which the 2011 Constitution elevated to the rank of a "regulatory and good governance agency", is placed under the "protective supervision" of the King, who appoints five of the nine members of

[51] Point 26 of General Comment No. 34: "Laws restricting the rights enumerated in article 19, paragraph 2 [...] must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant". Consequently, "Laws must not violate the non-discrimination provisions of the Covenant".
[52] Point 44 of General Comment No. 34.

its decision-making body in order to guarantee HACA's independence vis-à-vis the government and political parties.[55] The law establishing HACA was amended on August 25, 2016, but the amendments did not substantially change the nature and scope of the agency's prerogatives.[56] These powers can be summarised as follows:

- To participate in the elaboration of the legal framework applicable to audiovisual communication by submitting opinions to the King, the parliament and the government.
- To approve the terms of reference of public media operators.
- To monitor programmes to ensure that public and private operators comply with the legislation and regulations in force and with the obligations laid down in their terms of reference.
- To ensure respect for the pluralistic expression of thought and opinion, especially in the field of political information and in particular during elections.
- To hear and investigate complaints from political parties, trade unions, NGOs and individuals against any radio or television channel that has broadcast content that is contrary to the law.
- To examine requests from private operators for the authorisation, creation and operation of media organisations (licensing, authorisation and terms of reference).
- To issue licences for the use of radio frequencies allocated by the National Telecommunications Regulatory Agency.

To complete this new mechanism, in 2005 Parliament adopted a law on audiovisual communication,[57] which was amended and expanded by several laws enacted in 2015 and 2016.[58] According to its preamble, the law "constitutes an important milestone in the process of establishing the legal framework for the liberalisation of this sector". It effectively marks a break with the previous system since it establishes the legal framework for determining the general principles and the necessary mechanisms for the restructuring and regulation of the audiovisual sector. It thus offers new private operators the possibility of creating and operating a radio or television station in a fair and transparent system that is independently regulated by HACA.

This mechanism has led to a diversification of the media landscape with the creation of new public radio and television channels and some 20 private radio stations. In contrast,

[53] Decree Law No. 2-02-663 of September 10, 2002.
[54] Dahir No. 1-02-212 of August 31, 2002.
[55] HACA is made up of two complementary institutions: the High Council for Audiovisual Communication (CSCA), a deliberative body, and the Directorate General for Audiovisual Communication (DGCA), which is responsible for preparing and implementing the Council's decisions. The Board of Governors is composed of nine members from various professional, intellectual and academic backgrounds. The president and four other members are appointed by the King, two members are appointed by the Prime Minister, and one member each is appointed by the Speaker of the House of Representatives and the Speaker of the House of Councillors. Unlike the other members, the term of office of the five people appointed by the King is unlimited.
[56] Dahir No. 1-16-123 of August 25, 2016.
[57] Law No. 77-03 on Audiovisual Communication, promulgated by Dahir No. 1-04-257 of January 7, 2005.
[58] Law 66-16, Law 96-14 and Law 83-13 amending and supplementing Law 77-03 on Audiovisual Communication.

the private television sector has not seen the same level of expansion. With the exception of MEDI 1 TV,[59] no new TV licences have been issued, despite the fact that the Competition Council called for the market to be opened up to private investment in 2013. Several operators submitted applications during the second tender procedure in 2009. However, none were successful, and none of the applicants challenged the HACA decision. The agency had concluded that the viability of the proposed channels could not be guaranteed because the advertising market, affected across the globe by the financial crisis, was too small for new players to enter the market.

With regard to freedom of expression, the law's preamble refers to "universal principles of human rights, as recognised at the international level", particularly in the field of political pluralism, but without clearly establishing the primacy of Morocco's international commitments over domestic law, since this law is also based "in its general philosophy and objectives, on the immutable principles and constitutional benchmarks of the Kingdom, namely Islam, national and territorial unity and constitutional monarchy". The text of the law even seems to be leaning towards the primacy of domestic law. In fact, while "audiovisual communication is free" (Article 3(1)), this freedom must be exercised with due respect for "the immutable principles of the kingdom, the fundamental rights and freedoms as provided for by the Constitution, public order, morality and the requirements of national defence" (Article 3(3)). The same applies to programming, which "audiovisual communication companies [may] freely create" (Article 4), subject to positive obligations (providing pluralist information, encouraging domestic production, promoting gender equality), but "without prejudice to the dogmas of the Kingdom of Morocco as defined by the Constitution, in particular those relating to Islam, the territorial integrity of the Kingdom and the monarchy" (Article 9). These restrictions are accompanied by other limitations relating, in particular, to the promotion of violence or incitement to terrorism; the protection of children, people with disabilities, health, the environment and copyrights; or the fight against misleading advertising, violence against women and gender stereotypes.[60]

The very general terms of these limitations are likely to be interpreted in a way that may unduly restrict freedom of expression. Admittedly, HACA represents a significant bulwark against possible abuses. It can issue opinions on the regulations and sanction violations through fines and the suspension of programmes (not exceeding one month).[61] However, these sanctions are administrative in nature and do not eliminate the possibility of criminal prosecution. Their purpose is limited to the regulation of the sector, without the option to punish operators at fault or to compensate third parties for any private damage they may have suffered. Article 7 of the Law of August 25, 2016 on the reorganisation of HACA thus provides that the agency "may be called upon by the judiciary to issue opinions on justified complaints regarding infringements of the laws or regulations relating to the audiovisual communication sector". Likewise, in the

[59] The channel was first broadcast by Satellite (from 2006), before moving to the analogue terrestrial network (2010) and then finally to DTT (2015).
[60] Dahir No. 1-16-155 of August 25, 2015 amending Law 66-16-13, supplementing the law on audiovisual communication.
[61] Article 26 of Law 11-15 of August 25, 2016 on the reorganisation of HACA.

event of a criminal offence, HACA or its supervisory authority may refer the matter to the Crown Prosecutor with a view to initiating legal proceedings (Article 22).

ACCESS OF POLITICAL PARTIES, TRADE UNIONS AND NGOs TO PUBLIC AUDIOVISUAL MEDIA

The 2011 Constitution is the only one in the region that expressly guarantees opposition parties airtime in the public media, in proportion to their parliamentary representation (Article 10). Parties and candidates running for election are similarly guaranteed the right of equitable access to the public media (Article 11). This principle is enshrined in a number of laws:

- Article 295 of Law No. 9-97 on the Electoral Code: "Access to public audiovisual media is open to political parties participating in general municipal and legislative elections under the conditions and in the manner set out in decrees issued by the Minister of the Interior, the Minister of Justice and the Minister of Information".

- Article 48 of the Law on Audiovisual Communication: "The national public audiovisual companies are required to respect (...) the plurality of expression of thought and opinion and the equitable access of political organisations, in accordance with their importance and their representativeness, particularly during elections and within the framework of the applicable regulations, and to respect the plurality of civil society associations with an interest in public matters, in accordance with their importance, while respecting the principles of fairness, territorial equity and non-monopolisation".

- The law establishing HACA, which grants it the prerogative to ensure compliance with the applicable laws and regulations on the rules and conditions for the production, programming and broadcasting of programmes relating to election campaigns, which apply to both public and private audiovisual media.

Access to public audiovisual media is also guaranteed to trade unions and NGOs in order to promote the pluralistic expression of political, social, economic or cultural thought and opinion. This obligation is included in the terms of reference of public media operators, and each quarter, HACA sends a statement to the head of government, the two chambers of parliament, the heads of political parties, trade union organisations and the National Council for Human Rights detailing the airtime given to politicians, trade unions, professionals and NGOs in the programmes broadcast by television and radio channels.

COMMUNITY-BASED MEDIA

The Law on Audiovisual Communication does not grant any legal status to community radio stations. In fact, under Article 18, only a legal person incorporated as a public limited company may set up a television channel or a radio station, which de jure excludes NGOs. This restriction prevents Morocco from complying with its international commitments. In its General Comment

No. 34, the United Nations Human Rights Committee calls on States parties to the ICCPR to "avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations". The declaration on the principles of audiovisual freedom adopted by the African Commission on Human and Peoples' Rights also calls on African States to encourage community broadcasting "given its potential to broaden access by poor and rural communities to the airwaves".[62]

For the past ten years, NGOs have been campaigning for the media landscape to be opened to NGO and community-based radio stations. The final report of the national "media and society" dialogue launched in 2010 contains a series of recommendations to this effect, and at the Marrakesh international conference, held in December 2011, some 60 NGOs, journalists and bloggers developed a legislative framework for regulation and self-regulation with a view to promoting community radio broadcasting in Morocco.

More recently, the Forum des Alternatives Maroc (FMAS) initiated a memorandum to support advocacy for the legal recognition of community radio stations.[63] This 50-page document calls on the government and parliament to recognise NGO and community-based radio stations in the Audiovisual Communication Act by introducing amendments that acknowledge the specific role they play in citizenship education and local development and facilitate their access to the audiovisual landscape under the appropriate conditions. The demands include the establishment of an incentive system for licensing and frequency allocation, a non-binding set of terms and conditions, and the creation of a national support fund.

FREEDOM OF EXPRESSION ON THE INTERNET

The new criminal law system also acts as a brake on the development of freedom of expression on the internet. Citizen journalists, bloggers and other influencers, whose numbers are growing exponentially, are in the front line. The UN Human Rights Committee recommends that they should enjoy the same legal protections as journalists in accordance with a principle widely recognised in international law, but this idea is far from being unanimously accepted in Morocco. The Moroccan Federation of Newspaper Publishers (FMEJ) and the National Union of the Moroccan Press (SNPM) oppose it on the grounds that the journalistic profession is governed by ethical rules that non-professional information professionals are either unaware of or fail to respect.[64]

On the other hand, international human rights organisations are opposed to the introduction of specific legislation for freedom of expression on the internet, which they consider to be

[62] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, October 17-23, 2002.
[63] Memorandum drafted by Saïd Essoulami, Executive Director of CMF-MENA. http://www.e-joussour.net/wp-content/uploads/2016/04/Publication-plateforme-de-plaidoyer-FR-AR.pdf
[64] http://urlz.fr/6LUf;https://lematin.ma/journal/2017/les-editeurs-de-journaux-et-le-syndicat-de-presse-s-rsquo-associent-pour-defendre-le-metier/277458.html In this regard, the international NGO Article 19 also recommends that bloggers should have the possibility, but not the obligation, to join the self-regulatory mechanisms of the print media. Some countries, such as Serbia, have made it possible for online media to join the self-regulatory mechanism voluntarily.
[64] Session of July 5, 2012.
[65] Session of July 5, 2012.

inherently dangerous, and argue that the rules applicable offline should also apply online. The UN Human Rights Council has also adopted a recommendation to this effect.[65] It states that the rights enjoyed by people offline must also be protected online, in particular the right of all persons to freedom of expression through the means of their choice and across borders.

This is based on the general principle that the rules applicable offline should also apply online. The main challenge is to ensure compliance with the principles applicable offline while taking the specific context of the online environment into account. This concerns, in particular, the dissemination of illegal content and the resulting blocking of websites. A comparative study carried out under the auspices of the Council of Europe in April 2012 identified two main models for regulating the blocking of websites in Europe. The first model refers to countries that do not have a legislative or regulatory regime specifically dedicated to the blocking of websites, and which therefore rely on existing legal frameworks that are not specific to the internet.[66]

The second model concerns countries that have adopted a legal framework specifically for the internet and other digital media. In these countries, the provisions adopted usually specify the grounds for the blocking of content (illegal material relating to child pornography, terrorism and crime in particular) and the conditions for doing so. The Council of Europe has noted that these states, after implementing systems for removing the most serious threats, tend to extend this practice to all kinds of content of which they disapprove. Reiterating that the blocking of content constitutes, in principle, an interference with the exercise of the right to freedom of expression, the Council of Europe recommends that its member states ensure that restrictions on access to online content affecting users in their jurisdiction are based on a strict and predictable legal framework, specifying the scope of such restrictions and providing for judicial review to prevent possible abuses. In addition, it is for the domestic courts to determine whether a blocking measure is necessary and proportionate.[67]

THE LEGAL FRAMEWORK ON CULTURAL, ARTISTIC AND INTELLECTUAL CREATIVITY

In Morocco, there is no specific legislation governing freedom of expression in cultural, artistic and intellectual creation. Consequently, the latest version of the law on artists and the arts, which was promulgated in September 2016,[68] only contains professional guarantees for artists regarding contracts and social security. In the absence of specific legislation, cultural, artistic and intellectual creators are thus subject to the law in general, including the provisions of the Criminal Code relating to restrictions on freedom of expression.

[66] See also the Article 19 guidance document on the blocking and filtering of websites.
http://bit.ly/2io3o4U

[67] The case law of the European Court of Human Rights on the blocking of internet content, which has evolved in recent years, is based on the application of three criteria: 1) the need for a clear legal basis for any blocking measure; 2) the measure must pursue a legitimate aim, as enumerated by Article 10, paragraph 2 (for example, national security, prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others); 3) the measure must be proportionate to the legitimate aim pursued.

[68] Law No. 68-16 concerning artists and the artistic professions, repealing Law No. 71-99 concerning artists.

RECOMMENDATIONS

This report was presented and discussed by Moroccan stakeholders during two workshops held on October 24 and 25, 2017 in Rabat, and on January 27 and 28, 2018 in Marrakesh. At the end of the discussions, the participants agreed on the following recommendations:

- Despite significant progress since the adoption of the 2011 Constitution, Morocco's legal framework on freedom of expression still needs to be amended to comply with the principles and obligations enshrined in its international commitments, in particular the 1966 International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1979.

- In particular, the Moroccan parliament should review several laws that have recently been adopted (the Press Code, the amendments to the Criminal Code, the right of access to information), in light of the memoranda sent to the government by Moroccan and international stakeholders between 2011 and 2015, which have not been sufficiently taken into account.

- Bringing the Criminal Code into line with ICCPR standards is crucial to ensuring that the right to freedom of expression is fully guaranteed in Morocco. The various media laws offer a certain level of protection to professional media actors, without exempting them from the provisions of the Criminal Code, which remains applicable to all forms of journalism, whether professional or not, as well as to all forms of artistic, cultural, literary and scientific expression. Eliminating custodial sentences for offences of expression, with the exception of those permitted by the ICCPR, would also protect non-professional information actors (citizen journalists, community journalists, bloggers, etc.), while better protecting the rights and freedoms of professional journalists.

- In the framework of basic and continuous training, judges and other legal professionals should be made aware of the rights and obligations arising from Morocco's international commitments in the area of fundamental freedoms (freedom of expression and assembly), including those relating to the internet.

- The Moroccan parliament, in consultation with the judiciary and Moroccan civil society, should explore the possibility of creating a system of courts dedicated to fundamental freedoms, based on the model of family law, for which each court has a specialised section.

- A mechanism for the immediate publication of judgements (and rulings) rendered by the courts (and by tribunals) should be established to promote the harmonisation of case law on fundamental freedoms.

- A debate and consultative process involving all relevant stakeholders should be initiated with a view to creating a self-regulatory mechanism to effectively combat the spread of false news in traditional and social media.

- Trade unions, political parties and members of parliament should support civil society advocacy for the legal recognition of community radio stations, and this recognition should be extended to all types of community media (audiovisual, written and digital).

- After the promulgation of the law on the right of access to information, Moroccan civil society should set up a monitoring mechanism to ensure the effective implementation of this right on the part of public institutions and the Commission on the Right of Access to Information, as well as a rating system to identify the institutions that are least compliant.

- Moroccan civil society should strengthen its advocacy procedures by developing its capacity to intervene directly with members of parliament. This ability to act is particularly important during the parliamentary "shuttle" between the two chambers, during which the draft laws that the government has submitted to civil society actors for their advisory opinion may undergo substantial changes. By engaging in direct advocacy during the parliamentary shuttle period, civil society actors could take effective action against the addition of further restrictions on fundamental freedoms and ensure that they are better protected in the final version of the laws.

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