



HUMAN
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THE RED LINES STAY RED

Morocco's Reforms of its Speech Laws





The Red Lines Stay Red

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Summary

Since Mohammed VI became king in 1999, tens of Moroccans have been imprisoned solely for their nonviolent speech, under both the press code and the penal code. They include journalists convicted of defaming persons, disseminating false news, denigrating the judiciary, praising terrorism; rappers convicted of insulting the police; and ordinary citizens convicted of insulting the king on Facebook or YouTube.

Just before concluding its session in August 2016 and heading toward quinquennial elections held in October, Morocco's Parliament adopted a set of new laws governing the press and freedom of expression. One of those laws, the Press and Publications Code, constitutes a major overhaul of the press code that was adopted in 2002.¹ The government hailed the new laws as a major step forward for press freedom and for implementing the rights enshrined in the 2011 constitution.

One of the notable advances in the new press code is the elimination of prison time as punishment. The code still punishes many nonviolent speech offenses, but only by fines and court-ordered suspensions of publications or websites. The former code by contrast imposed prison as punishment for a range of offenses that included giving offense to the king or members of his family, causing prejudice to the monarchic regime, Islam, or Morocco's territorial integrity, maliciously publishing false news, and defaming persons or state institutions.

This report analyzes how, following the 2016 legal reforms, a number of key nonviolent speech offenses are defined and punished.

These reforms have ended prison as a punishment for offenses such as defaming other persons, insulting foreign heads of states or diplomats, and maliciously publishing false news. However, two major concerns undermine this progress:

¹ The Press and Publications Code, Law 88.13, published in the Official Journal, no. 6491, August 15, 2016, pp. 5966-5987, hereinafter the press code, http://www.sgg.gov.ma/Portals/1/BO/2016/BO_6491_Ar.PDF?ver=2016-08-18-141835-253 (accessed October 27, 2016).

First, many of the offenses that the new press code punishes with fines and suspensions of publications should be decriminalized entirely in order to conform with Morocco's obligations to protect international norms with respect to freedom of expression.

Second, the new press code cannot be viewed in isolation from the penal code, which continues to punish with prison a range of nonviolent speech offenses, whether committed by journalists or non-journalists. In fact, Parliament adopted, in tandem with the new press code, additions to the penal code that criminalized "causing harm" to Islam and the monarchy, giving offense to the king or members of the royal family, and inciting against territorial integrity, to be punished by prison and/or a fine.²

While the new press code states that it shall be the law that applies over other legislation whenever it contains a clear provision pertaining to the offense in question, the protection that this clause will provide to journalists and non-journalists from prosecution under the penal code is far from clear – and certainly not comprehensive.³

In order to consolidate the gains promised by the 2016 new press code, the new Parliament that convened on October 14, 2016 should set about reviewing each article of the penal code that can be applied to prosecute nonviolent speech. As a start, it should eliminate prison terms as punishment, as the previous parliament did for the press code. As a second step, parliament should examine all legislation with a view to decriminalizing speech offenses or narrowing their scope so as to comply with Morocco's treaty obligations governing freedom of expression, notably article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Morocco's government, in responding in writing to questions submitted by Human Rights Watch, rightly presented as advances a number of reforms in the laws, such as abolishing prison in the press code and making prison time for many speech offenses in the penal code optional instead of mandatory; reducing some penalties; narrowing the definition of certain offenses; eliminating the government's authority to seize or suspend publications on the basis of political content without a court order; and making it easier for a person accused of defamation to present evidence in court of the truthfulness of an assertion.

² Law 73.15 amending the penal code, published in the Official Journal, no. 6491, August 15, 2016, pp. 5992-5993, http://www.sgg.gov.ma/Portals/1/BO/2016/BO_6491_Ar.PDF?ver=2016-08-18-141835-253 (accessed October 27, 2016).

³ Press code, article 17.

This report excerpts at length the communications received from the government, rebutting in many places its claim that the new legislation is consistent with the relevant international law. The main response received from the government is reprinted, in the Arabic original, as an appendix to this report.

Recommendations

To Morocco's Parliament

- Revise the penal and press codes by eliminating all nonviolent speech offenses that conflict with Morocco's obligations to respect freedom of expression under the International Covenant on Civil and Political Rights (ICCPR). These include the articles on causing harm to the monarchic regime and Islam (penal code article 267.5, as revised in 2016, press code article 71), defaming or insulting or touching on the private life of the king or crown prince or royal family, showing a lack of reverence or respect due the king (penal code article 179, as revised in 2016, press code article 71), and insulting state institutions (penal code article 265). At the very least, Parliament should abolish the prison terms that the penal code imposes as one possible punishment for these offenses.
- Adopt legislation that implements the powers that the constitution has provided to the Constitutional Court to review existing and proposed laws and suspend their application if the court deems them unconstitutional.
- For those offenses in the penal and press code that derive from criteria for restricting speech that the ICCPR does permit under articles 19(3) and 20, Parliament should narrow and clarify the definition of each offense so that (1) it is formulated with sufficient precision to enable the citizen to regulate his or her conduct and (2) it is defined narrowly so as to meet a need that is necessary in democratic society, such as to prohibit incitement to violence. Those offenses that require narrowing and clarifying include:
 - *Inciting against territorial integrity* (penal code article 267.5 and press code 71): If Morocco is to retain a speech offense relating to "inciting against territorial integrity," legislators should define it with sufficient precision so it applies only to speech that constitutes incitement to use violence or physical force, and clearly excludes peaceful advocacy for self-determination for Western Sahara.
 - *Praising terrorism* (penal code article 218.2): Parliament should revise the article to restrict only terrorism-related speech that constitutes incitement to terrorism; the article should avoid reference to such vague terms as "glorifying" or "promoting" terrorism; to specify that criminal incitement requires the presence

of an actual risk that the act incited will be committed; and to expressly refer to two elements of intent, namely the intent to communicate a message and the intent that this message incite the commission of a terrorist act.

- *Insulting a state agent whilst performing his duties* (penal code article 263 and press code 72): Legislators should either abolish this offense or redefine it so that any restrictions it imposes on speech are both necessary and proportionate to protect genuine threats to public order, and cannot be used to punish protected, peaceful criticism of public officials and institutions, no matter how virulent.
- *Speech that casts discredit on court decisions and that can harm the authority and independence of the judiciary* (penal code article 266): Legislators should either abolish article 266 or revise it to ensure that any restrictions on judiciary-related speech are both necessary and proportionate to shielding the judiciary from interference with its independence. The revised article should protect the right to criticize and comment on court verdicts and on the judiciary as an institution, in whole or in part, so long as the speech does not constitute a deliberate and credible attempt to influence a court verdict from outside the courtroom.
- *Incitement to discrimination and hatred* (penal code article 431.5 and press code article 71): Legislators should narrow the definition of the offense to conform with article 19(3) of the ICCPR and to ensure that it restricts freedom of expression only to the extent necessary, pursuant to ICCPR article 19(3); for example, by making clear that peaceful advocacy of the interests of one particular group in society does not constitute by itself illegal incitement to discrimination.
- Eliminate from the new press code the offense of insulting foreign diplomats and high officials (articles 81 and 82), while continuing to allow those persons to file civil defamation suits.
- Consider decriminalizing defamation of other persons, which is currently punishable by a fine under press code article 85, to make defamation exclusively a matter for civil actions by the party that considers itself to have been defamed.

To the Prosecuting Authorities in Morocco

- Until Parliament abolishes laws that are inconsistent with international norms protecting the right to freedom of expression, or until the Constitutional Court has ruled on the conformity of such laws with the constitution's protections of that right, refrain from prosecuting persons for nonviolent speech under these laws.

Methodology

This report provides our analysis of Moroccan legislation in its Arabic original, in light of applicable international conventions, authoritative commentaries on those conventions, and explanations of the Moroccan legislation provided to us by the Moroccan government. Those explanations are reprinted in Arabic as an appendix to this report and excerpted extensively in English translation within the report.

The currency conversion rate used in this report is 10 Moroccan Dirhams (DH) = US\$1.

I. Background: The Press Law and the Penal Code

Following legislative elections in November 2011, a new government led by the Justice and Development Party took office. Minister of Communications and Government Spokesperson Moustapha Khalfi pledged to overhaul the 2002 press code in the direction of enhancing press freedom, consistent with the new constitution adopted in July 2011.⁴

That constitution contains a number of protections for freedom of expression. Article 25 states: “Freedom of thought, opinion and expression in all its forms are guaranteed.” Article 28 states, “Freedom of the press is guaranteed and cannot be limited by any form of prior censorship. Everyone has the right to express and disseminate freely information, ideas, and opinions, limited only by that which the law explicitly limits.”⁵

In October 2014, the government submitted three draft laws to Parliament: The Press and Publications Code (Law 88.13), a law on the status of professional journalists, and a law creating a new national press council. Parliament adopted all three laws, with some revisions, before concluding its session on August 3, 2016, in advance of parliamentary elections that took place on October 7, 2016.⁶

This briefing paper focuses on one key aspect of these reforms: how nonviolent speech offenses are defined and punished.

Law 88.13, adopted on July 26, 2016, is Morocco’s first-ever press code that does not include prison terms as punishments for peaceful speech offenses.⁷ However, it is important to examine the new press law side-by-side with the penal code, which continues

⁴ Le Matin.ma, “Code de la presse et de l’édition : Présentation à Rabat des membres du comité consultatif pour la réforme” October 2, 2012, http://lematin.ma/journal/2012/Code-de-la-presse-et-de-l-edition_Presentation-a-Rabat-des-membres-du-comite-consultatif-pour-la-reforme/172266.html (accessed October 20, 2016).

⁵ Constitution of Morocco, 2011, https://www.constituteproject.org/constitution/Morocco_2011.pdf?lang=en (accessed October 20, 2016).

⁶ This report does not cover the new law on the status of professional journalists, the law on the new national press council, or other draft legislation affecting press freedom, such as the draft law on the right to information and the rules governing public broadcasting media. Nor does it cover the provisions in Law 88.13 on other topics affecting press freedom, such as the confidentiality of sources, the financial and other requirements that publishers must fulfill, the licensing process for publications, the power to seize foreign publications, or new provisions governing electronic media.

⁷ Official Journal, August 15, 2016, pp. 5966-5987, http://www.sgg.gov.ma/Portals/1/BO/2016/BO_6491_Ar.PDF?ver=2016-08-18-141835-253 (accessed October 20, 2016).

to punish numerous nonviolent speech offenses with prison terms.⁸ In the end, both journalists and non-journalists still risk prison terms for critical speech on a wide variety of subjects of public interest.

Five days before approving Law 88.13, Parliament inserted new articles into the penal code punishing with prison or fines, or both, speech offenses related to sensitive topics in Morocco's political and public life: the monarchic regime; the person of the king and the royal family; Islam; and Morocco's territorial integrity. Both these new provisions of the penal code and existing provisions of the penal code that punish with prison such speech acts as praising terrorism, defaming state institutions, and denigrating court rulings undermine the progress that the new press code represents.

The previous press law, enacted in 2002, set both prison *and* a fine as the required punishment for the following offenses:

- incitement to racial discrimination, hatred, or violence against a person or persons because of their race, origin, color or ethnic, or religious affiliation (article 39 bis);
- incitement to disobedience among members of the security forces (article 40);
- causing offense to the king, the royal princes and princesses; or causing prejudice to Islam, the monarchy, or Morocco's territorial integrity (article 41);
- malicious publication of false news if it disturbs the public order, causes panic, or disrupts discipline or morale in the army (article 42);
- defamation of the courts, security services, state institutions or public administrations (article 45 and 51); and
- defamation of persons (articles 47 and 51).

The 2002 law set prison *or* a fine as punishment for the following offenses:

- causing offense publicly to foreign heads of state, to their prime ministers, or foreign ministers (article 51 and 52);
- causing offense to foreign diplomats accredited in Morocco (article 51 and 53).⁹

⁸ Penal code, consolidated version of June 4, 2015 (in French), <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/codepenal.pdf> (accessed November 1, 2016).

⁹ Press code, dahir N° 1-02-207 of October 3, 2002, promulgating Law n°77-00 modifying and completing dahir n°1-58-378 of November 15, 1958 constituting the Press and Publication Code of 2003, <http://www.wipo.int/edocs/lexdocs/laws/fr/ma/ma052fr.pdf> (accessed October 20, 2016).

For those speech offenses that the penal code does not mention – including malicious publication of false news, offending senior foreign officials and diplomats, and defamation of individuals – this means that, after the overhaul of the press code, they can henceforth be punished only by fines but not prison (press code articles 72, 81-82 and 85, respectively). Furthermore, the new press code eliminates for the first time the power of authorities to seize or suspend publications for nonviolent political speech, without first obtaining a court ruling.

However, two major problems remain. First, the new press law still targets for criminal sanction speech that is protected under international norms of freedom of expression. Second, both journalists and non-journalists can still go to prison if prosecuted under the penal code for any number of nonviolent speech offenses.

The government has stated that the new press code contains new provisions that will often shield journalists from being prosecuted under the penal code. It pointed to a clause in the press code's article 17, which states: "The provisions of other laws shall not be applied in any matter for which there is a clear provision in the Press and Publications Code."

However, the protection that this article provides to journalists and others from being imprisoned for their nonviolent expression is neither comprehensive nor entirely clear. This is because the penal code contains provisions criminalizing nonviolent speech that are either absent or worded differently from the press law. Those that are absent from the press law include the provisions on praising terrorism and casting discredit on court decisions. Those that are worded differently from the press law include the provisions that criminalize crossing Morocco's famous "red lines:" Islam, the monarchy, the person of the king and members of the royal family, and the country's "territorial integrity," which is usually but not exclusively applied to Morocco's claim of sovereignty over Western Sahara.

The government, in writing to Human Rights Watch in May 2016, justified Draft Law 73.15 in these terms, prior to its adoption by Parliament:

An effort has been made to reform the penal code, pursuant to what the Moroccan constitution and the current legal system stipulate, in relation to the bedrock principles of the nation regarding territorial integrity, the

monarchic system, Islamic religion and the person of His Majesty the King, as well as the crown prince and the royal family.

The reforms introduced by way of Draft Law No. 73.15 are essentially related to defining the terms more precisely, delimiting the scope of the judiciary's interventions, and reducing the penalties, as well as giving the judge discretion to choose between monetary fines and prison sentences. This is a step forward compared to the current situation, where the judge is compelled to impose prison sentences. This is a development inspired by comparative law, including from the Spanish penal code...

Also, the reforms are guided governed by article 4 of the penal code, which says that the penal code applies only in those cases where there is no clear provision in a specific [other] law.¹⁰ This means that all penalties stipulated in the press law [with regard to a crime] cannot, in any circumstances, entail the penalties stipulated in the penal code. Therefore, here we have the rule of “not duplicating the penalty,” which means that penalties in the penal code cannot be applied in cases related to the press and publications, as long as the Press and Publications Law includes penalties related to such matters.

While the press code, in article 71, and the penal code, in articles 179 and 267.5 (which are part of Law 73.15), define the “red line” offenses in similar terms, the press code provision applies to the publication as perpetrator whereas the penal code articles apply to persons as perpetrator. Does the press code's article 17 mean that if, for example, a newspaper columnist “caused harm” to Islam, the prosecutor could prosecute the newspaper only and would be pre-empted from charging the columnist under the penal code? The legislation is unclear.

Furthermore, even if the government's assertion was correct that the publication, and not the individual, would face prosecution for those offenses listed in press code article 71/penal code articles 179 and 267.5, this would not protect from prosecution under the

¹⁰ The actual wording of article 4 of the penal code is slightly different: “The provisions of this code apply also to matters governed by specific laws and regulations in all cases for which these laws lack a specific provision.”

penal code those persons whose offending expression occurred outside the realm of a publication as defined by the press law, such as in a Facebook post.

If this is accurate, it would constitute an unacceptable form of differential treatment, by imposing lighter penalties on persons who commit a speech offense via a recognized publication compared to persons who commit the identical offense outside of a recognized publication.

In any event, legislators should eliminate these offenses from both codes for the reasons we explain in the following chapters, which analyze the various nonviolent speech offenses that still carry possible prison sentences and explain how they are at odds with international standards on freedom of expression.

The Constitutional Court created by the 2011 constitution can also play a role in ensuring that Moroccan laws protect freedoms. While the constitution does not specify that all laws must comply with the constitution's provisions, it creates, in Section 8, a constitutional court that, under certain circumstances, can review both draft and existing laws and declare them unconstitutional, thereby suspending their application. Article 133 in particular empowers the Constitutional Court to rule on the constitutionality of an existing law when a litigant "argues that the law that is being applied in the case is prejudicial to the rights and freedoms guaranteed by the constitution." The Constitutional Court does not yet have such a power since Parliament has yet to pass an implementing law; a draft law is pending before it.¹¹

¹¹ Draft organic law no. 86.15 concerned with defining the provisions and procedures for applying article 133 of the Constitution, <http://www.chambre-des-representants.ma/sites/default/files/loi/86.15.pdf> (accessed November 1, 2016).

II. Causing Harm to Islam

In the new press law, the offense of “causing harm” (إساءة) to Islam (article 70) replaces “causing prejudice” (المس) to Islam in the previous law (article 41). But whereas this article of the previous code applies to persons, article 70 of the new law applies only to publications and electronic media and imposes as punishment fines and a court-ordered suspension of the offending publication. While rewriting the press code, Parliament also introduced a provision on harming Islam into the penal code, where it did not previously exist. Under the new penal code’s article 267.5, a person convicted of “causing harm” to Islam faces six months to two years in prison or a fine of 20,000 to 200,000 DH (US\$2,000 to 20,000), or both. The punishment is increased to imprisonment for two to five years or a fine of 50,000 to 500,000 DH, or both, if the offense is committed via any form of print, audiovisual, or electronic media. This new article 267.5 is part of “Law 73.15,” a revision to the penal code that was published in the Official Journal on August 15, 2016.¹²

It is unclear how the change in wording, from “causing prejudice” to “causing harm,” changes the definition of the infraction. The law does not define these terms. Either way, articles that criminalize speech deemed critical of, insulting to, or defamatory toward religions are incompatible with international standards on freedom of expression.

In its correspondence with Human Rights Watch, the government justified criminalization of assaults on religion, saying that because the constitution provides that Morocco is a monarchy and its state religion is Islam:

To criminalize insults of the monarchic regime and Islam is to criminalize that which harms the main symbols of the country as set forth in Morocco’s constitution. These are general provisions in the draft penal code that do not affect freedom of expression; rather, they are intended to prevent violations of the constitution. It is noteworthy that many international legal instruments recommend formulating legal provisions that protect the public order...

¹² Official Journal, no. 6491, August 15, 2016, pp. 5992-5993. http://www.sgg.gov.ma/Portals/1/BO/2016/BO_6491_Ar.PDF?ver=2016-08-18-141835-253 (accessed October 20, 2016).

Also, criminalization of insulting religions in draft law 73.15 relied on article 19 in resolution 65/224 adopted by the General Assembly on December 21, 2010 related to combating defamation of religion, where the General Assembly “welcomes the recent steps taken by Member States to protect freedom of religion through the enactment or strengthening of domestic frameworks and legislation to prevent the vilification of religions and the negative stereotyping of religious groups.”

This response is unsatisfactory from a human rights perspective on two levels. First, the provision is made no less a restriction on free expression by stating that its intention is to prevent violations of a national constitution. National constitutions are not the arbiter of what constitutes acceptable limits on speech under international norms. Rather, those norms emanate from the international conventions, and from the authoritative clarifications of those conventions issued by the United Nations Human Rights Committee, the independent body of experts that reviews state compliance with the International Covenant on Civil and Political Rights (ICCPR).¹³

Contrary to this norm, Morocco’s constitution does not give international conventions ratified by Morocco clear primacy over domestic law. Its preamble conditions that primacy over domestic law by placing it “within the framework of the dispositions of the Constitution and laws of the Kingdom, while respecting immutable components of [Morocco’s] national identity.”

The UN Human Rights Committee has held that states may not invoke their own constitutions as a basis to circumvent their minimum obligations under the ICCPR. In General Comment 31, the Committee held that “Although article 2, paragraph 2 [of the ICCPR] 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.”¹⁴

¹³ International Covenant on Civil and Political Rights (ICCPR), as adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

¹⁴ UN Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” General Comment No. 31 [80], CCPR/C/21/Rev.1/Add. 13 (2004) http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/21/Rev.1/Add.13 (accessed October 20, 2016).

Secondly, the assertion by Morocco that UNGA resolution 65/224 gives states a green light to criminalize insults to religion misstates international standards on freedom of expression with respect to religion.

The key articulation of the right to freedom of expression in international law is found in the ICCPR, which Morocco ratified in 1979. Article 19(2) states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19(3) recognizes that this right may be subject to certain restrictions; for example, article 20(2) prohibits “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

Articles criminalizing “insults” of Islam fall well short of meeting that standard.

The UN Human Rights Committee’s General Comment on article 20, as well as other authoritative jurisprudence on the ICCPR, makes clear that restricting expression on the basis of article 20 may be done only on grounds that are narrow and set forth in law.¹⁵

The Committee, in its General Comment on ICCPR article 19, wrote:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.¹⁶

¹⁵ UN Human Rights Committee, “Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20),” General Comment No. 11, 29/07/1983 (1983) <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf> (accessed October 20, 2016).

¹⁶ UN Human Rights Committee, “Article 19: Freedoms of opinion and expression,” General Comment No. 34, International Covenant on Civil and Political Rights (2011), CCPR/C/GC/34 (2011), <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed October 20, 2016).

Morocco's new penal code provision penalizing "causing harm to Islam" (article 267.5), as well as article 70 of the new press code, signally fail to meet the exacting criteria set forth in ICCPR Article 20, paragraph 2: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

The lack of a basis within the ICCPR to restrict peaceful criticism of religions was also the subject of a joint declaration in October 2008 by the UN special rapporteur on freedom of religion or belief and the special rapporteur on contemporary forms of racism, xenophobia and related intolerance:

Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one's religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.¹⁷

In March 2011, and every year since then, the Human Rights Council adopted a consensus resolution entitled "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief." This resolution expresses a global consensus, and Morocco supported it. It does not mention restricting freedom of expression, except to urge criminalizing "incitement to imminent violence based on religion or belief."¹⁸

The UN General Assembly on December 17, 2015 adopted by consensus a resolution (GA resolution 70/157) with very similar wording. While it "condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence," and calls on states to address incitement, it refrains from calling on states to restrict speech,

¹⁷ Special Rapporteur on freedom of religion or belief: references to "incitement to religious hatred." A/HRC/2/3, "Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance," http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/experts_papers/jahangir.doc (accessed October 20, 2016).

¹⁸ UN Human Rights Council, "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief," A/HRC/RES/16/18, <http://geneva.usmission.gov/wp-content/uploads/2012/04/Resolution16-18.pdf> (accessed October 20, 2016).

except to adopt “measures to criminalize incitement to imminent violence based on religion or belief.”¹⁹

Another international effort to protect both freedom of expression and religion is the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The plan, the outcome of an initiative by the UN Office of the High Commissioner for Human Rights (OHCHR) to clarify the scope of state obligations under Article 20 of the ICCPR, opposes blasphemy laws due to their stifling impact on freedom of expression, and urges that prohibitions on “incitement” be reserved for the most extreme cases, and require specific safeguards to prevent their abuse. It was signed in Rabat in 2012 by a group of experts.²⁰

¹⁹ UN General Assembly, “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief,” A/RES/70/157, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/157 (accessed October 20, 2016).

²⁰ Rabat Plan of Action on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence, October 5, 2012, para. 17, 19, http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (accessed October 27, 2016).

III. Causing Harm to the Monarchical Regime

Under the previous press code, speech that “causes prejudice to ... the monarchic institution” (المس بالمؤسسة الملكية) carried a penalty of three to five years in prison plus a fine of 10,000 to 100,000 DH and the possibility of a court-ordered suspension of the publication for up to three months. The new press code changes the wording to “causing harm to the monarchic regime” (الإساءة الى النظام الملكي) and eliminates prison and fines, keeping only a court-ordered suspension as punishment.

As noted above with respect to speech on Islam, Parliament introduced into the penal code a provision punishing speech on the monarchic form of government where no such provision previously existed. The new article 267.5 punishes “causing harm to” the monarchic regime with the same penalties noted above for “causing harm to” Islam: six months to two years in prison or a fine of 20,000 to 200,000 DH, or both, increased to imprisonment for two to five years or a fine of 50,000 to 500,000 DH, or both, if the offense is committed via the press.

The government denies that the criminalization of “causing harm to” the monarchy in article 267.5 restricts freedom of expression, arguing that this law is protecting one of the pillars of the nation as specified by the constitution.

Peaceful debate regarding the nature of political institutions, including changing or replacing them, should be among the most protected forms of speech in a democratic society. Laws that penalize speech deemed to “cause harm” to the existing form of government is a standard whose vagueness will likely cast a chill on the robust and freewheeling debate on government that every person has the right to engage in. The UN Human Rights Committee writes in General Comment 34, “State parties should not prohibit criticism of institutions, such as the army or the administration.”²¹ The monarchy is an institution, declaring it a pillar of the nation should not shield it from peaceful criticism, no matter how vigorous.

²¹ UN Human Rights Committee, “Article 19: Freedoms of opinion and expression,” General Comment No. 34, para. 40.

IV. Offenses to the King or Members of the Royal Family

Under the new press law, defaming, insulting, or causing prejudice (المس، القذف، السب) to the personal life of the king, the crown prince, or members of the royal family can result in a publication being suspended for a finite period by a court order. The new law eliminates the prison term or fines that the previous code imposed as punishment for this offense.

However, the penal code provides prison terms for this offense. Article 179.1-2, before its recent revision, provided terms of one to five years in prison and a fine of 1,200 DH for “any offense” directed at the king or crown prince, and six months to two years in prison and a fine of 1,200 DH if directed at other members of the royal family.

Parliament modified this article as part of Law 73.15. The new article 179.1 provides for imprisonment of between six months and two years and/or a fine of 20,000 to 200,000 DH for “defaming, insulting, or causing prejudice (المس، القذف، السب) to the personal life of the king or the crown prince, or failing in the duty to show reverence and respect for the person of the king.” The punishment is doubled if committed via the press or in public. The same article provides for imprisonment of between three months and one year and/or a fine of 10,000- to 100,000 DH for defaming, insulting, or causing prejudice to the personal life of a member of the royal family.

Morocco’s government has defended this provision by invoking article 46 of the constitution, which states, “The person of the King is inviolable, and reverence and respect are due to Him.” The government writes, “In this context, and by relying on comparative law, we find for instance article 490, paragraph 3, in the Spanish penal code, which punishes by imprisonment from six months to two years whoever defames, in a grave way, the king or any member of his immediate or extended family.”

This interpretation of the king and the royal family casts them as pillars of the Moroccan nation, like the country’s flag, which must be spared displays of disrespect. This interpretation conflicts with the obligation under international law to allow vigorous public debate about, and criticism of, those who govern, wield power, and shape policy. The king

is a public figure who exercises enormous power over Morocco's affairs and whose decisions and comportment are therefore subjects of legitimate public scrutiny and unfettered debate. The royal family receives a sizable budgetary allocation from the state, making the conduct and activities of its members a subject worthy of public scrutiny.

The UN Human Rights Committee's General Comment 34 on Article 19 of the ICCPR states:

[A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as lese majesty, desacato, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.²²

In this light, Morocco's laws and draft laws imposing prison terms or fines for defaming or insulting or causing prejudice to the private life of the king or family members are incompatible with Morocco's obligations to protect the right to freedom of expression and to establish a legal framework that is tolerant in particular of criticism of public officials. The fact that Spain, as well as other European constitutional monarchies, have preserved similar laws does not bring such laws into conformity with international legal standards. Nor does the fact that the king enjoys a special status under the national constitution negate Morocco's international human rights obligations in this regard.

The European Court of Human Rights in 2015 found a violation of the right to freedom of expression in that a French court had fined the magazine *Paris Match* for publishing an interview with a woman who stated Prince Albert II of Monaco was the father of her child. The Court found this aspect of the Prince's private life was a matter of public interest, as it could affect his succession.²³

²² Ibid.

²³ European Court of Human Rights, Grand Chamber, *Couderc and Hachette Filipacci Associés v. France*, Application no. 40454/07, judgment November 10, 2015, available at <http://iuscomparatum.info/echr-a-court-ruling-against-paris-match-for-publishing-information-about-prince-albert-of-monacos-private-life-breached-the-right-to-freedom-of-expression/> (accessed October 20, 2016).

V. Inciting Against the Kingdom's Territorial Integrity

Moroccan law has famously penalized speech “causing prejudice to territorial integrity” (المس بالوحدة الترابية). For this offense, the previous press code provided, in article 41, imprisonment of three to five years and a fine of 10,000 to 100,000 DH, and the possibility of a court-ordered suspension of the offending publication for up to three months.

Morocco's has repeatedly used this provision to prosecute those who dispute Morocco's claim of sovereignty over the Western Sahara, which Morocco annexed following the withdrawal in 1975 of Spain, the territory's colonial ruler. Moroccans have faced prosecution for questioning, or seeming to question, Moroccan sovereignty over the territory even though the international community does not recognize, de jure, that sovereignty. Journalist Ali Anouzla faced trial in 2016 because of an interview with a German newspaper that quoted him as calling Western Sahara “occupied.”²⁴ The court dropped the case after the newspaper acknowledged mistranslating Anouzla's words.²⁵

Parliament has modified the provision on harming territorial integrity in the press code and added a new provision on it to the penal code, where none previously existed. In both cases, the wording of the offense has changed from the language in the previous press code, and the punishment has been lightened. Instead of the old formulation, “causing prejudice to territorial integrity,” both codes now refer to “inciting against territorial integrity.” They do not, however define what that means. The only punishment that the new press law provides is a court-ordered suspension of the offending publication. However, the new penal code article 267.5 punishes “incitement against territorial integrity” with imprisonment from six months to two years and a fine of 20,000-200,000 DH, or both, with an increase in the punishment to two to five years in prison and a fine of 50,000-500,000 DH, or both, if the offense is committed publicly.²⁶

²⁴ “Morocco: Leading Journalist Facing Trial,” Human Rights Watch news release, February 8, 2016, <https://www.hrw.org/news/2016/02/08/morocco-leading-journalist-facing-trial>.

²⁵ Telquel, “Ali Anouzla innocenté dans l'affaire des déclarations sur le Sahara,” May 26, 2016, http://telquel.ma/2016/05/26/ali-anouzla-innocente-affaire-declarations-sahara_1498856 (accessed October 27, 2016).

²⁶ “...via speech, cries, threats proffered in public places or meetings or via posters displayed in public view or placed on sale or distributed or via any means that qualifies as public, including electronic, or paper or audiovisual means.”

In defense of these provisions, the government wrote to Human Rights Watch:

The integrity of the territory is among the pillars of Morocco's identity as established by the constitution. Therefore, criminalizing incitement against it is not considered a restriction of peaceful freedom of expression. It is natural that the law should provide a punishment for this offense.

An effort was made to respect the appropriate international references: Article 19 of ICCPR and the European Convention for Human Rights (ECHR), which confirmed the right to impose punishments in relation to "territorial integrity." This was done by establishing principles regulating this in the penal code that effectively narrow the scope of what the judiciary can intervene on, and by changing the current vague phrasing. Gone is the phrase, "causing prejudice to territorial integrity," which is replaced by "inciting against territorial integrity," which refers to an act that has a concrete effect. The ECHR in article 8 considered the protection of a state's territorial integrity a legitimate restriction.

As noted above with respect to laws criminalizing speech prejudicial to Islam or the monarchy, it is insufficient to argue that a law criminalizing "incitement against territorial integrity" does not violate the right to free expression because its intention is to prevent violations of the constitution. Norms governing permissible limits on speech emanate not from national constitutions but from international conventions.

Furthermore, the government is misguided in citing the ECHR as a justification for such laws. The ECHR does mention "territorial integrity," in its article 10(2), as an interest in defense of which certain rights may be restricted. But the same article notes that any such restrictions must be "necessary in a democratic society."²⁷

The European Court of Human Rights, the court that interprets the ECHR and rules when it has been violated, ruled that the Government of Turkey violated the right to freedom of

²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed November 1, 2016).

association by seeking the dissolution of a pro-Kurdish political party on the grounds that its program sought to undermine Turkey's territorial integrity. The ruling also addressed freedom of expression.

The Court noted that the program of the party contained no call for the use of violence, uprising, or any other form of rejection of democratic principles. The court held:

the fact that such a political project [advocacy of self-determination for Kurds] is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself... (para. 41)

Further, the court has previously held that one of the characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression.

From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. (para. 44)²⁸

The UN Human Rights Committee elaborates on the stringent conditions that any government must meet when imposing restrictions on freedom of speech, in its General Comment on article 19 of the ICCPR. Such restrictions, says the committee,

[M]ay not put in jeopardy the right itself... [T]hey must conform to the strict tests of necessity and proportionality... [A] norm, to be characterized as a

²⁸ European Court of Human Rights, *Freedom and Democracy Party (ÖZDEP) v. Turkey* (Application no. 23885/94), judgment, Strasbourg, December 8, 1999. <http://hudoc.echr.coe.int/eng?i=001-58372> (accessed October 20, 2016).

“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.²⁹

In light of these requirements under international law, criminalization of “inciting against territorial integrity” is an impermissibly vague restriction on freedom of expression because it fails to define “incitement” in a way that clearly excludes peaceful advocacy for self-determination, for example, for Western Sahara. Self-determination is a right guaranteed to “all peoples,” under article 1 of both ICCPR and the International Covenant on Economic, Social and Cultural Rights.³⁰

The Johannesburg Principles, a set of principles adopted by a group of experts in international law, national security, and human rights in 1995, provides guidance on how “incitement against territorial integrity” might be defined so as to meet the requirements laid out by international law, namely by linking it to violence or the use or threat of force:

A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.³¹

If Morocco is to retain a speech offense relating to “inciting against territorial integrity,” legislators should define it with sufficient precision so it applies only to speech that constitutes incitement to use violence or physical force.

²⁹ UN Human Rights Committee, “Article 19: Freedoms of opinion and expression,” General Comment No. 34, paras. 21, 25.

³⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976.

³¹ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted October 1, 1995 by a group of experts convened by Article 19, <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> (accessed October 20, 2016).

VI. Defaming or Insulting State Agents and State Institutions

The draft penal code maintains in article 263 the infraction of offending (إهانة) state officials “with the intention of causing prejudice to their honor, feelings, or the respect due their authority,” and the offense of insulting state institutions (إهانة الهيئات المنظمة). The government justified the criminalization of such speech as follows:

Morocco’s legislators introduced the offense of insulting judicial or public officials in article 263 in the current penal code, and the crime of insulting a state institution in article 265 of the same law. The draft penal code does not introduce any changes to these provisions, which were adopted to deter people from attacking officials as they carried out public services, and from attacking state institutions. The reason is to protect official posts and institutions. Comparative laws validate this approach. Paragraph 2 in article 433-5 of the French penal code punishes insults against a public official with six months in prison and a fine.

The new press code also punishes, in article 84, defaming or insulting “the parliamentary chambers, judicial institutions or the courts, the armies of the land, sea, and air, state bodies and institutions, and the public administration in Morocco.” The press code imposes a fine only for this offense, of between 100,000 and 200,000 DH, for defamation and 5,000 and 20,000 DH for insults.

The penal code, on the other hand, punishes insults to public officials and state institutions (articles 263 and 265 respectively) with prison terms of between one month and one year and a fine of 1,200 to 5,000 DH.

In a 2013 ruling, the European Court found France to have violated freedom of expression by convicting a man under a criminal law dating from 1881 for insulting then-President Nicolas Sarkozy, for having displayed a banner with an insulting phrase. It found that the words were indeed insulting but also amounted to political speech and that those in public life should

display greater tolerance for any form of criticism. Furthermore, such insults could be considered satire, which was artistic expression that also needed strong protection.³²

On insulting or defaming state institutions, international norms are clear: The UN Human Rights Committee writes, “concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high... States parties should not prohibit criticism of institutions, such as the army or the administration.”³³

Morocco’s abusive enforcement of its “insulting state institution” law is clear from its imprisonment of two rappers in separate cases since 2012 for lyrics deemed insulting to the police as an institution.³⁴

³² European Court of Human Rights, *Eon v. France*, application 26118/10, judgment 14.3.2013. <http://hudoc.echr.coe.int/eng-press?i=003-4290315-5123724> (accessed October 20, 2016).

³³ UN Human Rights Committee, “Article 19: Freedoms of opinion and expression,” General Comment No. 34, para. 38.

³⁴ “Unjustly Jailed Rapper To Go Free,” Human Rights Watch news release, November 11, 2014, <https://www.hrw.org/news/2014/11/11/morocco-unjustly-jailed-rapper-go-free>.

VII. Praising Terrorism

The penal code, in Article 218.2, penalizes “praising acts that constitute terrorism offenses, be it by speech, cries, or threats conveyed in public places or meetings, or in writings or printed materials that are sold, distributed, or put on sale or on display in public places or public meetings, or displaying it in a manner visible to the public via the various means of audiovisual or electronic means of information.” This offense is punished by two to six years of prison and a fine of 10,000 to 200,000 DH. A 2015 addition to the code known as Law 86-14 adds the same penalties for “propaganda, praising, or promoting a terrorist or a terrorist group, gang, or entity.”

The government of Morocco justified this provision, saying:

Praising terrorist acts is considered a very dangerous act and not just peaceful expression of a viewpoint. To praise terrorism is to support violent extremism, to threaten people’s right to security. The U.N. Security Council Resolution 2178 confirmed that terrorism in all its forms and manifestations is one of the gravest dangers threatening international peace and security, and that any terrorist act is a criminal act that cannot be justified regardless of motives. It called for the criminalization of supporting terrorism, which means that the stance of the Moroccan legislators, when criminalizing the praising (الإشادة) of terrorist acts and punishing this crime by imprisonment, constitutes a confirmation of the Kingdom’s position on terrorism, is a part of its applying the resolutions of the UNSC, and is not related to restricting the peaceful exercise of freedom of expression. Also, many comparative laws stipulated imprisonment as the penalty for acts of praising terrorist acts, like the Spanish and French penal codes.³⁵

Criminalizing the “praising” of terrorism gives the state too wide a margin to punish speech that falls short of incitement to commit an act of terrorism. Among other things, it

³⁵ United Nations Security Council, Resolution 2178, September 24, 2014 http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf (accessed October 27, 2016).

does not require the state to prove intent on the part of the “speaker” and could for example criminalize analysis of, or reporting on terrorist trends or groups.

While UNSC Resolution 2178, cited by the government, calls on states to criminalize and punish “support” for terrorism, it mentions nowhere criminalizing praise of it. The resolution, moreover, affirms, “Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law.” As noted above, one of those obligations is protecting freedom of expression.

The former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has criticized laws praising or glorifying terrorism:

[I]n the implementation of article 5 of the Convention on the Prevention of Terrorism, the offence of incitement to terrorism (a) must be limited to the incitement to conduct that is truly terrorist in nature, as properly defined pursuant to practice 7 above; (b) must restrict the freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals; (c) must be prescribed by law in precise language, including by avoiding reference to vague terms such as “glorifying” or “promoting” terrorism; (d) must include an actual (objective) risk that the act incited will be committed; (e) should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incite the commission of a terrorist act; and (f) should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.³⁶

Morocco’s National Council on Human Rights (Conseil national des droits de l’Homme, CNDH), an independent state institution, has criticized the breadth of the provision on praising terrorism, urging legislators to replace it by “the more precise term of public

³⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Human Rights Council Sixteenth Session Agenda item 3, Ten areas of best practices in countering terrorism, December 22, 2010, A/HRC/16/51, p.16. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement> (accessed October 27, 2016).

provocation of a terrorist offense.”³⁷ In language similar to the formulation of the Special Rapporteur, the CNDH urged legislators to take their cue from article 5 of the Council of Europe Convention on the Prevention of Terrorism, which defines “public provocation to commit a terrorist offense” as “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.”³⁸

³⁷ Conseil national des droits de l’Homme, “Avis sur le projet de loi 86.14 modifiant et complétant les dispositions du code pénal et de la procédure pénale relatives à la lutte contre le terrorisme,” January 2015, http://cndh.ma/sites/default/files/memorandum_code_terror_fr_o.pdf (accessed October 20, 2016).

³⁸ Council of Europe Convention on the Prevention of Terrorism, Warsaw, May 16, 2005 <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371c> (accessed October 20, 2016).

VIII. Speech Prejudicial to the Judiciary

Penal code article 266 penalizes speech “intended to exert pressure on decisions rendered by judges, as long as a case has not reached its final ruling,” and speech “intended to discredit court decisions and that cause prejudice to judicial authority or independence.” The penalties for infractions are one month to one year in prison and a fine of 250 to 5000 DH. Morocco’s government justified this law as follows:

The judiciary is an independent authority in the Kingdom of Morocco. The constitution banned any interference in its affairs, from any parties. This is in order to guarantee the right of individuals to a secure judicial process and to a fair trial... [T]he current Moroccan penal code, in article 266, punishes acts, speech, or public writings, that intend to influence the decisions of the judiciary before those decisions are issued, and discrediting judicial decisions when there is an intent to interfere with judicial authority and independence. The goal behind such criminalization is in no way a matter of peaceful expression, press freedom or constricting journalism. The goal is rather to promote the independence of the judiciary in carrying out its tasks as stipulated in the constitution. This is mentioned in the Basic Principles on the Independence of the Judiciary, adopted via UN General Assembly’s resolutions on November 29, 1985 and December 13, 1985.

While international norms permit governments to take steps to preserve the integrity of the judicial process and to shield courts from outside interference, the judiciary like all state institutions is a legitimate object of public scrutiny and criticism.

The Basic Principles on the Independence of the Judiciary, to which the government refers, makes no mention of restricting judiciary-related speech. It states only that “There shall not be any inappropriate or unwarranted interference with the judicial process.”³⁹

³⁹ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

IX. Incitement to Discrimination or Hatred

Among the package of amendments to the penal code that Parliament approved as Law 73.15 in July 2016 was article 431.5, which punishes “incitement to discrimination or hatred among persons.” Violators face one month to one year in prison or a fine of 5,000 to 50,000 DH, or both, unless they perpetrated the incitement through public means, in which case the prison part of the punishment is raised to between one and two years. The new press code punishes with fines “direct incitement to hatred or discrimination.”

The government of Morocco justified the penal code provision as follows:

Discrimination is a banned behavior, nationally and internationally. Many UN conventions, most prominently the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), confirmed the necessity of combating discrimination and confronting it with different means, including criminalization.⁴⁰ Also, hatred is one of the manifestations of racism, one of the major causes of extremism and the dissemination of offensive thoughts that lead to dangerous criminal actions. The recommendations of the Global Counterterrorism Forum confirmed the necessity of confronting the causes of hatred and incitement to it, because these can develop into violent extremism that is harmful to the individual and society.⁴¹

<https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/> (accessed October 20, 2016).

⁴⁰ [Footnote in government’s communication] Article 4 of the ICERD stipulates that States Parties: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed November 1, 2016).

⁴¹ Global Counterterrorism Form, <https://www.thegctf.org/> (accessed November 1, 2016).

Including in the penal code the criminalization of incitement to racial discrimination and hatred forms part of enacting the provisions of the constitution, which stipulates in article 23, “All incitement to racism, to hatred and to violence is prohibited.”

Thus, Moroccan legislators when criminalizing this behavior, were aiming to combat racism, discrimination and hatred, and confirm equality for all. The legislators adopted the trend established by comparative law.⁴² This has nothing to do with restricting peaceful expression.

In this context, while article 431.5 ... provides for imprisonment from one to three years and/or a fine of 10,000 to 100,000 DH,⁴³ for the crime of inciting discrimination and hatred among individuals through electronic, published or audiovisual means, this provision is only relevant to citizens other than journalists. Journalists will be handled exclusively according to article 71 of the draft Press and Publication code related to the criminalization of the acts mentioned.⁴⁴

The provisions in the Moroccan law are broader than those in the ICCPR, which specifies the types of hatred that can form the basis for restricting speech. Article 20(2), obliges states to prohibit by law “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” In contrast, Morocco’s revised penal code refers to incitement to “discrimination or hatred among persons” and the press code refers simply to incitement to “discrimination or hatred.”

The above-mentioned Rabat Plan of Action voiced concern about countries where the “legislation that prohibits incitement to hatred uses variable terminology and is often

⁴² [Footnote in government’s communication] Spain’s penal code, in article 510, punishes Inciting discrimination and hatred by imprisonment for one to three years, and a fine.

⁴³ The sanctions cited in this communication from the government differ from the ones in the law as it was adopted, which provides imprisonment from one to two years and a fine of 5,000 to 50,000 DH.

⁴⁴ [Footnote from Human Rights Watch] As noted above, the government asserts that when a particular offense is found in both codes, the press code takes precedence. If the offense is perpetrated in a publication as defined by the press code, then that publication shall face prosecution rather than the journalist. This provision apparently would not protect a journalist or other person who commits the offense outside of a recognized publication.

inconsistent with article 20 of the ICCPR. The broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of these laws.”⁴⁵

However, a state words its legislation prohibiting advocacy of hatred in compliance with ICCPR article 20(2), it must comply with the obligation to protect the right to freedom of expression. As the UN Human Rights Committee notes, “[ICCPR] Articles 19 and 20 are compatible with and complement each other... [A] limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.”⁴⁶

Article 19(3) states that restrictions on speech “shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; and (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

The Rabat Plan of Action states:

Article 20 ICCPR requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such a threshold needs to be read in consonance with article 19 of the ICCPR. Indeed, the three-part test for restrictions (legality, proportionality and necessity) also applies to incitement cases, i.e. such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions: are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measures available; are not overly broad, in that they do not restrict speech in a wide or untargeted way; and are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorize.⁴⁷

⁴⁵ Rabat Plan of Action, para. 15.

⁴⁶ UN Human Rights Committee, “Article 19: Freedoms of opinion and expression,” General Comment No. 34, para. 50.

⁴⁷ Rabat Plan of Action, para. 18. See also Article 19, “Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred, Work in Progress; A study prepared for the regional expert meeting on article 20, Organized by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010,” <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf> (accessed October 28, 2016).

The Rabat Plan of Action urges governments to ensure that their laws are “guided by express reference to article 20 of the ICCPR... and should consider including robust definitions of key terms like hatred, discrimination, violence, hostility, etc. In this regard, legislation can draw, inter alia, from the guidance and definitions provided in the Camden Principles on Freedom of Expression and Equality (Camden Principles).⁴⁸

Robust definitions would, for example, make it more difficult to brand speech as illegal incitement to discrimination merely because it advocates on behalf of a particular group or people within society. Yet that is what Moroccan authorities have done in the past, exploiting the vague concept of “incitement to discrimination” to challenge the legality of nongovernmental associations whose agenda they disliked. Moroccan authorities used the Associations Law provision banning groups that “call for discrimination”⁴⁹ to deny legal recognition to the Collective of Sahrawi Human Rights Defenders based in El-Ayoun. In 2008, authorities wrote in a letter to Human Rights Watch:

Reviewing the principles underlying the inaugural assembly of the "Collective of Sahrawi Human Rights Defenders," we find that the goal in establishing this association is to "promote the culture of human rights in Western Sahara and Morocco's southern cities and universities that contain students coming from these regions." ... Given that this association aims to organize and represent a specific segment of Moroccan society while excluding others, not to mention that even its name displays its discriminatory origin, it directly violates the requirements of Article 3 of [Dahir No. 1-58-376 of November 15, 1958 on the Right of Association].⁵⁰

⁴⁸ The Rabat Plan, para. 19. The Camden Principles were issued in April 2009 by Article 19, a nongovernmental organization, on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues. The Camden Principles on Freedom of Expression and Equality, Article 19, April 2009, <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (accessed October 27, 2016).

⁴⁹ Dahir n° 1-02-206 of July 23, 2002 promulgating Law n°75-00 modifying and completing dahir n° 1-58-376 of November 15, 1958 governing the right of association, <http://adala.justice.gov.ma/production/html/Fr/42134.htm> (accessed November 1, 2016).

⁵⁰ Human Rights Watch, *Human Rights in Western Sahara and in the Tindouf Refugee Camps*, December 2008, pp. 166-167, <https://www.hrw.org/report/2008/12/19/human-rights-western-sahara-and-tindouf-refugee-camps>.

In July 2015, the Tiznit Court of First Instance upheld the government’s petition to dissolve a nongovernmental association called Ifni Memory and Rights in the city of Sidi Ifni,⁵¹ holding that the association had illegally “incited discrimination” by restricting membership to persons born in Ifni Province before 1969 and who were of Spanish origin, and their descendants.⁵² The Agadir Court of Appeals upheld the decision in March 2016.

Human Rights Watch is concerned that authorities will exploit the broad wording of the new penal code provision on incitement to hatred and discrimination to suppress speech or advocacy that seeks to advance the interests of specific segments of society, as they did in their bans of the CODESA and Ifni Memory and Rights associations on grounds of discrimination.

⁵¹ Ifni Memory and Rights, <https://www.facebook.com/AsociacionIfni/> (accessed November 1, 2016).

⁵² First Instance Court of Tiznit, ruling 134/2015, July 6, 2015. A copy is on file at Human Rights Watch.

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Annex I: Response Received on May 24, 2016, from Morocco's Ministry of Communication, to Human Rights Watch's Letter of May 6, 2016

ملاحظات على رسالة هيومن رايتس ووتش المؤرخة في 6 ماي 2016 بخصوص مشروع قانون الصحافة ومسودة مشروع القانون الجنائي مع التركيز على المخالفات المتعلقة بالتعبير السلمي

أولا نقدر موقف الارتياح والتنويه المعبر عنه من طرف منظماتكم بخصوص إلغاء عقوبة السجن من قانون الصحافة على المخالفات المتعلقة بالتعبير السلمي، وإذ نتقاسم معكم الموقف من كون مسودة مشروع القانون الجنائي يمكن أن تعزز حرية الصحافة من خلال زيادة عدد المخالفات المتعلقة بالتعبير السلمي التي يتمتع فيها القاضي بسلطة تقديرية لفرض غرامة بدلا من عقوبة السجن، نعبر عن استعداد المغرب الدائم للتواصل معكم في كل القضايا المتعلقة بحرية التعبير والإعلام ببلادنا.

أولا- حول إقرار وتعزيز حرية التعبير السلمي

تعتبر حرية التعبير في المغرب حقا مضمونا بنص الدستور، فالفصل 28 منه وضع المبادئ الأساسية المتعلقة بحرية الصحافة، وأكد على أن هذه الحرية مضمونة ولا يمكن تقييدها بأي شكل من أشكال الرقابة القبلية، وأن للجميع الحق في التعبير ونشر الأخبار والأفكار والآراء بكل حرية ومن غير قيد عدا ما ينص عليه القانون.

وكما هو معتمد في المواثيق الدولية لحقوق الإنسان، فإن حرية التعبير وإن كانت من الحقوق الأساسية لكل فرد، إلا أنها ليس حقا مطلقا، بحيث يجوز تقييدها بنص القانون لحماية مصالح أخرى هي أولى بالحماية، وقد أكدت المادة 19 من العهد الدولي للحقوق المدنية والسياسية جواز تقييد حرية التعبير بنص القانون لضمان احترام حقوق الآخرين أو سمعتهم، أو لحماية الأمن القومي أو النظام العام أو الصحة العامة أو الآداب العامة.

كما أعطت المادة 20 من العهد الدولي للحقوق المدنية والسياسية نماذج من الأفعال التي تخرج عن حرية التعبير ويجب حظرها بنص القانون كالدعاية للحرب أو إلى الكراهية القومية أو العنصرية أو الدينية أو التحريض على التمييز أو العداوة أو العنف.

و تشير الفقرة 22 من التعليق العام رقم 34 حول المادة 19 من العهد الدولي الخاص بالحقوق المدنية والسياسية المتعلقة بحرية الرأي وحرية التعبير على أنه "لا يجوز فرض قيود إلا إذا كانت تخضع للشروط التالية: أن تكون محددة بنص القانون وألا تفرض إلا لأحد الأسباب الواردة في الفقرتين (أ) و(ب) من الفقرة 3 من الفصل 19 من العهد الدولي الخاص بالحقوق المدنية والسياسية، وأن تكون متلائمة مع اختبارات صارمة تتعلق بالضرورة والتناسب". مع التذكير على أن الفقرة 3 المادة 19 من العهد الدولي الخاص بالحقوق المدنية والسياسية، تشير إلى أنه "تستتبع ممارسة الحقوق المنصوص عليها في الفقرة 2 من هذه المادة واجبات ومسؤوليات خاصة، وعلى ذلك يجوز إخضاعها لبعض القيود ولكن شريطة أن تكون محددة بنص القانون وأن تكون ضرورية: (أ) لاحترام حقوق الآخرين وسمعتهم، (ب) لحماية الأمن القومي أو النظام العام أو الصحة العامة أو الآداب العامة".

إن مشروع القانون رقم 88.13 المتعلق بالصحافة والنشر جاء بنفس الفلسفة التي أقرتها المواثيق الدولية، فكرس حرية التعبير بمقتضيات واضحة تنظم مهنة الصحافة وتمنح الصحفيين ضمانات للحصول على المعلومة وحمايتهم من أي تدخل أو تعسف، مع وضع ضمانات لخلق التوازن بين حرية التعبير والحقوق الأساسية للأفراد والمجتمع، ولذلك فقد تم إلغاء كل العقوبات السالبة للحرية من مشروع قانون الصحافة وتم تعويضها بعقوبات مالية.

لقد تم الاشتغال على إصلاح القانون الجنائي فيما يتعلق بما نص عليه الدستور المغربي أو أحكام المنظومة القانونية الحالية، بخصوص الثوابت والمقتضيات التي تتعلق بالوحدة الترابية والنظام الملكي والدين الإسلامي وشخص جلالة الملك، أو ما يتعلق بولي العهد والأسرة الملكية. ذلك أن الإصلاح الذي تم بمقتضى مشروع القانون رقم 73.15 بهم أساسا التوجه نحو تدقيق المصطلحات وتضييق نطاق تدخل القضاء وتقليص العقوبات، وتمكين القاضي من سلطة تقديرية للاختيار بين العقوبة المالية والعقوبة الحبسية، وهي خطوة متقدمة بالمقارنة مع الوضع الحالي والذي يلزم القاضي في مثل هذه القضايا بتطبيق العقوبة الحبسية، وهو اجتهاد استلهم من القانون المقارن، من مثل القانون الجنائي الإسباني.

كما أن الإصلاح هو مؤطر بالمادة الرابعة من مجموعة القانون الجنائي والتي تنص على أن القانون الجنائي لا يطبق إلا في الحالات التي لم يرد فيها نص صريح في القانون الخاص، أي أن كل العقوبات التي تم التنصيص عليها في قانون الصحافة لا يمكن بأي حال تطبيق العقوبات الواردة في القانون الجنائي بصدها، وبالتالي فقد تم اختيار المبدأ الذي يحول دون إقرار عقوبة مزدوجة وهو ما يعني أن وجود عقوبات في القانون الجنائي لا يعني تطبيقها في قضايا الصحافة والنشر مادامت مدونة الصحافة والنشر تتضمن عقوبات حولها.

ثانيا- بخصوص المعطيات غير الصحيحة التي تضمنها التقرير

أشار تقرير منظمة "هيومن رايتس ووتش" إلى أن السب والقذف في حق الأشخاص والمس بالحياة الخاصة للأشخاص معاقب عليهما بعقوبات سالبة للحرية في المادتين 444 و448.3 من مشروع القانون الجنائي، والحال أن جريمة السب والقذف في حق الأشخاص معاقب عليهما في المادة 88 من مشروع قانون رقم 88.13 المتعلق بالصحافة والنشر بالغرامة فقط. كما أن المساس بالحياة الخاصة للأشخاص غير وارد في الصيغة الحالية لمشروع القانون الجنائي. مما يتعين معه إلغاء هذه الجريمة الأخيرة من التقرير وتصحيح المعطيات المتعلقة بالجريمة الأولى، مع التأكيد على أن القانون الجنائي المغربي الحالي لا يعاقب على السب والقذف بالحبس وإنما يحيل في العقوبة على قانون الصحافة الذي يعاقب بغرامة فقط، وقد اعتمد مشروع القانون الجنائي نفس الاتجاه.

ثالثا- بخصوص الجرائم المضمنة في التقرير والمتعلقة بالقانون الجنائي

خلافًا لما تضمن التقرير من كون الجرائم الواردة في مشروع القانون الجنائي والقانون الجنائي الحالي تحد من التعبير السلمي، فإن الغاية من التجريم بخصوص الأفعال الواردة في التقرير لا علاقة له بحرية التعبير ولا بالممارسة الصحفية، وإنما هو بغاية منع أفعال محظورة دوليا كالإرهاب والتمييز والعنصرية حسب الفصل 19 من العهد الدولي الخاص بالحقوق المدنية والسياسية والتي نص مشروع قانون الصحافة والنشر في المادة 71 منه على عقوبات مالية لها، إذ ينبغي التمييز بين الجرائم الصحفية وجرائم الحق العام التي ترتكب عن طريق وسائل النشر وشتان بينهما.

وفيما يلي أساس التجريم في كل جريمة من الجرائم الواردة في التقرير:

■ بخصوص جريمة الإشادة بأفعال تكون جريمة إرهابية (الفصل 218-1)

تشكل الإشادة بالأفعال الإرهابية سلوكا خطيرا جدا وليس مجرد تعبير سلمي عن الرأي، فالإشادة بالإرهاب هي تأييد للتطرف العنيف وتهديد لحق الأفراد في الأمن، وقد أكد قرار مجلس الأمن بالأمم المتحدة عدد 2178 على أن الإرهاب بجميع أشكاله ومظاهره يمثل أحد أشد الأخطار التي تهدد السلام والأمن الدوليين وأن أي عمل إرهابي هو عمل إجرامي لا يمكن تبريره بغض النظر عن دوافعه، ودعا إلى تجريم تأييد الإرهاب، مما يكون معه موقف المشرع المغربي بتجريم الإشادة بالأفعال الإرهابية والمعاقبة عليها بعقوبة سالبة للحرية هو تأكيد لموقف المملكة المناهض للإرهاب وتطبيقا لقرارات مجلس الأمن، ولا علاقة له بالتضييق على التعبير السلمي، كما أن العديد من القوانين المقارنة وضعت عقوبات سالبة للحرية عن الإشادة بالأفعال الإرهابية كالتشريع الجنائي الإسباني والفرنسي¹.

■ بخصوص جريمة التأثير على القضاء وتحقير مقرراته

يشكل القضاء سلطة مستقلة في المملكة المغربية، ومنع الدستور أي تدخل في شؤونه من أي جهة كانت، وذلك ضمانا لحق الأفراد في الأمن القضائي وفي المحاكمة العادلة، وخلافا لما ورد في تقرير منظمة "هيومن رايتس ووتش" من كون مشروع القانون الجنائي هو من جرم التأثير على القضاء وتحقير مقرراته، فإن القانون الجنائي المغربي الحالي في الفصل 266 هو الذي يعاقب الأفعال أو الأقوال أو الكتابات العلنية التي يقصد منها التأثير على قرار القضاء قبل صدور الحكم، أو تحقير المقررات القضائية بغاية المساس بسلطة القضاء واستقلاله. والغاية من تجريم هذا الفعل لا علاقة لها بالتعبير السلمي ولا بحرية الصحافة أو التضييق على الممارسة الصحفية، وإنما بهدف تعزيز استقلال القضاء في أداءه لمهامه الدستورية، وهذا ما أوجبه مبادئ الأمم المتحدة بشأن استقلال السلطة القضائية المعتمدة بموجب قراري الجمعية العامة المؤرخين في 29 نونبر 1985 و13 دجنبر 1985.

¹ يعاقب على الإشادة بأفعال تشكل جريمة إرهابية بالحبس لمدة قد تصل خمس سنوات في القانون الجنائي الفرنسي (المادة 2-5-421)، كما يعاقب على نفس الفعل القانون الجنائي الإسباني في المادة 578 بالحبس من سنة إلى سنتين.

■ بخصوص جرائم إهانة الموظفين والقضاة أثناء تأديتهم لمهامهم وإهانة الهيئات المنظمة

نظم المشرع المغربي جريمة إهانة أحد رجال القضاء والموظفين العموميين في الفصل 263 من القانون الجنائي الحالي وجريمة إهانة هيئة منظمة في الفصل 265 من نفس القانون، ولم يدخل مشروع القانون الجنائي أي تعديل على هذه الجرائم التي تم سنّها لمنع الاعتداء الذي يمكن أن يمارسه الأفراد ضد الموظفين الذين يؤدون خدمات عمومية أو ضد الهيئات المنظمة بصفة قانونية، وذلك بهدف حماية الوظيفة أو الهيئة، وقد أكدت القوانين المقارنة نفس التوجه، إذ مثلاً تعاقب الفقرة الثانية من المادة 5 – 433 من التشريع الجنائي الفرنسي على الإهانة الموجهة ضد موظف صاحب سلطة بالحبس لمدة ستة أشهر مع الغرامة.

■ بخصوص جريمة إهانة علم المملكة ورموزها

يتضمن القانون الجنائي الحالي مقتضيات خاصة تمنع الإساءة إلى علم المملكة، وهي مقتضيات تقرها كل التشريعات لحماية ثوابت البلاد التي تؤدي إهانتها إلى الإساءة لكل المواطنين.

رابعاً- بخصوص الجرائم المضمنة في التقرير و المتعلقة بمشروع قانون 73.15 لتعديل القانون الجنائي

فيما يتعلق بالثوابت والمقتضيات التي تتعلق بالوحدة الترابية والنظام الملكي والدين الإسلامي وشخص جلالة الملك، أو ما يتعلق بولي العهد والأسرة الملكية فقد تم الاستناد إلى مختلف المرجعيات الوطنية والدولية والاجتهادات الفضلى التي تتوافق مع القانون الدولي لحقوق الإنسان، إذ أن مشروع قانون 73.15 يهدف إلى تعزيز ضمانات حرية الرأي والتعبير ويقوي الحماية القضائية للثوابت الوطنية كما ينص عليها الدستور، ويضمن احترام الالتزامات الدولية للمغرب، وذلك في إطار إرادة واضحة في ضمان ممارسة صحفية حرة في إطار المسؤولية والمقومات الأساسية للمجتمع المغربي والحفاظ على الحقوق والحريات

الفردية والجماعية، من جهة، والالتزام بالواجبات واحترام حرمة المؤسسات والأفراد والمجتمع من جهة أخرى.

أما بخصوص سؤالكم حول الغرض من تدقيق المصطلحات، فهو توضيح نطاق تدخل القضاء مما يخدم التعبير السلمي عن الآراء، ويجدر التذكير على أن الإصلاح الذي تم بمقتضى مشروع القانون رقم 73.15 بهم أساسا التوجه نحو تدقيق المصطلحات وتضييق نطاق تدخل القضاء وتقليص العقوبات، وتمكين القاضي من سلطة تقديرية للاختيار بين العقوبة المالية والعقوبة الحبسية، وهي خطوة متقدمة بالمقارنة مع الوضع القانوني الحالي والذي يلزم القاضي في مثل هذه القضايا بتطبيق العقوبة الحبسية. كما أن المقاربة الحالية التي تم نهجها في هذا المشروع تعتبر اجتهادا استلهم من القانون المقارن من مثل القانون الجنائي الإسباني.

■ بخصوص جريمة الإساءة إلى الإسلام وإلى النظام الملكي

تؤكد المملكة المغربية في دستورها على أن نظامها هو ملكية دستورية ديمقراطية برلمانية واجتماعية، وأن الإسلام هو دين الدولة، وأن شعار المملكة هو: الله الوطن الملك، فتجريم الإساءة إلى النظام الملكي والإسلام هو تجريم للمساس بالرموز الأساسية للبلاد والتي يؤكدتها الدستور المغربي، وهذه مقتضيات عامة واردة في مشروع القانون الجنائي ليس بغاية المساس بحرية التعبير، بل للحد من الإساءة إلى الدستور، والجدير بالذكر أن العديد من التشريعات الدولية توصي بسن مقتضيات قانونية للحفاظ على النظام العام.

كما أن التنصيص على المقتضيات المتعلقة بتجريم القذف أو السب أو الإساءة لشخص الملك ولشخص ولي العهد استند على مقتضيات الفصل 46 من الدستور الذي ينص على أن "شخص الملك لا تنتهك حرمة، وللملك واجب التوقير والاحترام". في هذا الصدد، واستنادا على القانون المقارن، على سبيل المثال تنص المادة 490 الفقرة 3 من القانون الجنائي الإسباني على عقوبة سالية للحرية تتراوح من ستة أشهر إلى سنتين في حق كل من سب أو قام بالتشهير، على نحو خطير، بالملك أو بأحد من فروع أو أصوله.

كما أن تجريم الإساءة للأديان في مشروع القانون 73-15 استند على الفقرة 19 من القرار رقم 65/224 الذي اتخذته الجمعية العامة للأمم المتحدة في 21 دجنبر 2010 والمتعلق

بمناهضة تشويه صورة الأديان، حيث تم التأكيد على أن الجمعية العامة "ترحب بالخطوات التي تتخذها الدول الأعضاء لحماية حرية الدين عن طريق سن أو تعزيز الأطر والتشريعات المحلية لمنع الحط من شأن الأديان ومنع عرض صور نمطية سلبية للمجموعات الدينية".

■ بخصوص جريمة التحريض ضد الوحدة الترابية للمغرب

تعتبر الوحدة الترابية للبلاد من الثوابت المنصوص عليها في الدستور، ولذلك فإن تجريم التحريض ضدها لا يعد تضييقاً على الحق في التعبير السلمي، ومن الطبيعي أن ينص القانون على عقوبة لهذه الجريمة.

لقد تم العمل على احترام المرجعية الدولية متمثلة في العهد الدولي للحقوق المدنية والسياسية في المادة 19 والاتفاقية الأوروبية لحقوق الإنسان التي أكدت على الحق في إقرار عقوبات فيما يتعلق بسلامة الأراضي، وذلك عبر جعل المقتضيات التي تنظم هذا الأمر على مستوى القانون الجنائي تعمل على تضييق نطاق تدخل القاضي وتجاوز العبارات الفضفاضة الحالية، ولذلك لم نعد إزاء الحديث عن المس بالوحدة الترابية بل التحريض ضد الوحدة الترابية الذي يحيلنا على فعل ذي أثر مادي، ذلك أن المادة 8 من الاتفاقية الأوروبية لحقوق الإنسان (اتفاقية حماية حقوق الإنسان في نطاق مجلس أوروبا الموقعة بروما في 4 نونبر 1950) اعتبرت الحفاظ على السلامة الترابية للدول تقييداً مشروعاً.

■ بخصوص جريمة السب والقذف في حق الملك أو ولي العهد أو في حق أعضاء العائلة الملكية

إن الملك حسب الفصل 42 من الدستور هو رئيس الدولة وممثلها الأسمى وينص الدستور على أن شخص جلالته موقر، ولذلك من الطبيعي اتخاذ تدابير جزرية لمنع الإساءة إلى شخصه أو شخص ولي العهد أو الأسرة الملكية، وتجريم القذف والسب الموجه إلى الملك أو أفراد أسرته، وذلك لا يمس حرية التعبير في شيء، باعتبار أن الوقائع الصحيحة ومناقشة أمور السياسة العامة للبلاد يبقى متاحاً وجائزاً، بالمقابل فإن الوقائع غير الصحيحة أو الأقوال الشائنة التي تعد سباً أو قذفاً هي التي تمنع ويعاقب على ارتكابها.

■ بخصوص جريمة التحريض على التمييز وعلى الكراهية

يعتبر التمييز سلوكا ممنوعا وطنيا ودوليا، وقد أكدت عدة اتفاقيات للأمم المتحدة على رأسها اتفاقية مكافحة التمييز العنصري على وجوب مكافحة التمييز والتصدي له بمختلف الوسائل بما في ذلك عن طريق التجريم²، كما أن الكراهية تشكل تمظهرا من تمظهرات العنصرية وأحد الأسباب الخطيرة التي تولد التطرف وتنشر أفكارا عدائية قد تولد سلوكات إجرامية خطيرة، وقد أكدت توصيات المنتدى العالمي لمكافحة الإرهاب على وجوب التصدي لأسباب الكراهية وللتحريض عليها لأنها قد تتطور إلى تطرف عنيف يهدم كيان الأفراد والمجتمع.

إن إدراج تجريم التحريض على التمييز العنصري والكراهية في مشروع إصلاح القانون الجنائي يندرج في إطار تفعيل مقتضيات الدستور الذي ينص في مادته 23 على أنه "يحظر كل تحريض على العنصرية أو الكراهية أو العنف".

وبذلك فإن المشرع المغربي حينما جرم هذا السلوك فإنه يهدف إلى مكافحة العنصرية والتمييز والكراهية والتأكيد على المساواة بين الجميع، وقد اعتمد في ذلك موقف القوانين المقارنة³ ولا علاقة لذلك بالتضييق على التعبير السلمي.

في هذا الإطار، فإذا كان الفصل 5-431 من مشروع قانون 15-73 ينص على عقوبة سالبة للحرية من سنة إلى ثلاث سنوات وغرامة من 10.000 إلى 100.000 درهم أو بإحدى هاتين العقوبتين، من أجل جريمة التحريض على التمييز وعلى الكراهية بين الأشخاص من خلال الوسائل الإلكترونية والورقية والسمعية البصرية، فإن هذا المقتضى لا يهيم سوى باقي المواطنين، في حين أن الصحافيين ستسري عليهم بشكل حصري أحكام المادة 71 من مشروع قانون الصحافة والنشر المتعلقة بتجريم نفس الأفعال المذكورة.

² تنص المادة 4 من الاتفاقية الدولية لمناهضة التمييز العنصري على ما يلي:
(أ) اعتبار كل نشر للأفكار القائمة على التفوق العنصري أو الكراهية العنصرية، وكل تحريض على التمييز العنصري وكل عمل من أعمال العنف أو تحريض على هذه الأعمال يرتكب ضد أي عرق أو جماعة من لون أو أصل أثنى آخر، وكذلك كل مساعدة للشاملات العنصرية، بما في ذلك تمويلها، جريمة يعاقب عليها القانون؛
(ب) إعلان عدم شرعية المنظمات، وكذلك النشاطات الدعائية المنظمة وسائر النشاطات الدعائية، التي تقرم بالترجيح للتمييز العنصري والتحريض عليه، وحظر هذه المنظمات والنشاطات واعتبار الاشتراك في أيها جريمة يعاقب عليها القانون".
³ يعاقب على التحريض على التمييز والكراهية في القانون الجنائي الإسباني (المادة 510) بالحبس من سنة إلى ثلاثة سنوات مع الغرامة.

خلاصة

يكمن التقدم الحاصل في مضامين الإصلاح الجاري أساسا في:

- تدقيق المصطلحات المتعلقة بالإساءة للثوابت. في هذا الإطار، جاء هذا المشروع بمصطلح "التحريض" ضد الوحدة الترابية للمملكة بدل الحديث عن "المس" وهو تدقيق متقدم. كما ينص المشروع على مفهوم "الإساءة" للدين الإسلامي بدل "المس"، وكذا تم تدقيق عدد من المفاهيم مثل "القذف والسب والمس بالحياة الخاصة" لشخص الملك أو لشخص ولي العهد.
- تخفيض العقوبات المتعلقة بهذه الجرائم، وذلك من خلال تخفيضها مقارنة مع الإطار القانوني المؤطر لهاته الجرائم حاليا، وذلك بحسب الحالات (انتقلت العقوبة على سبيل المثال فيما يتعلق بجريمة القذف أو السب أو المس بالحياة الخاصة لشخص الملك أو لشخص ولي العهد ما بين ثلاث وخمس سنوات في القانون الحالي لتتراوح في المشروع المقترح من سنة إلى أربع سنوات) وبالتالي فلا مجال للحديث على التراجع.
- جعل إيقاف الصحف وحجبها والحجز حصريا بيد القضاء مع إقرار تعويض عن الضرر في حالة تعسف في المنع أو الحجز لمطبوع دوري أو صحيفة إلكترونية.
- تمكين القاضي من سلطة تقديرية من أجل اختيار عقوبة مالية عوض عقوبة حبسية، حيث تمت زيادة عدد المخالفات المتعلقة بالتعبير السلمي التي يتمتع فيها القاضي بسلطة تقديرية لفرض غرامة بدلا من عقوبة السجن، وهو ما يتلاءم كلية مع مبدأ التناسب المنصوص عليه في التعليق العام رقم 34 للجنة حقوق الإنسان الأممية حول الفصل 19 من العهد الدولي الخاص بالحقوق المدنية والسياسية.

THE RED LINES STAY RED

Morocco's Reforms of its Speech Laws

Morocco's 2015 Press Code eliminates prison as a punishment for speech offenses. This, on its face, represents progress for freedom of expression in a country where journalists and ordinary citizens have been locked up for “insulting” the king, questioning Morocco's claim over Western Sahara, or rapping about police corruption.

The Red Lines Stay Red: Morocco's Reform of its Speech Laws analyzes the laws governing speech offenses in Morocco and finds that the recent overhaul falls well short of securing freedom of speech as guaranteed by international conventions and Morocco's own 2011 constitution. Imprisonment as punishment for crossing Morocco's famous “red lines” – causing harm to Islam, “territorial integrity,” the institution of the monarchy, or the person of the king – is alive and well. While the new press code punishes “red line” offenses only with the suspension of publications, judges can, thanks to new provisions of the penal code, still hand down prison sentences for these offenses. In addition, the penal code continues to mandate prison sentences for other speech offenses such as “insulting” state institutions or state agents, and broadly defined notions of “praising terrorism,” “casting discredit on judicial decisions,” and “inciting hatred or discrimination.”

The 2015 legal revisions contain some positive steps, eliminating prison terms for defaming another private citizen, insulting foreign heads of state or diplomats, or maliciously publishing false news. Also, the penal code now allows judges a choice between imposing prison time or a fine for certain speech offenses, instead of prison as the only option.

Morocco's newly elected parliament should build on these modest advances by abolishing or revising all existing laws that put both journalists and other citizens at risk of going to prison for nonviolent speech offenses.



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