



المجلس الوطني لحقوق الإنسان
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Conseil national des droits de l'Homme

Draft bill of the **Press and Publishing Code**

Contribution to public debate series - No. 8

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The National Human Rights Council's Memorandum on the Draft Bill of the Press and Publishing Code (version of 15 July 2014), sent to the Minister of Communication, Government Spokesperson, on 8 October 2014

INTRODUCTION

1. Article 28 of the Constitution, adopted by referendum on the 1st of July 2011, enshrines the fundamental press freedom principles. Devoting a special article to press freedom in the Kingdom's supreme law is the result of a process that can be summed up as follows:

2. As soon as Law No. 77.00, dated 3rd October 2002, amending and supplementing the Press and Publishing Code of 15 November 1958, was enacted, many professionals expressed the need for a substantial review of all press-related legislations. They criticized several weaknesses of the Code, especially the provisions relating to prison sentences, defamation and the retention of administrative seizures.

3. These requests found their echo in the recommendations of the First National Conference of Print Media, organized in Skhirat on 11-12 March 2005 by the National Union of Moroccan Press (SNPM), the Moroccan Federation of Newspaper Publishers (FMEJ) and the Ministry of Communication. The recommendations of this conference focused on the overall review of laws regulating the press and publishing sector; the strengthening of the independence of the judiciary, and the creation of specialized chambers in courts for press cases¹.

4. In 2007, consultations between the SNPM, the FMEJ and the Ministry of Communication resulted in developing a draft bill of the Press and Publishing Code which has never been put in the legislative process for approval.

5. In 2010, several parliamentary groups initiated a national dialogue on "Media and Society", which provided a fitting occasion to reflect on the structural problems relating to the freedom of the press, the evolution of the sector; media and the related professions, the sector's economy, etc. As part of this dialogue, various public bodies, professional organizations and associations, elected representatives and institutions held several seminars and roundtables; a number of field surveys were conducted, memoranda were submitted and auditions were organized. All these efforts led to the publication of a final report containing more than 150 recommendations on the political, legal, economic, and human aspects related to the various media sectors.

The "Media and Society in Morocco" report, more known as the "White Paper", affirmed that the press code "has become outdated, even obsolete, not only in relation to technological developments in the media in absolute terms, but also -and above all- in relation to the new reality of the national landscape for nearly a decade". It called for "the establishment of a self-regulation, devolving primarily -if not exclusively- on the professionals themselves, which requires the creation of a relevant authority, or a professional Order"².

This process culminated in enshrining the fundamental principles relating to freedom of the press in Article 28 of the Constitution, in particular the prohibition of any form of prior censorship and the recognition of the right of all persons to express and diffuse information, ideas and opinions freely, subject only to the limits expressly provided by law.

6. The current Government, under the supervision of the Ministry of Communication, has initiated a consultation process to revise the Press and Publishing Code. To this end, it established a Scientific Committee that issued about a hundred recommendations, most of which have been included in the draft bill.

7. The National Human Rights Council (CNDH) welcomes the initiative of Mr. Mustapha Khalfi, Minister of Communication and Government Spokesperson, to refer the draft bill of the Press and Publishing Code to the Council for opinion thereon.

CNDH'S OPINION

8. The National Human Rights Council,

Considering the Constitution, particularly the Preamble and Articles 25, 27 and 28;

Considering the Universal Declaration of Human Rights, particularly Article 19;

Considering the International Covenant on Civil and Political Rights, particularly Article 19 as commented by the Human Rights Committee in its General Comment No. 34³;

Considering Human Rights Council Resolutions No. 12/16 on the freedom of opinion and expression⁴ and No. 21/12 on the safety of journalists⁵;

Considering Resolutions of the Commission on Human Rights No. 2004/42⁶, 2003/42⁷, 2002/48⁸ and 2001/47⁹ on the right to freedom of opinion and expression;

Considering UNESCO's Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, adopted on 19 November 1974, in particular paragraph 29;

Considering UNESCO's Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, adopted on 28 November 1978, in particular paragraphs 2 and 4 of Article 2;

Considering UNESCO's Declaration of Principles on Tolerance, adopted on 16 November 1995, in particular Article 3;

Considering UNESCO's Declaration on Race and Racial Prejudice, adopted on 27 November 1978, in particular Article 5;

Considering the reports of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;

Considering the recommendations of the National Dialogue on "Media and Society" published in 2011;

Considering Articles 13, 16, 24 and 25 of Dahir (Royal Decree) No. 1-11-19 of 25 Rabii I 1432 A.H. (1st March 2011) establishing the National Human Rights Council;

After reviewing the draft bill of the Press and Publishing Code, in its version of 15 July 2014;

Hereby presents its opinion and recommendations on the Draft Bill of the Press and Publishing Code.

Recommendations concerning the General Provisions (Title I)

The normative basis of Article I

9. The CNDH recommends strengthening the provisions of Article I by making reference to Articles 25 and 27 of the Constitution, the penultimate paragraph of its Preamble and Article 19 of the International Covenant on Civil and Political Rights.

DEFINITIONS

10. The CNDH notes that the definition of information provided for in paragraph 2.1 of Article 2¹⁰ of the draft bill, particularly the terms "clear", "accurate" and "concise", may give judges broader discretion, especially when deciding press-related cases, and compromise – even indirectly- the right to inform. The Council recalls in this respect that the UN Human Rights Committee has stated in its General Comment No. 34 (paragraph 21) that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself" underlining that "the relation between right and restriction and between norm and exception must not be reversed".

For these reasons, The CNDH recommends removing the adjectives "clear", "accurate" and "concise" from the definition of information, especially as making reference in the definition to "the recognized professional writing rules" constitutes in itself a sufficient ethics reminder.

Recommendations concerning the second section of Title I on freedom of the press and publishing

11. Concerning the provisions relating to freedom of the press and publishing (Articles 3, 4 and 5)¹¹, the CNDH proposes reinforcing the rights guaranteed to journalists by the Code as follows:

- Incorporating journalists' rights enshrined in the Statute of Journalists in the draft bill;
- Reinforcing Article 3 of the draft bill through a wording that limits the freedom of the press in a way compatible with the third paragraph of Article 19 of the International Covenant on Civil and Political Rights. This wording should also include the necessity criterion as the only justification for any restrictions by law which should be decided only by the court. To implement this recommendation, the Council proposes drawing on the second paragraph of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that authorizes subjecting the exercise of the freedom of expression to “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

In the same context, the CNDH recommends reviewing the expression “other press related laws” (paragraph 4 of Article 3). The term “other laws” does not actually respond to the criteria of clarity, accuracy and accessibility, indispensable for any valid restriction. Therefore, the Council recommends removing this expression or defining “these laws” in a precise manner in relation to the purpose of the Code;

- Introducing an article in the General Provisions recognizing the presumption of journalists' good faith. The Council considers that the presumption of good faith under Article 96 of the draft bill is insufficient and limited in scope as it only concerns the publication of information on ongoing litigations. This proposal seeks to implement Recommendation No. 39 of the National Dialogue on Media and Society which calls for “enshrining the principle of journalists' good faith in this unique code as a fundamental principle determining the legal interpretation of any legislative provision governing the exercise of media freedom”. The incorporation of the principle of journalists' good faith in the General Provisions will give this principle the status of “interpretative clause” as advocated by Recommendation No. 39 above and allow case-law to define the scope of this principle¹²;
- Enshrining the principle of the protection of journalists in the exercise of their profession. This proposal aims to implement the recommendations of Resolution 21/12 of the

Human Rights Council on the safety of journalists¹³, in particular paragraph 8 which calls upon “States to promote a safe and enabling environment for journalists to perform their work independently and without undue interference, including by means of (a) legislative measures; (b) awareness-raising in the judiciary, law enforcement officers and military personnel, as well as journalists and civil society, regarding international human rights and humanitarian law obligations and commitments relating to the safety of journalists; (c) the monitoring and reporting of attacks against journalists; (d) publicly condemning attacks; and (e) dedicating necessary resources to investigate and prosecute such attacks”;

In addition, the Council stresses that enshrining the journalists safety principle will provide a legislative basis for early warning and rapid response mechanism for the protection of journalists, which the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression advocated for in his report of 11 August 2011. In the national institutional context, and given the composition proposed by the Special Rapporteur¹⁴, the CNDH recommends establishing this mechanism at the Prime Minister’s Office. The introduction of this principle in the Press and Publishing Code will likely have a positive impact on the national case-law that will develop guidelines on the scope of that right.

The Council also recalls that the UN Action Plan for the Safety of Journalists is clear on the need to enact legislation protecting journalists, as it calls for assisting Member States “to fully implement existing international rules and principles, as well as to improve, where needed, national legislation on safeguarding journalists, media professionals and associated personnel in conflict and non-conflict situations”. CNDH therefore seizes the opportunity of giving opinion on the Draft Bill of the Press and Publishing Code to recommend incorporating the safety of journalists into the draft;

■ Rewording the second paragraph of Article 4 of the draft bill dedicated to access to information. As it stands, the draft requires public authorities to “facilitate the access of journalists to information”. In the opinion of the CNDH, this formulation should be replaced by the obligation to “guarantee the right of access to information”¹⁵. Considering that journalists’ access to information is subject to time constraints, the Council recommends adding a provision to Article 4 under which “information must be released to journalists in a timely manner”.¹⁵

12. Concerning the protection of journalistic sources, the CNDH recommends:

- introducing a provision that refers to Article 3 of the Statute of Journalists that recognizes the right of journalists to protect their sources, except when a judge orders them to reveal their sources;
- setting in a clear and explicit manner cases where the competent judicial authority may ask journalists to reveal their sources.

By way of comparison, the Council recalls that the European Court of Human Rights (ECHR) case-law has established guidelines for the protection of journalistic sources from which the national legislator may draw inspiration to define the legal rules governing this important aspect of freedom of the press.

In its judgment of 27 March 1996 in the case of *Goodwin v. the United Kingdom*¹⁶, the ECHR found that the “protection of journalistic sources is one of the basic conditions for press freedom (...). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest (...). Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest”.

In the ECHR judgment in the case of *Voskuil v. the Netherlands* of 22 November 2007, the Court assessed the interests at stake in the protection of journalistic sources before ruling on the possible violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, the Court considered in particular that the interest of the respondent Government to know the identity of the applicant's source was not sufficient to outweigh the applicant's interest in not disclosing his source. Therefore, the Court found a violation of Article 10 of the Convention.

In the case of *Sanoma Uitgevers B.V. v. the Netherlands* of 14 September 2010, the ECHR held that the absence of an independent assessment of the interest in protecting journalistic sources constituted a basis for concluding a violation of Article 10 of the Convention. The Court found in particular that “there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. There has accordingly been a violation of Article 10 of the Convention in that the interference complained of was not “prescribed by law””.

In its Recommendation 1950 (2011)¹⁷, the Parliamentary Assembly of the Council of Europe stated that “the right of journalists not to disclose their sources of information is a professional privilege, intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality”.

The right to protect sources is enshrined in the legislation of several countries and sometimes it can be restricted under international law and national laws. The disclosure of journalistic sources is only possible if the public interest outweighs the interest in the non-disclosure and there is an overriding requirement of the need for disclosure. For

example, French Law No. 2010-1 of 4 January 2010 on the Protection of Journalistic Sources provides in its first Article that “the confidentiality of sources shall not be violated, whether directly or indirectly, except when an overriding public interest justifies it and the measures envisaged are strictly proportionate to the legitimate objective sought. This infringement cannot, under any circumstances, consist of an obligation on the journalist to reveal his sources”¹⁸.

One of the most advanced legislations in the protection of journalistic sources is the Belgian Law of 7 April 2005. Article 2 thereof defines the persons in respect of whom this protection is guaranteed as follows:

1. Journalists, or any person who, as part of an independent or salaried work, and any legal person who contributes regularly and directly to the gathering, writing, production or dissemination of information to the public by means of media;
2. Editorial staff, or any person who in the exercise of his functions has knowledge of information that can lead to identify a source through the gathering, editorial processing, production or dissemination of this information.

Under Article 3 of this Law, the persons specified in Article 2 cannot be compelled to reveal their information sources or to communicate data, recordings or documents that may reveal the identity of their sources, the nature or origin of the information, the identity of an author of a text or audiovisual production, or the content of information and documents themselves, if that may lead to identify the source.

One feature of the Belgian law on the protection of sources is that it defines in a clear, precise and explicit manner a few exceptions to this right. As such, Article 4 provides that persons enjoying the right to source protection can be required to disclose their sources only at the request of a judge, if the disclosure is likely to prevent the perpetration of crimes that constitute a serious threat to the physical integrity of one or more persons. Such a request is only legitimate if two cumulative conditions are met: the requested information is of crucial importance for the prevention of these crimes, and the requested information cannot be obtained in another way.

13. Regarding the conscience clause, the CNDH recommends transferring the related provisions included in the draft Statute of Journalists¹⁹ to Section 2 of Title I (general provisions on freedom of the press and publishing).

Journalistic enterprises

14. Article 9 of the draft bill requires every natural or legal person holding more than 30% of the capital of or voting rights in a media organization to declare it to the governmental

authority in charge of communication and the National Press Council. The same article provides that each media company holding more than 10% of the capital of or voting rights in another media company must declare it to the same authorities. Non-compliance with these provisions is punishable with a fine of 15,000-30,000 Dirhams (MAD). While understanding the concern to prevent by law the abuse of dominance and monopoly, in accordance with Article 36 of the Constitution, the CNDH believes that it is the Competition Council, not the Ministry of Communication (the executive branch) that ought to look into—and punish if necessary—practices contrary to the principles of free and fair competition in business and the operations of economic concentration, pursuant to Articles 2, 3 and 4 of Law No. 20-13 establishing the Competition Council.

15. In order to enable the judiciary, not the executive, to ensure and guarantee freedom of the press, the CNDH proposes amending Article 19 of the draft bill by awarding the public prosecutor of the court of first instance (receiver of the declaration provided in Article 21), instead of the government authority in charge of communication, competence to ensure the process of appointing the deputy editor.

8 Publishing management

16. Article 14 of the draft bill provides that the publishing manager should not have incurred a final conviction depriving him of his civil rights, or a conviction for breach of decency, financial corruption, fraud or blackmail. The CNDH recommends excluding from this condition the persons who have benefited from judicial rehabilitation. If this recommendation is taken into account, the deputy publishing manager should benefit from the same exception under Article 18 of the draft bill.

Registration (Title III)

17. CNDH recommendations relating to the registration procedure aim to reinforce the declarative and liberal logic that has characterized the national law of civil liberties since 1958. These recommendations start from the premise that gives the judiciary the power to regulate and guarantee press freedoms under Articles 28 and 117 of the Constitution.

18. Accordingly, the Council proposes that Article 21 of the draft bill should be reworded to reduce the supporting registration documents. To this end, it recommends replacing the birth certificates, criminal records and copies of the academic diplomas and certificates of the publishing manager, the deputy publishing manager and the editors with a copy of the national identity card for nationals and of the residence permit for foreigners.

19. In this regard, the CNDH recalls the joint declaration adopted in 2003 by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative of the Organization for Security and Co-operation in Europe (OSCE) on Freedom of the Media and the Special Rapporteur of the Organization of American States (OAS) on Freedom of Expression, which states that “imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical”.

20. The analysis of recent developments in the registration procedure of newspapers shows a clear trend towards the repeal of this procedure. In France for example, Law No. 2012-387 of 22 March 2012 (on simplifying the law and reducing administrative procedures) has amended in a liberal sense two articles of the Law of 29 July 1881 on freedom of the press: Article 7 (which specified the terms of registration) and Article 5 which now provides that “any newspaper or periodical may be published without prior declaration or authorization or payment of any security deposit”²⁰.

Legal deposit (Title IV)

21. The Council recommends the legislator to draw on UNESCO's Guidelines for Legal Deposit Legislation²¹. According to these principles, “The preservation of the national cultural and intellectual heritage is a clear matter of public interest and is a state responsibility. It is absolutely necessary that the “collective memory” be identified, described in the national bibliography and preserved. A legal deposit is an essential element of any program aiming at such an objective”²².

22. Considering that the purpose of the legal deposit is essentially contributing to preserving historical memory, and for the sake of simplification, the Council proposes reducing the number of entities with which copies of published periodicals are deposited. This recommendation may be implemented through the amendment of Article 27 of the draft bill, particularly by removing the deposit with the government authority responsible for communication, for obvious reasons relating to the guarantee of freedom of the press.

Foreign publications (Title V)

23. Article 31 of the draft bill requires prior permission of the Head of Government for the publication of a foreign periodical in Morocco; Article 48 establishes prior authorization from the competent governmental authority before printing a foreign periodical; and

Article 55 provides for the prior approval of the relevant government authority before distributing foreign periodicals. These three articles not only discriminatory for foreign press, but they also establish authorization logic that is incompatible with the declarative logic that characterizes the exercise of press freedom in our national legal system.

The CNDH points out that the Human Rights Committee has stated in the 26th paragraph of its General Comment No. 34 that “laws restricting the rights enumerated in article 19, paragraph 2 [of the International Covenant on Civil and Political Rights], ... 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. [Therefore] Laws must not violate the non-discrimination provisions of the Covenant”.

The Council also recommends taking into account the Commission on Human Rights' Resolution 2004/42 on the right to freedom of opinion and expression²³, which in paragraph 4(g) calls upon all States to “promote a pluralistic approach to information through encouraging a diversity of ownership of media and of sources of information, including mass media”, noting that the diversity advocated in the resolution must be interpreted as widely as possible.

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24. In the national context, recommendation No. 57 of the national dialogue “Media and Society” calls for “clear and consistent guarantees and remedies for the foreign press accredited in Morocco or distributed/broadcast in Morocco” to be included in the new Press Code.

Based on these considerations, the CNDH recommends aligning the registration, printing and distribution procedure of the foreign press on the one regulating the national press. This alignment will ensure clear and consistent remedies for this press, as recommended by “Media and Society” the national dialogue.

Electronic media

25. Article 35 provides that electronic newspapers that choose “.ma” as a web domain are eligible to receive public incentives. The National Human Rights Council concluded that the wording of this paragraph can be easily interpreted in such a way that electronic newspapers that have not opted for this web domain may not be eligible for these public incentives. In order to avoid any discriminatory effects with respect to electronic newspapers, the Council accordingly recommends that these incentives be granted on the basis of other criteria that guarantee both the independence and the development of these media outlets.

26. Under article 36, electronic media authorized to publish in accordance with the

provisions of Article 21 shall have the right to make films and reportages. The Moroccan Cinematographic Centre (CCM) shall then deliver a filming permit valid for one year to these outlets. The Council recommends checking the opportunities of this provision, particularly regarding the period of the permit validity.

For example, the Constitutional Council in France considered in its Decision No. 2001-450 DC of 11 July 2001 (on the various social, educational and cultural provisions Act) and Decision No. 2007-550 DC of 27 February 2007 (on the modernization of audiovisual broadcasting and the television of the future Act) that the freedom of the legislator shall be more limited and therefore the (proportionality) control of the constitutional court shall be more thorough when freedom of expression and communication are threatened. The CNDH recommends to the Moroccan legislator adapting the same approach, thus assessing the various interests involved, taking into account the constitutional provisions related to the protection of freedoms and public interests that are guaranteed or not guaranteed by a legislative measure²⁴. For more clarity and legal certainty, the Council proposes mentioning in the same article (Article 36) the law under which filming without permission shall be sanctioned.

27. The CNDH also took note of the outcome of the (Moroccan) National Control Commission for the Protection of Personal Data's first websites monitoring campaign, released on 19 September 2014. This campaign shed light on a number of irregularities relating to non-compliance with Law No. 09-08 on the protection of individuals' personal data.

The study found that 50% of the monitored websites did not display any signs or phrases related to personal data protection. In 80% of cases, the websites did not ask for the internet users' consent. The obligation to inform these persons when collecting their personal data in compliance with the law was respected only in 1% of the monitored cases. The right of internet users to access, to rectify and to object to the disclosure of their personal data was not guaranteed in 95% of the monitored websites²⁵.

The CNDH considers that there is an opportunity to add between Articles 45 and 46 of the draft bill a provision to explicitly impose on electronic media the duty to respect the provisions of Law No. 09-08 and National Control Commission for the Protection of Personal Data's Guidelines, designed to help websites comply with this law (No. 09-08)²⁶.

Printing and distribution

28. The CNDH recommends removing the prior authorization of the "competent governmental authority", referred to in Article 48 of the draft bill, which the printer must

have before printing a foreign periodical publication; the prior statement is sufficient, in the Council's opinion.

29. The Council proposes rewording and clarifying the scope of Article 50 of the draft bill, by replacing the vague phrase-wording for the responsibility of the printer by a clause under which the printer cannot be prosecuted if the author is known and resident in Morocco. This recommendation aims at implementing the provisions of Article 28 of the Constitution which stipulates that freedom of the press cannot be limited by any form of prior censorship.

30. The same must be applied to Article 58 on the distributors' responsibilities.

Advertisement

31. The CNDH recommends that people with disabilities should be included in the list of persons protected against advertisement by virtue of Article 70. The Council further proposes prohibiting the illegal use and sale of personal data for advertising purposes in the same article.

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Offenses and penalties (Part III of the draft bill)

Introduction: Conditions for the validity of a restriction on freedom of expression in international law

32. Since freedom of expression is guaranteed by Article 28 of the Constitution and governed by law, the Council will highlight, hereinafter, the general conditions for the validity of a restriction on freedom of expression, before presenting its detailed recommendations. Under the third paragraph of Article 19 of the International Covenant on Civil and Political Rights, the exercise of freedom of expression carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputation of others and the protection of national security or of public order, or of public health or morals.

Article 20 of the Covenant urges States to prohibit by law any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

33. Based on these two articles, the CNDH believes that the entire draft bill must take into account the following limitation principles²⁷:

- Any restriction must be prescribed by law, be clear, precise and accessible to all; in order for the individuals directly concerned by the code to be aware of the consequences of their actions. When laws do not meet this criteria, they can be easily disobeyed, and may give law enforcement officers discretion which may lead to arbitrariness;
- The law must serve one of the objectives set out in the third paragraph of Article 19 of the International Covenant on Civil and Political Rights (principle of legitimacy);
- The law must demonstrate that the restrictive measure is necessary and proportionate for the stated purpose (principles of necessity and proportionality).

34. Regarding press offenses, it is necessary to highlight the main elements upon which the National Human Rights Council based its proposals and recommendations.

In this respect, the Council underlines the fact that Resolution 12/16 of the United Nations Human Rights Council on freedom of opinion and expression²⁸ in its 5th paragraph calls upon all States to “(n) review their procedures, practices and legislation, as necessary, with a view to ensure the full and effective implementation of all their obligations under international human rights law, including to ensure that any limitations on the right to freedom of opinion and expression are only such as are provided by law and are necessary for the respect of the rights and reputations of others, or for the protection of national security or of public order or of public health or morals.”

In the same resolution (sixth paragraph), the UN Human Rights Council stresses that “condemning and addressing, in accordance with their obligations under international human rights law, including those regarding equal protection of the law, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is an important safeguard to ensure the enjoyment of human rights and fundamental freedoms of all”.

35. In his report published on 7 Sept. 2012²⁹, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression urged States to “conduct constitutional and legal reviews to ensure that domestic law on hate speech complies with the three-part test stipulated in article 19 (3) of the International Covenant on Civil and Political Rights, namely that: the restriction must be provided by law, which is clear and accessible to everyone; it must be proven as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals; and it must be proven as the least restrictive and proportionate means to achieve the purported aim. Any breach of those principles should be subject to review by an independent court or tribunal”.

36. With regard to the dissemination of hate speech online, “States should request the removal of content only through a court order and intermediaries should never be held liable for content of which they are not the authors”.

The Special Rapporteur also calls upon media professionals “to abide by high ethical and professional standards of journalism to fulfil their role of informing society with accurate facts. He therefore encourages media professionals and media outlets to adopt and adhere to voluntary codes of ethics and professionalism and to establish self-regulatory bodies”.

37. The CNDH also underlines the principle of proportionality firmly rooted in international core instruments concerning press offenses. Indeed, the 19th paragraph of the Human Rights Commission’s Resolution No. 2002/48³⁰ appeals to all States “to create and permit an enabling environment in which training and professional development of the media can be organized 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”.

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The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression provides guidance in his report³¹ published 10 August 2011 on what to prohibit in the criminal code and on the restrictions criteria that this law must comply with.

The Special Rapporteur indicated in the recommendations section in his report that “States are obliged to guarantee a free flow of ideas and information and the right to seek and receive as well as to impart information and ideas over the Internet. States are also required under international law to prohibit under its criminal law the following types of content: (a) child pornography; (b) direct and public incitement to commit genocide; (c) advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and (d) incitement to terrorism”. However, the Special Rapporteur reminded all States that “any such laws must also comply with the three criteria of restrictions to the right to freedom of expression, namely: prescription by unambiguous law; pursuance of a legitimate purpose; and respect for the principles of necessity and proportionality”. These guidelines are applicable to all press types.

38. It should also be noted that the status of journalist as “potential whistle-blower” must be considered in any litigation concerning press offenses. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted in his report published on 4 September 2013³² that “journalists, other media personnel and

civil society representatives, who receive, possess or disseminate classified information because they believe that it is in the public interest, should not be subject to liability unless they place persons in an imminent situation of serious harm”, adding that “only if the information released is related to the above principles should the person be considered a whistle-blower and, therefore, bear no liability”.

The European Court of Human Rights has provided through its jurisprudence for some principles to be considered in press litigations. In the case of *Lingens v. Austria*³³, the Court considered that “the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt, paragraph 2 of Article 10 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues”.

In the case of *Incal v. Turkey*³⁴, the Court held that “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries”. The positive obligation to protect freedom of expression in the press affects all media. In the case of *Editorial Board of Pravoye Delo and Shtekel V. Ukraine*³⁵, the Court recognized for the first time that Article 10 of the European Human Rights Convention must be interpreted as imposing on States a positive obligation to provide for an appropriate legal framework to ensure effective protection of journalists' freedom of expression on the internet.

39. In the Moroccan context, the “Media and Society” national dialogue proposed recommendations that can inspire any reform of the press litigations in general. Recommendation No. 28 reads as follows: “transfer to this single code all provisions contained in other texts (such as the Criminal Code) dealing, explicitly or implicitly, with the freedom of expression of citizens, media of all types and ICTs.” Recommendation 31 calls for “enshrining in the new single code the specific character of exercising freedom of expression and freedom of the media by protecting it against enforcement by committal which may only be applied to individuals as citizens through the application of laws in

force regarding serious violations of human rights (incitement to crime, incitement to civil war, glorification of crimes against humanity, genocide, forced deportations, racism, abductions and torture, etc.)". Recommendation 32 suggests "giving precedence in the new code to civil and symbolic redress in case of "press offence" or "professional offence" and opt for a system of punishment in the form of fines that are reasonably proportional to the adjudicated offence type and that may be determined based on the turnover of the company under investigation, especially in case of defamation, insult or abuse. The fine, in this case, may correspond to one-week turnover of the company with a 20% increase in the event of a recurrence. Punishment may also consist in banning the publication from inserting any advertisement (particularly from the State) for a week, in the case of a daily and for a month, in the case of a periodic (weekly or monthly) or an electronic newspaper. In the event that a journalist is convicted for the same offences, punishment may take the form of a fine equivalent to a salary period that is proportional to the gravity of the offence: a week, a month to three months at the most with a 20% increase in case of a recurrence".

Regarding defamation, recommendation 34 suggests that "in the event of an alleged defamation offence, [legislator shall] provide in the code for the possibility of citizen complainants bringing direct action before courts against a press act, with effective accessibility to legal aid, considering that as a yearly average in recent years 80% of defamatory complaints were lodged by ordinary citizens."

40. The CNDH also recommends regarding defamation that the legislator takes into account the principles included in the Joint Declaration by Abid Hussain, UN Special Rapporteur on Freedom of Opinion and Expression, Freimut Duve, OSCE Representative on Freedom of the Media, and Santiago Canton, OAS Special Rapporteur on Freedom of Expression, dated 26 November 1999³⁶. These principles, considered as a minimum, can be presented as follows:

- the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
- defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens;
- the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
- no one should be liable under defamation law for the expression of an opinion;
- it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all circumstances;
- civil sanctions for defamation should not be so large as to exert a chilling effect on

freedom of expression and should be designed to restore the harmed reputation, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.

41. Based on these elements, the CNDH recommends the following:

- reinforcing the trend to drop deprivation of liberty for press offenses, and replacing civil imprisonment provided for under Articles 76 to 82 of the Code of Recovery of Public Debts by alternatives to incarceration;
- amending Article 85 to give the court, instead of the judicial police officers, the power to seize publications under Article 84. This is actually a fundamental recommendation for the National Human Rights Council which sees the court as the guarantor of press freedom in accordance with Articles 28 and 117 of the Constitution;
- transferring Articles 442, 443 and 444 of the Penal Code to the Press Code;
- amending the provisions of Articles 218-2 of the Penal Code related to the glorification of terrorism. In this context, it is recommended to be guided by the provisions of Article 5 of the Convention of the Council of Europe for the prevention of terrorism which defines “public provocation to commit a terrorist offence” 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”. The same article calls on each State Party to “adopt such measures as may be necessary to establish public provocation to commit a terrorist offence (...) when committed unlawfully and intentionally, as a criminal offence under its domestic law”.
- amending article 101 of the draft bill and specifying a maximum threshold of compensation for privacy infringement, taking into account recommendation 32 of the “Media and Society” national dialogue; and
- amending the second paragraph of Article 118 of the draft bill, giving the power to temporary ban distribution to the President of the Court of First Instance.

Privacy and image rights

42. After analyzing articles 99 and 100 of the draft bill related to the protection of privacy and the right to the image, the CNDH recommends:

- extending the application scope of Article 99 on personal data held by public authorities and private bodies to data collected by electronic monitoring via the Internet³⁷ as well as data collected by private or public surveillance cameras; and
- rewording Article 100 to extend the requirement of consent to the context of data

usage, including use of these data and possible display on other media. Article 100 should also include, in the opinion of the Council, a clause allowing the person concerned to exercise his/her right to be forgotten. The CNDH also proposes providing in Article 100 for the explicit and prior consent of parents or legal guardians for the use of personal data of minors under their guardianship.

The right of journalists to inform about ongoing cases before the court

43. Regarding the provisions of Articles 86, 87 and 88 of the draft bill, the Council proposes adding an article at the beginning of the Court Immunity Protection Section, to enshrine the 18 principles of the Recommendation Rec. (2003)13 of the Committee of Ministers to member States of the Council of Europe on the provision of information through the media in relation to criminal proceedings³⁸. Similarly, the CNDH proposes building on the Belgian experience to create the position of Magistrate in charge of Press Relations who will have the task of informing the media about ongoing cases³⁹.

The CNDH recalls also that the European Court of Human Rights held in the case of *Sunday Times v. United Kingdom* (26 April 1979) that the press can provide information on pending cases in certain conditions, including respect for the presumption of innocence. In its judgment, the Court recognized that it would be difficult to admit that the media must wait until the end of a trial to report on how a case that arouses certain feelings and emotions in society was handled⁴⁰.

Protection of minors

44. In order to strengthen the provisions relating to the protection of minors, the CNDH proposes adding in Article 90 of the draft bill an explicit provision to extend the scope of the Article to include electronically distributed content.

Notes

1- http://www.mincom.gov.ma/fr/textesjuridiques/rapports/item/download/49_ec492719d735dcf728226ead41f58d56.html

2- www.adrare.net/det/.../Synthese_recommandations_francais.pdf

3- United Nations Human Rights Committee; 102nd session; Geneva, 11-29 July 2011; General Comment No. 34; Article 19: Freedoms of opinion and expression.

4- Adopted at the 31st session, 2 October 2009.

5- Human Rights Council, Twenty-first session, 21 September 2012; Safety of journalists.

6- Adopted at the 55th session, 19 April 2004.

7- Adopted without a vote at the 59th session; 23 April 2003.

8- Adopted without a vote at the 51st session; 23 April 2002.

9- Adopted at the 73rd session, 23 April 2001.

10- Paragraph 2.1 of Article 2 defines information as a description of an event in a clear, accurate and concise manner according to recognized rules of professional writing.

11- Article 3 provides that freedom of the press is guaranteed under Article 28 of the Constitution and cannot be limited by any form of prior censorship. The same article establishes the right of all to freely express and publish information, ideas and opinions. These freedoms are exercised in accordance with this Law and other laws in connection with the press. Article 3 also guarantees freedom of publishing and distribution of newspapers and other publications. Article 4 guarantees for journalists and journalistic institutions the right to have access to information sources and obtain information from various sources, unless such information is confidential and this right is restricted under law. The second paragraph of Article 4 provides that the administration, elected bodies and institutions responsible for public service missions should facilitate the journalist's work in terms of access to information. Article 5 provides that the State shall ensure the promotion of media pluralism and that the sectors of press, publishing, printing and distribution receive a subsidy based on the terms laid down by regulation.

12- By way of comparison, French case law has defined four traditional elements of good faith: a legitimate ground for information, the seriousness of the investigation, the cautious tone, and the absence of personal animosity.

Case law has also established the important principle that good faith must be assessed precisely "based on the type of the newspaper" (Paris Court of Appeal, 11th Chamber; 27 June 2002, *Légipresse* No. 195-I, p. 116). Thus, for example, if the intention of the journalist is to contribute to a "public debate about the behaviour of politicians", he can be recognized "the greatest freedom of tone", which implies "neither impartiality nor objectivity", even if he has to take a minimum of precaution regarding information checks (Paris First Instance Court; 17th Chamber; 4 July 2001). For editorials signed by a newspaper editor and characterizing real opinion journalism, it is necessary to define a concept of good faith that reflects the nature of this type of writing (Toulouse Court of Appeal, 3rd Chamber; 13 September 2001).

See also: Christophe Bigot: "La bonne foi du journaliste : Etat des lieux" (The good faith of the journalist: current state); *LEGICOM* 2002/3 (No. 28); *Editions victoires* (pp. 73-84).

13- Morocco was part of a group of six States that committed themselves to this issue under the Human Rights Council, alongside Switzerland, Austria, Tunisia, Brazil and Qatar. At the initiative of these States, a resolution on the protection of journalists was adopted in September 2012 by the Council.

http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/21/L.6&referer=/english/&Lang=F

14- "The Special Rapporteur also encourages all States to establish an early-warning and urgent response mechanism for the protection of journalists (...). It should be an official State

commission with high-level recognition and an appropriate budget, composed of high-level representatives of State institutions related to security, territorial administration and human rights, as well as representatives of journalists' associations, media associations and non-governmental organizations working on issues related to the right to freedom of expression. The Commission's plan of work and urgent response procedures should be determined through a common agreement among its member:'

A/65/284: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 August 2010 (paragraph 89).

15- The draft bill on the National Press Council provides in Article 3 that the said Council proposes to the Government procedures to adopt for implementing the right of journalists to access to information.

16- [http://hudoc.echr.coe.int/eng?i=001-62533#{%22display%22:\[%220%22\],%22languageisocode%22:\[%22ENG%22\],%22appno%22:\[%2217488/90%22\],%22itemid%22:\[%22001-57974%22\]}](http://hudoc.echr.coe.int/eng?i=001-62533#{%22display%22:[%220%22],%22languageisocode%22:[%22ENG%22],%22appno%22:[%2217488/90%22],%22itemid%22:[%22001-57974%22]})

17- <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17943&lang=en>

18- Law No. 2010-1 of 4 January 2010 on the protection of the confidentiality of journalists' sources: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021601325&categorieLien=id>

19- This Article provides that when the employment contract is terminated at the initiative of a professional journalist because of "significant change in the nature or direction of the newspaper or periodical if that change creates, for the employee, a situation likely to harm his honour, reputation or, more generally, his moral interests", this termination shall produce the same effect as a dismissal.

20- Joint Declaration on the regulation of the media, the restrictions on journalists and investigating corruption <http://www.article19.org/resources.php/resource/3046/en/joint-declaration-on-regulation-of-the-media,-restrictions-on-journalists-and-investigatingcorruption#sthash.WOXqbSBZ.dpuf>

21- UNESCO Guidelines for Legal Deposit Legislation; CII-00/WS/7 ; Paris, 2000

22- Idem.

23- Adopted without a vote at the 55th session, 19 April, 2004; E/CN.4/RES/2004/42.

24- François Ost et Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Publications des facultés universitaires Saint-Louis, Bruxelles, 2002, pp. 438-443.

25- According to a press release published on the Commission's institutional website www.cndp.ma on 19 September 2014.

26- <http://www.cndp-maroc.org/fr/presse-et-media/communiquede-presse/253-communiquede-presse-19-09-2014.html>

27- For more details, <https://www.article19.org/pages/en/limitations.html>

28- Adopted at the 31st session, 2 October 2009

29- A/67/357 (paragraph 77)

30- Adopted at the 51st Session, 23 April 2002

31- A/66/290 (paragraph 81)

32- A/68/362 (paragraph 107)

33- Application no. 9815/82, 8/7/1986.

34- 41/1997/825/1031, 9 June 1998.

35- Application No. 33014/05, 5 May 2011.

36- <https://www.article19.org/resources.php/resource/3044/en/Joint%20Declaration%20on%20censorship%20by%20killing%20and%20defamation>

37- The Right to Privacy in the Digital Age (<http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx>)

38- Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies

39- In Belgium, this position was established under the Act of 12 March 1998 designed to improve the criminal procedure as regards the earlier and later stages of investigation (also called the Franchimont law). The legal framework, the nature, content and form of this communication of information were determined in the joint circular No. 7/99 of the Minister of Justice and the College of Public Prosecutors on 30 April 1999, both for the prosecutor press spokesperson and the police press spokesperson. The mission of the public prosecutor and authorized police spokesperson is to provide the press with correct and objective information taking into account the specificity of the distribution means.

40- [http://hudoc.echr.coe.int/eng#{%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\]}](http://hudoc.echr.coe.int/eng#{%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]})

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