

Digital Participatory Culture: Assessing the Moroccan New Media Legal Challenges

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Abstract

This paper discusses the development of freedom of speech regulation in the Moroccan legal system. It especially looks at the intersection of legal texts in the context of new media use. While it highlights that Internet regulation is still an understudied subject, it sheds light on the Moroccan legal apparatus and how it has responded to the growing challenges of new media use. Through an assessment of the myriad of intersecting codes and bills that apply to new media and affect freedom of expression in particular, it demonstrates how the existing and developing new media regulation tends to impact the growth and the enjoyment of the full potential of the Internet through continuous "chilling effects". To demonstrate the probability of these chilling effects, a sample of a dozen historical legal cases is presented to substantiate how the judicial system is reproducing the legal atmosphere that characterized the practice of freedom of expression in traditional media.

Keywords: new media, Morocco, freedom of expression, chilling effects.

1. Introduction:

Research on the Internet's role in participatory culture in the Arab world has abounded in recent years. Generally there has been a tendency to celebrate this culture and credit new media with irrepressible powers in boosting it. Originating from early assessments of the so called Arab Spring, many of the arguments behind this premature euphoria have usually overlooked "offline politics" that customarily orchestrated the development of the mediascape in the Arab world. However, while current research has grown more suspicious of early idealized assumptions about new media powers, human rights that make the most of the Internet's empowering capabilities seem to have received less attention especially at the level of pertinent legislation and incurred impacts.

This paper draws from the global debate over the expansive role of the Internet in participatory culture and its relation to the public sphere. While it highlights that Internet regulation is still an understudied subject, it sheds light on the Moroccan legal apparatus and how it is responding to the growing challenges of new media use. Through an assessment of the myriad intersecting codes and bills that apply to new media and affect freedom of expression in particular, it demonstrates how the existing and developing new media regulation tends to impact the growth and the enjoyment of the full potential of the Internet through continuous "chilling effects". The assessment of a dozen legal cases not only reflects a reproduction of the legal atmosphere of traditional media but also pinpoints to an emerging legal trend involving new media. As a result, the regulatory void that has characterized much of the life of the Moroccan online new media is being eclipsed. The paper concludes with an evaluation of the stakes involved in the developing legal atmosphere.

2. Chilling Effects

The hypothesis that direct or soft censorship, surveillance and heavy sanctions of free speech results in negative effects on people's ability and willingness to practice their freedom of expression is as old as this basic human right itself. Known as the theory of chilling effects in the context of the First Amendment in the US it is now widely studied in connection with mass online surveillance in democracies as well as in authoritarian regimes (Penney, 2017). Ever since the revelations of Edward Snowden about the scale of the National Security Agency's sheer surveillance scheme in the US more studies have been conducted to assess the effects of such "security" measures on the freedom of expression and the creative production in particular. Although there is growing cynicism as to the scale of the actual effects on freedom of speech, recent studies carried out on online speech provide ample evidence of chilling effect not only on the ability to express one's ideas freely but also on consumption of ideas thought to be unpleasant to the majority of the public. A study conducted by PEN international for example (PEN, 2013) found out that of the surveyed American population of writers 28% have curtailed or avoided social media activities following Snowden's revelations. Although it acquiesced that writers are more likely to disapprove of government surveillance notwithstanding, it found out that PEN writers, assuming they are under surveillance, tend to self-censor their work either by avoiding writing, speaking about or doing research on certain subjects. Similarly, investigating Wikipedia use after Snowden's revelations Jonathan Penney found out that traffic to sensitive topics on the free encyclopedia decreased significantly compared to the time before the revelations (Penney, 2016). Making use of the spiral of silence theory Elizabeth Stoycheff has pointed out to the potential that surveillance may have on stifling the expression of minority political groups on social media thus affirming chilling effects on discussing sensitive topics (Stoycheff, 2016).

In the Moroccan context, besides the notorious history of human rights under various laws and regulations, the story of the death of the website Mamfakinch.com could likewise be compared to the effects of surveillance program exposed by Edward Snowden (Privacy International, 2015). Once a central hub for information related to February 20 Movement in the context of the Arab Spring, the members of the editorial team received an email attachment containing spyware that undermined their privacy and proved, through third parties, that their activities were under surveillance. Having sensed their privacy compromised, the members lost interest in writing for the website and it soon proved useless to keep it online. Thus it is a pertinent example of the chilling effects on freedom of expression on one of the social movements that succeeded in pushing for historical political changes in Morocco.

3. Methodology

Following the Arab Democratic Spring the discourse of an unprecedented emancipation of speech has been positively evaluated to a large extent. In Morocco that atmosphere has been exacerbated by continuous legal developments involving amendments to laws relating notably to freedom of expression. This study presents an overview of the legal developments starting from the press code of 2002 until the latest press code (2016)—the first to acknowledge electronic journalism. This period is also marked by the evolution of social media and ubiquity of new communication technologies. The aim here is to highlight the disregard to the implications of new communication technologies in these revamped texts.

To expose the effects of the regulations and laws pertaining to freedom of expression at the level of new media the paper makes use of pertinent legal cases that have been considered to impact this freedom, and how in turn this resulted in a less expansive digital participatory culture while breeding a culture of silence on certain topics. The selection of these legal cases has been done through in-depth interviews with bloggers who have maintained their blogs before, during and after February 20 Movement. The bloggers were asked about the most salient legal cases that they thought made them reconsider /self-censor their takes on some topics (i.e. had the most chilling effects on them). While the analysis of these interviews is not the focus of this paper, it has informed the review of the legal apparatus.

Another criterion behind the selection of these cases is that they were either brought to the attention of the justice system by either of the following: the government, the public prosecutor, the state or a local executive of the government. Cases taken to the court by individuals not belonging to an official body have not been considered. Although the sentence of each of the bloggers/YouTubers/activists involved is mentioned, they are less important compared to their potential chilling effects on other people of similar interests in freedom of expression. These cases span the period before and after February 20, 2011 demonstrations. The reason is to explore if there is any trend in prosecuting similar cases or if specific cases are meant to be more popular than others. While it is not the purpose of this paper to evaluate the sentences made in these cases, it is of most importance to highlight the details where these cases show a rift with legal texts and regulation of freedom of speech. A general conclusion though is that the new constitution and the new Press Code as well as new perspectives on newer uses of social media have been overlooked in the proceedings of these cases. Likewise, few studies have pointed to the general spreading "chilling effects" of these new codes and the new legal cases that involved social media.

4. Legal Framework in Morocco

4.1 A History of Legal Texts

4.1.1. A New Constitution

The legal arsenal that defines and interprets the boundaries of freedom of expression in Morocco is as vast as to give the impression of its effectiveness and efficiency in securing both the responsible practice and full enjoyment of this right. However, the intersection and the obfuscation of the bulk of regulations and codes that pertain to freedom of expression not only challenge the definition of its boundaries but also create the opportunity for volatile interpretation and application. Historically, regulating freedom of expression has abided by sociopolitical changes and responded to the evolving mediascape. Passing from the early attempts at "divorcing" the Moroccan legal system from the French colonial legacy, to political upheavals such as the coups d'état of 1972 and 1973, to the terrorist attacks in Casablanca (May 16, 2003), freedom of expression regulation reached its ultimatum in the revamped Press and Publication Code of 2016—the first to acknowledge and "regulate" online journalism.

Freedom of expression has always been enshrined in the most foundational legal text, the Moroccan Constitution, since 1962. In this first constitution the Preamble established the Moroccan Kingdom's commitment to international human rights principles. Article 9 guaranteed "*the freedom of opinion, freedom of expression in all its forms, and freedom of assembly*" (Const., 1962). Affirming the Kingdom's commitment to universally recognized human rights, the Constitution of 1996 also maintained this right in its Preamble as well as in Article 9. In accordance with universal legal restrictions, this constitution firmly asserted that "*the exercise of these freedoms may be restricted only by law*". Yet it is exactly the explicit and succinct phrasing of article 9 that

seems to falsely "*suggest that freedom of opinion and expression, currently known as freedom of communication, is upheld, contained and containing*" (Hidass, 1999). The current constitution, born as a response to unprecedented social upheavals, seems to have attended to this shortage.

The latest constitution approved after the social upheavals of February 20th, 2011 marks a departure from the textual description and article numeration that characterized the previous five constitutions and subsequent amendments. While still upholding freedom of expression (Art. 25) and freedom of the press (Art. 28) as fundamental human rights, it strikingly stipulates that "*freedom of the press is guaranteed and cannot be limited by any form of prior censorship*" (Art. 28). Although this is a significant proclamation to find a place in the Constitution, the latter indicates that a respective law sets out the rules and organization of the practice of this right. Some observers however note that it is those organic rules that are suspected to be restrictive and will most likely control the public means of communication (Madani, Meghraoui, Zerhouni, 2012). Explicitly declaring prior censorship illegal in the Constitution is in fact immensely important since it has affected some of the most controversial clauses in the Press Code. The latter, along with the Penal Code, expressly attends to freedom of expression and its interpretation.

4.1.2. The Constant Contents of the Press Code

The first Press Code in Morocco was adopted in the wake of independence (1956) by the *Dahir* (royal edict) of November 15, 1958 (Dahir # 1-58-378). Interestingly, it is noteworthy that its adoption, along with other laws about public liberties, came before the Kingdom had its first Constitution in 1962. While this Code has withstood the test of times until its first revision in 2002 it has always maintained notorious measures that challenged freedom of expression in the national press and international press distributed in Morocco. In his study of human rights laws in the Moroccan legislation Bendourou (2014) for example notes that the issue of freedom in the Press Code is raised at two levels: the level of the legal procedure to obtain a publication authorization and the level of the sanctions imposed on journalists. Both of these levels consequentially impact the livelihood of any publication.

For the launch of any publication the law dictates that the concerned party files for a prior authorization from the Public Prosecutor of the court of first instance in the province where the head office of the publication is located (Art. 5). After receiving the complete documents from the director of the publication, the Public Prosecutor must then provide a provisional deposit receipt. The final receipt shall be delivered within a maximum thirty days; otherwise the publication can be printed out (Art.6). While this may look like a routine formal procedure in practice, it hides a long defective bureaucratic loophole. In many cases the Prosecutor "*refuses to issue this document or evades receipt of the declaration when he considers that the officials are the subject of suspicion by the authorities*" (Bendourou, 2014. p.13). As noted by Sater (2007 p. 148) a notorious instance of the lack of independence of courts is illustrated by the withholding of the legal receipt to the former director of *Le Journal* Aboubakr Jamai, an icon of the independent press in Morocco.

Beyond the bureaucratic intricacies, media freedom under the Press Code of 2002 also suffered from one of the articles that put the life of publications at the hand of the executive branch. The press was challenged by the restrictive Article 77 that stipulates that the Prime Minister has the right to ban the publication of a newspaper and the Interior Minister has the right to censure individual issues. The Arab Press Network has identified at least 26 instances that could put a journalist behind bars. Among these Article 66 for example stipulates that anyone "*undermining*" the authority of the King or members of the royal family, Islam or territorial integrity may face a prison sentence of one to five years. It also punishes publications that publish material that goes against *morality* and *public morals*, without clearly defining them (Arab Press Network, 2007). Indeed, an inventory of the cases that have been the subject of judicial processes shows that there are multiple offenses that are usually invoked based on many codes and laws: violating the *sacred values* of the Kingdom, undermining the Monarchical regime, attacking Islam, undermining internal and external security of the State, offending heads of foreign states, praising and/or assistance to terrorist acts (Bendourou, 2014). Combined with defamation against the ministers and lay people (in the Penal Code), these offenses correspond to the bulk of codes and laws that have historically applied to freedom of expression regulation in Morocco; however, the Press Code has remained the most controversially invoked one.

4.1.3. A New Press Code

The latest Press Code (2016) took years in the gestation period. The development of Moroccan digital journalism, the booming use of social media, campaigns of advocacy groups, human rights associations and journalism professionals have precipitated efforts for the delivery of a new code. Much as the Government has hailed it as the most advanced in the history of Moroccan media, many commentators and scholars have pointed out multifarious pitfalls and fossilized ordinances (warranting the short history above) that would threaten the practice of freedom of expression and slow down the growth of the burgeoning digital press (Hidass, 2016). While the new code introduced several positive ordinances such as the abolition of prison sentences for journalists (the previous code stated the words: *prison* and *jail* 24 times); relegating the interdiction of publications to the judiciary rather than to the Government; criminalizing hate speech and discrimination, there

remains a practical contingency: No act in this code exclusively specifies the Press Code as the sole applicable law when dealing with a freedom of expression offence. Any citizen/journalist could selectively face prosecution using the Terrorism Code, the Penal Code or the Press Code among others for an offence involving freedom of expression (Anouzla, 2016, Freedom House, 2016). In this way, the prosecution is given leeway tailoring the charges to meet the offences committed no matter the party concerned.

Irrespective of the notoriously small scale Moroccan media market, while the Press Code has indeed eliminated prison sentences for journalists, it replaced them with hefty fines capable of momentarily stifling any news media institution (El Yahyaoui, 2015; HRW, 2016; Freedom House, 2016). In fact, reiterating some provisions of the 2002 Press Code, Article 77 sets a fine of 2000 MAD to 200000 MAD for

whoever publishes, in bad faith, false allegations, inaccurate facts, falsified writings attributed to third parties where these acts have disturbed public order, irrespective of the means used, in particular by speech, threats made in public places or meetings, published and printed material distributed for sale in public places or meetings or billboards or posters exposed to the public by any audiovisual or electronic means.

The fine is raised to 500000 MAD in other cases (such as *undermining* the army morale). In trying to assess the terminology used, the umbrella phrase "*electronic means*" here may be understood to subsume new technologies specially the Internet. However, for the first time in their decade-long history the Press Code recognizes electronic newspapers and treats them in discrete articles. Likewise, in a questionable timing and dubious association, the same Official Gazette that bore the new Press Code also carried a fresh controversial amendment to the Penal Code fundamentally tied to the struggle for freedom of expression (Official Gazette, 2016). Noting the ominous juxtaposition of the amendments to the Penal Code with the Press Code, Human Rights Watch (2016), Freedom House (2016), and Committee to Protect Journalists (El Rifae, 2016) all expressed in different terms their concerns about "*smuggling*" the prison sentences from the Press Code to the Penal Code. Insisting on analyzing the old and new codes "side-by-side" Human Rights Watch in particular in a timely treatise of the legal environment in Morocco criticizes the fact that non-violent speech is still largely punishable despite the new code provisions. Indeed the new amendment to the Penal Code (Law 73-15) now carries a sentence of up to five years in prison and/or a fine of up to 500000 MAD for crimes involving insulting the Islamic religion, offending the monarchic regime and royal family, and inciting against territorial integrity.

Whether media professionals are exempt from this law is not guaranteed. For although there is a clause in Article 17 that stipulates "*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*" Human Rights Watch for example warns that

[T]he 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."

This intersection between the Penal Code and the Press Code does not give a complete picture of the provisions regulating freedom of speech. Recent terrorist events inspired a terrorism code some articles of which also bear on freedom of expression.

4.1.4. Terrorism Code

Inspired by the 9/11 events and as part of the range of laws that relate negatively to freedom of expression, the Terrorism Code has also been criticized of stifling freedom of speech. The Code adopted on May 28, 2003 only a few days after May 16 attacks in Casablanca carries some equivocal provisions. For example, Article 218-2 proscribes prison terms of two to six years and fines of up to 200,000 MAD for condoning acts of terrorism. As Seib and Janbek (2011, pp. 2-10) argue there can hardly be a consensus on the politically nuanced definition and difference between terrorism and freedom fighting and by extension between fighting for freedom of expression and condoning terrorism. This is pertinently the case in Morocco: "*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 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 " (Human Rights Watch, 2016.p.28).

As social media get more ubiquitous, another Code that is rarely invoked by concerned human rights organizations and experts and which social media brought to the fore is the Labor Code (Code du Travail). In the absence of any laws expressly regulating social media in Morocco, common law is applied on "breaches" carried out on social media. For example, Article 39 of the Code du Travail is applied on many cases related to freedom

of expression considered as grave mistakes such as leaking professional secrets and defamation of coworkers. Given the novelty of social media practices, lawmakers make recourse to adjacent laws such as Law 09-08 related to the protection of persons against the abuse of personal data (CFCIM, 2016).

4.1.5. Towards a New Media Bill

A global picture of this panoply of laws that regulates freedom of expression would not be complete without a reference to the only attempt towards regulating freedom of expression online. The aborted infamous Digital Code Bill presented by the Ministry of Industry, Investment and Digital Economy in 2013, aimed at updating and reinforcing the legislative framework by regulating all Internet-related activity. By the time it was considered by the Government, the backlash that this code stirred in social media resulted in its abortion. Presumably to give it a chance for more debate leading to a consensus over its contents, as argued by Minister Moulay Hafid Elalamy (Akhmisse, 2013). The fact that Article 24 in this code verbosely reiterated the three historically controversial "red lines" in the Press Code (offending Islam, the King and undermining national integrity) and even extending them to include statements considered against public order, national security, necessities of public service, or public policy (as vague as interpretations of these entities may be) was considered by activists as an intention to stifle freedom of expression online (York, 2013).

The intricacies of each and every article in these laws cannot be grasped without appropriate legal cases where the interpretation of these laws matters the most. While the age-old omnipresent three *red lines* have glossed over numerous other possible offences, this inventory of some legal cases pertaining to freedom of expression suggest an atmosphere where "chilling effects" are more than likely to affect the digital participatory culture. They also suggest that, like many legal systems around the world, the Moroccan legal apparatus seems to be lagging behind technological revolutions.

5. Sampling Legal Cases

Despite the adoption of a new constitution, the amendments brought to the Press Code (including the acknowledgment of the digital press), prosecution of individuals on the basis of their right to expression has not seemed to take these changes into consideration. A first look at the list of legal cases suggests that legal procedures involving freedom of expression have continued unabated since 2008 regardless of the codes or bills involved. Although there were fewer cases before February 20, 2011, this does not suggest that the subsequent cases are necessarily related to those events. While these cases involved the use of new/social media, they show striking similarities with legal cases experienced by journalists in traditional media thus confirming the *sacredness* of the "red lines". The monarchy, Islam and territorial integrity continue to be at the background of cases involving freedom of expression.

If considered linearly from 2008, on the one hand, even if the early cases directly involved the charge of "disrespect to the King/royal family", it must be noted that such cases have become rare in recent years. On the other hand, more and more cases brought to the courts by officials representing the state or local authorities or political parties (see for example Hassan El Hafa, Mohamed El Khou and Redouan Assermouh). These cases point to a trend that makes of social media a field that is not level for all players. While access to social media is open to all parties who feel hurt by certain a speech, these cases suggest that preference for resolving defamation matters in courts is becoming more and more prevalent and acceptable.

For example, a case that set a precedent is that of Walid Bahomane. Walid was a teenager shared cartoons of King Mohamed VI on his Facebook page. Those cartoons have been online for a long time before his sharing. As soon as he was arrested and the crime went public the case had a backlash, as thousands of people shared the same cartoons. It is the first time that sharing defamatory caricatures is also considered a crime that equals creating the original cartoons.

In fact the assessment of these legal cases could go farther than this providing more details about their proceedings. In conjunction with the history of the legal texts regulating freedom of expression, these selected cases represent a long list of similar cases that neither the new constitution nor the new Press Code seem to have affected.

Figure 1. Selected Legal Cases between 2008 and 2016

Name	date	offense	sentence
Fouad Mortada	2008	Creating a fake profile of Prince Moulay Rachid.	Three years in prison and 10000 MAD fine.
Erraji Mohamed	2008	Showing disrespect to the monarchy by claiming the King encourages a culture of dependency.	Two year in prison and 5000 MAD fine.
Hassan Barhoun	2009	Circulating false news and accusing a public prosecutor of corruption on a petition online.	One year in prison and 10000 MAD fine.
Bashir Hazzam	2010	Publishing false information harmful to the image of the country on human rights.	Four months in prison.
Abdesslam Haydour	2012	Showing disrespect to the King	Three years in prison.
Bahomane Walid	2012	Sharing caricatures of King Mohamed IV online.	Ten months in prison.
Mouad Belghouat	2012	Insulting security agents in a song on Youtube	One year in prison
Mr Crazy	2014	Offending a state institution (..) in a video clip online.	Three months in prison
Hicham Elmiraat	2015	Endangering state security (...)	Pending judgment since 2015 after six postponements.
Hassan El Hafa	2015	Writing a defamatory article about the wife of a local executive.	Three months in prison and 10000 MAD fine.
Mohamed El Khou	2015	Defaming a local executive in a caricature.	Pending judgment since 2015.
Redouan Assermouh	2016	Defamation of the head of political party.	5000 MAD fine. Later the plaintiff dropped the charges.

6. Conclusion:

Through a historical look at the legal apparatus that regulates freedom of expression, this paper attempted to demonstrate the possible chilling effects that legal texts may have on the right of new media users to express themselves. It highlighted the different bills and laws that relate to freedom of expression while at the same time pointing to the fact that they disregard the particularities of new media use and the implications therein. Numerous legal cases have been addressed in the courts all over Morocco. The sample that this study made use of represents a fraction of other cases that involve new media. An important conclusion that can be drawn from these cases is that there is little evidence to suggest that they have been influenced by the change in legal texts thus suggesting the chilling effects on the ability to freely express opinion on the subjects involved in these and similar legal cases.

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