

Freedom of the Press in the Middle East and North Africa:

Decriminalizing Defamation and Insult Laws against Journalists and the Media through Legislative Reforms, Executive Decrees and Prioritized Law Enforcement Policy Statements

By Keith Henderson, IFES

Abstract

The main objective of this paper is to encourage debate and reform action in the Middle East and North Africa (MENA) region on the need to create the legal enabling environment necessary to promote good governance, the Rule of Law and citizen participation. The paper notes that many of the defamation laws in the region still contain criminal penalties, including high fines and imprisonment, and that the enforcement of these laws and policies often leads to official government censorship as well as self-censorship. These practices are now well understood as counter to international obligations and best practices as well as to the guarantees of a free press enshrined in most MENA Constitutions. The result is a culture of secrecy that will be a high barrier to sustainable economic and political reform in the region. The paper suggests that a first-step reform strategy might be to decriminalize these laws as they relate to journalists and the media since they are the main source of information to the public and one of the primary means for citizens to participate in the reform debate taking place in the region.

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> "The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret our corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal-and incept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed."[1]

1- Introduction and Overview

Background – The Constitutions of most countries in the Middle Eastern and North Africa (MENA)[2] guarantee freedom of expression and freedom of the press. However, in practice, many MENA countries either lack the necessary implementing legislation or have adopted conflicting criminal laws, decrees or enforcement policies that obviate this fundamental right. For purposes of this policy paper and at the risk of over-simplification, the term "defamation" is used to refer to a range of related legal terminology across regions, such as libel, slander, defamation and insult laws. All of these laws have been used, in various ways and degrees, in countries throughout the region to stifle the press and inhibit criticism of government officials and government decisions.[3] Consequently,

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* This article is a Preliminary White Paper designed to encourage debate on key constitutional and legal enabling environment issues needed to promote freedom of the media, free expression, good governance, citizen participation and a Rule of Law culture. A work in progress, its substantive and geographic scope is limited in nature. It is also important to note that much of the information in this paper was obtained from open press and Internet sources, human rights groups and a cursory examination of selected laws. The author welcomes comments and updates on legal and policy developments in the countries highlighted in the paper and others throughout the region. The information presented in this paper reflects the situation in the region for a limited time frame, mainly 2001 and 2002. We are aware of reform trends and changes under consideration in the region but our legal research on these developments is still underway.

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[1] The Supreme Court of South Africa in Government of the Republic of South Africa v. the Sunday Times, 1995 1 LRC 168, pp. 175-176. Available at: Article 19, Memorandum on The Moroccan *Code de la Presse* of 1958, as well as the Proposed Amendments of 2001 by Article 19 Global Campaign for Free Expression, London, UK, December 2001

[2] For purposes of this paper, the term "MENA" will be used to refer to countries in the Middle East and North Africa, encompassing countries geographically located from Morocco to Iraq. While most of the analysis presented in this paper narrows in on five specific countries, preliminary research was undertaken to cover a broader range of countries in this region. The five focus countries are Egypt, Jordan, Lebanon, Morocco and Yemen.

[3] It should be noted that in some countries the laws, sanctions and enforcement policies for each of these terms vary. That said these laws appear to often be used interchangeably in many countries, depending on

journalists critical of government officials or government decisions in a number of MENA countries speak or write under the veiled or real threat of criminal prosecution and high criminal fines. The net effect is self-censorship and a general inability for most to have a meaningful voice in the democratic governance debate or reform process.

Reform considerations – There is a growing global consensus that decriminalizing defamation laws is an international best practice, if not an international obligation, and that it is something that all democratic countries around the world should do immediately. It is clear that criminalizing defamation stifles and chills freedom of expression and the rights and development of a free media. Reforms aimed at decriminalizing defamation are also now seen as key to promoting both economic and political reforms, compliance with a country's own democratic constitution. Reforms to strengthen the freedom of the press will serve to give citizens and officials alike the legal protection they need to engage in mutual critical but constructive dialogue.

While decriminalizing free expression is essential to overall economic and political reform, it is only the first step in a multi-faceted reform process that requires more policy debate and broader reforms within country context.[4] These reforms will help establish the legal enabling environment to promote more governmental openness, access to information and public participation in the reform debate sweeping the region.

Serious attention should also be given to passing and implementing a number of closely interrelated, mutually supportive reforms, such as those geared towards promoting open government and institutional strengthening. This would include laws and policies promoting more transparency, accountability and independence within the structure and processes of key governmental and non-governmental institutions, such as the media, the judiciary, the parliament and regulatory agencies. Together, this mutually supportive package of reforms will simultaneously promote more public participation and more public trust in government and the Rule of Law. Any serious governance or rule of law initiative should be to break the culture of secrecy and censorship that exists in many countries in the region and around the world.

Scope and thesis of the paper – This paper highlights some of the fundamental problems related to the current legal environment regulating speech and the press in the region, and suggests a legal and political strategy for a region-wide reform initiative focused on decriminalizing defamation in relation to the media reporting. The thesis of this paper is that such an initiative is needed as a springboard for a series of key legal and institutional reforms to promote broader, interrelated open government initiatives in the region, such as those related to access to information, open meetings, whistle blowing, campaign finance, income and asset disclosure, conflict of interest and ethics.

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the exact political circumstances and the state of the law. Thus, in the final analysis, many of these laws, by whatever name, operate much the same way in practice and certainly have similar impacts on free expression and freedom of the press.

[4] We now know from experience that fundamental reforms of this nature should be considered within a holistic, balanced context that comports to at least minimal international and constitutional norms and best practice.

This paper is a cursory attempt to review and compare some of the defamation, slander, libel and insult laws and policies in selected countries in the MENA region, such as Morocco, Jordan, Egypt, Yemen and Lebanon, some of which have begun to consider reforms in this and other areas.[5] Harsh defamation laws and criminal sanctions still remain on the books in the region and in many countries around the world, even though this practice is now seen as draconian.[6] While there are various reasons for their slow demise, in general it is probably because many of those in positions of power want the option of being able to threaten criminal defamation action as a way to control or bury certain information. Even in some of the more progressively democratic countries where imprisonment for defamation is no longer enforced, high criminal fines are still imposed periodically on journalists. Because the sanctions under defamation includes the risk of criminal fines and imprisonment, they have an acute chilling effect on freedom of expression and a free media in developing and transition countries; likewise, they pose particularly high hurdles to reform, economic growth and good governance. Thus, it is important that these countries in particular reform their laws sooner rather than later and that they not wait on other more developed countries to set the example.

This paper suggests that timely reform of these laws and policies could serve as a powerful symbolic and demonstrable catalyst for overall governance reform in the region. It will send a clear signal to journalists that they will not face imprisonment or criminal fines for reporting critically on issues at the center of government accountability.

2- International and Regional Legal and Political Obligations[7]

Emerging international standards – Decriminalizing defamation has been recognized as a best practice for promoting good governance and citizen participation for many years. Moreover, the use of criminal penalties against journalists and media entities on the grounds of defamation has been condemned by a number of international and regional organizations and human rights courts. The United Nations Rapporteuers, the Council of Europe, the Organization of American States and international human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, have all strongly condemned this practice and have recommended the decriminalization of defamation for over a decade.

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[5] These countries are also some of the initial countries included in the soon to be announced UNDP led regional rule of law and governance initiative being launched by the Arab Center for the Rule of Law and Integrity and IFES (March 2005). One of the objectives of this new initiative is to develop pilot programs and model laws that can potentially be replicated through a network of indigenous organizations and country reformers across the region. This approach will be particularly important to the new government in Iraq, which is grappling with a host of issues to rebuild shattered institutions.

[6] For example, many Latin American countries still have similar laws on their books (often called "desacato" laws) even though the Inter-American Court of Human Rights and the Organization of American States has condemned these laws for many years. The same situation exists in a number of African and Asian countries as well. While similar old laws are still on the books in some European countries, for the most part criminal sanctions are not invoked in practice.

[7] For a table highlighting the international and regional standards applicable to the MENA region, see, annex II.

This best practice is grounded, in part, on the notion that the fundamental rights and societal benefits of a free press generally outweigh any other rights or special privileges of the State, and that criminal sanctions for defamation is not proportionate to the violation incurred. Like other restrictions on the right to freedom of expression, the imposition of sanctions for defamation must (i) correspond to a pressing social need, (ii) be proportionate to the harm suffered, and (iii) be strictly necessary in the particular circumstances. A particular sanction will not be regarded as necessary if it is disproportionate to the harm done, in this case, to reputation.

More broadly, the media and civil society have a critical role to play in promoting good governance and the Rule of Law. One of the main lessons learned from global reform experience is that wide access to timely, accurate information is the *sine qua non* condition to economic and political development and to creating a good governance culture grounded on the Rule of Law.

Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) – The UDHR and ICCPR are the two key international instruments that capture a democratic country's fundamental democratic and legal obligations with respect to the universal rights and freedoms of citizens. Both instruments recognize freedom of expression as a paramount human right, even though it also acknowledges that no rights can be totally absolute. In this regard, the UDHR and ICCPR both authorize restrictions to freedom of expression under certain circumstances and within strictly defined parameters. This caveat is reflected in many national Constitutions and laws as well.

The UDHR was adopted by the United Nations General Assembly on December 10, 1948. This Declaration is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. Article 19 of the Declaration provides:

> "Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Under this provision, freedom of expression is consecrated as one of the pillars of individual and societal democratic development.

The ICCPR was adopted by the United Nations General Assembly on December 16, 1996. The ICCPR is a legally-binding treaty which many MENA countries have signed; others, such as **Egypt, Jordan, Lebanon, Morocco** and **Yemen,** have ratified it.[8]

[8] Ratification of the ICCPR: Egypt: on 14 April 1982; Jordan: on 23 March 1976; Lebanon: on 23 March 1976; Morocco: on 3 August 1979; Yemen: on 9 May 1987.

Paragraphs 1, 2 and 3 of Article 19 of the Covenant provide:

> "1.Everyone shall have the right to hold opinions without interference.
>
> 2. 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.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals."

These provisions, beginning with Paragraph 1 of Article 19, make it clear that the right of citizens, including journalists, to express an opinion and freedom of expression is a fundamental universal right. Paragraph 2 of Article 19 provides a comprehensive definition of the scope of freedom of expression. Indeed, it must offer the possibility to disclose, obtain, communicate and receive any information or opinion, both domestically and internationally. It also covers all forms of media, including the written and broadcast press. Paragraph 3 of Article 19 expressly provides that the exercise of freedom of expression includes with it special duties and responsibilities. Restrictions to freedom of expression are therefore permitted to the extent that they are required in order to protect the interests of other persons or to those of the community as a whole.

Acceptable Restrictions to Free Speech

The ICCPR outlines three cumulative conditions for restrictions to the freedom of expression to be deemed acceptable:

1. Restrictions must be "prescribed by law", meaning that they must be enshrined in the legal framework. In order to meet this requirement, a restriction must be "adequately accessible" and foreseeable, that is "formulated with sufficient precision to enable the citizen to regulate his conduct." The restriction, however, does not need to be codified, it is sufficient if it is "reasonably foreseeable" from case law.

2. Restrictions must be "necessary". To meet the necessity threshold, a restriction does not have to be "indispensable" but it must be more than merely 'reasonable" or "desirable." A "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.[9]

[9] See, the European Court of Human Rights in its landmark judgment in the Handyside case, Selected International Standards on Freedom of Expression, London, February 3, 1996, available at www.pili.org/library/brief_bank/bulgarian/bulgarian.htm

3. The justification for the restriction must reflect subparagraphs (a) and (b) of paragraph 3.

Adherence to the core principles underlying the UDHR and ICCPR requires that when a State party imposes certain restrictions on the exercise of freedom of expression, these should not put in jeopardy the right itself. Courts in countries bound by the treaties are also bound by tests of similar structure and severity.

African Charter on Human and Peoples' Rights (ACHPR, African Union – 1981) – The ACHPR was adopted on June 27, 1981 by the Organization of African Unity (now known as the African Union). Of the selected countries, only **Egypt** is a member of the African Union. Egypt has ratified the Charter, which entered into force on October 21, 1986. Article 9 of the Charter guarantees the access to information and the freedom of expression and opinions:

> "1. Every individual shall have the right to receive information.
>
> 2. Every individual shall have the right to express and disseminate his opinions within the law."

Declaration of Principles on Freedom of Expression in Africa (African Commission on Human Rights – 2002) – The Declaration of Principles on Freedom of Expression in Africa was adopted by the African Commission of Human Rights at its 32nd session in 2002. The Declaration aims at promoting the free flow of information and greater respect for freedom of expression in Africa, notably by defining the scope and limits of freedom of expression under the African Charter. Article 1 of the Declaration reiterates the guarantee of freedom of expression enshrined in the African Charter and provides detail as to the scope thereof:

> "The Guarantee of Freedom of Expression:
>
> 1. Freedom of expression and information, including the right to seek, receive, and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
>
> 2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination."

Freedom of expression and the right of access to information held by public bodies and private entities will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy. Article 2 of the Declaration outlines the boundaries of acceptable restrictions on freedom of expression:

> "Interference with Freedom of Expression:
>
> 1. No one shall be subject to arbitrary interference with his or her freedom of expression.
>
> 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."

Sana'a Declaration (UNESCO – 1996) – The Sana'a Declaration was adopted at a 1996 Seminar on "Promoting Independent and Pluralistic Arab Media" in Sana'a, Yemen. The Seminar was a joint initiative of the UN Department of Public Information (DPI) and the United Nations Educational, Cultural and Scientific Organization (UNESCO) and brought together media professionals from Arab states. Debates focused on specific issues that affect the independence and pluralism of Arab media and led to the adoption of a draft Declaration which was later endorsed by the general conference of UNESCO at its 29th session in 1997. Similar Declarations have been adopted in other regions of the world under the aegis of UNESCO. The Sana'a Declaration was endorsed by all five selected countries discussed in this paper.

Key Principles Guaranteed under the Sana'a Declaration

- Recognize the arrest and detention of journalists because of their professional activities as a grave violation of human rights;
- Abolish laws and measures that limit the freedom of the press;
- Establish truly independent, representative associations, syndicates and/or trade unions of journalists where they do not exist;
- Try disputes involving the media and/or the media professionals in the exercise of their functions … under civil, not criminal, codes and procedures;
- Promote the adoption of guidelines for reporting by media professionals since sound reporting practices are the most effective safeguard against governmental restrictions and pressure by special interest groups;
- Encourage governments to cooperate with the United Nations and UNESCO, as well as other governmental and non-governmental development agencies, organizations and professional associations, in order to: (i) enact and/or revise laws with a view to enforcing the rights to freedom of expression and freedom of the press and the legally-enforceable, free access to information; (ii) improve and expand the training of journalists and managers, along with other media practitioners, with a view to upgrading their professional standards;
- Establish training centers, including in Sana'a;
- Assist national, regional and international press freedom and media professional organizations and other relevant NGOs to establish national and regional networks aimed at monitoring and acting against violations of free expression, to create data banks and to provide advice and technical assistance in computerization as well as in new information and communication technologies.

3- Constitutional Rights of the Media in the MENA region[10]

The Constitutions of the five countries examined in the MENA region guarantee freedom of expression and opinion, as well as freedom of the press.[11] The only exception is

[10] For a table highlighting the constitutional rights guaranteed in the MENA region, see, annex I.

[11] Egypt: Constitution of 1971, amended in 1980 (articles 47-48, 206-211); Jordan: Constitution of 1952 (article 15); Lebanon: Constitution of 1926, amended several times, most recently in 1989 (article 13);

Morocco, whose constitution does not expressly guarantee the latter right. These guarantees imply a duty of the State to encourage the free exchange and expression of opinions and to refrain from action that may undermine it. Accordingly, journalists should be allowed to report freely, within the boundaries of the law, and to have access to remedies in case of violation of these provisions.[12]

Although virtually all of the constitutions of these countries include the right to freedom of expression and the press, a cursory review of reported cases, laws and decrees, reveals these rights are severely restricted in practice in a number of countries. Despite the constitutional protections related to freedom of expression and a free media, in practice these rights are often severely limited.

For example, in **Jordan**, the government has always imposed restrictions on these rights, and these restrictions have increased since 2001 when the government broadened its authority to prosecute journalists and close publications.[13] In **Lebanon,** the government has repeatedly intimidated journalists and broadcasters into practicing self-censorship.

In Egypt, despite amendments providing journalists and media owners with legal rights on paper, the constitutional provisions protecting the freedom of the press are of limited value in practice, because Article 48 (3) of the Constitution allows the censorship of newspapers, publications and mass media in a state of emergency. Thus, since an emergency decree has been in force in Egypt for decades, despite the constitutional protection of the freedom of expression and the freedom of the press stated in one part of the constitution, in practice, these rights are severely limited by another part of the constitution through mere Executive action.

The effective implementation of constitutional provisions prohibits the imposition of any unnecessary constraints that could jeopardize the expression and exchange of opinions in the press, either through prior restraint or severe punishments. Journalists should be allowed to express their opinions without fear or interference.

4- Laws Criminalizing Defamation Applicable to the Media[14]

The Constitutions in Egypt, Jordan, Lebanon, Morocco and Yemen include express provisions that the State shall guarantee the freedom of expression and opinion. This obligates the State to adopt and enforce legislation to facilitate and protect the application of this guarantee. In practice, however, MENA media entities in the countries examined

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Morocco: Constitution of 1972, amended in 1992 and 1996 (article 9); Yemen: Constitution of 1991, amended in 1994 (article 41).

[12] However, in **Jordan** and **Yemen**, the constitutional provisions are limited to the written press and do not expressly apply to broadcast media such as television or radio.

[13] Yahia Shukkeir, Arab Press Freedom Watch, Jordan, Status of Press Freedom in Jordan, www.apfw.org/data/annualreports/2003/english/jordan.pdf, 1.

[14] For tables highlighting the laws and penalties for defamation and insult as well as what specifically constitutes defamation in the MENA region, see, annexes III and IV.

are regulated by a series of laws that often contradict or restrict the rights guaranteed under the Constitution, including:

- Press and Publication Laws,
- Insult Laws (which are included in the Press Laws),
- Penal Codes, and
- Emergency Laws. [15]

Legal protection of the rights of the press – Certain laws provide additional guarantees for journalists and media outlets. Indeed, under the **Egyptian** Press and Publication law, insulting a journalist in the course of his duty is an offense (see, article 14 Law 96/1996). The **Lebanese** Press Law promotes the rights of journalists and publishers to organize.[16] The **Yemeni** Press and Publication Law prohibits the interrogation of journalists on opinions which they had expressed or published (see, article 13 of the Law of 1990).

The courts may also strengthen the rights and freedoms of journalists in the course of their duties. For example, **Egyptian** Supreme Constitutional Court has ruled that, in a country governed by the Rule of Law, any restrictions on civil liberties must be justified by the necessities of a democratic society. Accordingly, the Court ruled that imprisonment must be justified by the needs of society, and may not be used to repress freedoms or to protect the ruling regime. The ruling relied on the Egyptian Constitution, especially articles 48 (guarantees of freedom of the press and prohibition of censorship), 206 (exercise of the freedom of the press) and 208 (prohibition of censorship, ban or withdrawal of licenses of newspapers).[17]

Arbitrary, punitive laws and enforcement – Our cursory review of the laws and practices illustrates that a number of MENA countries provide for similar restrictions and sanctions for the press under their Constitutions, Press Laws and Penal Codes. It is important to note that the cases and circumstances presented here are mainly from secondary but reliable sources and that the situation, laws and enforcement policies in

[15] For purposes of this paper, the term "Press Laws" will be used to refer to the variety of laws regulating the media and defamation, including press and publication laws, broadcast laws, insult laws, and media association laws. The term "Penal Code" will be used to refer to the criminal legislation regulating defamation. Where relevant, more detail on the applicable laws will be provided. Here are some of the laws relevant for purposes of this paper: Egypt: Press and Publication Laws 48/1960, 93/1995 and 96/1996 and Emergency Law 162/1958 as amended by Emergency Laws 37/1972, 164/1981 and 50/19982; Jordan: Press and Publication Law of 1998 as amended by Royal Decrees of 1999 and 2001, Press Association Law of 1998 and Penal Code of 1960; Lebanon: Press Laws of 1948, 1952 and 1962 as amended and 1991 security agreement between Lebanon and Syria; Morocco: Press Code of 1958 as revised in 2002; Yemen: Press and Publication Law of 1990.

[16] The post-independence laws and regulations include: 1) The Press Law of 1948, which regulated the affairs of print media and organized the journalists into one union; 2) the Press Law of 1952, which organized journalists into two unions-one for publishers, and one for editors-and set the stage for the granting of new newspapers licenses; and 3) The Press Law of 1962 which clearly defined the profession and the practice of journalism. Available at: http://www.internews.org/

[17] Civil Society: Democratization in the Arab World, A Monthly Publication of the Ibn Khaldun Center for Development Studies, Headlines: Arab Civil Society, Egypt, December 1998, Volume 7, Issue 84, available at www.ibnkhaldun.org/newsletter/1998/dec/civil.html

some countries may have changed since this information research was examined for the 2001-2003 time-frame.

Although more legal and on-the-ground country context analysis is required, it appears that the present laws and enforcement policies in some countries are sometimes punitive and arbitrary and are used as political weapons against journalists trying to exercise their right to report freely and critically. Further compounding this problem is the fact that in some countries the laws specifically provide that truth will not be a defense in a defamation case.[18] Over the years, press reports and human rights organizations throughout the region have documented a number of arrests and detentions for defamation, self-censorship, harassment, surveillance, expulsion of foreign journalists, and the ban of local or foreign publications in a number of MENA countries in recent years.[19] These practices are perpetrated in violation of the principles enshrined in the Constitutions but often restricted and sanctioned by Press Laws and Penal Codes.

Press Laws and Penal Codes – Generally speaking, a plethora of outdated, punitive laws are on the books in a number of MENA countries that criminalize defamation by the media and give the government broad powers to issue fines, shut down newspapers and imprison journalists, if their reporting reflects unfavorably on the government or its officials, destroys the country's image, or undermines State dignity. These laws have virtually imposed a regime of governmental censorship and private self-censorship, on a variety of topics ranging from the reputation of the Head of State to relations with "friendly States". Publications and reports deemed to insult or undermine, *inter alia*, the Head of State and his family, foreign Heads of State, the armed forces or security agencies, "friendly States", and parliamentary proceedings, international relations, national currencies, religion, and national unity are effectively banned in most countries.

Typology of offenses – In a number of MENA countries the law prohibits critical statements against specific institutions and officials, including:

1) Prohibited statements because of a person: the Head of State (King, President) and his family; public officials; foreign Heads of State; etc.;
2) Prohibited statements because of an institution: the parliament; the courts; public agencies; religious authorities; etc.; and
3) Prohibited statement because of a topic: public morality; nation's reputation; relations with a foreign State or territory (for example, the Western Sahara in Morocco, Syria in Lebanon, etc.).

These three categories of prohibited speech appear to be included in the Press Laws and/or Penal Codes of five MENA countries covered in this paper. Additionally, many

[18] Article 122 of the Jordanian Penal Code prohibits the insult or humiliation of a Head of State, its ministers or his political representatives and specifies that truth is not a defense.
[19] See, *inter alia*, Reporters without Borders (http://www.rsf.org/), Internews (http://www.internews.org/), Freedom House (http://www.freedomhouse.org/) and the Committee to Protect Journalists (http://www.cpj.org/)

laws include a catch-all category of vaguely-defined offenses such as inflammatory propaganda or malicious information.

Some recent amendments to these laws also seem to have made it easier, not harder, for journalist to face charges and criminal penalties as a result of their written or broadcast reports. For example, the **Jordanian** 2001 Royal Decree includes a series of amendments to the Penal Code reinforcing restrictions on free speech and facilitating the prosecution of any person found to have written published, or aired any statements deemed in violation of a broad range of defamation provisions.

Censorship – The restrictions on media reporting contained in the Press Laws and Penal Codes of MENA countries virtually operate as censorship laws prohibiting the publication of anything which could be deemed a criticism of the State, certain officers of the State, the judiciary, the military establishment, the security forces, the religious community, and many other issues. In addition, some governments also exercise censorship by establishing offices of censors within media entities, through government-appointed editors-in-chief and through effective control of news sources. In **Lebanon**, the internal security agency screens foreign publications entering the country and has banned the distribution of media that report unfavorably on local affairs.[20]

Reacting to this environment, many journalists exercise a large degree of self-censorship. In view of the risk of prosecution or suspension of the publication or broadcast, journalists in **Lebanon** have often censored themselves on matters related to Syria. Similarly, journalists in **Morocco** often avoid coverage that the government might regard as adversarial. And the so-called three taboos – the monarchy, the country's claim of territorial sovereignty over the disputed Western Sahara, and Islam – must never be challenged in public. While there is no mention of prior censorship in the law, it has been used by the government in the past, especially during periods of political crisis, to control and restrict information. In **Yemen**, journalists often exercise self-censorship, especially when writing on such sensitive issues as relations with Saudi Arabia and other foreign governments, official corruption, and terrorism.[21]

Discretionary administrative government powers -- While the trend appears to be towards relaxing discretionary government control of the media, ministries and government agencies across the MENA region retain significant powers to curtail media reporting through a variety of actions:

1) Banning of media outlets;
2) Suspension of publication or broadcast;
3) Discretionary prosecution or detention powers; and
4) Regulation of media outlet regulation.

[20] See, Committee to Protect Journalists, Middle East and North Africa: Country Report 1999, Lebanon, available at http://www.cpj.org/attacks99/mideast99/Lebanon.html

[21] See, *inter alia*, reports released by the Committee to Protect Journalists, Reporters without Borders, Internews and Freedom House.

For example, the **Moroccan** Press Code gives the Minister of the Interior extensive powers to order the administrative seizure of any publication deemed to be a threat to public order. He can also indefinitely suspend any publication which attacks the political and religious foundations of the Kingdom. The Prime Minister can also ban indefinitely any publication which disturbs public order. Furthermore, the Press Code empowers the Minister of Interior to confiscate publications judged offensive to the government. This Code also empowers the government to censor newspapers directly by ordering them not to report on specific items or events. Within these limits, newspapers and weeklies were published across the political spectrum and were sometimes critical of government policies. The Ministry of the Interior is required to justify to the courts any seizure or banning of domestic or foreign publications, suspension of the publisher's license, or destruction of equipment.[22]

In **Yemen,** governmental agencies and ministries have occasionally sent official directives to media outlets notifying them of new restrictions or clarifying provisions of the law. For instance, media outlets and international correspondents were notified of the requirement of prior approval of the Ministry of Defense for any military-related reporting.[23] The Ministry of Information is responsible for communicating with the media and enforcing the provisions of the Press and Publications Law. Implementation of the Press and Publications Law revolves around three main axes: (i) ensuring compliance of news reports and articles with the requirements set by the law, including assessing whether they defame or insult individuals and institutions[24]; (ii) issuing and renewing permits for media outlets and journalists; and (iii) monitoring the activities of newspapers[25].

1996 amendments to the **Egyptian** Press and Publication Law repealed a section granting authorities the right to detain journalists without charges.[26] Similarly, in 1999, amendments to the Jordanian Press and Publication Law limited the government's discretion to issue fines, transferred the power to withdraw licenses to the judiciary, limited significantly the government's power to order shutdowns, and allowed journalists to cover court proceedings unless the court rules otherwise.

Emergency laws and extrajudicial courts – Emergency decrees and laws only exacerbate the problems surrounding the restrictive legal framework that is now in place in many countries. A number of MENA countries are under Emergency Laws that further restrict the rights guaranteed by the Constitution. Indeed, in **Egypt**, the Emergency Law authorizes prepublication censorship, the confiscation of newspapers, and the closing down of publications.[27]

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[22] See, Internews, Morocco, http:www.internews.org/arab_media_research/morocco.pdf/
[23] See, Internews, Yemen, http://www.internews.org/arab_media_research/yemen.pdf/
[24] In case of violation of the Press and Publication Law, the Ministry of Information will refer the case to the courts for prosecution.
[25] See, Internews, Yemen, http://www.internews.org/arab_media_research/yemen.pdf/
[26] See, Internews, Egypt, http://www.internews.org/arab_media_research/egypt.pdf/
[27] Emergency Law 162/1958 is still in force, although it was amended by Law 37/1972, Law 164/1981 and Law 50/1982. Moreover, on February, 2003, the Egyptian government introduced a bill in the Peoples' Assembly (Maglis al Sha'b) to extend the 22nd year of government under a state of emergency for another 3

Other countries have mandated that defamation cases against journalists should be held in special courts dealing exclusively with the press and defamation issues, instead of the regular courts. In many countries around the world this is often as a convenient way to control the outcomes or circumvent traditional judicial processes.[28] In Jordan, some violations of defamation provisions may also be tried in a State Security Court. This tribunal almost invariably uses military judges and military prosecutors instead of ordinary court judges and prosecutors proscribed by the constitution. The State Security Court has the authority to temporarily or permanently close any publication that carries "false or libelous information that can undermine national unity or the country's reputation." Various reports throughout the region note that this extrajudicial practice does not usually provide the same guarantees of independence and impartiality provided by ordinary courts.[29]

The regime of penalties[30] – In **Egypt, Jordan, Lebanon, Morocco** and **Yemen,** journalists who violate the restrictive provisions mentioned in the abovementioned laws are subject to harsh sanctions, such as imprisonment and high fines and media outlets may face the confiscation, seizure, suspension or even ban of their publications or broadcasts. In practice, a regime of penalties operates as an effective, efficient deterrent against journalists who want to engage in investigative journalism and critical reporting. While the official justification is that these defamation provisions and the penalties associated thereto provide protection against malicious or unsubstantiated reporting, they are sometimes used to silence journalists who report on sensitive topics such as the actions of those in power or prevailing government policies.[31]

Many scholars and practitioners readily acknowledge that officials may have legitimate security or economic concerns that justify civil penalties for some forms of intentional or negligent defamation. However, they also take the firm position that the penalties should not be punitive or disproportional to the offense committed and that in all cases they need to be carefully balanced against the constitutional free expression rights of journalists and citizens in general. Likewise, it is very important that any form of censorship or punishment should be very clearly delineated and uniformly enforced.[32]

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years. The Assembly passed the bill the same day. Available at: http://www.marsad.net/arabic/ioc/endless%20sentence.doc

[28] In some countries, including Jordan and Lebanon, journalists and media outlets charged with violating the regulations on the press and freedom of speech are prosecuted before a specialized court. For example, Special Press and Copyright Court in Jordan, Publications Court in Lebanon

[29] Internews, Jordan, www.internews.org/arab_media_research/jordan.pdf, 11. U.S. Department of State, Jordan, Country Report on Human Rights Practices-2001, Released by the Bureau of Democracy, Human Rights and Labor, March 4, 2002, www.state.gov/g/drl/rls/hrrpt/2001/nea/8266.htm, 7.

[30] For tables highlighting the cases of prosecutions and the types of penalties imposed in 2002, see, annexes V and VI.

[31] For Egypt, see, International Journalists Network, Press Overview: Egypt published by the International Center for Journalists, 2002, http://www.ijnet.org/FE_Article/pressoverview.asp?CountryID=4&UILang=1

[32] Another best practice that originally merged through case law several decades ago is that it was implicit in free speech provisions of the U.S. Constitution that government officials should have a higher burden of proving they were defamed or slandered since they are considered public servants whose official actions need to be subject to close public and media scrutiny.

Available penalties under the Press Laws and Penal Codes range from the suspension of newspapers to the imprisonment of journalists. Tribunals retain a large degree of discretion in imposing sanctions on a media outlet, its owner or a journalist. Some Press Laws and Penal Codes also provide for broad powers of administrative seizure, followed by confiscation and destruction, often pursuant to court orders under the color of the law.

Nascent investigative journalism – Over the years, a number of governments have used the Press Laws to criminalize and punish critical reporting, which helps explain why quality investigative journalism is virtually non-existent in most MENA countries.[33] Indeed, a review of many of the reports that cover the region, including the UNDP Human Development Report, note that a number of journalists (and others) in the region have been arrested, prosecuted and sentenced based upon solely on the critical content of their reports. However, it is important to note that although there were repeated attempts to restrict freedom of opinion and the press, daily criticism of government policies and leaders has increased in certain countries such as **Lebanon** or **Morocco**. In **Lebanon**, dozens of newspapers and hundreds of periodicals criticizing the government or public officials are published throughout the country and are financed by various local and foreign groups.

Reform trends and reaction to restrictive reform attempts – In some MENA countries, including Egypt, Jordan, Lebanon and Morocco, some reforms have been undertaken to ease the restrictions on the media. Also, journalists and media groups have at times successfully resisted government attempts to impose more restrictions of media reporting and strengthen criminal defamation laws.

The 1995 **Egyptian** Press and Publications Law expanded governmental control over the media and the penalties for violations of the restrictions. These changes generated long debates and strong opposition. As a result, the government repealed or amended some of the most onerous provisions in 1996. In 1994, the **Lebanese** press objected to new controls imposed by the government over the print media, including the right to detain and fine journalists and publishers for certain offenses prior to their actual conviction by a court.[34] In **Morocco**, the 2002 amendments to the Press Code were not well received by the Moroccan National Union of Journalists (SNPM), various political parties, human rights groups and international NGOs.[35] While the Press Code recognizes the right to

[33] Fostering investigative journalism is key to promoting good governance, breaking a culture of secrecy and establishing the environment for the rule of law. Other regional assessments and reports that include reform recommendations for transition countries that are moving from authoritarian to more open democratic regimes reveals that lack secrecy is a breeding ground for corrupt economic and political transitions.

[34] See, Internews, Lebanon, http://www.internews.org/arab_media_research/lebanon.pdf/

[35] The Press Law of Morocco was first released in November 1958 as one of many laws pertaining to civil liberties. Judging by the standards of that period, it was a progressive law, legislating for freedom of opinion, expression and publishing. But starting in the 1960s, the government was uncomfortable with these rights and freedoms and set out to strip the law of its democratic content. The restraints and provisions introduced by the government in 1973 and 1974 turned into another copy of the criminal law, instead of being a sanctuary for freedom of the press. Available at: Hassan Abdul Khaliq, Critical Appraisal of the Draft Moroccan Press Law, Arab Press Freedom Watch, http://www.apfw.org/data/annualreports/2003/english/morocco.pdf/

publish, it places several restrictions on journalists and editors, particularly when reporting on issues related to the King, the royal family and the Western Sahara conflict.

5- Strategic Reform Options for Debate and Consideration in the MENA Region

Legal enabling environment – In this kind of country or regional legal and political environment, where information is often legally or effectively censored under the threat of criminal sanctions, it will be extremely difficult for the Rule of Law to take root, for civil society and businesses to flourish, to address systemic corruption or to promote and sustain democratic good governance reforms. Democratic countries and institutions now know that access to reliable, timely information is the lifeblood of democratic governance, a participatory, accountable government decision-making process, an effective, efficient market and to exercising and protecting fundamental human rights.

Freedom of expression and a free media is a central component to democratic governance grounded in openness, public participation and the Rule of Law. It is also a clear international and constitutional obligation in many MENA countries. Promoting transparency and accountability within the governmental decision-making process, protecting citizens' constitutional and property rights and resolving disputes efficiently, effectively and fairly, are all dramatically advanced when these fundamental rights are enforced in practice.

Chilling criminal threat if not practice – Imprisonment or the threat of imprisonment is a draconian, disproportionate sanction that has a chilling effect on journalists' ability to engage in free speech and critical, quality reporting. These sanctions block public access to information as well as their ability to meaningfully participate in or oversee the government.

As noted in this paper, in the past criminal sanctions have been used in some MENA countries to curb not only harmful but also legitimate speech, especially if it relates to criticism of a government official or an official policy pronouncement.

Suspension of publications – Likewise, the harsh sanction if suspension is for publications analogous to imprisonment for individuals; it is another serious sanction that should only be justifiable under very limited circumstances. While government seizure of the assets of the media may seem less serious to some, it has a serious economic and public perception impact on the viability of a newspaper.[36] When the risk may be imprisonment or publication suspension, the net result is both government censorship and even more damaging a culture of self-censorship.

[36] The Supreme Court of South Africa in Government of the Republic of South Africa v. the Sunday Times, 1995 1 LRC 168, pp. 175-176. Available at: Article 19, Memorandum on The Moroccan Code de la Presse of 1958, as well as the Proposed Amendments of 2001 by Article 19 Global Campaign for free Expression London 6,7 (December 2001).

Conflicting Codes, Constitutions and international obligations – As this paper attempts to illustrate, certain provisions of the Press Laws and Penal Codes in **Egypt, Jordan, Lebanon, Morocco** and **Yemen** imperil the rights of the press and freedom of information, and call into serious question the integrity or relevance of each country's constitutional and international obligations.

First steps – As a fundamental first step in the overall reform process, it is in the self-interest of all countries serious about promoting freedom of expression, good governance, democratic participation and the Rule of Law, to clarify and enforce their constitution's freedom expression and free media rights fairly and effectively or to adopt, if needed, the legislative or executive reforms required to decriminalize defamation.

At a minimum, these countries should consider promulgating ministerial priority and policy changes that expressly or effectively accomplish this objective. At the same time, governments, reformers, human rights groups and donors should consider more creative and sustained legal and constitutional challenges to the practice of criminalized defamation and to providing broader political, legal and financial support to investigative journalists and a free media.

There is a global consensus on the side of decriminalization, as expressed in a number of international and regional human rights instruments, international organizations and court cases.

Reform ideas for the MENA region – MENA countries and reformers should consider a number of best practices and high priority reforms as first steps towards establishing the legal enabling environment for freedom of expression and a free media in the region, including::

1. **Repeal criminal defamation laws**: defamation should be decriminalized. However, compliance is still lagging with very few countries having taken criminal laws against defamation off their books. At a minimum, public policy should encourage the reduced, if not abandoned, use of criminal prosecution against the media on defamation charges. The use of civil litigation should be favored as a replacement of criminal prosecution, focusing therefore on the compensation for the harm done to reputation rather than on punishment.

2. **Alternatively, eliminate disproportionate criminal sanctions**: Prison sentences and prohibitive fines for defamation and insult should be repealed. Sanctions imposed on journalists should preferably be limited to fines without imprisonment. The detention of journalists, and especially preventive detention in publications cases, should be abolished.

3. **Limit the scope of defamation**: No journalist should be liable under defamation and insult laws for the expression of a legitimate opinion. Governments should be prevented from bringing defamation actions in matters such as criticizing the president, the judiciary, the army, government bodies and public authorities.

Public figures should be protected from defamation but in the interest of government accountability, freedom of expression and a free media they should also be subject to legitimate criticism

4. **Prohibit excessive civil penalties**: Civil penalties should be reasonable and proportionate to the harm effectively caused to prevent a chilling effect on freedom of expression. Moreover, civil penalties should be designed to restore the reputation harmed, 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 prioritize the use of a range of non-pecuniary remedies.

5. **Protect media outlets**: Provisions allowing the banning and seizing of publications should generally be legally sanctioned only in exceptional, well-defined circumstances.

6. **Revise court jurisdiction and procedures**: Jurisdiction over defamation and offences attributable to the media or individual journalists should, as a rule, not be tried in military, state security or exceptional courts of jurisdiction.

ANNEX I

FREEDOM OF THE PRESS IN THE MIDDLE EAST AND NORTH AFRICA: CONSTITUTIONAL RIGHTS AND RESTRICTIONS

	Egypt	Jordan	Lebanon	Morocco	Yemen
A-Constitutional Rights					
1- Freedom of expression	■	■	■	■	■
2- Freedom of opinion	■	■	■	■	■
3- Freedom of the press	■	■	■		
4- Requirement of a warrant to seize publications					
5- Access to information for journalists	■				
6- Limitations on suspension of publication/media outlet	■	■			
7- Prohibition of censorship	■				
8- Prohibition of restrictions through administrative action	■				
B- Constitutional Restrictions					
1- Restrictions authorized in case of state of emergency	■	■			
2- Restrictions of freedoms for defamation					
3- Restrictions on freedoms for national security reasons					

* All countries except Palestine and Saudi Arabia have a Constitution. Palestine has a Draft Basic Law for the transitional National Authority. A fourth draft, amended in 2003, is still under discussion in Palestinian circles. Saudi Arabia is an absolute monarchy and has no written secular Constitution. The monarchy justifies its refusal to adopt a secular written constitution on the ground that the country already has a Constitution in the form of the Koran, the Muslim Holy book, and the Sunnah of the prophet Mohammed. On March 1, 1992, King Fahed issued three major laws: the Basic Law of Government and two procedural laws. The Basic Law is sometimes referred to as Saudi Arabia's Constitution but such a reference is misleading. Chapter 1, Article 1 of the Basic Law explicitly provides that Saudi Arabia's only "constitution" are the Koran and the Sunnah. The Basic Law does however set a number of principles of constitutional value.

ANNEX II

FREEDOM OF THE PRESS IN THE MIDDLE EAST AND NORTH AFRICA: INTERNATIONAL AND REGIONAL OBLIGATIONS

	Egypt	Jordan	Lebanon	Morocco	Yemen
A- International Standards					
1- Universal Declaration of Human Rights *					
2- International Covenant on Civil and Political Rights **					
B- Regional Standards					
1- African Charter on Human and Peoples' Rights ***		n/a	n/a		n/a
2- Declaration of Principles on Freedom of Expression in Africa		n/a	n/a		n/a
3- Sana'a Declaration					

* Article 19 of the Universal Declaration of Human Rights provides that "everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

** Article 19 of the International Covenant on Civil and Political rights provides: "1.Everyone shall have the right to hold opinions without interference. 2. 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 9 of the African Charter on Human and Peoples' Rights (which only applies to African countries) states: "1.Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."'

ANNEX III

FREEDOM OF THE PRESS IN THE MIDDLE EAST AND NORTH AFRICA: LAWS ON DEFAMATION: CRIMINALIZATION AND PENALTIES

	Egypt	Jordan	Lebanon	Morocco	Yemen
A-Laws Criminalizing Defamation					
1- Press Law	■	■	■	■	■
2- Penal Code	■	■	■	■	■
3- Emergency Law	■				
B- Penalties for Defamation					
1- Imprisonment	■	■	■	■	■
2- Fine	■	■	■	■	■
3- Suspension of publication/media outlet	■	■	■	■	■
B- Insult Laws *					
1- Press Law	■	■	■	■	■
2- Penal Code	■				
3- Emergency Law					
B- Penalties for Insult *					
1- Imprisonment	■		■	■	■
2- Fine	■	■	■	■	■
3- Preventive detention			■		
4- Suspension/seizure of publications			■		
5- Prosecution					
3- Imprisonment and fine	■	■	■	■	■

* See, The World Press Freedom Committee Study in 2000

ANNEX IV

FREEDOM OF THE PRESS IN THE MIDDLE EAST AND NORTH AFRICA: WHAT CONSTITUTES DEFAMATION?

	Egypt	Jordan	Lebanon	Morocco	Yemen
1- Criticizing the Head of State/King	■	■	■		
2- Criticizing Parliament	■				■
3- Criticizing the army	■	■			
4- Criticizing the courts	■				
5- Criticizing public officials	■	■	■	■	
6- Threatening national security/unity	■	■	■	■	
7- Threatening the national currency		■			
8- Spreading false information/rumors	■	■		■	■
9- Criticizing public institutions	■				■
10- Criticizing a foreign Head of State	■	■	■		
11- Disparaging religion		■			
12- Disparaging the dignity of individuals		■			■
13- Undermining the nation's reputation	■				
14- Offending/interrogating journalists					■
15- Offending a religion/religious leaders			■		■
16- Offending/insulting a journalist	■				
17- Offending/insulting the Head of State/King (and royal family)	■	■	■	■	■
18- Insulting the heads or members of diplomatic missions		■			
19- Insulting a foreign Head of State/government official/representative	■	■	■		
20- Insulting the Parliament/Council of Ministers	■				■
21- Insulting the army	■			■	
22- Insulting the courts/judges/infringing judicial independence	■	■		■	
23- Defaming/insulting government officials	■			■	
24- Publishing false or biased information/news	■				■
25- Harming national unity		■			■
26- Defaming/insulting a civil servant			■	■	
27- Defaming/insulting private individuals/entities			■	■	■
28- Defaming/insulting constituent or administrative entities				■	
29- Defaming/insulting public service or commission representatives				■	

ANNEX V

2002 REPORTED CASES:
CHARGES FOR DEFAMATION AND INSULT BY THE MEDIA IN THE MIDDLE EAST AND NORTH AFRICA

	Egypt	Jordan	Lebanon	Morocco	Yemen
1- Insulting the Army			■		■
2- Defaming the President/King (or his family)			■	■	
3- Defaming businessmen	■				
4- Harming citizens/violence/false news	■	■			■
5- Defaming journalists/editors	■				
6- Harming the image of the State/Kingdom		■			
7- Harming/defaming government officials		■		■	■
8- Alleged government corruption		■			■
10- Criticizing/insulting the judiciary			■		
11- Offending public institutions					■
12- Insulting a religion/religious leader	■				■
13- Defaming friendly countries/foreign Heads of State		■			■
14- Criticizing the police					
15- Attacking constituent bodies					
16- Publishing indecent photographs	■				
17- Intending to change the nature of the State					
18- Belonging to an illegal organization					
19- Criticizing the labor union					
20- Criticizing proposed constitutional reforms					

* Information based on the data reported by organizations monitoring the freedom of the press around the world, including the Committee to Protect Journalists, Reporters without Borders, Internews and Freedom House.

ANNEX VI

2002 REPORTED CASES:
PENALTIES FOR DEFAMATION AND INSULT BY THE MEDIA IN THE MIDDLE EAST AND NORTH AFRICA

	Egypt	Jordan	Lebanon	Morocco	Yemen
1- Complaint					
2. Arrest		■	■		
3- Fine				■	■
4. Imprisonment	■	■	■	■	
5- Confiscation of the journalist's passport					
6- Suspension of the journalist					■
7- Expulsion of the journalist from the country					
8- Confiscation/suspension of publications	■		■	■	■
9- Ban of publications		■		■	■
10- Assault/threat/attack					■
11- Kidnapping journalists					■
12- Prior censorship			■		

* Information based on the data reported by organizations monitoring the freedom of the press around the world, including the Committee to Protect Journalists, Reporters without Borders, Internews and Freedom House.

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