

The state  
of the right to freedom  
of expression in Egypt,  
Morocco and Tunisia,  
from 2011 to 2015

By Christopher Roberts for ASF

the right  
to freedom  
of expression

**Headquarter**

rue de Namur 72  
1000 Brussels  
Belgium  
Tel.: +32 (0)2 223 36 54



[www.asf.be](http://www.asf.be)

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## THE AUTHOR

Christopher Roberts holds a BA in International Relations from Brown University, an MA in Critical Theory from the School of Oriental and African Studies, and a JD from NYU School of Law. For two years prior to commencing his JSD at NYU he worked as Arthur Helton Fellow and Legal Officer with the Arab Regional Program of the Cairo Institute for Human Rights Studies in Cairo, Egypt. Christopher Roberts is a member of the African Litigants Group, a group of lawyers involved in litigation before the African Commission and Court, and has served as a legal expert to the Commission, including as the chief legal consultant in charge of preparing the Commission's Guidelines on the Rights to Freedom of Association as it Pertains to Civil Society and Peaceful Assembly. Mr. Roberts has also served as an expert legal consultant with numerous organizations addressing civil and political rights, supranational litigation, and constitutional and legislative reform throughout the Middle East, Africa and South Asia.

## EXECUTIVE SUMMARY

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### 1. Introduction

This report examines the state of the right to freedom of expression in Egypt, Morocco and Tunisia in the period from 2011 to the present. It examines three areas impacting on that right in particular – limitations imposed on speech based on its content; limitations on the freedom of the media; and limitations derived from counter-terrorism laws and practice.

The right to freedom of expression is of fundamental importance to the development of a free, open and democratic society, as freedom of expression is required in order for individuals to inform themselves, communicate, discuss political affairs and become active participants in the governance of their communities. As such, however, it is also an area in which governing authorities are often particularly keen to establish their dominance and control, recognizing the core importance of controlling the public narrative to maintaining their positions of power. Ensuring freedom of expression against such attacks is hence a vital task, made all the more necessary by the enabling role freedom of expression plays relative to the potential to address human rights violations across the board.

Historically, similar problems have been faced in all Egypt, Morocco and Tunisia, underpinned by a philosophy and practice of government control and the utilization of restrictive legal frameworks frequently derived from colonial practice. In the past 5 years examined by this study, however, significant divergence in the countries considered can be observed.

In Egypt, despite calls since 2011 for existing restrictive legal frameworks to be reformed, little progress was made on such grounds. A new constitution approved by referendum in January of 2014 contains numerous guarantees pertaining to freedom of expression. The clauses of the constitution protecting that right, together with Egypt's international obligations, have been ignored over the last several years however. Existing legal frameworks have continued to be used to attack and limit freedom of expression in a wide range of areas during this time, and in fact have been augmented by new rights-restricting laws, including in the area of counter-terrorism in particular.

The story in Morocco is similar. A new constitution containing several guarantees pertaining to freedom of expression was adopted in 2011; Morocco has yet to bring its legal framework into compliance with the rights guaranteed by the constitution however. Instead, as in Egypt, existing laws continue to be used to restrict freedom of expression. Morocco has had a less tumultuous history than Egypt over the last five years, and as such red lines are clearer, and restrictions comparatively more likely to be imposed through financial penalties than imprisonment. The effect, however, may be an even more tightly limited space for freedom of expression, sharpened by a more restrictive attitude adopted by the government since mid-2014 in particular.

In Tunisia, recent history has been more positive. Positive reforms to laws governing the media have been made since the 2011 fall of Ben Ali, and while a number of problematic legal provisions remain and have been used, the situation is dramatically more free and open than under the pre-2011 regime. New counter-terrorism legislation adopted following dramatic terrorist attacks in 2015 contains a number of rights restrictive provisions however.

## 2. Limitations on speech on the basis of its content

Despite these variations in path and in intensity of violation, the types of limitations relied on in all three countries exhibit a high degree of similarity. Limitations on speech on the basis of its content include, in the first place, *provisions limiting criticism of the authorities*. Such provisions may still be found in the penal codes of all three countries; that in Morocco is perhaps the most symbolically emblematic, with one article combining prohibitions on criticism of the King, Islam and the nation. Particularly problematic in this context is the fact that laws prohibiting criticism of the judiciary are often included among such clauses, helping to legally reinforce a pattern in which judicial actors more often reinforce repressive tendencies than they work to reform unjust laws.

Laws prohibiting criticism of the authorities have been applied in Egypt for instance to individuals who called for a no vote during the 2014 constitutional referendum, while prominent critical politician Amr Hamzawy was charged with insulting the judiciary in January 2014 due to criticism of sentences issued against international democracy promotion organizations. In Morocco, rappers who have composed songs critical of the authorities have faced prosecution under such legal provisions, as have other individuals who have criticized the authorities in personal discussions or on their Facebook pages. Perhaps the best known and most frequent target of such laws has been journalist Rachid Nini, however, who has been penalized with prison and fine for investigative stories concerning the authorities, including a 2011 sentence following the publication of a piece criticizing the head of Morocco's domestic intelligence agency. In Tunisia too, numerous individuals who have criticized the authorities in one way or another have found themselves subject to charges under numerous provisions of the Penal Code, including for example the recent charges against filmmaker Ines Ben Othman following her accusations of harassment by the police.

The second form of problematic limitation of speech on the basis of its content takes the form of *laws penalizing violations of public morality or insult to religion*. Such clauses generally serve as a disproportionate and inappropriate limitation on freedom of expression by preventing discussion of abstract ideas. Such provisions are even more problematic in practice, however, as they are inevitably used to target those possessing minority views, and not those possessing majority religious or normative positions. In this context, such prosecutions themselves ironically may come very close to and often in fact constitute and involve hate speech and persecution – even while potentially relying on a purportedly anti-hate speech rationale.

Innumerable instances of such violation may be cited to in Egypt, where both the public at large and the government have contributed to the persecution of individuals, such as author and land rights activist Kareem Saber Ibrahim, found guilty of having insulted Islam; Mohamed Fahmi Abd al-Sayyad Asfour, Amr Abdullah and Mahmoud Dahroug, due, it seems, to their being Shia; against Sharif Gaber and Karim Ashraf Mohamed al-Banna for having allegedly declared themselves atheists; and against numerous Copts for purported insults to Islam, regardless of the level of questions – often extremely high – as to the accuracy of the evidence pertaining to the charges against them. In Morocco, charges against rapper Othman Atiq included not only charges of insulting state institutions, but also of insulting religion, demonstrating once again the interplay between the two categories. Charges of offending public morality have also been brought against women who had purportedly worn tight dresses, after they were harassed by men, once again demonstrating the manner in which laws in such areas target victims. Tunisia has seen individuals penalized under such laws due to what were deemed offensive depictions of the prophet Mohammed as well as the broadcasting or creation of creative work found offensive in one way or another. As elsewhere, the Tunisian examples reveal extreme subjectivity, and a one-way street in which such charges are only applied to purported offenses against majority viewpoints.

The third type of limitation of speech on the basis of its content are *laws which impose overly broad penalizations*, most prominently in the region *laws which penalize the spreading of false news*. Such laws provide a convenient and facially neutral mechanism by which the authorities can pursue those engaging in speech they do not approve of while asserting neutrality. As such, they grant the authorities excessive discretion, penalize behavior that should not be penalized, and exert a particularly broad chilling effect on the right to freedom of expression.

In Egypt, such provisions were relied on in the trial of the Al Jazeera journalists as well as in bringing charges against Hossam Bahgat, a well-known investigative journalist and human rights defender. In both cases, charges appeared to have been brought due to the airing of stories and perspectives the authorities would rather had not been aired. In Morocco, charges under such provisions have been brought against Hamid Elmahdaouy, editor of a website known for reporting on human rights violations and corruption, journalist Rachid Nini, after a story critical of a government ministry, and Maati Monjib and Karima Nadir, human rights defenders and journalists, following assistance in the preparation of a report documenting violations of the right to freedom of expression in Morocco. In Tunisia, such provisions were infamously used to target Fahem Boukadous, a reporter, in 2008, following his reporting on protests against poor economic conditions, human rights violations and corruption in Gafsa. More recently they have been employed against Hajlaoui Nabil, Ayoub Massoudi, Hakim Ghanmi, Yassine Ayari and Sahbi Jouini for criticizing the military in various ways.

Fourth, legal frameworks in the countries studied demonstrate a *failure to properly define defamation or provide for an appropriate set of defenses and exemptions*. Laws in all three countries inappropriately penalize insults, an overly vague and subjective form of penalization inevitably used in a discriminatory manner in practice. In general, moreover, laws across the three countries fail to adequately define defamation, appropriately distribute burdens of proof, provide for heightened standards in order to show defamation in cases raising matters of public concern, or allow for the defense of reasonable publication. The result is the creation of a framework in which defendants will have an extremely difficult time prevailing in their cases, and in which the chilling effects relative to freedom of expression will be strengthened.

Fifth, legal frameworks in the countries in question *impose excessive penalties, including penal sanctions* for speech offenses. While legal frameworks that penalize defamation are reasonable, it is crucial that any sanctions imposed be proportionate to the harm in question, with an eye to ensuring the minimal chilling effect possible. Penal sanctions in particular are widely recognized as inappropriate, not only because of the weight of sanction involved but also because they make the state the agent of that sanctioning. Excessive monetary sanctions must be recognized as inappropriate as well however – excessive monetary sanctions have, in fact, been applied in the region, with the apparent intent and clear practical effect of preventing freedom of expression. Most apparent in this regard was the shutting down of the critical media outlet *Le Journal Hebdomadaire* in Morocco following a massive defamation penalty in 2006.

Taken together, clauses of the sort found in all three countries grant the authorities wide powers of discretion and control relative to policing the sorts of expression that will and will not be allowed in the polities in question, and exert chilling effects that are responsible for limitations of the right well beyond the boundaries of cases actually brought. While in some countries such as Tunisia practice has been more positive, this can be traced more to the development of a positive political climate and public sphere in the country; even there, in other words, it is important that that sphere be strengthened and protected by reform of the laws in question.

## **Recommendations**

- Remove all provisions in law which impose additional penalties for speech targeting the authorities; revise legal frameworks to allow more, rather than less, freedom of speech in all areas of public concern;
- Remove or limit all overly broad or vague provisions, including provisions which aim to protect a vaguely defined 'public morality', 'national sovereignty' or 'national security';
- Remove all penalizations of insult;
- Rework procedural provisions to ensure an appropriate regime of defenses;
- Remove all penal sanctions for speech, as well as other excessive penalties.

### **3. Limitations on freedom of the media**

In addition to limitations on speech on the basis of its content, the countries in question employ legal frameworks that limit freedom of expression by providing the authorities with extensive control over the media.

Laws in Egypt and Morocco impose *state control over the print media*; a new law in Tunisia is more positive, though several components of that law are still in need of further positive amendment. Newspapers must obtain permission to operate in Egypt and Morocco, from less than independent government bodies. While the situation is better under a new law in Tunisia, the unnecessary requirement of declaration to a judge is still included in the law. In addition, a substantial sector of the print media is government-owned and controlled in Egypt, in addition to which government control over substantial advertising funds provides yet further control over content. Enabling a transition to an independent print media will provide both an important signal and enabler of the transition to freer societies on the whole.

Laws in all Egypt and Morocco impose *state control over broadcast media*; in Tunisia a new law is more positive, though a number of provisions should be strengthened to provide for greater independence. In Egypt, broadcast media is almost entirely controlled by the state, though satellite broadcasts of course have more independence due to the nature of their industry. In Morocco too, the law provides the authorities extensive control and discretion over broadcast media. Broadcast media are one of the most important and commonly accessed sources of information around the world; as such, ensuring that such forms of media are free and independent is, as with the print media, a key signal and enabler of freer societies.

Laws in all three countries impose *state control over communications media*; while in Tunisia those legal framework of control have been less used since the revolution, they are still in need of replacement. Egyptian control over such media was exemplified most dramatically when internet and telephone services were cut in 2011; while this was later found to have been a violation by Egypt's highest administrative court, that positive spirit of that 2011 judgment has not led to necessary reforms. Given the key importance of telecommunications to modern societies, and the important space for alternative voices provided by the internet, it is crucial to ensure state control over such spaces not be allowed to tighten.

Laws in all three countries impose *state control over journalists*. In all three countries, the law limits the definition of journalists unnecessarily. All three have also seen attacks on journalists. In Morocco, Mohamed Sokrate, a blogger known for his reporting on sensitive topics, was sentenced to two years in prison on drug charges in 2012. Micham Mansouri, a member of the Moroccan Association of Investigative Journalists, was sentenced to ten months in prison in 2015 on adultery charges. Samad Iach, another member of the Association, was banned from travelling abroad on the basis of a variety of vague charges. In Egypt, attacks on journalists have been yet more severe. Numerous journalists have been killed and detained since 2011, often while covering protests.

Laws in Egypt and Morocco allow for *censorship*. Censorship has been applied since 2011 in Egypt to shut down TV channels and shows and seize the publication of newspapers and human rights organizations, and in Morocco to shut down papers and websites. Governments are unlikely ever to use censorship frequently, given the difficulties of effectively limiting information in the current age and the potential outcry should they do so; that the option is maintained, however, contributes to a broader network of legal provisions designed to chill speech, and demonstrates an underlying philosophy of control.

Laws in Egypt and Morocco also impose special requirements on foreign media outlets, and both countries have taken measures against foreign reporters and channels with whose coverage they differed. *Al Jazeera* in particular has been on the receiving end of such attacks, with several reporters with *Al Jazeera English* notoriously detained in Egypt, while *Al Jazeera* has also been penalized in Morocco following coverage of issues pertaining to Western Sahara.

### **Recommendations**

- Press entities should be able to operate freely, without the need for licensing or oversight;
- Broadcast regulators should distribute frequencies impartially and with the aim of promoting diversity; non-terrestrial broadcasters should not be required to apply for licenses;
- Telecommunications networks, including both mobile phones and the internet, should be able to operate freely and without extensive government interference or surveillance;
- Any government entities with oversight powers over the media must be completely independent;
- Who may practice as a journalist should in no way be limited, and journalistic quality assurances should be left to self-regulation;
- Censorship, seizure of publications or suspension of media outlets should be banned in all but the most extreme cases;
- A diverse media, including a wide range of viewpoints, should be promoted;
- The protection of journalists' sources should be assured.

### **4. Limitations on freedom of expression imposed by counter-terrorism laws**

Restrictions on the content of speech and control over the media have long been the principle tools used by repressive regimes to restrict freedom of expression. More recently, however, and especially since the aggressive approach adopted by the United States post 9/11, counterterrorism laws have become a means to violate rights across the board and target those groups regimes in power find the most threatening. Violations perpetrated through counterterrorism laws include the extrajudicial killing, torture, arbitrary detention and the deprivation of procedural rights of individuals who may in fact have been guilty of terrorist crimes, as well as similar offenses against entirely innocent individuals.

All three countries have counter-terrorism legislation of excessively broad and vague scope, in Tunisia and Egypt largely formed out of laws recently adopted following dramatic terrorist attacks. While governments should adopt strong measures to address terrorist threats, it is important that measures adopted in fact address terrorism, and that they respect human rights principles. The end result of rights-violating counter-terrorism policies is not to eliminate terrorism, but rather to drive individuals towards it. Ensuring the respect for and fulfillment of rights, on the other hand, is the surest way to combat terrorism.

The most significant problem with laws in all three countries is that they employ *overly broad definitions of terrorism*. These laws categorize as terrorist a wide range of activity,

failing to conform to the requirement found in international law that terrorism only be applied relative to crimes involving severe violence. Such laws thereby exert a wide chilling effect, as they help to enable and constitute an ideological field in which organizations criticizing official policies, such as human rights organizations, can be tarred as enablers of terrorism of one sort or another. This was illustrated, for example, when an Egyptian spokesman claimed Human Rights Watch was a supporter of terrorism in 2015, due to their release of a report criticizing Egypt's human rights record.

Laws in all three countries also employ *overly broad charges of promoting terrorism*. Such laws penalize advocacy of vague lists of objectives. Such articles are clearly deeply problematic in the first place in that they criminalize advocacy, propagation, glorification, praise or apology – vague terms that do not comply with the international requirement to only penalize incitement in order not to infringe the right to freedom of expression. Such laws are even more problematic in that they magnify the vagueness already found in definitions of terrorism discussed above. The law in Egypt goes even further, essentially linking advocacy of terrorism with publication of information that contradicts the information put out by official sources. Morocco in turn has generated a prime example of the way such laws may be abused – through the 2013 arrest of Ali Anouzla, and the suspension of the *Lakome* news website, following a link posted on that website to an article by Spanish paper *El Pais* in which a video calling for jihad was embedded, clearly for the purpose of providing evidential support to the content of the article. Questionable charges have also been brought recently in Tunisia against Nour Edine Mbarki, editor of *Akher Khabar Online*, following publication of photos of a car that allegedly transported the attacker in the attack on Sousse beach.

Laws in Egypt and Morocco enable *extensive and intrusive warrantless surveillance*. Such surveillance is made possible through a combination of active authorization of surveillance and silence around necessary privacy protections. Such frameworks have enabled extensive surveillance in Egypt and Morocco. In recent years both countries have turned to private foreign companies such as the Italian Hacking Team and French Amesys to obtain the latest in surveillance technology. In Tunisia, the terrain in this area is more mixed; while the situation is far better than it was during the Ben Ali regime, and some positive provisions of law have been introduced, numerous gaps remain, allowing ample potential for abuse.

Vagueness and excessive breadth in terrorist provisions in all three countries is augmented by the *extreme penalties applied in the context of 'terrorist' offenses*. While severe penalties, not including the death penalty, are reasonable relative to properly defined terrorist offenses in light of their severity, in a context where the underlying legal frameworks are inadequate the application of severe penalties, including the death penalty, magnifies the harm involved. The problems involved in the imposition of such severe penalties are compounded by the *violations of due process rights* also contained in the legal frameworks relative to terrorism in all three countries.

### **Recommendations**

- States must ensure that terrorist offenses are defined in accordance with international standards, and in particular that only crimes rising to the necessary level of severity are defined as terrorist;
- Penalization of statements understood to support terrorism must be limited to direct incitement of terrorism;
- Criminal penalization of indirect support to terrorist acts or membership of terrorist organizations must be limited to situations where the individual in question demonstrated an intent to commit or further the commission of terrorist acts;
- Any procedure set up to designate entities as terrorist must be overseen by independent authorities and make its decisions on the base of evidence and reasoned decisions, in a procedure respecting the principle of equality of arms.

Any organization listed should be granted a fair hearing prior to any overt action against such organization on the basis of its listing;

- Relevant details of the situations under which surveillance may occur, inappropriate forms of surveillance, appropriate penalties and the structure of judicial oversight of the surveillance authorities should be clearly laid out by law. Any surveillance must be case-specific and on the basis of a warrant granted under probable cause on the basis of fact;
- Due process rights must be ensured.

## **5. Conclusion**

The study considers the extent of the right to freedom of expression in Egypt, Morocco and Tunisia in the last five years relative to three key areas. The study finds that Tunisia is the only country that has seen substantial positive development during that period, although numerous challenges remain. In Morocco, an extensive repressive apparatus is in place, though operated with a comparatively deft touch compared to Egypt, where an even more repressive legal framework is coupled with heavy-handed suppression of critical voices.

While the countries have arrived at different points, the underlying logic and philosophy of the repressive frameworks still being reinforced in Morocco and Egypt and still unfortunately significantly still in place in Tunisia is similar. In the first place, the legal frameworks are designed to grant the governments as much discretion as possible. In the second place, the chilling effects of the legal frameworks are intended to apply as widely as possible. Both are accomplished in significant part through overly broad and vague laws, which can be used in a wide variety of circumstances, granting the authorities the tools they need in those cases they choose to focus on, while depriving individuals of any certainty as to the type of actions or speech that will be allowed, which is replaced by general ideas as to the sorts of speech that might land one in trouble.

The vagueness and potential of selective application present in individual articles of the law is compounded by the existence of so many repressive articles of law, while the force of such laws is granted both by the excessive sanctions that apply to individual provisions, as well as the potential that numerous provisions might be stacked together to target particularly outspoken individuals.

Such legal frameworks are clearly in violation of the human rights obligations of the countries considered as well as the rights guarantees provided by their own constitutions; in addition, by admitting individually and collectively of excessive vagueness they fail to comply with the basic parameters of the rule of law as such.

The effects on freedom of expression are apparent. In Egypt, the last five years have witnessed numerous prosecutions on the basis of the content of speech, along with continuing tight controls on the media in general. While the situation in Morocco has been significantly better in comparison, numerous prosecutions have also occurred, and a similarly comprehensive legal regime of control exists. Finally in Tunisia, several positive legal developments have taken place, although the new laws adopted themselves remain in need of further amendment and several areas of law that have not yet been updated remain in need of extensive reform. Reforming legal frameworks relating to freedom of expression in all three countries hence remains a key priority.

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## INTRODUCTION

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This report examines the state of the right to freedom of expression in Egypt, Morocco and Tunisia based on the situation and data available in 2015. Historically, similar problems have been faced in all three countries, underpinned by a philosophy and practice of government control. Recent years have seen increasing levels of divergence, however. In Tunisia, the progressive development of a participatory democratic government and a more open public space has seen traditional limitations challenged and surpassed – though new legal rules have not gone as far as they might, and a number of lingering limitations remain in need of reform. Currently, moreover, the challenge of terrorism is threatening to produce, as it so often does, a rights-restricting and counterproductive legal response. In Morocco, a relative opening in 2011, which saw protests as well as the introduction of a new constitution, was not followed by many substantial reforms, and since mid-2014 the situation including for human rights defenders in particular has grown more restrictive. Overall, Morocco maintains an extensive array of tools for the repression of freedom of expression, with several sharp red lines aggressively enforced, although the means of repression employed are often carefully chosen in contrast to more overt forms of oppression in other countries. Egypt, in contrast, is a country in which little subtly has been employed in suppressing freedom of expression; the period in question has seen dramatic measures taken against freedom of expression across the board, with extensive preexisting restrictive legal frameworks supplemented by a raft of new measures.

In this context, the case of Tunisia should serve in many ways as a positive example to the other countries of the region, while bearing in mind both that paths may differ, and that the situation in Tunisia too could still bear substantial improvement.

This study begins with a brief summary of major developments in the countries in question, including the drafting of new constitutions in each country in the period in question and the guarantees of freedom of expression provided. Following that introduction, the study is broken down into three major areas. The first section addresses limitations imposed on speech on the basis of its content; the second, control and limitation of the media; and the third, the use of the legal framework of counterterrorism to inappropriately restrict and violate rights.<sup>1</sup> Each section first describes international standards in the area in question, then describes violations in the country in question in both legislation and practice, before concluding with recommendations. While the sections have been differentiated in order to better ensure clarity in the ensuing analysis, the restrictions discussed are to a significant degree overlapping in practice, such that expression may often be suppressed by a combination of tools from across the three areas considered. The study ends with a brief conclusion and some of the most important general recommendations.

Before launching into the detailed substantive analysis, it is worth noting that central to all potential of positive progress in rights fulfillment is the dissemination of human rights knowledge and culture.

It is of course particularly important, though similarly particularly challenging, that the governing authorities adopt a human rights-based approach to all policy questions. Most fundamentally, this means that legislation should be drafted in order to better support and ensure rights – instead of rights being viewed to one degree or another, as they often are by less than democratic governments, as unwanted restrictions to be acknowledged to the barest extent possible, in the context of legislation designed with a

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<sup>1</sup> The study does not address limitations relative to the rights to freedom of association and assembly due to limitations of time, space and resources; limitations in these areas too remain serious in the three countries considered, and are closely interwoven with limitations in the areas discussed above.

fundamentally rights restricting and controlling purpose. Similarly, it is important that judicial actors take an approach to the law and its interpretation informed by human rights, including as contained in international law and the recently adopted new constitutions of the countries in question. Once again, however, all too often judicial authorities do not see their role as to promote justice and respect for human dignity and equality by providing a rights-based interpretation of the law, but rather as to act as an enforcer for the governing authorities, magnifying rather than challenging rights abuses.

Finally, however, the dissemination of human rights awareness to the population at large is perhaps the most important step – as ultimately it is to the people that rights are due, and it is the people alone who can ensure that they are provided the rights to which they are entitled. It is in this context in fact that the right to freedom of expression is of such fundamental importance – as the realm of freedom of expression is the realm in which individuals can inform themselves, can communicate, and can discuss political affairs and become active participants in the governance of their communities. As such, however, it is also an area in which governing authorities are particularly keen to establish their dominance and reluctant to relinquish their tools of control, recognizing the core importance of controlling the public narrative and informational space to maintaining their positions of power.

## I. International obligations and constitutional guarantees in Egypt, Morocco and Tunisia, and brief summary of developments over the past 5 years

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The past five years have witnessed tumultuous events in the Arab world.

**In Egypt**, Hosni Mubarak stepped down on 11 of 2011. A new parliament and president were elected in 2012; the primary body of the first was disbanded later that year by the constitutional court due to constitutional problems with the law under which they had been elected, while the president was removed by the army following major protests on 3 July 2013. Early calls following the ouster of Mubarak to amend numerous provisions of the law to bring them into compliance with Egypt's human rights obligations went largely unheeded during this period.

A new constitution was pushed through in Egypt in 2012; in the wake of the removal of president Morsi it was replaced by another, approved by referendum in January of 2014.<sup>2</sup> Article 65 of the 2014 Constitution guarantees freedom of thought, opinion and expression, Article 66 freedom of research, Article 67 freedom of artistic and literary creation, Article 68 access to information, Article 70 freedom of the press, Article 71 freedom of publication, including by prohibiting censorship and custodial sanction for publication crimes, and Article 72 the independence of press institutions. Some of these Articles contain problematic provisions however – for instance, Article 70 states that a newspaper may only be issued when notification is given by law, and while the purported aim of Article 72, to ensure independence of press institutions, is positive, the idea that the state will be responsible for ensuring that independence is problematic, as it is precisely in significant part from the state that independence must be ensured.

Articles 211-213 of the 2014 Egyptian Constitution concern the National Media Council and the National Press and Media Association. The former is to be set up to manage the affairs of the media generally, while the latter is to manage state-owned media. The constitution stipulates that these bodies are to be independent, but does not provide details as to how such independence might be assured, leaving that matter to be 'specified by law'.

The 2014 Egyptian constitution also contains positive provisions concerning international human rights law. Both the preamble and Article 5 commit the Egyptian state to respect for human rights. Article 93 further states that Egypt is committed to all human rights agreements, covenants and conventions it has ratified, which are to 'have the force of law after publication in accordance with the specified circumstances.' Egypt ratified the International Covenant on Civil and Political Rights,<sup>3</sup> the primary vehicle for the protection of the right to freedom of expression in international law, in 1982, and the African Charter on Human and People's Rights<sup>4</sup> in 1984. As such, the Covenant and Charter may be considered part of Egyptian law.

Unfortunately, the new constitution did not usher in the reforms to Egypt's legal system necessary to bring it into compliance with the rights guaranteed by the constitution. Instead, new repressive laws have been issued – including a repressive Decree Law governing assemblies issued in late 2013, and two more repressive Decree Laws purporting to combat counterterrorism, but in fact containing numerous clauses that counter the fulfillment of human rights, enacted in 2015.

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<sup>2</sup> Egyptian Constitution of 18 January 2014.

<sup>3</sup> 16 Dec 1966, United Nations, Treaty Series, vol. 999, p. 171; entered into force on 23 March 1976.

<sup>4</sup> 27 June 1981, Organization of African Unity, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982); entered into force on 21 Oct 1986.

**In Morocco**, 2011 saw protests by the February 20<sup>th</sup> movement and others. Later in the year, a new constitution was introduced.<sup>5</sup> Article 25 guarantees freedom of thought, opinion and expression, and of creation, publication, scientific research and the presentation of artistic work. Article 28 guarantees freedom of the press, and expressly limits prior censorship, though the article also contains an unfortunate clause found in many rights provisions in the constitutions of the Arab world which states that freedom of the press shall apply 'within the sole limits expressly provided by the law...'. While such clauses should never be taken to enable infringement of the right in question – as such a reading would render the entire Article meaningless – unfortunately this is precisely the reading they are often given.

Other elements of Morocco's Constitution contain language supportive of human rights in general, and the right to freedom of expression in particular, as well. The preamble states that Morocco is committed to the rights found in the charters of international organizations and conventions and to the 'Rights of Man as they are universally recognized', and commits Morocco to comply with the international conventions it has ratified, which are recognized as having primacy over domestic laws. Article 19 reiterates that the rights contained in international conventions ratified by Morocco apply in Morocco. While Morocco's 1984 withdrawal from the Organization of African Unity (now the African Union) after that organization admitted the Sahrawi Arab Democratic Republic means that it has not signed the African Charter on Human and People's Rights, it ratified the International Covenant on Civil and Political Rights in 1979, which is effectively incorporated into Moroccan law by the constitution.

While Morocco's new constitution was supposed to mark the beginning of greater respect for rights in the country, few legal reforms came in the years following the adoption of the constitution, leaving Morocco's legal framework in ongoing violation of the rights guaranteed by the constitution.

Some important attempts at reform have been made, however, and it is yet to be hoped that they bear fruit. On 18 October 2014 three draft bills aiming to reform numerous provisions of law governing the operation of the press in Morocco were revealed.<sup>6</sup> While the drafts included certain positive steps, in particular through the elimination of penal sentences, they failed to address some of the most significant issues in Moroccan law, such as the prohibitions on criticizing the monarchy or Islam and on raising issues impacting on territorial integrity, as well as the potential for massive financial penalties. The new laws have yet to move forward from draft stage.

**In Tunisia**, important changes were made to the legal framework governing the media through Decree Laws 115, a new Press Code, and 116, providing for a new independent audiovisual authority, both passed in late 2011. The new framework laid out by these Decree Laws has not always been put into effect in practice, however. Moreover, of course, as decree laws the codes remain in need of replacement by a more permanent legal framework.

2012 in Tunisia saw much controversy over the appointment by the authorities of allies to key media positions, and the suspension of the work of the progressive National Authority to Reform Information and Communication in 2012 due to its frustration with rejection of its proposals.<sup>7</sup>

On 3 May 2013, the new Independent High Authority of Audiovisual Communication, established by Decree Law 116 of 2011, came into being. The body has authority to

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<sup>5</sup> Moroccan Constitution of 1 July 2011.

<sup>6</sup> See Jacobs, "Morocco Announces New Press Code," Muftah, 31 July 2014; RWB, "RWB's Recommendations on Morocco's Media Reform Bills," 21 Nov 2014.

<sup>7</sup> See World Association of Newspapers and News Publishers, "IFEX-TMG salutes work of INRIC as media freedom body shuts down over obstruction," 9 July 2012.

designate the heads of public media, assign television and radio frequencies, and monitor speaking time given to political parties during elections.<sup>8</sup>

Tunisia adopted a new constitution in 2014.<sup>9</sup> Article 31 of that constitution guarantees the rights of freedom of opinion, thought, expression, information and publication, and specifically outlaws prior censorship. Article 32 reiterates the right to freedom of information, while Article 33 provides for the right to academic and scientific freedom. Article 20, meanwhile, gives international agreements that Tunisia has ratified a status superior to laws. Effectively, this incorporates the protections of the International Covenant on Civil and Political Rights, which Tunisia ratified in 1969, into Tunisian law, as well as the African Charter on Human and People's Rights, which Tunisia ratified in 1983.

In March 2015, a dramatic terrorist attack occurred at the Bardo Museum in Tunis. Following the attack, the government proposed a new security bill. Following a second dramatic attack, at a beach in Sousse on 26 June, the bill was passed. As with other legal frameworks governing counter-terrorism in the region, the bill contains numerous clauses restricting rights in general and the right to freedom of expression in particular.

## **II. Issue area 1: penalization of speech based on its content**

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The first means by which the right to freedom of expression is restricted in the three countries considered is through penalizations of speech on the basis of its content, either due to that content containing criticism of the authorities or other powerful individuals or actors, or because the speech challenges values held by the majority in the society in question. Such limitations are most frequently enshrined in penal and press laws, though they may be found in other laws as well. Alternatively, individuals who speak out may be punished without any pretense of legality – through attacks by the security forces, or directly by offended citizens in instances when the authorities fail to provide those individuals who voice their contentious opinions with the protection to which they are entitled.

Underpinning all such violations lie two interrelated problematic philosophies possessed by both state agents and actors in society at large. The first is a belief, principally on the part of governing authorities, that criticism is detrimental – rather than a recognition that it is only through vigorous and open debate, including criticism, that common goals and advancement can be accomplished, be they in the political, social or economic spheres. The second problematic philosophy is broader and pertains to society as a whole, though it is often strongly propagated by those in power as well, and that is the belief that alternative viewpoints to those of the majority should not be tolerated. The theoretical weaknesses of such an approach can be easily identified; that such beliefs persist is testimony to the use they have served in reinforcing centers of power, and in the utility for power's wielders of the identification of others and outsiders as a means through which to deflect attacks on their own privileged status.

### **1. International Standards**

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There are certain situations when speech may be legitimately penalized on the basis of its content – in the case of libel laws or in instances of incitement of hatred, for instance, as both are defined by international law. While restrictions on speech encountered in the region may formally present themselves under these labels, however, they frequently and dramatically exceed the reasonable parameters of laws addressing such content. The

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<sup>8</sup> See UNESCO, "UNESCO applauds launch in Tunisia of independent audiovisual regulatory body," 13 May 2013.

<sup>9</sup> Tunisian Constitution of 26 January 2014.

only reasonable purpose for defamation laws is to protect reputations. Unfortunately, however, as will be seen, laws in the countries surveyed are designed and frequently serve to combat and suppress criticism of the authorities and of majority viewpoints, rather than serving to protect individuals from unjust attack.

Human rights law requires that public officials and bodies, rather than being subject to an extra degree of protection, be susceptible to an extra degree of scrutiny.<sup>10</sup> Public bodies should not be able to bring suit for defamation at all;<sup>11</sup> while public officials may, law should make clear that they are subject to greater scrutiny than private individuals, and increasing scrutiny with higher position. Ensuring that public authorities may be criticized is vital to ensuring a healthy democracy, for promoting the public good and for helping to combat corruption and other potential abuses of power. It is important in this context that public scrutiny of the judiciary is not penalized as well, given the importance of the judiciary to a healthy democracy and respect for rights.<sup>12</sup>

Penalizations of criticism of a country's reputation overall also represent illegitimate restrictions of freedom of expression, for the same reasons discussed above – such criticisms in fact play an important role in ensuring the best functioning of societies and their responsiveness to their citizens, whereas limitations on such speech are invariably used to target those rightfully attempting to hold a government to its proper role, including human rights advocates in particular. In general, moreover, as relative to public morality restrictions, discussed below, defamation laws, and criminal defamation laws in particular, should not “be used to protect abstract notions or concepts, such as the State, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines”, since human rights law protects “individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism.”<sup>13</sup>

While public morals are reasonable grounds for the restriction of rights under international law, the situations in which the grounds may be invoked are limited. In particular, limitations “for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Rather, “any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.”<sup>14</sup> Blasphemy laws are also inappropriate. This is both because such laws inevitably infringe the right to express dissenting opinions and to criticize religions, and because they are enforced in practice only on behalf of majority views, and against those with minority views, be they members of minority religions or atheists. As the Special Rapporteur on Freedom of Expression has emphasized, limitations on freedom of expression, for instance relative to hate speech, are “designed to protect individuals rather than belief systems”; moreover, “freedom of expression is applicable not only to comfortable, inoffensive or politically correct opinions, but also to ideas that ‘offend, shock and disturb.’ The constant confrontation of ideas, even controversial ones, is a stepping stone to vibrant democratic societies.”<sup>15</sup>

<sup>10</sup> See, e.g., *Lingens v Austria*, European Court of Human Rights, 1986; *Castells v Spain*, European Court of Human Rights, 1992; African Commission, Declaration of Principles on Freedom of Expression in Africa, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle XII; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000.

<sup>11</sup> See, e.g., *City of Chicago v Tribune Co*, US Supreme Court, 1923; *New York Times v Sullivan*, US Supreme Court, 1964; *Rajagopal v Tamil Nadu*, Indian Supreme Court, 1994; *Die Spoorbond v South African Railways*, South African Supreme Court of Appeal, 1946; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000.

<sup>12</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002.

<sup>13</sup> Special Rapporteur on Freedom of Expression, A/HRC/14/23, 2010, para 84.

<sup>14</sup> HRC, General Comment No 34: Article 19: Freedoms of opinions and expression, CCPR/C/GC/34, para 32, quoting HRC General Comment No 22, para 8.

<sup>15</sup> Report of the Special Rapporteur on Freedom of Expression, A/HRC/7/14, 2008, paras 65-66; quoting *Arslan v Turkey*, European Court of Human Rights, 1999. See also Joint Declaration by the UN Special Rapporteur on

International human rights law requires that states take measures to combat hate speech.<sup>16</sup> It is extremely important in doing so, however, that hate speech is properly defined and that the laws in question are properly applied in practice, as otherwise the clauses in question may be abused to undermine the very goal they are designed to pursue, by providing an additional means through which to target those with minority beliefs.<sup>17</sup> In assessing whether or not particular speech constitutes hate speech, regard should be had to context, the speaker, intent, content, extent of dissemination, and likelihood of incitement.<sup>18</sup> Perhaps of particular centrality among these factors should be assessing the relative power or powerlessness of the speaker, and whether the speech in question targets a minority group – since spurious and abusive uses of hate speech generally target those who disagree with those in power and/or the views of the majority. Criminalization of such speech should only be used as a means of last resort, applied only where the speech constitutes intentional incitement to violence, hatred or discrimination.

Restrictions on rights must always be imposed by law, which means, among other things, that they must not be overly broad and vague, but rather that they should be sufficiently precise for individuals to judge their conduct accordingly. Such limitations on restrictions are particularly important in the realm of freedom of expression, both because any broad or vague language is likely to have a chilling effect, impacting speech beyond that which in fact is targeted, and because broad or vague language may be used in an arbitrary and discretionary manner, to target those who happen to speak out against those in authority, for instance, precisely the sort of speech that should enjoy the highest degree of protection.<sup>19</sup> Relative to freedom of expression, one of the most frequently encountered overly broad and vague provisions, at least in the Arab world, comes in the form of penalization for spreading ‘false news’.<sup>20</sup>

Best practice suggests expressions of opinion should never be subject to defamation charges, which should only apply in the case of inaccurate and damaging factual assertions. This greater protection may be understood to rest on the absolute protection of freedom of opinion under Article 19(1) of the International Covenant on Civil and Political Rights. Opinions deserve a higher degree of protection because of the importance of allowing individuals to express their judgments on various matters – even where others may find those judgments offensive; because any regime that punishes ‘insults’ is likely only to punish insults to the powerful (in contrast to effective hate speech laws); and because any defamation regime relating to opinions would have to determine whether or not particular opinions were ‘reasonable’, a highly subjective exercise.

A strong system of defenses and exemptions should be put in place in any defamation regime, to ensure speech is not excessively limited. Accused parties should always be able to invoke the defense of truth, by proving the truth of the matter they were

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Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 9 December 2008.

<sup>16</sup> ICCPR, Art 20(2).

<sup>17</sup> See, e.g., Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 19 December 2006; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 3 February 2010.

<sup>18</sup> See Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence and Article 19, Prohibiting Incitement to Discrimination, Hostility or Violence, Policy Brief, December 2012.

<sup>19</sup> See HRC, General Comment No 34: Article 19: Freedoms of opinions and expression, CCPR/C/GC/34.

<sup>20</sup> On the problematic nature of false news provisions see, e.g., Report of the Special Rapporteur on Freedom of Expression, A/HRC/20/17, 2012, para 79; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 3 February 2010.

asserting – in which context, it is of course important that they have access to reasonable evidential rules of procedure through which do so.<sup>21</sup> Where the case involves a matter of public concern, the burden should be shifted, such that the plaintiff must prove the falsity of the statements in question in order to succeed.<sup>22</sup> Defendants should also have access to the defense of reasonable publication – if, taking into account the circumstances under which they published the information in question, a reasonable person would have done so, the defense should prevail.<sup>23</sup> In addition, law should provide for certain privileges and immunities in the case of statements made in certain contexts – statements made before elected bodies or during judicial proceedings should be absolutely protected, for instance, while statements made under a legal, moral or social duty should only be penalized if stated with malice.

In addition, it is important that only the individual in question be able to bring a defamation suit – overly broad standing provisions, especially where combined with loose and broad substantive laws as to what constitutes offense and what sorts of entities may be offended, invariably lead to a diminution in the right to freedom of expression. Statutes of limitation relative to defamation should provide for short time periods, and defamation cases should always be conducted promptly (while fully respecting the procedural rights of the parties of course).

Rights cannot be understood in an abstract sense; rather, each right will only be as powerful and important as the corresponding remedies, just as every rights violation will be diminished or enhanced by the scale of the penalty applied. Criminal defamation has been widely understood to violate the right to freedom of expression, given the extreme chilling effect it provokes.<sup>24</sup> Civil defamation laws too may be highly chilling, however, as and where they impose excessive penalties. In this context, non-monetary measures, such as apology, correction, reply, and publication of judgment should always be preferred, and remedies in general should be understood as a means to redress the harm done to plaintiffs, not to punish those responsible for the dissemination of the statements in question.<sup>25</sup> As in other areas of civil law, plaintiffs should be under a duty to mitigate damage where possible, by seeking recourse to available mechanisms prior to bringing suit. Where monetary penalties are applied, they must not be excessive. Finally, an effective remedy should be available to defendants relative to unsubstantiated cases, as for instance may be brought by powerful individuals, corporations or politicians, with the intent of limiting criticism and chilling speech rather than protecting reputations.

## **2. Limitations in law and practice**

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### **2.1 Limitations on the criticism of public officials and bodies**

Among the most serious restrictions to freedom of expression, encountered across Egypt, Tunisia and Morocco are limitations on criticism of public authorities.

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<sup>21</sup> See, e.g., African Commission, Declaration of Principles on Freedom of Expression in Africa, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle XII.

<sup>22</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000.

<sup>23</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000.

<sup>24</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 3 February 2010.

<sup>25</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000.

## □ Egypt

In Egypt, Article 179 of the Penal Code<sup>26</sup> prescribes imprisonment for criticism of the president and Article 181 applies the same penalty to criticism of the “King or President of a foreign country”; Article 182 penalizes “vilification... [of] the representative of a foreign country accredited to Egypt, because of a matter connected with the performance of his position”; Article 184 penalizes with imprisonment and/or a fine insults to “the People’s Assembly, the Shura Council, or other regular organizations, the Army, the tribunals, the Authorities, or Public departments”; Article 185 penalizes with imprisonment and/or a fine insulting of a public official “due to the performance of his official duties...”;<sup>27</sup> and Article 186 penalizes with imprisonment and a fine insults to the “standing, dignity, or authority of a judge in connection with a court action”. The penalizations in question apply, according to Article 178, to “printed material, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs, or other objects or pictures”. According to Article 178(bis), they also apply to “newspapers,” in which case “the Chief Editors and the Publishers shall be considered responsible as principal perpetrators, upon publishing”, “the printers, the displayers and the distributors shall be punished” “where the perpetrator of the crime cannot be known”, and “importers, exporters, and middlemen” will also be punished “if they premeditatedly contribute to committing the misdemeanors prescribed”. Article 21 of the Press Code further stipulates that a journalist ‘may not address or deal with the demeanor of a public servant’ unless their reporting concerns that public servant’s work and is aimed at the public interest, with penalization of imprisonment and/or fine provided by Article 22. Article 23 of the Press Code prevents newspapers from addressing or dealing with the process undertaken by the authorities or courts in a manner that might interfere with the integrity of the investigations or cases under trial, or the status of individuals subject to the legal actions in question. While it is reasonable for law to protect the rights of the accused by limiting reporting in certain instances, the article in question could easily be used simply to prevent reporting of which the authorities disapprove, or which is critical of the prosecutorial or judicial processes, some of the most important sorts of expression in need of protection.

Articles 133 and 134 of Egypt’s Penal Code penalize by imprisonment and/or fine affronts to public officials or civil servants who are performing their duty; the penalty is doubled if the affront is to a court agent or council during the convening of its session. The title of the section of the Penal Code (Book II, Chapter 7) in which these provisions are contained, “Opposing the rulers, disobeying their orders, and insulting them...” is also relevant, suggesting as it does that the penalties in question are designed to apply not in instances of defamation, but rather in instances of opposition or criticism and hence offense to the authorities.

Article 98(b) penalizes with up to five years imprisonment calls for changing the constitution or the “basic system of the social community”; Article 174 penalizes with up to five years imprisonment whoever “instigates to overthrow, hate, or deride Egypt’s established regime of government”; and Article 98(b)(bis) ensures that a variety of means of propagation are covered relative to either sort of call. While of course violent acts may be prohibited, a provision such as Article 174 of Egypt’s law is clearly out of place in a democratic society, where rulers will regularly be replaced; the penalization of criticism of those in power is similar to those discussed above.

Article 189 of Egypt’s Penal Code penalizes through imprisonment and/or fine whoever publishes details of the prosecutions involving charges under Articles 171-201 or 302-310 – the very articles, note, which constitute the largest part of the problematic

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<sup>26</sup> Egypt Penal Code, Law 58 of 1937.

<sup>27</sup> Law 147 of 2006 removed the possibility of imprisonment for breach of Article 185 alone, however. See UNESCO, IPDC, Assessment of Media Development in Egypt, 2013, 34.

restrictions on free expression. As such, the law purports not only to excessively limit freedom of expression, but also to prevent discussion of the very limitations being imposed. Article 190 allows the court to prohibit publication of rulings and arguments in cases in whole or in part "in order to maintain public order and morals" as well – giving further discretionary power to the system to penalize the discussion of instances where the judiciary may be involved in committing or covering up human rights violations, for instance. Article 193 penalizes publication of news "concerning a criminal investigation if the Investigation Authority has decided to conduct it in the absence of the litigants". While as elsewhere a reasonable intent might be discerned here – to prevent the publication of information vital to the progress of a case – the language as written is vague and could easily be applied to those who criticize the prosecution for engaging in partisan and political prosecutions, for violating due process requirements, for fabricating evidence, and so forth.

Article 191 penalizes publication of public discussions in the courts, and Article 192 publication of public discussion in the People's Assembly, wherever such publication is done "with dishonesty and ill will" – again, language likely to be flexibly applied in practice.

Article 201 of Egypt's Penal Code penalizes with imprisonment and or/fine anyone who criticizes the government or the law at a religious gathering. Once again, such criticism is perhaps the most important component of the right to freedom of expression, and should never be penalized.

In April 2011, blogger [Maikel Nabil](#) was sentenced by a military tribunal to 3 years imprisonment under Articles 102(bis) and 184 of the Penal Code for allegedly insulting the military and spreading false information, following his criticism of the military's use of violence against protesters in Tahrir Square and of the state policy of mandatory conscription. His lawyers were informed that his trial would take place on April 12; however, when they arrived that day they found he had been sentenced the day before without legal representation. While in detention Mr. Nabil was denied necessary medication. He was released after a pardon in 2012.<sup>28</sup>

In December 2011, democracy activist [Gaber Elsayed Gaber](#) was sentenced to 1 year in prison on charges of having disturbed public security and of having harmed the reputation of the army, after, at a pro-SCAF rally, he handed out pamphlets criticizing the Supreme Council of the Armed Forces that governed Egypt at the time. In the words of the court, the publications he had distributed "disturbed public security and drove a wedge between the Egyptian people and the Egyptian army and harmed the reputation of the Egyptian ruling military council." Gaber was acquitted four months later in 2012.<sup>29</sup>

In 2012 [Kamal Abbas](#), a union leader, was sentenced in absentia to six months in prison for 'insulting an official', after he interrupted Ismail Fahmy, of the Egyptian Trade Union Federation during a speech at the ILO in June 2011, asserting that Mr. Fahmy was not a real representative of the Egyptian working class.<sup>30</sup> Mr. Abbas already had a long history of being targeted by governing authorities and laws penalizing freedom of expression by that point, having for instance been sentenced to a year in prison in 2007 on charges of defamation after publication of a report alleging corruption in the running of a youth center in a Cairo suburb,<sup>31</sup> and detained at the airport in 2009.<sup>32</sup>

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<sup>28</sup> See HRW, "Blogger's 3-Year Sentence a Blow to Free Speech," 11 April 2011; HRW, "Military Trials Usurp Justice System," 29 April 2011; Amnesty, "Egypt: Release of blogger Maikel Nabil is the end of a 'cruel ordeal'," 24 Jan 2012; WGAD, *Maikel Nabil Sanad v Egypt*, 50/2011, 29 Feb 2012.

<sup>29</sup> See HRW, "Year of Attacks on Free Expression," 11 Feb 2012; Amnesty, "Egypt must overturn prison sentence for actor accused of 'insulting Islam'," 25 April 2012.

<sup>30</sup> See Amnesty, "Defend Egyptian trade unionist Kamal Abbas: protect the Arab Spring," 3 March 2012.

<sup>31</sup> See FIDH, "Sentencing of Mr. Kamal Abbas and Mr. Mohamed Helmy to one year imprisonment," 12 Oct 2007.

<sup>32</sup> See HRW, "Egypt and Libya: A Year of Serious Abuses," 24 Jan 2010.

In 2012 Islam Afifi, a journalist, was charged under Article 179 with insulting the president, as well as with spreading 'false information' (the provisions of law dealing with which are discussed below). He was released later in 2012 following a presidential decree banning the pre-trial detention of journalists.<sup>33</sup>

In January of 2014, activists from the Strong Egypt part were arrested and charged under Article 98(b) of the Penal Code together with other similar charges including terrorism charges under Article 86 of Egypt's Penal Code, based on the fact that they were disseminating posters calling for a no vote on the constitutional referendum. In February, three of those arrested were sentenced in absentia to three years in prison.<sup>34</sup>

On January 19, 25 people, including prominent academic and politician Amr Hamzawy, were referred to trial on charges of insulting the judiciary. Mr. Hamzawy was specifically charged on account of tweets criticizing the judiciary for sentences issued against international not-for-profit democracy promotion organizations in June 2013; he was an outspoken critic of the governing powers and proponent of respect for human rights generally as well, however. 20 of those charged were banned from travel while charges were pending; the travel ban on Hamzawy persisted for an extensive period of time despite non-referral of the case to trial.<sup>35</sup>

In November 2014 charges were brought against Khaled Abol Naga, an actor, due to criticism of the president; he was accused of treason, incitement against the regime and threatening national security. Virulent attacks on Mr. Naga in the media followed, including threatening and demeaning suggestions intimating that he was gay – at a time when attacks on the basis of sexual orientation in Egypt were on the rise.<sup>36</sup>

## □ Morocco

In Morocco, Chapter Four of the Penal Code<sup>37</sup> concerns crimes and misdemeanors which contravene public order, and section one of that chapter concerns 'insults and violence' against public officials. The very presence of such a section in the Penal Code is already reason for concern. Article 263 thereunder prescribes imprisonment and fine for anyone who insults a magistrate, public officer, or public agent, including by words, gestures and writing, even if not made public; and Article 265 includes the army in the list of governing bodies offense against which will be penalized as well. The punishment is magnified if offense is given to a magistrate or jury members during the course of a trial. Article 264 penalizes denouncing public authorities or producing false evidence linking them to a crime they did not commit or conspire to commit. Article 266 penalizes acts, public speech or writing that either put pressure on the decisions of judges, or criticize those decisions.

In addition to generally falling afoul of the need to allow a greater degree of criticism of public authorities already discussed, Article 263 improperly penalizes offenses that are not made public – which by definition cannot cause public defamation – as well as imposing a limit on the ability of individuals to adequately defend themselves, by creating the possibility that in doing so they will fall afoul of the additional penalties applied in cases of offense committed in the courtroom. Needless to say the inclusion by Article 265

<sup>33</sup> See Guardian, "Egypt bans detention of journalists," 24 Aug 2012.

<sup>34</sup> See HRW, "Activists Arrested for 'No Campaign'," 13 Jan 2014; Mada Masr, "Strong Egypt members sentenced to 3 years for campaigning against constitution," 25 Feb 2014.

<sup>35</sup> See Middle East Monitor, "Egypt bans 20 people from travel on charges of 'insulting the judiciary'," 16 Jan 2014; Kirkpatrick, "Egypt Says Twitter Post by Liberal was Crime," NYT, 19 Jan 2014; HRW, "Egypt: High Price of Dissent," 19 Feb 2014; Fekki, "Egypt's judiciary united opposing political currents in one trial," Daily News Egypt, 23 May 2015.

<sup>36</sup> See ANHRI, "Egypt: A Complaint Against Actor 'Khaled Abol Naga' Accusing him of 'High Treason' for Criticising President 'Abdel Fattah el-Sisi'," 17 Nov 2014; Amin, "Gay Egyptians living in 'constant fear' as crackdown from authorities and media worsens," Index on Censorship, 6 Jan 2015.

<sup>37</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

of the army in the set of public bodies not to be offended is in many ways particularly troubling, as if anything individuals should be subject to an extra degree of protection when they bring charges against security bodies with the power to retaliate. In both instances, the articles also violate human rights law obligations by prescribing punishment for insults rather than statements of fact. While Article 264 is plausibly aimed at a reasonable goal – preventing individuals from bringing false charges – in reality any such provision should be general and should be subject to a high degree of proof such that individuals are not deterred from bringing legitimate claims (which, given the right to presumption of innocence, will and should be hard to prove); at the same time, the linking of such a clause to charges against the authorities seems tailor-made to penalize those who may attempt to hold public authorities accountable. Article 266 is particularly egregious, penalizing negative commentary on court cases during or after their completion – given the serious problems with the legal and judicial framework in Morocco, this clause not only undermines freedom of expression but also attempts to establish the impartial rule of law.

Unlike in Egypt, the most serious penalizations of legitimate expression in Morocco are found not in the Penal Code but rather in the Press Code.<sup>38</sup> Article 41 of the Press Code penalizes with imprisonment and fine insults to the King or other members of the royal family. As with Article 263 of the Penal Code, this article improperly penalizes insults, rather than focusing on statements of fact. Among other problems with such a focus, the penalization of insults inevitably deprives a provision of specificity, since the determination of what constitutes an insult is left to the discretion of the offended party and the authorities.

Article 45 of Morocco's Press Code penalizes with fine and imprisonment defamation of the army or the government of Morocco; Article 46 defamation of ministers or other government agents; while Article 48 penalizes insulting the same bodies. Articles 52 and 53 penalize with imprisonment or fine offenses against foreign heads of state, ministers and diplomats. Needless to say, all of these articles evince the same desire to protect public officials from scrutiny already discussed, and so unjustly restrict criticism of the authorities. Moreover, public bodies as such should never be able to bring defamation suits or have such suits brought on their behalf.

In April 2011, Rachid Nini, editor of *Al-Massae* newspaper, was arrested and charged under Articles 263, 264 and 266 of the Penal Code. In June, he was sentenced to a year in prison by a Casablanca Court of First Instance, a prison term upheld by the Casablanca Court of Appeals in October. Nini was sentenced on the basis of the content of his columns; the court judgment mentioned nine columns, but it appears that the last one, in which Nini attacked the head of the General Directorate for Territorial Surveillance, Morocco's domestic intelligence agency, was the column that provoked attention, as Nini was summoned by the police eight days after that column's publication. Other columns cited by the court included criticism of a governor for corruption, allegations of torture at a government detention facility in Temara, criticism of Morocco's counterterrorism laws and practice and calls for greater political freedom.

The events of 2011 were not Nini's first brush with the law. Nini was previously sentenced, along with another journalist, to imprisonment and a fine in 2009, following reporting pointing to the involvement of a judicial official in drug-trafficking, though the prison term was eliminated on appeal in 2010.

In 2008 Nini was sentenced to a large fine (approximately \$720,000) for suggesting a prosecutor had attended a gay wedding party.<sup>39</sup>

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<sup>38</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>39</sup> See ANHRI, "Moroccan Journalist Rachid Nini Sentenced to 3 Executable Months," 16 Nov 2009; Amnesty, "Moroccan journalist set to face trial over security forces criticism," 16 May 2011; HRW, "Morocco: Free Popular Columnist," 6 Dec 2011.

As discussed below, another defamation conviction was issued against Mr. Nini in July 2015, and several other charges, brought by government officials, are pending.<sup>40</sup>

In 2012, [Mouad Belghouat](#), a rapper, was sentenced to two years in prison due to a rap song criticizing the police.<sup>41</sup> Charges against Mr. Belghouat were apparently motivated in significant part by a YouTube video accompanying the song in which a policeman's head was replaced by the head of a donkey, though Mr. Belghouat denied any responsibility for the production of that video. Mr. Belghouat's work in general contained a strong theme of denouncing corruption, injustice and inequality, and he was seen as a representative of the pro-reform February 20<sup>th</sup> youth movement. Mr. Belghouat was sentenced in May to a year in prison, having been found to have violated Articles 263 and 265 of the Penal Code; the conditions in prison were inadequate to the point that he was struggling with health problems when released a year later. On 1 July 2014 Mr. Belghouat was sentenced to four months in prison for alleged public drunkenness and assault and insult against a policeman, in a trial marked by extensive irregularities and violations of due process; Mr. Belghouat, in contrast, claimed the policeman had assaulted him.<sup>42</sup>

The same year [Walid Bahomane](#) was charged and sentenced to a year in prison for sharing an image making fun of the king on Facebook, which was deemed to defame Morocco's sacred values. Abdelsamad Haydour received a three-year sentence issued in February and confirmed in March of the same year, under Article 179 of the Penal Code and Article 41 of the Press Code. Mr. Haydour's offense was to criticize the King and the political situation during an impromptu discussion with other individuals following a period of demonstrations against unemployment; he was arrested after a video another individual had taken of the discussions was posted on YouTube.<sup>43</sup>

In 2013, [Youseff Jajili](#), editor of *Alaan*, a weekly periodical, was fined and given a two-month suspended sentence for being found in violation of Article 42 of the Press Code after an article in *Alaan* alleged that a government minister had used public money to order alcohol while on an official trip.<sup>44</sup>

In 2014 another rapper, [Othman Atiq](#), who was 17, was sentenced to three months in prison due to the content of his rap songs, having been convicted under Articles 263 and 265 of the Penal Code among others. The songs primarily portrayed the reality of the lives of young and unemployed Moroccan men.<sup>45</sup>

## □ Tunisia

Chapter Four of Tunisia's Penal Code<sup>46</sup> concerns attacks against public authority; Section Two of Chapter Four addresses insults or violence against public functionaries. Article 125 imposes imprisonment and fine on whoever insults a civil servant in the course of or in connection to his or her duties. Article 126 steepens the penalty if the offense was made at a judicial hearing. Article 128 imposes imprisonment and fine on whoever accuses a public official of illegal acts, unless they can prove the truth of their accusations. Article

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<sup>40</sup> See Amnesty, "Morocco: Court orders suspension of news website, editors fined for 'false news' and 'defamation'," 17 August 2015.

<sup>41</sup> Mr. Belghouat was previously arrested in 2011 and sentenced to four months in prison following an alleged assault, though his defense team pointed to extensive inconsistencies in the evidence

<sup>42</sup> See HRW, "Morocco: Drop Charges Against Detained Rapper," 18 April 2012; HRW, "Morocco: Prison for Rapper Who Criticized the Police," 12 May 2012; Schemm, "Mouad Belghouat, Moroccan Rapper, Released From Prison" 5 May 2013; HRW, "Morocco: Rapper Convicted After Apparently Unfair Trial," 2 July 2014.

<sup>43</sup> HRW, "Morocco: Free Student Imprisoned for 'Insulting' King," 16 July 2013. As one commentator has pointed out, insulting the King is generally taken as insulting religion as well. See, e.g., Errazzouki, "'Violating Sacred Values' in Morocco: Free Speech with an Exception," 17 Feb 2012.

<sup>44</sup> See Amnesty, "Morocco/Western Sahara: Editor facing year in jail over 'official's champagne dinner," 25 Feb 2013; CPJ, "Moroccan editor arrested for publishing link to video," 18 Sept 2013.

<sup>45</sup> See HRW, "Morocco: Unjustly Jailed Rapper To Go Free," 11 Nov 2014.

<sup>46</sup> Tunisia Penal Code, Law 68-23 of 1968.

129 penalizes with imprisonment anyone who insults either the Tunisian or a foreign flag. Article 91 of Tunisia's Code of Military Justice prescribes imprisonment for anyone who insults the flag or insults or damages the dignity, reputation or morale of the army, acts to undermine its internal discipline, or criticizes officers. Article 55 of the Decree on Media Freedom, Printing and Publishing<sup>47</sup> penalizes the criticism of 'official entities.'

As in Egypt and Morocco, these provisions inappropriately prescribe penalties for criticism of public bodies and officials – in contrast, public bodies should never be protected by defamation law, and rather than steeper penalties and a heightened likelihood of prosecution, the standard for successful pursuit of a defamation case should be heightened where the speech in question concerns public authorities or matters of public concern. Insults should never be penalized (including, of course, insults against the flag). Article 126, steepening the penalty when the offense is committed at a judicial hearing, runs counter to ensuring the rule of law, which requires that individuals be able to speak freely in legal proceedings. The stipulation that accusations of illegal acts can only be made if proven would essentially prevent any such accusations, as proof is unlikely to be available prior to reporting and investigation sparked by investigative reporting, which would rarely if ever be defamatory. As observed above, criticism of the army in particular should be subject to a degree of protection rather than extra scrutiny, given the importance of ensuring transparent oversight of the armed forces.

In 2010 Mouldi Zouabi, a reporter with *Kalima* radio station, was charged with defamation and assault of Khalil Maaroufi, a member of the governing party. The charges came after, on Mr. Zouabi's account, Mr. Maaroufi assaulted Mr. Zouabi and took his press card and recording equipment. Mr. Zouabi was also charged with defamation in relation to a 2009 story criticizing the Tunisian boy scouts, run by Mr. Maaroufi's father. Mr. Zouabi was known for his reporting on violations of socio-economic rights. While the charges predate the Tunisian revolution, the case is bizarrely ongoing as of late 2015.<sup>48</sup>

The Articles in question have also been used numerous times since 2011 in Tunisia to bring charges against individuals engaged in criticizing the authorities.

In 2011 Samir Feriani, a police officer, was taken into custody after writing a letter to the Ministry of Interior alleging serious abuses. Mr. Feriani was charged under Articles 61, 121(ter) and 128 of the Penal Code. In March 2012 Mr. Feriani was sentenced to a fine.<sup>49</sup>

In 2013 Olfa Riahi, a blogger, was brought up on charges under Article 128 of the Penal Code (as well as Article 86 of the Telecommunications Code, discussed below), after she posted hotel receipts on her blog showing the Foreign Affairs Minister had spent several nights at the luxury Sheraton hotel in downtown Tunis. A travel ban was issued against Ms. Riahi. Shortly after her reporting, the Foreign Minister stepped down. Around the same time Raja Ben Slama, an academic, faced charges of defaming a public official for having suggested a top official involved in drafting the new constitution, Mr Habib Kheder of the Ennahda party, had watered down free speech protections.<sup>50</sup>

Alaa Eddine Yacoubi, a rapper, was charged twice in 2013, once with another rapper, with having violated numerous articles of the Penal Code, including Articles 125, 128, 247 and 226 (discussed below), for insulting the police with his rap songs. Mr. Yacoubi and the other rapper taken in with him were allegedly beaten by police while detained. On the first occasion Mr. Yacoubi received a one year and six months sentence, later

<sup>47</sup> Decree Law 115 of 2011.

<sup>48</sup> See IFEX, "Journalist Mouldi Zouabi arrested, detained for eight hours," 1 Feb 2010; CPJ, "Tunisia should drop charges against Mouldi Zouabi," 6 Dec 2010; Kapitalis, "Mouldi Zouabi devant la justice pour des articles publiés au temps de Ben Ali," 22 Sept 2015.

<sup>49</sup> See HRW, "Tunisia: Free Would-Be Whistle-Blower Policeman," 9 June 2011; UNESCO, IPDC, Assessment of Media Development in Tunisia, 2013, 42.

<sup>50</sup> See Yaros, "'Sheraton Gate'; Blogger Olfa Riahi Travel Ban," Tunisialive, 8 Jan 2013; Khalaf, "'Sherationgate' reveals Tunisia's growing pains," Financial Times, 3 Feb 2013; HRW, "Tunisia: Repeal Criminal Defamation Law," 20 March 2013.

reduced to six months, and on the second occasion a one year and nine months sentence, issued in the absence of the defendants, latter overturned on appeal. Despite the lightening of penalties on appeal, the Yacoubi cases demonstrate the susceptibility of individuals who criticize the authorities to criminal charges, as well as the ease with which provisions penalizing criticism of the authorities, violation of public morality and insult can be rolled together and used interchangeably.<sup>51</sup>

2013 also saw charges under Articles 128 and 245 of the Penal Code, and 54 of Decree Law 115, against [Walid Zarrouk](#), a security union member, after a Facebook post criticizing the general prosecutor of the Tunis tribunal for the politicization of prosecutions, and against Zied Al-Heni, a journalist, for criticizing the arrest and trial of a cameraman who had filmed while an egg was thrown at the Minister of Culture. These charges demonstrated a particularly dangerous development, whereby individuals were charged for criticizing the operations of the justice system itself.<sup>52</sup>

In 2015, [Ines Ben Othman](#), a filmmaker, was sentenced to a two-month suspended prison sentence, having already been held for a month in pretrial detention, for allegedly insulting a police officer. Ms. Othman was charged under Article 125 of the Penal Code after she attempted to submit a complaint against the deputy director of a police station due to his harassment of her on Facebook. Ms. Othman and her partner were known for denouncing government corruption.<sup>53</sup>

## Conclusion

Limitations such as those discussed above violate the right to freedom of expression, and the constitutional and international legal obligations of each of the countries in question to protect it, in several ways. In the first place, defamation should never carry a criminal penalty, and hence the location of such articles within penal codes is inappropriate. Public bodies should never be able to benefit from defamation provisions. Insult – as opposed to defamation, based upon statements of facts rather than merely expression of opinion – should not be penalized at all. And, most centrally, no special provisions providing heightened penalties should apply in the case of statements concerning public officials – in fact, a far greater degree of leeway should be provided in such cases, to ensure that individuals are not prevented from raising important matters of public concern.

Of course in reality, the legal provisions in question are used precisely to target and penalize any individuals who challenge government officials. Even were they not applied, the provisions in question would serve to violate the right to freedom of expression, by clearly and directly infringing the right to comment on public affairs and to criticize members of the government, and chilling such forms of speech in practice – in fact, the most effective repressive regimes are likely to witness very few prosecutions, as individuals will be too afraid to speak out in the first place, and fora of public expression will not be available. Note also that many of the provisions in question do not even pretend to penalize defamation, or infringements of the personal reputation of governing figures – directly penalizing insult and criticism instead.

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<sup>51</sup> See Amnesty, "Tunisia: Abusive prosecution of cameraman for filming egg throwing on minister," 4 Sept 2013; HRW, "Tunisia: Rapper Acquitted After 3 Weeks in Prison," 21 Oct 2013; Justice Denied, "Rapper Klay BBJ Acquitted of Insulting Police by Appeals Court," 28 Oct 2013.

<sup>52</sup> See Slama, "Security Union member arrested after making accusations against government," *TunisiaLive*, 10 Sept 2013; HRW, "Tunisia: Spate of Prosecutions for Free Speech," 13 Sept 2013; Lambroschini, "Zied el-Heni: Latest victim of media crackdown in Tunisia," 14 Sept 2013.

<sup>53</sup> See Labidi, "Tunisie: Inès Ben Othman et Yassine Ayari, deux activistes en prison pour avoir dit ce qu'il ne fallait pas dire," *Huffington Post*, 26 Dec 2014; Fryd, "Update: Amnesty International takes stand against Ben Othman's Prosecution," 8 Jan 2015; Amnesty, "Film Director Ines Ben Othman Released," 21 Jan 2015.

## 2.2 Penalization of offending the country's reputation or sovereignty

### □ Egypt

In addition to criticisms of various specific government authorities, Article 178(ter) of Egypt's Penal Code penalizes harms to the country's reputation, whether through "departing from fact, incorrect description, emphasizing improper aspects, or by any other means".<sup>54</sup> The article penalizes not only the creation of such content, but also possessing for the purposes of distribution, importing, exporting, or transporting material that might be adjudged to fall under the above description – noting that the penalty applies even when the content in question is not publicly disseminated.

### □ Morocco

Article 41 of the Press Code,<sup>55</sup> mentioned above, also penalizes publications that undermine Morocco's territorial integrity. Needless to say, this prohibition is exceedingly broad and vague, such that it might easily be used to target those who peacefully call for greater degrees of autonomy or independence – particularly relevant to the situation in Western Sahara, of course.

### □ Tunisia

Article 61(4) of Tunisia's Penal Code<sup>56</sup> imposes extreme penalties on whoever in wartime maintains contact with the subject of a foreign power, without permission. Article 61(bis) – added shortly before the Ben Ali regime was overthrown – penalizes 'undermining Tunisia's territorial integrity', or making direct or indirect contact with the agents of a foreign power, or with a foreign institution or organization whose purpose is to prejudice the interests of Tunisia.

Article 61(4) is clearly extremely overly broad. Article 61(bis) is also broad and vague, written in language that could easily be used to target human rights organizations that might make contact with the international community in order to publicize human rights issues.

## Conclusion

Penalizations of harming a country's reputation, territorial integrity or national security are all overly broad sorts of penalizations that complement articles of law allowing penalization of those who criticize the authorities by allowing for penalties to be applied to those who do not directly criticize the regime, but whose message those in power disapprove of for one reason or another. These clauses are particularly worrying in that they may be used to target human rights defenders or journalists who publically criticize the situation in the country in question. The overall effect is to create a situation where neither the authorities nor the policies or governance of the country in question can be challenged.

<sup>54</sup> Egypt Penal Code, Law 58 of 1937.

<sup>55</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>56</sup> Tunisia Penal Code, Law 68-23 of 1968.

## 2.3 Penalization of statements violating 'public morality' or religion

### □ Egypt

Article 98(f) of Egypt's Penal Code penalizes with 6 months to 5 years imprisonment whoever "uses religion to advocate or propagate... extremist thoughts with the aim of instigating sedition and division or disdain and contempt of the heavenly religions... or prejudicing national unity or social peace."<sup>57</sup> The clause has hence been a primary vehicle for prosecuting any who challenge traditional religious beliefs. As noted, religion as such should never be protected by defamation clauses; while the language in Article 98(f) is particularly vague, any clause along these lines is likely to be vague in effect, since such clauses allow any individual to claim that they have been offended and for suit to then be commenced. Needless to say, the result of such provisions in practice is inevitably to persecute those who voice views discordant with those of the majority, whereas offense to minority religions is generally tolerated (in contrast to the effect of a well-designed hate speech regime).

Article 160 of Egypt's Penal Code applies imprisonment and/or a fine on, *inter alia*, anyone who desecrates religious symbols, and Article 161 applies the same penalties to printing sacred books with intentional distortions of their meaning, and to holding religious celebrations in public with an intent to mock. While the language of these articles is not as egregious as Article 98(f), both articles have also been relied on to bring charges against those advocating counter-majoritarian views, and both seem clearly designed to protect majority sentiment against minority challenges, in contravention of human rights law principles.

Article 176 of Egypt's Penal Code penalizes the incitement of hatred of a sect or a people, if such incitement is liable to disturb public peace. Article 20 of the Press Code prohibits publication of information disrespectful of the cast, creed, nationality or religion of any individual, or which demonstrates racial bias, with penalization of imprisonment and/or a fine supplied by Article 22. While international human rights law requires the penalization of hate speech, it is important that the laws around such penalization be tightly defined to ensure that the law is properly applied, including through ensuring that ideas as such cannot invoke hate speech penalties, but only attacks on particular groups of people with the intent of provoking the imminent risk of discrimination, hostility or violence. In this context, of course, it is minority groups, and not the majority, that are in particular need of protection. Unfortunately, in Egypt and elsewhere, vague hate speech clauses become a means by which the majority penalizes the minority for holding alternative views, and thereby serve the exact opposite purpose from that for which they are designed.

The clauses penalizing individuals for violating public morality have been frequently applied in Egypt. While some cases make it to court, others are settled outside the courthouse. When charges are made public, those accused might be directly assaulted by a crowd; and even where that does not occur, the nature of the charges often leads to little chance for a fair trial, and little chance of police protection for those accused. Beyond such practical matters, of course, the broad and vague nature of the provisions of law relied upon makes a fair trial extremely difficult, over and above the fact that the underlying conduct imputed is a legitimate exercise of freedom of expression which should not incur any punishment in any case.

2011 saw numerous convictions on the grounds of insulting religion in one form or another.<sup>58</sup> On 21 March Naima Wahib Habil, principal of a school in al-Maragha, was sentenced to two years in prison under Article 98(f) for defaming Islam. Numerous demonstrators protested against Ms. Habil before she was charged and prior to her sentencing, despite questions as to the veracity of the claims made against her.

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<sup>57</sup> Egypt Penal Code, Law 58 of 1937.

<sup>58</sup> See generally on this issue and for more information on the following cases Ibrahim, "Besieging Freedom of Thought," EIPR, August 2014.

On 12 April Karam Saber Ibrahim, the author of "Where is God", a collection of short stories about poor farmers in Egypt, and director of the Land Center for Human Rights, had complaints filed against him together with his publisher under Article 161 of the Penal Code, on the basis of the content of his book, which the complainants alleged insulted Islam. He was sentenced to five years in prison in 2013, with the judgment confirmed on appeal June in 2014.<sup>59</sup>

On 18 June a complaint was filed against Mohamed Fahmi Abd al-Sayyad Asfour, following allegations that he had insulted the prophet due, it seems, to his Shia religious affiliation. In April 2012 Mr. Asfour was sentenced to three years in prison for allegedly violating Article 160, reduced to one after appeal in July.

On 17 August, Ayman Youssef Mansour, a blogger, was charged under Articles 98(f) and 160 (inter alia) of the Penal Code and sentenced to three years in prison for allegedly insulting the Quran and the prophet on Facebook; the charges were upheld on appeal in January 2012. The decision did not give any indication as to the precise questionable content allegedly shared by Mr. Mansour.<sup>60</sup>

In late December, hundreds gathered to protest against Gamal Abduh Gad al-Sayyed Masoud, a minor, following claims that his Facebook page contained images defaming the prophet, and Gamal's home and those of neighbors were targeted with stones and Molotov cocktails, with several set fire; Coptic homes in neighboring villages were also set on fire. Gamal was meanwhile detained, and then brought up on expedited charges under Penal Code Articles 160, 176 and others. On 3 April 2012 Gamal was sentenced to three years imprisonment, a judgment confirmed in May 2012. The trial sessions were reportedly marked by irregularities and attacks on defense lawyers.

2012 saw a continuation in the prevalence of prosecution.

In 2011 a suit was filed against Adel Imam, an Egyptian actor, on the allegation that his films were insulting to Islam. In January 2012 Mr. Imam was sentenced under Article 98(f) to three months imprisonment and a fine. The charges were dropped on appeal in September 2012, however – while on the one hand the overturning of the charges was positive, their overturning in this case in particular seemed more predominantly to indicate rather the selectivity of morality charges on the basis of the social position of the defendant.

February 2012 saw charges that had been brought in 2011 under Articles 98(f), 161, 176 and others against Naguib Sawirus due to a picture of a mouse with a beard and another in a headscarf on his webpage dismissed, on the grounds that plaintiffs lacked standing. Once again, while the dismissal was positive, it seems likely another result would have been reached had the defendant not been as wealthy or powerful.

In February Makarem Diab Said, a Christian, was sentenced to six year in prison, including due to charges under Article 160 of the Penal Code, following a conversation with Muslim colleagues during which he asked why the prophet had married so many women. Charges were also brought against Mr. Said under Article 176 of the Penal Code, highlighting once again the problem with the manner in which vague hate speech provisions are used in practice discussed above. Mr. Said's trial was marked by numerous irregularities; his defense lawyer was not informed of the first session, and when he did find out about its occurrence, was prevented from entering the first trial session by a large crowd gathered outside, for instance. Mr. Siad's sentence was upheld in April, on which occasion defense attorneys were again prevented from presenting a defense and

<sup>59</sup> See also CIHRS, "Sentencing 'Karem Saber' to five years for charges of defamation of religion is a flagrant violation of freedom of opinion and expression," 13 June 2013; el-Gazzar, "The Defamation of Religion and Karam Saber, Again," Sampsonia Way, 24 March 2014; HRW, "Egypt: Repeal Law Used to Convict Author," 4 June 2014; ESCR-Net, "Egypt: Allow Karam Saber, a human rights defender, to remain free," 4 June 2014.

<sup>60</sup> See also Diab, "Egypt must protect the right to insult," Guardian, 27 Oct 2011.

assaulted by individuals present in the courtroom. Local authorities refused to comply with the attorneys' attempt to press charges following this assault.

In April charges of insulting Islam brought against six film workers under Article 98(f) were dismissed by the Agouza court in Cairo. In the course of a rare positive judgment, the court stated that Article 98(f) of the Penal Code was intended to protect national unity and social peace, not the revealed religions, and that penalization based on broad and loose categories would serve to prevent religious discourse, and violate the rights to freedom of expression and belief.

July saw another positive judgment issued in a case brought against two Islamic thinkers, Dr. Sayyed al-Qimni and Dr. Hassan Hanafi. The defendants had been awarded a prize in the social sciences; the suit demanded that the award be revoked, due to their allegedly anti-Islamic views. The first circuit court of administrative justice rejected the allegations, however, holding along the way that to reach another outcome would have violated the rights to freedom of belief and the pursuit of knowledge, which are protected inter alia by the international conventions Egypt has ratified.

The same month saw a dramatically abuse decision in the case of Bishoy Kamil Kamel, a Christian teacher, however. Mr. Kamel was accused by his colleague of posting messages insulting Islam on Facebook. During pretrial detention and trial, protesters demonstrating against Mr. Kamel gathered outside the prosecution offices and courthouse, preventing Mr. Kamel from being brought into the courthouse on occasion, and attempting to attack his defense attorneys. On 18 September Mr. Kamel was sentenced to six years in prison under Articles 161, 176 178 and 179 (inter alia) of the Penal Code, despite serious questions as to his responsibility for the Facebook page in question. The conviction was upheld later in the month.

On 13 September Alber Saber a crowd gathered outside Saber's house, demanding that he come down and alleging that he had defamed Islam and the prophet through sharing a provocative film on his Facebook account. When the police responded to calls from Mr. Saber's mother, they took him into custody, where he was assaulted by other prisoners reportedly with the encouragement of the police. Mr. Saber's house was meanwhile broken into and his mother forced to flee. Charges under Articles 98(f) and 160 of the Penal Code were brought against Mr. Saber the following day and he was placed in incommunicado detention in poor conditions. On 12 December, Saber was to three years in prison, despite the fact no evidence he had shared the trailer for the film Innocence of Muslims, under accusation of which he was originally charged, ever emerged, and despite violations of his right to defense.<sup>61</sup>

On February 26 2013, Amr Abdullah, a Shia Muslim, was sentenced to five years in prison under Article 98(f), after he entered Cairo's Hussein Mosque on the Shia holy day of Ashura.<sup>62</sup> In June 2013, Roman Murad Saad, a Coptic lawyer, was sentenced in absentia to a year in prison under accusation of having insulted the Quran, and Demiana Emad Abdelnour, a Coptic teacher, was sentenced to a 100,000 pound fine following accusations by the parents of a student that she had defamed Islam; a year later, on appeal by Ms. Abdelnour, a six month jail term was added.<sup>63</sup> On October 26, Sharif Gaber was arrested after declaring himself an atheist on a social networking site.<sup>64</sup>

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<sup>61</sup> See also Amnesty, "Egypt: Outrageous guilty verdict in blasphemy case an assault on free expression," 12 Dec 2012; CIHRS, "The prison sentence against Alber Saber: another nail in the coffin of democracy," 13 Dec 2012; Human Rights First, "Alber Saber Sentenced to Three Years in Prison: A Case Study in 'Blasphemy Law' Persecution," 19 Dec 2012.

<sup>62</sup> See HRW, "Egypt: Repeal Law Used to Convict Author," 4 June 2014.

<sup>63</sup> See CIHRS, "Sentencing 'Karem Saber' to five years for charges of defamation of religion is a flagrant violation of freedom of opinion and expression," 13 June 2013; EIPR, "Sentencing Demiana Abdelnour with a 100 thousand pounds fine - religion defamation claims have become a weapon for the oppression of religious minorities," 13 June 2014; Ahram Online, "Coptic teacher gets 6 months in jail for 'insulting Islam'," 15 June 2014.

<sup>64</sup> See HRW, "Egypt: Repeal Law Used to Convict Author," 4 June 2014.

April 2014 saw Mohammed Ahmed Suleiman and Khalifa Mohamed Khair sentenced to six months imprisonment on charges of contempt for Islam. June 2014 saw Kirolos Ghattas, a Copt, sentenced to six years imprisonment, after allegations he had posted content insulting to Islam on his Facebook page. Bishoy Armia Boulos, a convert to Christianity, was sentenced to five years imprisonment the same month, officially due to his journalistic reporting on anti-Christian attacks in Minya governorate, though his lawyer has suggested the sentence was due to his being a convert. Kirolos Shawky, another Copt, was also sentenced to six year in prison for having liked a Facebook page that later published an anti-Islamic cartoon, after a mob of angry men carrying Molotov cocktails had gathered outside his house.<sup>65</sup>

In December 2014, Fatima Naoot, a columnist, was charged following criticism of the slaughter of animals during Eid al-Adha on Facebook. In 2015 Naoot's defense attorney filed charged against the lawyer who had brought the charges, alleging he had insulted the courts, while Naoot suggested on her Facebook account that he was a Muslim Brotherhood supporter. Later in 2015 Naoot announced plans to run for parliament, out of opposition to religious parties.<sup>66</sup>

In January 2015, Karim Ashraf Mohamed al-Banna was sentenced to three years in prison for having stated that he was an atheist on Facebook, a claim taken as an insult to Islam. Mr. al-Banna was arrested at a cafe in Beheira governerate in November 2014, which was later closed down on the grounds that it was an 'atheists cafe'; another 'atheists cafe' was closed down in Cairo the following month.<sup>67</sup>

On 8 April, a Coptic teacher and five students were arrested for making a video making fun of ISIS. On 28 April, Michael Mounir Bishay was sentenced to a year in prison for sharing a video of two Muslim sheikhs, that had aired on an Egyptian TV channel, on Facebook. On 12 May, Mahmoud Dahroug, a Shia, was sentenced to six months for possessing Shia books.<sup>68</sup>

On 31 May 2015, Islam El-Beheiry, a television host and reformist Islamic scholar, was found to have insulted Islam and sentenced to five years imprisonment under Article 98(f). The charges followed complaints by Al Azhar concerning Mr. Beheiry's show. The court judgment was upheld on 10 October.<sup>69</sup>

As one authority has observed, while blasphemy prosecutions declined slightly after Morsi's ouster, they had returned to previous levels by late 2014.<sup>70</sup>

<sup>65</sup> See Casper, "Christian Convert Arrested in Egypt: Details and Background," Arab-West Report, 10 Dec 2013; EIPR, "After Luxor Misdemeanor Court sentenced to imprisonment of 6 months to a teacher on charges of contempt of religion" 19 June 2014; Salama, "Egyptian Christian jailed for contempt of religion," AP, 21 June 2014; Roddy, "Blasphemy: Intolerance in Egypt," Tahrir Institute for Middle East Policy, 8 August 2014; Haddon, "In Sisi's Egypt, Blasphemy is Still a Crime," Foreign Policy, 21 April 2015; Immigration and Refugee Board of Canada, "Egypt: Situation of Coptic Christians, including treatment," 8 May 2015.

<sup>66</sup> See Egyptian Streets, "Egyptian Writer to Stand Trial for Criticizing Islamic Sacrificial Rituals on Facebook," 27 Dec 2014; Fekki, "Renowned writer's trial for 'insulting Islam' on Facebook adjourned to 29 July," Daily News Egypt, 27 May 2015; Nanns, "Trial against Fatima Naoot continues," Daily New Egypt, 30 July 2015; Ezzidin, "Questions for a parliamentary candidate: Fatima Naoot," 29 Sept 2015.

<sup>67</sup> See Mada Masr, "Authorities raid, close 'atheists' cafe' in downtown Cairo," 14 Dec 2014; HRW, "Egypt: 3-Year Sentence for Atheist," 13 Jan 2015; Greenslade, "Egyptian student jailed for proclaiming that he is an atheist," Guardian, 13 Jan 2015.

<sup>68</sup> See Haddon, "In Sisi's Egypt, Blasphemy is Still a Crime," Foreign Policy, 21 April 2015; Testimony of Samuel Tadros, "Egypt Two Years After Morsi: Part 1," House Committee on Foreign Affairs, Subcommittee on the Middle East and North Africa, 20 May 2015.

<sup>69</sup> See Cairo Post, "Islam Beheiry sentenced to five years in prison," 31 May 2015; Moftah, "Sisi Islam Reform: Blasphemy Case Against Reformist Islam El-Beheiry Undercuts Egyptian President's Call for Muslim Religious Revolution," International Business Times, 2 June 2015; Daily News Egypt, "TV presenter Islam El-Beheiry's imprisonment upheld," 10 Oct 2015; Daily News Egypt, "ANHRI demands acquittal of TV-presenter Islam El-Beheiry," 12 Oct 2015.

<sup>70</sup> See Haddon, "In Sisi's Egypt, Blasphemy is Still a Crime," Foreign Policy, 21 April 2015, citing Ishak Ibrahim, EIPR researcher.

## □ Morocco

Finally, in addition to penalizing insults to the royal family and the undermining of territorial integrity, Article 41 of Morocco's Press Code<sup>71</sup> also penalizes publications that undermine Islam. Such a provision is of course susceptible to the same criticisms as leveled above – what exactly constitutes such undermining is left extremely vague – in addition to which, of course, the privileged place given to Islam in particular constitutes a violation of the rights to freedom of religion and to freedom from discrimination. It is also worth emphasizing, of course, the interesting combination of the prohibitions of these three elements – royal family, territorial integrity, and Islam – in a single article, indicating, as it were, the attempt by those in power to weave all three together into a single source of legitimacy – and hence providing insight into the manner in which authorities in Morocco attempt to ensure their hegemony.

Article 59 of Morocco's Press Code penalizes with fine and imprisonment whoever creates or disseminates content contrary to public morals; Article 60 penalizes with both or either of the same penalties public speech with similar effect; and Article 61 makes editors, publishers and distributors potentially liable for such penalizations as well as authors. While public morals may be an ultimate grounds for limitation, articles of the law that penalize speech simply for offending public morals are overly broad and vague, and liable to be used to attack speech the majority do not approve of in practice – as indeed, such clauses are used in Morocco and elsewhere. Article 64 of Morocco's Press Code compounds the problem, by enabling the police, provided they have notified the prosecutor, to seize materials which 'through their character of being contrary to public morals present an immediate danger to public morals', as well as allowing materials to be seized at the border. Needless to say, this clause places discretionary power largely into the hands of the police, making clear that public morals will serve in practice as a grounds to police content the authorities do not approve of.

Articles 65 and 66 of Morocco's Press Code also target offenses to public morality, through penalizing the provision of materials that offend public morality to children or the public advertising of such materials, and by allowing the authorities to seize such material, or to ban public shows found to be indecent. While of course special provisions to protect children from indecent materials are not uncommon in laws around the world, the vagueness of the provisions in question (which only refer to harm specifically directed against children in places) means that once again they may be used to target material that is not offensive as such, but only to the majority and/or the authorities.

Article 39(bis) of Morocco's Press Code penalizes whoever sets out to incite racial discrimination, hatred or violence against a person or persons because of their race, origin, color, ethnicity or religion with imprisonment and/or a fine. While, as noted relative to Egypt, states are required to prohibit hate speech, it is important that provisions on hate speech be tightly defined, as otherwise they are liable to in practice serve precisely as a tool for the majority to silence minorities, the aim they are intended to help to preclude.

Article 483 of Morocco's Penal Code<sup>72</sup> prescribes imprisonment and a fine for outrages against public decency through nudity or obscenity. As with the clauses above, this clause is vague and threatens serious penalties, and is hence easily subject to abuse.

Charges against Moroccan rapper [Othamn Atiq](#), discussed above, included not only offending a state institution, but also harming public morality, demonstrating once again the tightly intertwined use in practice of such provisions.<sup>73</sup>

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<sup>71</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>72</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

<sup>73</sup> See HRW, "Unjustly Jailed Rapper to Go Free," 11 Nov 2014.

In July 2015 charges of having 'offended public morals' were brought against two women who had been harassed by men due, apparently, to having worn tight dresses.<sup>74</sup>

## □ Tunisia

Section Three of Tunisia's Penal Code<sup>75</sup> concerns attacks on morals. Articles 226 and 226(bis) of Tunisia's Penal Code punish with imprisonment and fine those who offend public decency, or draw attention to opportunities to commit debauchery. These clauses are overly broad and vague, providing neither a clear test of the sort of behavior that will be penalized, nor ensuring that such penalization is sharply limited to only those activities which merit it. Such provisions are ripe to be abused in practice to target behavior and individuals the majority and/or the authorities disfavor.

Article 121(ter) of Tunisia's Penal Code penalizes those who disseminate materials liable to cause harm to public order or public morals. This clause too provides a ripe grounds for abuse similar to the articles discussed above. Article 121(ter) is particularly serious in that it imposes up to five years in prison as a penalty.

Article 53 of the Decree Law on Media Freedom, Printing and Publishing<sup>76</sup> in Tunisia imposes a penalty on those who use places of worship for partisan, political propaganda. While the apparent intent behind this article is reasonable, the article as drafted is overly broad, as it is not clear where the boundaries of what constitutes political propaganda might fall. Religious institutions should be able to campaign for greater social justice. At the same time, utilization of religious institutions for direct political purposes – campaigning, endorsement of candidates and the like – is reasonably outlawed.

Article 52 of the Decree Law penalizes through imprisonment and fine incitement of hatred between races, religions or populations through the dissemination of ideas based on racial discrimination, religious extremism or regional or tribal sectarianism. While as noted elsewhere the penalization of actual hate speech is positive, laws in this area can easily be abused; as such, the provision in question should be specified to a far greater degree in order to ensure it is not applied to target legitimate expression or generally applied in a discriminatory manner.

Article 121(ter) of Tunisia's Penal Code has been the primary vehicle used in prosecutions.

In 2012, two individuals, Jabeur Mejri and Ghazi Beji, were prosecuted for publishing what were deemed offensive depictions of the prophet Mohammed on Facebook. While Ghazi Beji fled the country, Jabeur Mejri was imprisoned with a seven and a half year sentence. He was released in 2014 by presidential pardon, after he wrote a letter of apology.<sup>77</sup>

2012 also saw Nassredine Ben Saida, the publisher of a tabloid, was penalized for having published a controversial fashion picture of a footballer with his girlfriend, while the head of a television station faced blasphemy charges for having allowed the broadcast of Persepolis. Two sculptors were also charged due to artwork that was perceived to be immoral.<sup>78</sup>

<sup>74</sup> See Spencer, "Two hundred lawyers defend Morocco women tried for wearing dresses," The Telegraph, 7 July 2015.

<sup>75</sup> Tunisia Penal Code, Law 68-23 of 1968.

<sup>76</sup> Decree Law 115 of 2011.

<sup>77</sup> See HRW, "Tunisia: Seven Years in Jail for Mocking Islam," 6 April 2012; Goldstein, "Human Rights and Culture Wars in the New Tunisia," HRW, 17 July 2012; Popescu, "Jabeur Mejri," Literary Review, July 2013; Amnesty, "Jabeur Mejri, Imprisoned for Facebook Posts in Tunisia," 9 May 2014.

<sup>78</sup> See HRW, "Tunisia: Drop Charges Against Artists," 3 Sept 2012.

2012 also saw a proposed amendment to the Penal Code that would have strongly reinforced the penalties in these areas; fortunately, the amendment was not passed.<sup>79</sup>

## Conclusion

As the above makes clear, limitations of speech on the basis that it violates public morality or constitutes an offense to religion are overly vague and exceptionally susceptible to partisan application, as well as constituting fundamentally unjust grounds upon which to restrict speech in the first place. As Moroccan law makes clearest, in the law itself such limitations are seen as a natural extension and component of the protection of both the ruling authorities and the state itself. This of course constitutes a double move, both attempting to claim for the ruling authorities some sort of divine mandate, and consequently some degree of religious authority, while also pandering to the beliefs of the majority and using religion generally as a tool in public spaces through which to generate popular support. Needless to say, in reality this leads not only to a variety of unjust and inappropriate limitations on speech, but also to scant regard for the factual basis for prosecutions, which serve the purpose of providing public theater as much as addressing any real harm, such that the actual guilt or innocence of the defendant is of little concern.

## 2.4 Overly broad penalizations, for instance of spreading 'false news'

### □ Egypt

Article 80(d) of Egypt's Penal Code penalizes with imprisonment and/or fine deliberate disclosure of "false or tendentious news, information or rumors concerning the country's internal situation, which is bound to weaken the country's financial credibility, dignity, and prestige, or exercise of... an activity that is liable to cause damage and harm the national interest."<sup>80</sup>

Article 102 penalizes with imprisonment of up to a year and/or a fine of two hundred pounds whoever through "speaking loudly or singing... stirs up sedition". Article 102(bis) prescribes imprisonment and a fine for the deliberate dissemination of "news, information, or false or tendentious rumors... if this is liable to disturb public security, cause alarm among the people, or cause harm to public interest". Article 102(bis) also states that the penalties in question shall apply to anyone who possesses materials that might invoke the liability of the first part of the Article, if they are prepared for distribution or access; and to any institution that has assisted in the dissemination of such materials through printing, recording or similar means.

Article 135 penalizes informing the Egyptian authorities of "disasters, incidents or risks that in fact have no existence". While there may be a reasonable intent behind this provision, the article as written is excessively vague, and would seem to serve to deter Egyptian citizens from informing the authorities as to various threats of which the authorities would hope to be well informed.

Article 171 penalizes whoever induces a crime through "talk, shouting, deed, or a hint insinuated in public, by writing, drawing, pictures, photographs, marks and symbols, or any other method of public representation".

While of course incitement to crime may reasonably be criminalized, the nature of the article in question – which essentially leaves the matter at that, suggesting a 'hint' alone is enough for incitement – suggests it might easily be applied to hold figures the government does not like, for instance members of opposition parties or groups, to

<sup>79</sup> For more, see Human Rights First, "Blasphemy, Freedom of Expression, and Tunisia's Transition to Democracy," May 2013.

<sup>80</sup> Egypt Penal Code, Law 58 of 1937.

account for incidents which in fact they had not intended. Article 177 penalizes incitement to disobey the laws. This is of course in large part a problem because Egypt's laws do not otherwise conform to its human rights obligations; insofar as they are often overly vague, such that whether or not a law has been broken becomes a matter of government discretion, such a provision also serves to magnify the lack of clarity within the legal system.

Article 187 penalizes anyone who publicly disseminates some statement or information that is "liable to influence" judicial figures or witnesses, or "influences public opinion in favor of a party to the case, or the investigation, or against that party." While clearly improper interference with witnesses or the conduct of an investigation is rightly penalized, the clause in question is extremely broad and vaguely worded, such that it might be used to penalize any commentary on a case in practice, including for instance criticism of due process violations.

Article 188 penalizes through imprisonment and/or a fine publishing "with ill will" false news, data, or rumors... that are "likely to perturb general peace, create fright among the people, or cause harm and damage to public interest."

The provisions in question are excessively vague, and hence can easily be used to penalize those against whom authorities might wish to take action for other reasons; as such, even if not applied, they are likely to chill free speech. Article 102(bis) of Egypt's criminal code is particularly excessive in this regard for instance – since it refers to a broad range of information that might be disseminated, including simply news or information, and since it allows for prosecution in cases where the news or information is 'liable' to disturb public security, without reference to either ill will or the falsity of that information. While Article 188 adds those limits, the vagueness of determining falsity in the context in question, as well as the essential discretion left to the authorities in determining what constitutes a harm to public interest, mean in practice the article could easily be applied with the same excessive breadth. In effect, such clauses potentially criminalize any but the most banal and harmless of public statements.

The most infamous charges for spreading false news were those brought against [three Al Jazeera International correspondents](#), detained in 2013 and sentenced in 2014, along with a number of other international journalists tried in absentia. The *Al Jazeera* journalists were eventually pardoned in September 2015, after extensive jail terms. As numerous organizations have pointed out, however, the pardons only concerned a small number of those arbitrarily detained in Egypt, and did nothing to address the systemic problems relative to freedom of expression and other rights addressed here and elsewhere.<sup>81</sup>

In November 2015, investigative journalist and human rights defender [Hossam Bahgat](#) was detained by the authorities, apparently due to an investigate piece he had written concerning a secret trial of alleged coup conspirators in Egypt's army.<sup>82</sup> Mr. Bahgat was charged under article 102(bis) and 188 of the penal code; he was released following extensive international outcry however a few days after he was detained, in which context it was not clear if charges were still pending.<sup>83</sup>

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<sup>81</sup> See, e.g., Amnesty, "Egypt frees Al Jazeera staff jailed for journalism," 23 Sept 2015; Article 19, "Egypt: Presidential pardon is an inadequate step towards freedom of expression," 23 Sept 2015; CPJ, "CPJ urges Sisi to release all journalists jailed in Egypt," 24 Sept 2015.

<sup>82</sup> That piece is Bahgat, "A coup busted? The secret military trial of 26 officers for plotting 'regime change' with the Brotherhood," Mada Masr, 14 Oct 2015.

<sup>83</sup> See Mada Masr, "Update: Hossam Bahgat has been released, unclear if charges still pending," 10 Nov 2015.

## □ Morocco

Article 42 of Morocco's Press Code<sup>84</sup> penalizes with imprisonment and/or fine the publication or dissemination in bad faith of false allegations, inaccurate facts, or fabricated documents which disturb public order or arouse fear, or affect the morale of the army (in which case a longer prison sentence potentially applies). That the limitation that the provision will only apply in instances of bad faith is built into this article is positive; the penalization of publications that 'disturb public order or arouse fear' however remains an extremely broad and vague underlying grounds for penalty. Moreover, what little protection might be found in the requirement of bad faith is only effective to the extent the onus of proving such bad faith is placed on the prosecutor – whereas in fact, Article 50 of Morocco's Press Code creates a presumption of bad faith that must be defeated by the author of the statement in question, the proof of which in practice is likely to frequently prove impossible.

Article 43 of Morocco's Press Code penalizes with a fine those who publish false or defamatory information that causes or attempts to cause the withdrawal of public funds. This clause is in many ways even vaguer than Article 42, as it is not clear what exactly is meant by the withdrawal of public funds, and hence also represents a potential source of unjust penalization.

Article 51(bis) of Morocco's Press Code penalizes with imprisonment and/or fine the publication of information infringing the privacy of another – while this may be a reasonable basis for liability, the clause as it stands is vague and in need of further clarification to prevent abuse.

Article 55 of Morocco's law imposes limits on what may be reported relative to trials. While much of the intent of the article is reasonable, the language is overly vague in several areas, and might allow the article to be used to shut down reasonable and important discussion and debate concerning court judgments.

Article 447 of Morocco's Penal Code<sup>85</sup> penalizes with fine and imprisonment the sharing by employees of 'factory secrets', a penalization that increases when the information is shared with foreigners or Moroccans abroad. This clause is excessive in many ways; from the point of view of freedom of expression, the clause is both broad and vague, and might easily be used to penalize workers seeking to expose inadequate conditions and workplace rights issues, for example.

In July and August 2015 Hamid Elmahdaouy, editorial director of the *Badil.info* website, was twice convicted, *inter alia*, of publishing false news under Article 42 of the Press Code, and *Badil.info* was shut down for three months. Mr. Elmahdaouy was penalized with extensive fines of 130,000 dirhams between the two convictions (approximately US\$13,000). The *Badil* website was set up in 2014, after the shutting down of *Lakome*, discussed below. Like *Lakome*, *Badil* was known for reporting on human rights violations and corruption. One judgment against Mr. Elmahdaouy came on the basis of a report on explosions in and the burning of a car in Meknes in 2015, an event the authorities had recognized and that other news outlets had reported on without prosecution. The other came on the basis of reporting on the death of a man following his arrest by police officers in 2014 – a death yet to be accounted for by the police forces at the time.<sup>86</sup>

Rachid Nini, whose ordeal earlier in the current decade was discussed above, was convicted on 27 July 2015 by the Casablanca Court of First Instance of, *inter alia*, reporting false information after a story reporting that sub-standard materials were used

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<sup>84</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>85</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

<sup>86</sup> See Amnesty, "Morocco: Court orders suspension of news website, editors fined for 'false news' and 'defamation'," 17 August 2015.

by the Ministry of Equipment and Transport in constructing a new highway. An extensive fine of 400,000 dirhams (approximately \$41,000US) was issued.<sup>87</sup>

Charges of spreading false news have also been brought against [Maati Monjib](#), head of Freedom Now, a Moroccan NGO aimed at defending freedom of expression, and a member of the Moroccan Association for Investigative Journalism, and [Karima Nadir](#), Vice-President of the Moroccan Association for Digital Rights, following assistance in the preparation of a report documenting violations of the right to freedom of expression in Morocco.<sup>88</sup>

## Tunisia

As with Egypt and Morocco, legislation in Tunisia is overly broad and vague in several areas. Particularly troubling however is Article 54 of the Decree Law on Media Freedom, Printing and Publishing,<sup>89</sup> which penalizes the knowing distribution of false news likely to affect public order. What exactly constitutes false news is not clear, nor how it will be assessed whether a particular piece of information or story is 'likely to affect public order'. As such, this article can easily be used to penalize free expression, and even when not applied will exert a chilling effect.

Article 86 of Tunisia's Telecommunications Code<sup>90</sup> penalizes knowingly disturbing the peace via a telecommunications network, while Article 91 of the Code of Military Justice,<sup>91</sup> in addition to the penalizations discussed above, punishes the disclosure of information relating to the military. These articles too do not clearly define their terms or what sort of publications will be problematic, thereby sweeping under their scope much legitimate reporting. All such clauses are likely to prove easy tools for the authorities to use against journalists who seek to report with a critical voice.

Provisions of Tunisia's law such as the above were used prior to the revolution in order to target journalists. In one particularly serious case a number of journalists, including [Fahem Boukadous](#), a reporter for the *Al-Hiwar Attounsi* TV station, were sentenced to six, later reduced to four years in prison for allegedly forming and belonging to a criminal association and spreading reports liable to disrupt public order. In fact, the journalists' 'crime' had been reporting on protests against poor economic conditions, rights violations and corruption in Gafsa in 2008.<sup>92</sup>

These provisions have also been frequently employed since the revolution to target individuals engaging in speech particular authorities did not like. In 2011, [Hajlaoui Nabil](#), an agronomist, was sentenced to two months in prison for criticizing the military.<sup>93</sup>

In 2012, [Ayoub Massoudi](#), a former presidential advisor, was charged under Article 91 of the code of military justice and Article 128 of the Penal Code following criticism of the army's role in the extradition of Libya's former prime minister to Libya. He was later given a suspended sentence and a fine by a military court.<sup>94</sup>

<sup>87</sup> See id.

<sup>88</sup> See RWB, "Monarchy's Red Lines Gag Morocco's Independent Media," 7 Sept 2015; CIHRS, "The Moroccan government should halt all restrictions on civil society and stop harassment of human rights defenders," 22 Sept 2015; El-Rifae, "CPJ joins call for Morocco to end harassment of journalists," CPJ, 29 Sept 2015.

<sup>89</sup> Decree Law 115 of 2011.

<sup>90</sup> Law 1 of 2001.

<sup>91</sup> Promulgated by Decree on 10 January 1957.

<sup>92</sup> See HRW, "Tunisia: Quash Unfair Convictions," 26 April 2010; Prince, "Tunisia – The Imprisonment of Fahem Boukadous (Part one of a series)," View from the Left Bank: Rob Prince's Blog, 2 August 2010; Amnesty, "Tunisie: portrait de Fahem Boukadous," 19 May 2011.

<sup>93</sup> See Abrougui, "Tunisia: Army Critic Sentenced to Two Months in Prison," Global Voices, 10 Nov 2011; HRW, "Tunisia: Dismantle Repressive Ben-Ali-Era Laws," 17 Dec 2011.

<sup>94</sup> See HRW, "Tunisia: Drop Charges for Criticizing Army," 22 Aug 2012; Amnesty, "Freedom of Expression on Trial in Tunisia," 2 July 2013..

In 2013, [Hakim Ghanmi](#) was charged under both Article 91 of the code of military intelligence and Article 86 of the Telecommunications Code, together with the Article 128 of the Penal Code, penalizing defamation of public officials, for publishing statements on his blog criticizing a military hospital for its treatment of his sister-in-law. Mr. Ghanmi was ultimately acquitted by the Supreme Court of Tunisia in 2015, however, after he was finally able to appeal his case there having previously had the case considered by military tribunals.<sup>95</sup>

On 18 August 2013 charges under Article 86 were also brought against [Mourad Mehrezi](#), a cameraman who was filming when an egg was thrown at the Minister of Culture by actor Nasreddine Slihi. Other charges included being drunk in public, causing disorder and conspiracy to assault a public official. Mr. Slihi was also charged with defamation and undermining public morals.<sup>96</sup>

In 2014, [Yassine Ayari](#) was sentenced by a military tribunal to three years in jail for criticizing the defence minister and specific military appointments on his Facebook page. He was sentenced in absentia, as he was out of the country at the time, and then arrested immediately upon his return. In a retrial in January 2015 he was sentenced to a year in prison, which was commuted to six months in March, and released in April under provisions of the code of criminal procedure allowing for release with more than half a sentence served.<sup>97</sup>

2014 also saw charges brought against [Sahbi Jouini](#), a police union leader, after he stated on television that the armed forces had not taken the proper measures to deter an attack on Tunisian soldiers given information available to them. Mr. Jouini was sentenced in absentia (despite being in the country) to two years in prison. The case was dismissed on 13 October 2015.<sup>98</sup>

Needless to say and as the examples demonstrate, the danger of Article 91 is magnified by the fact that charges under the article are frequently brought in military tribunals, in flagrant violation of human rights obligations.

## Conclusion

The charges discussed in this section all violate human rights standards through their overly broad and/or vague nature – usually both – thereby failing to inform individuals as to the standards with which they should comply, and hence broadening the scope of the chilling effect; penalizing a variety of behavior that should not be penalized at all; and admitting extremely flexible application, granting the authorities complete discretion in their use. Of course, the problems described here do not apply to these legal provisions alone – rather, these are merely those provisions where such problems are front and center, as almost all of the legal provisions discussed in this study contain the faults of overly broad and vague language. The impropriety of such provisions is not only a matter of human rights but also of the rule of law and the principle of legality itself – as exceptional vagueness strips articles of law of their generalizability. Reforming the vagueness of legal provisions in the region hence must form an essential part of creating rights and rule of law respecting systems.

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<sup>95</sup> See Amnesty, "Tunisian blogger faces military court for criticizing hospital staff," 28 May 2013; Amnesty, "Freedom of Expression on Trial in Tunisia," 2 July 2013; Kapitalis, "Le blogueur Hakim Ghanmi acquitté par la cour de cassation militaire," 8 Jan 2015.

<sup>96</sup> See Amnesty, "Tunisia: Abusive prosecution of cameraman for filming egg throwing on minister," 4 Sept 2013

<sup>97</sup> See Labidi, "Tunisie: Inès Ben Othman et Yassine Ayari, deux activistes en prison pour avoir dit ce qu'il ne fallait pas dire," Huffington Post, 26 Dec 2014; HRW, "Tunisia: Blogger Convicted by Military Court," 6 Jan 2015; Guellali, "Tunisia Blogger Jailing Shows Flaws in Legal System," HRW, 3 March 2015; Middle East Eye, "Tunisia frees blogger for defaming army in Facebook posts," 17 April 2015.

<sup>98</sup> Tunisia Live, "Sahbi Jouini faces two year prison sentence," 27 Nov 2014; Kapitalis, "Tribunal militaire: Non-lieu pour Sahbi Jouini," 13 Oct 2015.

## 2.5 Inadequate definition of defamation, provisions of defense and exemption and procedural frameworks

### □ Egypt

As already noted, many of the clauses penalizing criticism of the authorities do not limit themselves to statements of fact, but rather encompass statements of opinion. Similarly, Articles 306 and 308 of Egypt's Penal Code penalize insults as such.<sup>99</sup> In contrast, statements of opinion should not constitute grounds for defamation charges.

Articles 302 and 303 of Egypt's Penal Code, the clauses dealing with defamation as such, apply to instances where an individual has attributed to another something which "if true would necessitate" subjecting the person to legal penalty, or would lead to the person in question being "despised" by "patriots and fellow citizens." While the language in question suggests that the statement must be one that can be either true or false, the manner in which this specification is expressed is somewhat vague and could helpfully be clarified. This is enhanced by the vagueness of the clause on the whole, which, while not referring to harms to reputation as expected in a defamation clause, brings in language concerning the purported opinions of 'patriots', suggesting that the clauses might be applied relative to those who question government policies, for instance, thereby limiting discussion of public issues in instances where nothing like defamation occurs.

Articles 302 and 303 moreover double the penalty when the charges are made against a public employee acting in the course of their work; such a penalty may only be avoided if the person who challenged the public employee can show they made the challenge in good faith and can prove the truth of their assertions. Once again, these clauses make clear that far from allowing a greater degree of criticism of public officials, as required by human rights law, the Egyptian Penal Code goes to extra length to protect public officials from criticism. Moreover, by placing the burden of proof on the party not in possession of all the information, the articles as written basically ensure individuals will be penalized for critiquing government officials even where their critiques are in fact true.

Articles 304 and 305 of Egypt's Penal Code positively create an exception to the application of the above provisions where an individual informs the authorities "honestly and without bad faith" of a violation of the law by another, as opposed to informing them of a false matter with bad faith. Article 309 positively creates an exception for statements made in the course of legal proceedings.

The legal system around freedom of expression in particular in Egypt is made more problematic by the possibility of 'hesba' suits – that is, by the possibility for individuals who were not harmed by the statement in question to file complaints that a certain provision of the law has been violated. This is then compounded by the fact that in Egypt it is largely the criminal system that deals with defamation, as the case may then be picked up by the prosecutor and pursued by the state – not only creating the possibility of improper penalties, but putting the case in an unjust posture from the beginning, with the words of the accused being taken as some form of affront to the state.<sup>100</sup>

<sup>99</sup> Egypt Penal Code, Law 58 of 1937.

<sup>100</sup> On the issue of hesba suits see, e.g., ANHRI, "Egypt: Hesba cases and censorship threaten movies," 2 June 2009; ANHRI, "Egypt – Hesba Cases Threaten the Freedom of Creativity Again," 29 Oct 2013; ANHRI, "Egypt: Following the Rejection of a Political Hesba Case Calling for the Revocation of the Egyptian Citizenship of El Baradei, Complaint Calls for Revoking the Citizenship of Bassem Youssef due to Insults," 29 Sept 2014; IFEX, "Egyptian lawyers file complaint calling for satirist Bassem Youssef's citizenship to be revoked," 30 Sept 2014.

## □ Morocco

As in Egypt and as already observed, several clauses of Morocco's law, such as Article 263 of the Penal Code<sup>101</sup> and Articles 41 and 48 of the Press Code,<sup>102</sup> improperly penalize insults. Article 44 of the Press Code and Article 443 of the Penal Code also create a category of penalization for insult as such.

In addition, Article 44 of Morocco's Press Code states that defamation will consist of any allegation or imputation of a fact; it goes on however to state that such a statement will be punished even if expressed in 'tentative terms.' The precise meaning of this phrase is not clear, but it seems quite possible that it might be read to enable prosecution of journalists for reporting allegations made by other bodies, or generally for the presentation of claims in a context in which certainty is not asserted. As such, the article means that Morocco's defamation penalizations might easily be used to target reporting on government corruption and offenses, which are rarely likely to be subject to clear and absolute proof and where serious reporting requires discussion of allegations and the like.

Article 49 of Morocco's Press Code states that the truth of a defamatory matter shall be established 'in the ordinary ways' in the case of imputations against public bodies and officials and the managers of companies. The law does not clearly define what this means, however, nor does it clearly state on whom the burden relative to proof of truth will fall, or what effect the truth content of a statement will have on a suit. It seems, however, that the law intends that the accused must prove the truth of their statements. The law should be amended to state clearly that the plaintiff should bear the burden of proving falsity relative to matters of public concern. Moreover, together with expanding the defenses provided, Article 49 of Morocco's Press Code should make clear that it applies to all instances of defamation.

Article 49 also states that those responsible for publication must have had evidence prior to their publication of the claims in question. Rather than making this an additional requirement, this should be made into an additional grounds of defense, the 'reasonable publication' grounds – such that even if the verity of a statement cannot be proven or its falsity can be shown, publishers may still avoid liability if they can show that publication of the information in question was reasonable in light of the circumstances.

Article 49 also contains unusual language, disallowing proof of the truth of defamatory facts in cases concerning privacy, facts which go back more than 10 years, or facts relating to amnestied or forgiven offenses. While offenses to privacy are naturally a different matter from defamation, they should hence be dealt with as such, through a different set of provisions – by including the clause here, all defamation actions potentially become effective if the accuser can simply state that the matter in question was private, a particular cause for concern relative to matters of public interest. The clauses pertaining to long-past actions and amnestied actions are an even more serious matter, as they appear designed to prevent establishment of a truthful historical record – contrary to the right of individuals to know the truth of past wrongs committed in their society.

Article 73 gives the accused 15 days from receipt of summons in which to state all the relevant sources that will be relied upon in proving the truth of the claim in question; care is necessary to ensure that the prompt nature of this timeframe not prejudice the right of the accused to potentially defend themselves through demonstrating the truth of the matter in question.

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<sup>101</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

<sup>102</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

Article 57 of Morocco's Press Code starts off with a gesture towards immunizing statements made in good faith in the course of court proceedings from defamation liability. The vagaries in the article quickly deprive this initial statement of any protection it might provide, however, by allowing judges to remove statements from the record and to impose damages, as well as to impose injunctions against lawyers or suspend them. The article also states that defamatory statements 'foreign to the cause' of the case may still be subject to action. These broad and vague exceptions, and the discretionary powers placed in the hands of the judge, mean that in fact individuals and lawyers are stripped of any guarantees as to their freedom of speech in legal proceedings, a problem compounded by the penalties applied to those who offend judges under Articles 263 and 266 of Morocco's Penal Code, discussed above. In contrast to the manner in which Article 57 of Morocco's Press Code is currently written, the article should be amended to state clearly that statements made in the course of judicial proceedings should not invoke defamation liability.

Article 51 of Morocco's Press Code imposes a fine and imprisonment in cases where slander or an insult is contained in a letter. The implications of this article are troubling, as they suggest correspondence might be monitored; moreover, since defamation requires publicity, there is no reason to penalize sentiments expressed in private correspondence, which would constitute an undue restriction on freedom of expression.

Articles 59 and 61 of Morocco's Press Code extend liability in matters of offense to public morals to all members of the chain of production and dissemination. Care must be taken in such areas and elsewhere to ensure such provisions are not abused and applied too broadly; and certain types of information carriers, such as internet service providers in particular, should be exempted from liability.

On 22 June 2015 the website *Goud.ma* and its editorial director [Ahmed Najim](#) were convicted of defamation of a Moroccan businessman, following publication of a short summary of a story published elsewhere accusing him of corruption. A hefty fine of 520,000 dirhams (approximately \$53,000US) was issued. The businessman who brought the suit serves as personal secretary to the King.<sup>103</sup>

## □ Tunisia

As we have seen above, numerous clauses of Tunisia's law penalize insults to the authorities (or to flags) in particular. Article 57 of the Decree Law on Media Freedom, Printing and Publishing<sup>104</sup> specifically defines and punishes insults as such as well. Article 55 of the Decree Law positively refers to 'inaccurate' statements, although here too the language could be clarified. Insults should never be subject to penalization under defamation laws, given the vague and subjective nature of claims under such a category, and the extreme effects on both free expression and political discussion created by limitations on expression of opinion.

Tunisian law fails in several cases to specify the proper legal effect to be given to proof of the truth of a claim, and where the burden of proof should fall in different instances. Article 128 of the Penal Code<sup>105</sup> seems to only allow allegations against public officials where proof can already and immediately be provided. Article 246 of the Penal Code provides that slander will be found where the accused cannot provide proof of the fact in instances where the law requires such. While Article 59 of the Decree Law provides a generally positive framework around truth in defamation claims – providing for the defense of truth, and for the burden to be on the claimant in matters of public concern – Article 59 contains several illegitimate and/or vague exceptions, including a clause

<sup>103</sup> See Amnesty, "Morocco: Court orders suspension of news website, editors fined for 'false news' and 'defamation'," 17 August 2015.

<sup>104</sup> Decree Law 115 of 2011.

<sup>105</sup> Tunisia Penal Code, Law 68-23 of 1968.

preventing the defense of truth in cases involving past offenses for which offenders have been pardoned, effectively giving the authorities power to silence discussion of certain issues, and also states that it will not apply in cases of criminal prosecution – depriving defendants of the ability to mount an effective defense under charges that should not even form part of the Penal Code. In contrast to these articles, proving the truth of a matter should always provide a defense; and in cases involving public authorities or other matters of public interest, the plaintiff should bear the burden of proving the falsity of the claims in question.

Tunisian law also fails to provide for the defense of reasonable publication – allowing individuals to defeat defamation claims where they can show that their publication was reasonable in light of the circumstances at the time.

Article 55 of the Decree Law also provides that individuals may be penalized even where the statement that they make is made in the form of language not stating an absolute certainty. As such, this clause might be read to prevent important reporting on allegations that cannot yet be proven, essentially foreclosing the vast majority of important media reporting on public issues and suspect behavior.

Article 58 of the Decree Law limits the situations in which individuals may bring defamation actions relative to the defamation of deceased individuals to situations where living persons are personally affected. In contrast, defamation actions on behalf of deceased persons should never be possible – such actions serve little positive purpose, and may easily be used to squash important historical debate. If the reputation of living individuals is harmed, they may seek recourse to defamation claims in their own right.

## **Conclusion**

The sections above have explored various ways in which laws in the countries studied violate the right to freedom of expression. These violations are compounded by the violations explored in this section. In the first place, by providing inadequate definitions of defamation, and by allowing the penalization of insult and hence opinion in particular, the sort of speech that might be targeted is widened dramatically. Moreover, by penalizing insult the laws in question automatically strip away some of the most important potential defenses in defamation cases – that the burden be on the accuser to demonstrate the truth of the matter in cases of public interest, and that the defendant otherwise have access to the defense of truth, as well as the defense of reasonable publication. It is unsurprising then that these defenses too are generally inadequately provided for even in defamation rather than insult cases. This inadequate legal framework is compounded by several other of the factors mentioned, such as potentially inadequate timelines, refusal to permit qualified statements, broad possibility to bring claims forward, and the like.

The overall result is a framework in which defendants will have an extremely difficult time prevailing in their case, an essentially impossible task when the state is against them, barring an exceptionally independent judge who chooses to rule with broader principles of justice in mind.

## **2.6 Excessive penalties**

As the above review has made clear, the laws of Egypt, Morocco and Tunisia all cast extremely wide nets as to the sorts of expression that may be penalized, including through directly prohibiting several forms of speech of vital importance to the health of a free, rights respecting, democratic society, including criticism of governing authorities in particular. Any penalization in these areas is inappropriate; the countries in question magnify the violation by imposing excessive penalties across the board. Penalties are only appropriate in cases of defamation laws that are not applied to inappropriate categories of speech and where the necessary procedural guarantees are protected, and

even their financial penalties should be applied only where absolutely necessary and with serious consideration given to potential chilling effects; any such penalties must of course not be excessive. Unfortunately, as already noted, the countries considered provide negative examples in these regards. Criminal penalties should never be applied in defamation cases, owing to their extreme chilling effect – unfortunately, the countries in the region continue to utilize legal frameworks where such penalties, including the fairly extreme penalty of imprisonment, are the norm. Such provisions constitute grave violations of freedom of expression, and reflect a vision of the rule of law in which the purpose of the law is to protect the authorities from criticism, to prevent the citizens from engaging in public debate, and to punish those who call for their rights or seek to exercise their right to participate in the governance of their countries.

## □ Egypt

Articles of Egypt’s law which violate Egypt’s human rights obligations by imposing excessive penalties on speech include Articles 80(d), 98(b), 98(f), 102, 102(bis), 133-135, 160, 161, 171, 174, 176, 177, 178(ter), 179, 181, 182, 184-189, 191-193, 201, 302, 303, 306 and 308 of the Penal Code<sup>106</sup> and Article 22 of the Press Code.<sup>107</sup> As observed, speech offenses should not be dealt with by Penal Codes or penalties at all. It is further worth observing that Egypt’s Code of Criminal Procedure<sup>108</sup> was amended on 18 February 2015, to allow judges to exclude witnesses’ testimony during hearings – an amendment widely criticized as it was expected to diminish due process rights in the case of individuals accused of political crimes in particular.<sup>109</sup>

## □ Morocco

Numerous Articles of Morocco’s law violate Morocco’s human rights legal obligations, including Articles 39(bis), 41, 42, 45, 46, 51, 51(bis), 52, 53, 59, 60 and 65 of the Press Code<sup>110</sup> and Articles 263-66, 447 and 483 of the Penal Code.<sup>111</sup> Needless to say, all Penal Code provisions also violate the prohibition, which is not only on imprisonment but on applying penal sanctions to speech.

The impropriety of the sentences imposed in Morocco is compounded by Articles 67-69 of the Press Code, which extend penalties across the production chain. Article 74(bis) moreover imposes steeper sentence on repeat offenders.

In addition, the fines imposed in Morocco are often wildly out of proportion to the underlying offenses in question. Financial penalties should be used as a last resort in defamation cases, and should always only be a civil penalty to be paid to the harmed party, not an automatic fine or a penalty owed to the state.

Infamous in the years prior to 2011 was the case of *Le Journal Hebdomadaire*, which constantly pushed Morocco’s red lines through critical reporting. Following a series of lawsuits, the paper was finally shut down by a \$360,000 defamation penalty in 2006. The judgment was awarded following suit by the director of a Brussels-based think tank, which had published a report on Western Sahara that *Le Journal Hebdomadaire* had characterized as excessively pro-regime viewpoint. The former editor of the paper, Aboubakr Jamai, left the country, though he has continued to edit the French language version of *Lakome*.<sup>112</sup>

<sup>106</sup> Egypt Penal Code, Law 58 of 1937.

<sup>107</sup> Egypt Press Code, Law 96 of 1996.

<sup>108</sup> Egypt Code of Criminal Procedure, Law 23 of 1971.

<sup>109</sup> See Sadek, “Egypt: Council of Ministers Approves New Amendment to Code of Criminal Procedure,” Library of Congress Global Legal Monitor, 25 Feb 2015.

<sup>110</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>111</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

<sup>112</sup> See HRW, “Morocco: Convictions Show Limits on Press Freedom,” 8 May 2006.

## □ Tunisia

As seen above, numerous provisions of Tunisia's penal law impose sanctions based on expression. Articles 65 – 77 of the Decree Law on Media Freedom, Printing and Publishing<sup>113</sup> reinforce this approach, compounding the violation of the right to freedom of expression by doubling down on a criminal approach, in addition to taking the inappropriate step of prescribing penal penalties outside of the Penal Code. Articles 65-67 extend liability to all stages of the dissemination chain. Articles 68 and 69 attempt to straighten out some of the complications around the involvement of the public prosecutor in defamation cases, generally highlighting the inappropriateness of making defamation cases a public matter in the first place.

### Conclusion

Excessive penalization of speech, including penal and carceral penalties in particular, is inappropriate. This is the case both because such penalties are disproportionate and likely to have extensive impact on freedom of expression, and because such penalties evolve the state in extensive and troubling ways in determining what citizens can and cannot say, by converting the matter from a private tort to a public prosecution.

Moreover, laws in the countries studied, as in many countries, often strip those who have been convicted of penal offenses of several of their rights on an ongoing basis, thereby further punishing such individuals in a way that often would be inappropriate even in the case of those who actually merit penal punishments. Finally, the articles discussed above are not exclusive – such that multiple charges, themselves often highly vague, may be brought against individuals on the basis of speech that should not have been subject to any penalization in the first place, granting the authorities total discretion.

Of course, the excessive power that such a legal framework grants to the state, and the extensive chilling effects that such legal frameworks produce, are precisely what states that maintain such frameworks appear to be aiming at. Removing penal sanctions, and limiting the state's ability to police speech generally, is therefore one of the most central tasks of any set of reforms aimed at enabling the right to freedom of expression.

### 3. Recommendations

- Remove all provisions in law which impose additional penalties for speech targeting the authorities; revise legal frameworks to allow more, rather than less, freedom of speech in all areas of public concern;
- Remove or limit all overly broad or vague provisions, including provisions which aim to protect a vaguely defined 'public morality', 'national sovereignty' or 'national security';
- Remove all penalizations of insult;
- Rework procedural provisions to ensure an appropriate regime of defenses;
- Remove all penal sanctions for speech, as well as other excessive penalties.

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<sup>113</sup> Decree Law 115 of 2011.

### III. Issue area 2: control of the media

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The above section has considered various provisions of law that limit and penalize speech across the board on the basis of its content. Such general provisions provide a powerful framework states can use to control the content of public expression and to attempt to limit the possibility of critical speech in particular. In order to better ensure their control of public discourse, however, repressive regimes are not content to stop there, but rather complement such laws with extensive frameworks designed to control the media. Such legal frameworks generally will create partial and government-influenced bodies which exercise oversight over print, audiovisual and more recently, online media. Journalists are also subject to restrictive regimes, and the laws allow not only for penalizations but also for censorship and/or suspension of the media should the authorities consider those sources to have strayed too far out of line.

Attention on the part of repressive regimes to the media is, of course, unsurprising given the central importance of the media to public discourse. Ensuring that the authorities do not exert undue influence over the media is challenging even in comparatively more democratic regimes; where law-makers intent is not to ensure press independence, limitations abound. While public broadcasters can be extremely positive media entities where they are insulated from government pressure, in less democratic regimes they almost inevitably become mouthpieces for the powers that be. Finally, in the ideal system the media would not only be independent of the government, but would also be internally diverse. Ensuring diversity however requires a particular degree of neutrality on the part of authorities, and hence a significant degree of diversity is unlikely to be witnessed outside more open states.

At the same time, recent innovations in media, including satellite broadcasting and the internet, have worked to enable populations subject to restrictive governmental media regimes to access a more diverse and less biased range of perspectives. Recognizing such potentials, however, repressive regimes have taken a range of measures to control such newer media in turn. On the whole, the media remains one of the most crucial loci and battlegrounds on which attempts to control or exercise freedom of expression play out.

#### 1. International Standards

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International standards make clear that self-regulation is the best system of governance relative to the print media, while regulation of the broadcast media should be limited to the measures necessary to manage those media that rely on limited mediums (radio and terrestrial television).<sup>114</sup> This means that a country need have no specific press law at all – in practice, such laws often seem geared at controlling the media sector, rather than ensuring its freedom, success and promotion, and hence serve primarily negative purposes. A country must however set up a broadcast authority, to oversee distribution of limited airwave frequencies. Broadcast frequencies should be allocated in a fair and transparent manner, with a focus on promoting diversity and community broadcasting.<sup>115</sup>

Newspapers should not be required to register, or if they are, the requirement should be a simple formality with no discretion to refuse registration.<sup>116</sup> If a registration

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<sup>114</sup> See African Commission, Declaration of Principles on Freedom of Expression in Africa, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle IX(3).

<sup>115</sup> See African Commission, Declaration of Principles on Freedom of Expression in Africa, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle V.

<sup>116</sup> Newspaper registration schemes have been found in breach of freedom of expression in a number of cases – see UNHRC, *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997; ACHPR *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 128/94, 130/94; ECtHR, *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95; UNHRC, *Mavlonov and Sa'di v.*

requirement is imposed, registration fees must be minimal, and the registration procedure not unduly burdensome. Newspapers should not be subject to overly burdensome requirements in the course of their operations, such as the requirement to provide multiple copies of each issue to government authorities, to inform the authorities every time there is a change in ownership, and so forth.

Governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting, including in that the placement of public advertising should be based on market and not political considerations.<sup>117</sup> Media outlets should not be required by law to carry messages from particular political figures, such as the president.<sup>118</sup> The state should promote an environment in which broadcasting can flourish.<sup>119</sup>

Such regulatory bodies as do exist should be completely independent. The appointment process to such bodies should be transparent, should allow for public input and should not be controlled by any particular political party.<sup>120</sup> The ability to remove individuals from such bodies should be strictly limited. Courts should have review power over such bodies' decisions.

Broadcast regulatory bodies must not interfere in any way with the editorial independence of the broadcasters. They should not be required to carry specific broadcasts or allocate time to the government.<sup>121</sup> Decision-making on the allocation of the frequency spectrum should be open and participatory, and should ensure that frequencies are shared among public, commercial and community broadcasting, radio and television, and national, regional and local communities.<sup>122</sup> Broadcast regulatory bodies should be protected against interference, and their autonomy and independence guaranteed by law, including through clearly setting out the policy objectives underlying broadcast regulation and the powers of the bodies, laying out how membership in the bodies will be determined, specifying the process of accountability of such bodies, and laying out how they will be funded.<sup>123</sup> The process of appointing members should be open and democratic, involving public participation and consultation, and should lead to membership which is reasonably representative of society as a whole. Members of the government or of political parties, as well as those with significant financial interests in the media, should not be appointed. Those who are appointed should be protected against dismissal unless there is a clear violation of terms or inability to serve in the office.<sup>124</sup> Regulatory bodies should be held accountable through a multi-party body, and

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*Uzbekistan*, 19 March 2009, Communication No. 1334/2004. See also Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003.

<sup>117</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002.

<sup>118</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 12 December 2007.

<sup>119</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principle 8.

<sup>120</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003; African Commission, Declaration of Principles on Freedom of Expression in Africa, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle VII.

<sup>121</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principle 2.

<sup>122</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principle 9.

<sup>123</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principles 10-17.

<sup>124</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principle 13.

required to produce a detailed annual report on their activities and budget.<sup>125</sup> The framework for their funding should never be used to influence their decision-making.<sup>126</sup>

Should public service broadcasters be set up, their independence should be ensured by a transparent appointment process to their governing boards, requirements for the independence of board members, and a guaranteed source of funding, among other measures.<sup>127</sup>

Telecommunications networks, including both mobile phones and the internet, should be able to operate freely and without extensive government interference or surveillance. Intermediaries, such as internet service providers (ISPs), should not be held liable for content nor required to monitor and take down content, though they may reasonably be asked to take down content following a court order. When they do so, they should if possible provide forewarning, they should be transparent, they should minimize the impact of the restrictions, and the possibility of appeal should exist.<sup>128</sup> Moreover, internet services should be provided in accordance with the principle of net neutrality, meaning that all internet traffic should be accessible at the same rate, without discrimination based on content, device, author, origin or destination of the content.

Licensing of journalists, whether formally required or imposed through various other pressures, is an illegitimate restriction on freedom of expression.<sup>129</sup> Barriers to entry into the field of journalism should be removed.<sup>130</sup> Compulsory membership in a professional media practitioner's organization is a violation of freedom of association, and hence cannot be required.<sup>131</sup> Extreme penalties for journalists, such as barring from the practice of journalism, may only be applied in exceptional circumstances, if at all.<sup>132</sup>

Pre-publication censorship and post-publication seizure should be banned. Licensing of newspaper vendors should be prohibited to ensure the free dissemination of media.

The circulation of foreign publications should be ensured without censorship.

Journalists should have a right not to disclose their sources, and should not suffer any legal detriment for choosing to invoke such right. The right should only potentially be subject to abrogation in cases where a judicial proceeding finds that the information is necessary in order to address crimes representing a serious risk to the physical safety of individuals, and where the information cannot be obtained through any other means.

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<sup>125</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principle 15.

<sup>126</sup> See Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002, Principle 17.

<sup>127</sup> See African Commission, Declaration of Principles on Freedom of Expression in Africa, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle VI; HRC, General comment no 34: Article 19: Freedoms of opinions and expression, CCPR/C/GC/34, para 16. For a model law incorporating international best practice in these regards, see Article 19, "A Model Public Service Broadcasting Law," June 2005.

<sup>128</sup> See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011; OSCE report, Freedom of Expression and the Internet, July 2011; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 2011.

<sup>129</sup> See IACTHR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A No. 5; Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003; HRC, General comment no 34: Article 19: Freedoms of opinions and expression, CCPR/C/GC/34, para 44.

<sup>130</sup> See IACHR, Inter-American Declaration of Principles on Freedom of Expression, approved during the 108<sup>th</sup> session, 19 October 2000, Principle 6, finding the requirement that journalists possess a university degree an unlawful restriction on freedom of expression. See also Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003.

<sup>131</sup> See IACTHR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalists.

<sup>132</sup> See ECHR, *De Becker v. Belgium*, 8 January 1960, Application No. 214/56.

It is also important that care be taken relative to the attribution of defamatory statements. Journalists should not be held liable for reporting the words of others.<sup>133</sup> Distributors, broadcasters or internet service providers which have no particular knowledge of the content of statements that they may help to disseminate also should not be held liable for such content.<sup>134</sup>

It is important that the media reflect a diverse range of viewpoints, including through the existence of media reflecting the different languages and communities in the country in question, as well as the voices of potentially vulnerable or marginalized groups such as women, children and refugees.<sup>135</sup> Undue concentration of media ownership must be avoided.<sup>136</sup> Regulation of the media to promote diversity must not under any circumstances become a tool of political influence, however; transparency in all public policy relative to broadcasting is essential.<sup>137</sup>

## 2. Limitations in law and practice

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### 2.1 Excessive control of print media

#### □ Egypt

Articles 46-50 of Egypt's Press Code concern the process under which newspapers must apply for licenses, without which they cannot publish.<sup>138</sup> Article 47 gives the Supreme Press Council power to decide on such applications. While the article positively stipulates that the Supreme Press Council must provide justified reasons for a refusal, which may be appealed to the courts, it does not stipulate the grounds that constitute a justified refusal. As such, the Supreme Press Council is given fairly unfettered power to accept or deny permission at its discretion. In contrast, international law states that there is no reason to allow any discretion to the authorities to refuse a paper registration, and in fact freedom of expression is best promoted through having no such system at all. Article 51 of the Press Code requires newspapers to promptly notify the Supreme Press Council of any changes in the information they are initially required to submit, with potential penalties should they not do so according to the prompt timeline specified. In contrast, since no notification should be required in the first place, no updates should be required, and of course no penalties should be imposed should those updates not be provided, particularly not the egregious penalty of imprisonment. In addition to these powers over registration, Article 70 of the Press Code provides the Supreme Press Council with numerous other powers over the press sphere.

While Article 67 of the Press Code states that the Supreme Press Council will be autonomous, other articles undermine any potential independence. Article 68 establishes a broad membership for the Council, that the chair is to be the speaker of the Shura Council, that numerous other members will be determined by the Shura Council, and that ultimately the president will issue a decree determining the formation and composition of

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<sup>133</sup> See, e.g., *Jersild v Denmark*, European Court of Human Rights, 1994.

<sup>134</sup> See, e.g., See Article 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, 2002, Principle 5.

<sup>135</sup> See African Commission, *Declaration of Principles on Freedom of Expression in Africa*, adopted at 32<sup>nd</sup> session, 17-23 October 2002, Principle III; HRC, General comment no 34: Article 19: Freedoms of opinions and expression, CCPR/C/GC/34, para 14.

<sup>136</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 20 November 2001.

<sup>137</sup> See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 12 December 2007.

<sup>138</sup> Egypt Press Code, Law 96 of 1996.

the Council. As such, the Supreme Press Council clearly is not an independent body, as international law requires.

In practice, requests to the Supreme Press Council for licenses have been submitted to and vetted by the security forces.<sup>139</sup> While this practice dropped off immediately after the revolution, the strong reconstitution of the security apparatus since 2013 suggests the practice may be common once again.

While the Press Code gives a prominent role to the Shura Council in appointing the Supreme Press Council, the Shura Council was abolished by the 2014 constitution. As such, it is not clear how that legislation will be interpreted into the future. The current Supreme Press Council was appointed by the transitional government in January of 2014.

Article 24 of the press law requires editors to publish corrections upon request, though it makes no mention of how the veracity of such a request is to be established. Article 25 provides for the right of reply. Article 26 provides for certain grounds for refusal to publish the correction or reply. Article 27 allows for complaint to the Supreme Press Council should no action be taken, while Article 28 provides for potential imprisonment of up to three years or a fine should correction not be published.

A news outlet should not be under an automatic obligation to publish a correction or reply, and given that the grounds for refusal enumerated in Article 26 are inadequate, the provisions in question are in need of review and revision. In addition, of course, the sanctions involved are wildly disproportionate.<sup>140</sup>

A majority of media outlets in Egypt are government-owned. Articles 64 and 65 of the press law stipulate that the Shura Council appoints the editor-in-chief, the chair of the board, and half of the remaining members of the boards of national newspapers.

The state in Egypt has a substantial advertising budget; the majority of this budget goes to support state media (even to a percentage above that media's market share, it seems).<sup>141</sup> In practice, the combination of direct state control and state control of a principal source of revenue for the media means the positions taken by state media are generally highly aligned with state interests.

A draft law that would rework the legislative framework governing print and online media is currently pending in Egypt. Without attempting to assess the aggregate effect of that legislation, it is clear that it contains numerous restrictions following traditional lines, and might enhance limitations relative to online media in particular.<sup>142</sup>

## □ Morocco

Publications are required to obtain permission to operate in Morocco, after submitted a series of documents specified by Article 5 of the Press Law.<sup>143</sup> The operation of papers should not be subject to a discretionary authorization procedure at all. While it is not clear that the Moroccan law grants the authorities the ability to refuse registration, the vagaries in the process might allow registration to be constructively refused in practice. In particular, the specifications of the law are overly intrusive and necessitate the submission of information that new papers are unlikely to have to hand, and are in

<sup>139</sup> See UNESCO, IPDC, *Assessment of Media Development in Egypt*, 2013, 37.

<sup>140</sup> Moreover, the drafting of the law might even be taken to suggest that the Supreme Press Council might apply the penalties specified in Article 28, which of course would be entirely inappropriate.

<sup>141</sup> See UNESCO, IPDC, *Assessment of Media Development in Egypt*, 2013, 51.

<sup>142</sup> See, e.g., Hamama, "New plans to regulate digital media," *Mada Masr*, 4 Nov 2015.

<sup>143</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002). For more on media regulation in Morocco generally, see Arab Center for the Development of the Rule of Law and Integrity, "Promoting the Rule of Law and Integrity in the Arab World: The State of Media in Morocco," 2007.

general overly burdensome. Article 5 further requires that any changes to the information in question be reported within 15 days, while Article 7 imposes a fine should the provisions of Article 5 not be complied with or should the paper not commence publishing within a year of its initial registration, and a ban on publication in such instances with a fine should publication continue.

Article 8 requires publishers to submit six copies of every publication to the government, with a fine should this not occur. This requirement is unnecessary and burdensome.

Article 15 appears to make the owners of Moroccan papers unable to limit their financial liability relative to the paper, which will be in proportion to their share ownership. In combination with the use of excessive financial penalties, this Article will operate to limit freedom of expression, by exposing those involved in supporting the paper to personal penalties.

Article 19 requires that Moroccan papers have fixed advertising rates, which they may change twice a year. This clause unnecessarily restricts papers' ability to negotiate with advertisers and hence to successfully operate as businesses. Violations of Articles 15 or 19 are potentially punished by a fine under Article 23.

Article 22 leaves to be fixed by decree the conditions for audits of periodicals in Morocco. While auditing in general is a reasonable way to ensure financial regularity, in practice audits may be used to target and impose heavy burdens on disfavored publications, a possibility made more likely by leaving open the conditions under which audits may occur. In any case, audits in the periodical business should not involve more intrusive rules than pertain to other businesses.

Articles 25 and 26 require that publications publish corrections sent by public authorities and the responses sent by any person named in the paper, with fines imposed should the paper not comply. In contrast, papers should not be required to automatically publish corrections or replies.

Article 34 of Morocco's law requires that peddlers of any written or pictorial materials receive authorization, and Article 35 imposes a penalty for violation of that restriction. While certain regulation governing locations of peddling may be reasonable, they should always take into account the circumstances of the persons in question and their right to work and make a reasonable living; moreover, it is not clear why a special penalty is applied to the peddling of informative materials in particular.

In addition to potential financial penalties, the Moroccan government has been able to use the distribution of subsidies and advertising revenues to influence the content of the media.<sup>144</sup>

## □ Tunisia

Article 18 of the Decree Law on Media Freedom, Printing and Publishing<sup>145</sup> requires that a written declaration be submitted by the director of a periodical to the chief judge of the court district prior to the first issue of the periodical. Article 18 also requires that any modifications to the information contained in that declaration be brought to the chief judge within 15 days. Article 19 requires that six copies of the legal deposits be filed with the 'concerned departments of the information ministry', and imposes a fine on the director of a periodical should these procedures not be complied with.<sup>146</sup> The order issued

<sup>144</sup> See, e.g., Campagna et al, "The Moroccan Façade," CPJ, 3 July 2007; Akkad, "A free press in Morocco? Up to a point, Lord Copper," Middle East Eye, 12 Sept 2014.

<sup>145</sup> Decree Law 115 of 2011.

<sup>146</sup> Articles 5 and 6 impose a similar requirement and fine on the printer, producer or publisher of certain non-periodical works.

to accompany the Decree Law further expands on these requirements by imposing additional burdens and requirements, including requiring in Article 8 that new registration of periodicals must take place every year.

In contrast to Articles 18 and 19 and the order accompanying the Decree Law, there is no need for news outlets to submit a declaration prior to coming into existence; there is similarly no need for a requirement that they update their information. The first clause may serve as a barrier to entry, while the second may prove unduly burdensome in practice; moreover, neither serves a clear reasonable purpose. Imposing a fine where these unnecessary provisions are not complied with compounds the potential violation.

Even more seriously, Article 2 of the Order accompanying the Decree Law<sup>147</sup> refers to a license for periodicals, while Article 10 refers to permits relative to published materials. While the laws are unclear as to the precise meaning of these phrases, which may be the result of confusions in the drafting process, both terms suggest that an element of discretion might be provided to the authorities to determine that certain publications may operate while others may not. In that the law does not state with absolute clarity that there will be no possibility to refuse the registration of periodicals – and, as discussed below, in that suspension of publication is possible based on failure to comply with a complicated bureaucratic procedure – the law as written may give room to the authorities to exert undue pressure on publications.

Articles 16 and 18 also require that the newspaper have what Article 16 refers to as 'well known premises'. There is no clear reasonable purpose for such a clause, which should be removed.

Article 20 sets minimum sizes for the editorial boards of different periodicals, as well as requiring that set numbers of accredited journalists (for more on which see below) be part of those editorial boards, with a fine imposed in cases of violation. There is no reason for the law to concern itself with managing papers to this degree, not to mention the fact that the size requirements in question will be prohibitive for small periodicals; as such the provision should be removed.

Article 26 imposes limitations on periodicals' ability to freely negotiate and alter their advertising rates. Given the central importance of advertising revenue to publications, this clause poses the potential of sharply curtailing the financial viability of publications, and potentially gives the authorities a powerful lever of control over periodicals. As such, the provision should be removed.

Article 39 of the Tunisian Press Code requires papers to publish corrections when informed of the need to do so by individuals. The article makes no provision as to how the veracity of the correction will be established, however. Article 40 provides for a mandatory right of reply. Article 42 allows for the inclusion of a court in the process, but only it seems when the right of reply has been refused, which the language of Article 42 suggests is only proper where the reply itself contains a defamatory or otherwise illegal statement.

The section in question is confusing and should be clarified, both relative to the distinction between corrections and reply, and the nature of the involvement of courts in the process. Overall, in contrast to the current provisions, a periodical should be under no automatic obligation to publish a correction or reply, in order that its independence may be preserved. The penalization of failure to do so, stipulated by Article 41, augments the troubling nature of these provisions, and hence should also be removed.

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<sup>147</sup> Order of 2 November 2011.

Article 43 provides for a special regime of accelerated replies during election periods. The Article, like that on court involvement in the process generally, is highly confusing, and seems likely to place a hard to meet burden on the courts.<sup>148</sup>

A de facto monopoly on newspaper distribution survived the Ben Ali regime at least in the greater Tunis region, where a single network of retailers controlled most access to newsstands.<sup>149</sup> Under the Ben Ali regime, the government used the distribution of advertising revenue as a primary means to control the media.<sup>150</sup> Disproportionate distribution of public advertising continued along traditional lines following the revolution, leading to one periodical owner, Nabil Jridet, undertaking a hunger strike in 2012.<sup>151</sup>

## Conclusion

The legal framework in Egypt is the most restrictive, demonstrating the clear aim of establishing public control over the print media. The framework in Morocco is subtler, but can easily be applied to the same effect. In Tunisia, meanwhile, the general aim seems positive, but restrictive provisions remain, doubtless due to the difficulty of shifting from a philosophy of government control to one of rights-enablement.

While print media is not as central to the media sphere overall as it once was, it still occupies a highly important place in the media landscape, and is the home of many of the most incisive journalists. By exercising control over registration and exerting control over advertising revenues, states are able to maintain extensive control over the sector, a control that is only enhanced by the presence of even more directly controlled state media outlets. While despite extensive control in these areas individual journalists continue to demonstrate a significant degree of independence, their personal efforts would only be enhanced by ensuring extensive legal reform.

## 2.2 Excessive control of broadcast media

### □ Egypt

Terrestrial broadcasting in Egypt is entirely controlled by the state, according to the dictates of the law on the Egyptian Radio and Television Union;<sup>152</sup> as of 2012, there were only two private terrestrial broadcasters in Egypt, both FM radio stations. There are, hence, also no community broadcasters.<sup>153</sup> The Egyptian Radio and Television Union is under the overall supervision of the government as well, and the Minister of Information in particular, and its budget is primarily provided by the government. As such, needless to say, it is highly lacking in independence.

Private satellite broadcasters are in reality controlled by the General Authority for Investment, an entirely government-controlled body, which has authority over the media free zone in which they operate. There is no law at all laying out the criteria under which such licenses will be granted. What is clear however is that the General Authority in the past has used its unlimited power to influence the content provided by broadcasters; prior to the revolution, applicants needed security clearance as well, a requirement that it seems likely is once again in force.<sup>154</sup> More leverage is provided by the fact that the vast

<sup>148</sup> For more on the legal issues discussed in this section relating to Decree Law 115 and the accompanying order specifically, see Article 19, Decree on the Press, Printing and Publication Code of Tunisia, Legal Analysis, November 2011.

<sup>149</sup> See UNESCO, IPDC, Assessment of Media Development in Tunisia, 2013, 46.

<sup>150</sup> See id 63-4.

<sup>151</sup> See ANHRI, "Tunisia: Freedom of the press endangered," 12 May 2012.

<sup>152</sup> Law 13 of 1979.

<sup>153</sup> See UNESCO, IPDC, Assessment of Media Development in Egypt, 2013, 46.

<sup>154</sup> See id 29-30.

majority of broadcasts are carried by government-owned Nile Sat satellites. Nile Sat contracts, the licenses acquired by private broadcasters, and their status as broadcasters all commit broadcasters to comply with certain content standards, the limits and parameters of which are vague. While it is not clear these standards are much enforced in practice, their existence provides one more potential tool among the many already listed which might be used to target broadcasts.<sup>155</sup>

## □ Morocco

The High Authority for Audio-Visual Communication in Morocco was set up by a 2002 Decree.<sup>156</sup> Its powers were then more clearly defined by the 2005 Law on Audiovisual Communication.<sup>157</sup>

Articles 24-26 of the Law on Audiovisual Communication lay out general terms under which licenses will be distributed. Much of the details are left to further stipulation by regulation, however, and the law does not give firm indication that the High Authority will make its decisions with an eye towards promoting diversity of media and viewpoints. Articles 27, 28 and 34-36 of the law also give the High Authority power over the licensing of satellite broadcasters broadcasting both from and into Morocco, despite the fact that satellite broadcasters do not compete for limited airwaves in the same manner as terrestrial broadcasters. While Article 41 states that failures to renew or to withdraw licenses must be substantiated, the law does not provide for appeal to the courts.

Article 6 of the decree establishes that high members of the government, including principally the king, will appoint the members of the High Authority. As such, the body is clearly not independent, but rather controlled by the government. Thus while Article 7 positively sets some limits on who may be a member of the authority and the positions they may hold immediately afterwards, those protections are likely to do little good in respect to the government in regards to which the independence of the authority is already compromised. Article 11 makes this point even clearer by specifying that the president of the High Authority will be treated as a member of the government in financial and administrative terms. Article 20 of the decree further specifies that staff for the High Authority will be seconded from other branches of the government, another provision that undermines independence.

The government directly appoints the heads of public radio and television stations. Article 48 of the 2005 Law requires that public broadcasters comply with a broad list of requirements, including that they disseminate a wide number of government statements.

Article 5 of the 2002 Decree Law gives the High Authority power to require that companies publish corrections or response to individuals who have suffered harm to their honor, or to impose a penalty should such reply not be disseminated. The High Authority should not have such power, which should be up to the channels themselves, with judicial recourse possible for complainants where they want to make a case that they have suffered defamation.

Article 9 of the 2005 Law imposes various inappropriate limitations on what can be broadcast, including programs that 'prejudice the dogmas' of Morocco, namely Islam, territorial integrity and the monarchy, undermine public morals, or serve the exclusive interests of particular groups. Article 67 bans commercials that contain scenes contrary to morality or public order, or that shock religious or political convictions – clearly overly broad and inappropriate language.

<sup>155</sup> See id 64-5.

<sup>156</sup> Decree Law 1-02-212 of 2002.

<sup>157</sup> Law 77-03 of 2005.

Article 10 of the 2005 Law requires broadcasters to broadcast certain official statements, on request of the High Authority; while the requirement that broadcasters broadcast emergency information is reasonable, it is not clear what this provision might entail, and in particular it should not be understood to require the broadcasting of information for political purposes.

Articles 71-80 of the 2005 Law provides for sanctions where the law is breached, including large fines, imprisonment and confiscation of materials. The sanctions in question are often vastly disproportionate to the harms alleged, which often may amount to little more than administrative violation that should provoke little penalty.

## □ Tunisia

Tunisia's broadcast regulator, the High Independent Authority for Audiovisual Communication (HIAAC), is governed by the Decree Law on the Freedom of Audiovisual Communication and the Creation of a Supreme Independent Body of Audiovisual Communication.<sup>158</sup> The High Independent Authority was established in 2013. The law governing the HIAAC is generally positive, but does contain certain factors that could be improved. The law lays out several provisions protecting the independence of members of the HIAAC, including stipulating in Article 7 that they must be independent and must not hold or have held over the preceding years governmental or political positions, that they should not be appointed by the government or political parties, and that they should not have financial interests in the media.

While all of these guarantees are positive, the provisions on appointment could be strengthened. The law attempts to achieve independence by splitting up the appointment power among several different authorities – the president, the 'president of the legislative power', the judiciary, professional journalists' associations, non-journalistic audiovisual organizations, and media business owners. While splitting up appointment in this way provides one positive approach to achieving independence, it should be complimented by ensuring transparency and public participation in the process, as well as an explicit statement that the representatives in question should be neutral and not simply representatives of the respective interests of the different groups.

Article 8 limits the grounds upon which members of the HIAAC can be removed. While this limitation is positive, and it is positive that decisions will be subject to court appeal, the list of grounds in general is overly vague and might enable selective removals; in general, grounds for removal should be limited to the most serious instances of failure to be able to perform the duties or violations of the limitations set out in Article 7, in order to ensure members can in fact act independently.

Article 26 provides that staff for the HIAAC will be seconded from the government. In contrast, the HIAAC should have its own staff, in order to ensure the independence and effectiveness of the organization.

Article 20 of the Decree Law takes the positive step of requiring that the HIAAC publish an annual report on its activities. This accountability measure should be complemented by ensuring a greater regime of participation, specifically that the HIAAC consult on regular basis with the public on policy issues. To the extent the HIAAC interacts with the government, moreover, it should interact with the parliament rather than the executive and/or the president of the legislative power alone.

Chapter 3 of the Decree Law provides for various sanctions that the HIAAC may apply. Sanction power is broad, including the power to prevent broadcasting and to withdraw

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<sup>158</sup> Decree Law 116 of 2011. For more on this decree law as well as decree law 115, see Mir, "The New Tunisian Legislative Framework," *Internews*, February 2012.

licenses. Chapter 3 does not, however, provide detailed guidelines on the precise situations in which such penalties might apply – posing the danger that the HIAAC might abuse these powers.

The Decree Law 116 did not establish rules governing the licensing process. These rules were set out however by the HIAAC itself, in the 'Specifications on Private TV Station Standards for General Terms and Conditions for Licensing, Establishment and Utilisation' adopted in 2014. In terms of licensing, the rules could be strengthened by extending the period of license term from 7 to at least 10 years; by stipulating that the license fee must not be excessive; by laying out clearly the process to obtain a broadcast license, including a prompt timeline; and by stipulating that the HIAAC must provide written reasons if it decides not to grant or renew a license, and that any such decision should be subject to judicial review. Moreover, the rules should specify more clearly that diversity should be the key criteria when distributing licenses.

The content restrictions set out by the rules are even more problematic, due to broad and vague requirements, such as that broadcasters ensure the 'integrity of information' and that they prevent the dissemination of 'false news' – while of course broadcasters should endeavor to present accurate reports, it is important that they not be penalized based on errors beyond their control and made in good faith, or due to reporting of which the authorities do not approve – the use to which such broad and vague provisions have been put in the context discussed above. In addition, the rules require that broadcasters refrain from broadcasting content that would offend particular groups – this is also problematically vague, in addition to which certain important reporting, as well as other programming, may cause offense – causing offense as such is not a grounds to limit freedom of expression. As such, far more detailed and careful rules are necessary to ensure the rules are not used to limit legitimate expression.

## Conclusion

The legal framework in Egypt is clearly not designed to promote an independent audio-visual sector, as demonstrated by the lack of independent broadcasters in the country. While satellite broadcasters have been able to operate with comparatively more freedom, the legal tools necessary to shut down broadcasters who promote messages too far outside those the authorities desire are plentiful as well. The legal framework in Morocco similarly provides total discretionary control over the sector to the authorities. The law in Tunisia, on the other hand, is clearly designed to ensure the independence of the high broadcasting authority; while unsurprisingly the law is imperfect, and independence is always challenging to achieve in reality, the general shape of the law should serve as a model for the region. While the language laying out content restrictions in Tunisia is inadequately vague, it is hoped that such regulations can be tightened and clarified in future.

Needless to say, broadcast media are one of the most commonly accessed sources of information about the world, and it is unsurprising if deeply problematic that such media are tightly government controlled in Egypt and Morocco. As in other areas, the presence of alternative media, including satellite broadcasts, has helped to open up the sorts of information to which people might have access, and a certain diversity of coverage exists despite restrictions. Clearly, however, the sectors are still deeply government controlled, and used not only to disseminate predetermined narratives and misinformation but also to attack the reputations of regime critics.

## 2.3 Other forms of communication regulation

### □ Egypt

The Telecommunication Regulation Law in Egypt<sup>159</sup> gives the authorities extensive power to control the means of modern communication, specifically phone networks and the internet, in Egypt.

Article 21 of that law states that authorization is required for the creation, operation or provision of telecommunication services, which are defined in broad and vague terms. The law does not provide any details as to the factors that will be considered when granting or refusing a license, nor does it require that a reasoned decision be issued or specifically require the possibility of appeal of decisions to the courts. Article 44 of the law requires that a license be obtained for the import, manufacture or assembly of telecommunication equipment, with the decision to be made by the National Telecommunication Regulation Authority (NTRA) subject to an okay from the armed forces.

The NTRA set up by the law to govern the telecommunication sphere is not independent. Articles 3, 12 and 18 make clear that the government in general, and the Minister of Telecommunications in particular, have authority over the body, while Article 8 establishes that funding comes from the state. In contrast, the NTRA should be an independent agency, the leadership of which is appointed in an open and democratic manner, and which receives guaranteed and adequate funding.

The most abusive component of the Telecommunication Regulation law however is that it subjects the networks in question to the power of the armed forces and security services, which are granted full access to those systems by Article 64(2). Article 64 also prohibits the use of encryption, unless authorized by the armed forces and national security services, while Article 81 backs this up with a penalty of imprisonment and fine. The provision in effect criminalizes the use of email services, social networks and online financial transaction services, among other online services.

Article 67 of the law gives the competent state authorities power to take control of telecommunication services in cases concerning national security, without defining who the competent state authorities are or how this might be affected in practice. The procedure was used by the state in 2011 when it cut various internet and telephone services. In May 2011, Egypt's highest administrative court, the Council of State, issued a judgment that found that the shut down had violated the right to communicate, while also proposing a new definition of national security under which peaceful protesters could not be found to violate national security, but the aggressive action of shutting down telecommunications services could. While this judgment was extremely positive, it was passed in the period immediately following the 2011 revolution during which progressive judgments were possible, and there is scant evidence that the holdings of the judgment in question have been followed through on in Egyptian law since.<sup>160</sup>

### □ Morocco

Telecommunications in Morocco are overseen by the National Agency for the Regulation of Telecommunications, as laid out by the Law on the Post and Telecommunications.<sup>161</sup> The law requires that public telecommunications networks must be authorized or licensed to come into existence, and Article 30 gives the government, on recommendation of the

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<sup>159</sup> Law 10 of 2003.

<sup>160</sup> For more on this judgment and Egypt's telecommunications law in general, see Article 19, "Egypt: Telecommunication Regulation Law," April 2015.

<sup>161</sup> Law 24-96 of 1997.

National Agency for the Regulation of Telecommunications power to suspend or withdraw those licenses as well, should there be a finding that laws or regulations have not been respected. Articles 27 and 28 of the law establish that the agency is subject to the supervision of the state; moreover, the agency's director and board are both appointed by royal decree. As such, the National Agency is not an independent body, as required by the right to freedom of expression. As elsewhere in Moroccan law, the provisions on sanctions in the law impose a variety of excessive potential sanctions.<sup>162</sup>

The authorities in Morocco have occasionally blocked certain websites in the past, including blocking of the *Lakome* website in 2013 and 2014.<sup>163</sup> A draft bill floated in late 2013 and early 2014 that would have given the authorities wide powers of control over the internet was withdrawn after encountering heavy opposition. While Morocco hence does not have a strong regime of control of content targeting the internet as such, the combination of laws restricting expression in general, explored above, an extensive 'anti-terrorism' legal framework and state surveillance mean that the apparent lack of direct censorship, at least for the most part, still has sharp limits.

## □ Tunisia

Certain restrictive laws which might be used to curtail internet freedoms in future have persisted since the Ben Ali era. Telecommunications in Tunisia are primarily governed by the Telecommunications Decree<sup>164</sup> and the Internet Regulations.<sup>165</sup> Under Articles 5, 6 and 7 of the decree, licenses are required to operate telecommunication services, in procedures in which the licensing authorities have discretion to provide the licenses or not. The body overseeing the sector is the Ministry of Information and Communication Technologies – not even a government-appointed and controlled body, but rather under the control of the government directly. The National Authority of Telecommunications, the regulator for telecommunications, is presided over by officials nominated by the minister of information, and thus is also not an independent body.

While emphasizing once again that the implementation of the more restrictive elements of the legal framework governing telecommunications has been relaxed since the fall of the Ben Ali regime, numerous elements of that framework beyond the above points remain in place and in need of replacement. Articles 9 and 87 of the Telecommunications Decree, further enforced by supplemental 2007 and 2011 Decrees, prohibit ISPs from transmitting encrypted information without prior approval from the Minister of Communications. In addition, Articles 1 and 14 of the Telecommunication Decree and Article 9 of the Internet Regulations make ISPs entirely responsible for third party content, and require ISPs to monitor and take down objectionable online content.

In addition, while the 2004 Law on the Protection of Personal Data,<sup>166</sup> which was drafted and promulgated in an attempt to produce a better image for the Ben Ali regime, has certain positive features, it also operates with an overly extensive notion of privacy that can be used to engage in suppression of speech on the basis of its content.

Certain acts of internet censorship did continue following the fall of the Ben Ali regime. In May 2011, following an order by a military judge, certain Facebook pages were censored. May 2011 also saw a court of first instance rule to close all pornographic websites, a ruling that was overturned by the Court of Cassation in February 2012.<sup>167</sup>

<sup>162</sup> For more on such issues, see Freedom House, *Freedom on the Net* report, Morocco, 2014.

<sup>163</sup> See Labidi, "Ali Anouzla still in jail as government blocks Lakome," CPJ, 24 Oct 2013; RWB, "Lakome News Website Still Blocked Despite Editor's Repeated Requests," 20 Feb 2014.

<sup>164</sup> Law 1 of 2001.

<sup>165</sup> Regulations of 22 March of 1997. For more on this legal framework in Tunisia see Article 19, Tunisia: Background paper on internet regulation, Legal Analysis, May 2013.

<sup>166</sup> Organic Law 63 of 2004.

<sup>167</sup> See UNESCO, IPDC, *Assessment of Media Development in Tunisia*, 2013, 48-9.

## Conclusion

The third pillar in control of the media, to complement control of the print press and broadcasters, is control of telecommunications. This includes, of course, not only the internet, which has been an important tool for mobilization of activists, but also individual communications via mobile phones. Given the nature of such technologies, different strategies are necessary from those employed in the sectors considered above – instead of controlling content producers, control of telecommunication networks generally involves ensuring extensive surveillance, a less overt but potentially far more insidious form of control, coupled with the use of laws penalizing those who produce content that offends the authorities as discussed above.

The attempt to ensure ultimate control over the means of communication is apparent in the case of Egypt from both law and practice. In Morocco by contrast, the tools necessary to ensure control are largely in place – including mechanisms of surveillance, discussed further below – though used with more cautious discernment. In Tunisia, finally, a restrictive legal framework has persisted since Ben Ali times, and while its use has been relaxed, its replacement by a rights-respecting regime should remain a priority.

## 2.4 Excessive control of journalists

### □ Egypt

Article 65 of the Journalists' Syndicate Law in Egypt<sup>168</sup> provides that an individual must be a member of the syndicate to practice as a journalist (in practice apparently meaning a print journalist), while Article 103 provides that owners of print media may not hire individuals who are not members of the syndicate. Article 115 penalizes breach of these provisions with imprisonment and/or fine. Article 54 of the press law<sup>169</sup> requires that editors also be registered as journalists with the syndicate. Syndicate members have traditionally received significant payments from the government.<sup>170</sup>

The restrictive nature of requiring journalists to belong to the syndicate is augmented by a number of provisions setting out the conditions for syndicate membership in Article 5 of the Journalists' Syndicate Law, including that the journalist 'act as a professional', hold a university degree, and be of 'good repute', while Article 6 restricts freelance journalists. Members may be expelled for a number of reasons, and the law also provides for informing government ministries of the lists of potential journalists, with those government ministries empowered to provide input, and generally given a supervisory role over the syndicate.

Article 34 of the press law states that disciplinary actions may only be taken against journalists by the journalists' syndicate, while Article 15 gives the syndicate board the right to negotiate collective agreements. The law does not specify how the syndicate board is to be formed.

Needless to say, all of these provisions fail to respect media independence and the right to freedom of the press. The law should not define or limit who may be a journalist, and journalists should be free to form their own organizations, rather than being compelled to belong to state-mandated ones.

Despite the restrictive clauses of Egyptian law, a large number of journalists operate in practice without being members of the syndicate. While this practice is positive, the legal shadow left hanging over such individuals constitutes in and of itself a restriction on freedom of expression, and a potential lever to be used in a discretionary fashion against those who offend the government or other powerful interests. This practical

<sup>168</sup> Law 76 of 1970.

<sup>169</sup> Egypt Press Code, Law 96 of 1996.

<sup>170</sup> See UNESCO, IPDC, Assessment of Media Development in Egypt, 2013, 76.

discrimination is augmented by the fact that journalists operating outside of the syndicate do not obtain numerous benefits established by law specifically for syndicate members.<sup>171</sup>

Attacks on journalists in Egypt have been extensive in the post-revolution period. In the period following Morsi's removal in 2013, numerous journalists were detained and certain media would see several broadcasters lose their programs in the following period as well, including the suspension of Bassem Youssef's popular show following political pressure and threats, as well as the cancellation of the programs of other more critical broadcasters such as Wael Ibrashi and Mahmoud Saad.<sup>172</sup>

**Mahmoud Abou Zeid**, a photographer, was arrested while covering the dispersal of the Raba'a Al-Adawiya sit-in in **August 2013**, in which hundreds were killed; he has since been held without charge.<sup>173</sup> Others have received life sentences for their role in covering that event.<sup>174</sup> Detentions of journalists exercising some degree of sympathy towards the Muslim Brotherhood continued in 2014, while others voicing criticism of the regime suffered reprisals in one form or another as well.<sup>175</sup> In addition to extensive detention of journalists, numerous journalists have been killed in Egypt in the years since the 2011 revolution, often while covering protests, in addition to the assault and injury of even greater numbers.

In a sign of the level to which the media tow the official line, **in October 2014, 17 chief editors** pledged to refrain from criticizing the government, the army and other national institutions. On the positive side, however, in response more than 600 journalists signed a pledge defending freedom of expression and denouncing censorship.<sup>176</sup>

**2015** saw the formation of a state agency known as **FactCheckEgypt**, a state agency affiliated to the State Information Service, which set about attempting to pressure journalists into repeating official accounts, even when highly suspect.<sup>177</sup> The methods of control over the media employed by the governing forces have also been exposed by a leak in which regime figures were heard discussing their approach to getting the media to tow the line they favor.<sup>178</sup>

**In October of 2015** an armed raid was conducted on the offices of the **Mada Foundation for Media Development**, an NGO working on capacity building for Egyptian journalists. The raid was apparently conducted without the requisite judicial warrant.<sup>179</sup>

**In November of 2015, Salah Diab**, the owner of *Al-Masry Al-Youm*, was arrested together with his son on charges of corruption and possession of illegal weapons; the arrest followed an increasingly critical line taken by the paper towards authorities.<sup>180</sup> State TV anchor Azza Al-Henawy was suspended after criticizing the official response to floods in

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<sup>171</sup> Including, potentially, the protection of Article 41 of the press law, which prevents journalists from being detained pre-trial. While the Article originally created an exception for charges of insulting the president, in relation to which pretrial detention of journalists would be allowed, this exception was removed by a decree adopted by president Morsi in August 2012.

<sup>172</sup> See, e.g., Kingsley, "Egyptian satirist Bassem Youssef winds up TV show due to safety fears," 2 June 2014; Hofsommer, "Satirist Bassem Youssef pulled from air until after Egyptian elections," Human Rights First, 3 June 2014; POMED, "Egypt Daily Update: News Program Shut Off Mid-Broadcast for 'Political Reasons'," 17 Oct 2014. Both Saad and Ibrashi had faced obstacles previously as well; see, e.g., ANHRI, "Wael El Ibrashi: Six New Lawsuits," 11 Dec 2007; Bouckaert, "Egypt's Foreigner Blame Game," HRW, 9 Feb 2011.

<sup>173</sup> See CPJ, "Egypt should release Shawkan, photographer detained for two years," 13 Aug 2015.

<sup>174</sup> See CPJ, "CPJ urges Sisi to release all journalists jailed in Egypt," 24 Sept 2015.

<sup>175</sup> See Freedom House, "Egypt: Freedom of the Press 2015."

<sup>176</sup> See Amin, "Egypt: Regime pushes self-censorship on journalists," Index on Censorship, 24 Nov 2014.

<sup>177</sup> See Jones, "Egypt wants to jail journalists for not falling in line. It has been trained by a US nonprofit," Huffington Post, 6 July 2015; Accorsi, "Egypt media group chides reporters for questioning army statements," Middle East Eye, 7 July 2015.

<sup>178</sup> See Mada Masr, "New leaks expose military hold over media," 20 Jan 2015.

<sup>179</sup> See Amnesty, "Egypt: Armed raid on journalism NGO bears hallmarks of another assault on independent media," 21 Oct 2015.

<sup>180</sup> See, e.g., Mada Masr, "Al-Masry Al-Youm owner Salah Diab arrested," 8 Nov 2015.

Alexandria; President Sisi subsequently criticized the media for criticizing the government.<sup>181</sup>

Investigative journalist and human rights defender [Hossam Bhagat](#) was detained around the same time, as detailed above.

## □ Morocco

Article 1 of the Professional Journalists Law in Morocco<sup>182</sup> limits the definition of journalist to those whose main, regular and paid profession is journalism. Article 5 states that professional journalists must have a press card, which Article 6 states will be issued by a committee consisting of a government representative and equal numbers of additional representatives from journalists' unions and media companies. Article 9 allows for the press card to be withdrawn if the journalist is subject to conviction impacting on his or her morals, or at the discretion of the committee and the government where the journalist has violated the Press Code or journalists' ethics, while Article 10 states the card will be revoked if the holder ceased to be permanently engaged with a media company. Article 11 imposes penalties for obtaining press cards through false representation.

In contrast to the articles of the law, there should be no official definition of journalists – any and all who seek to practice journalism, whether on occasional or permanent basis, should be able to do so, and the law should guarantee their protection and work to promote the success of their work.

Journalists who report critically may find themselves the victim of prosecutions under laws outside the realm of those specifically targeting freedom of expression as well. Thus for example [Mohamed Sokrate](#), a blogger who frequently has reported on sensitive topics, was sentenced to two years in prison on drug charges.<sup>183</sup>

[Hicham Mansouri](#), a member of the Moroccan Association of Investigate Journalists, was sentenced to ten months in prison in [March of 2015](#) following highly questionable adultery charges.

[On 25 August 2015](#), [Samad Iach](#), another member of the Association, was banned from travelling abroad, questioned about his work as a human rights defender and charged with a variety of vague charges circulating around the idea of generating unrest.<sup>184</sup> Journalists in Morocco have also been the subject of physical attack from time to time.

## □ Tunisia

Article 7 of the Decree Law on Media Freedom, Printing and Publishing<sup>185</sup> contains an extremely restrictive definition of journalists, requiring possession of a license degree or equivalent, and that the individual in question derives his or her primary resources from regular publishing in regular news outlets. Article 20 requires that at least half the editorial team of a newspaper 'of a general news nature' have professional cards or relevant degrees. The law should not impose limits or qualifications on who may serve as a journalist. Tunisia's law in fact creates numerous confusions for itself in this regard, including through creating the vague categories of 'general news nature' and through the requirement that the main source of income of such persons be from certain publication work. In contrast, it should be clear that the right to freedom of expression, including by

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<sup>181</sup> See, e.g., Khater, "TV anchor suspended for criticizing official response to flood crisis," 9 Nov 2015.

<sup>182</sup> Law 21-94 of 1995.

<sup>183</sup> See RWB, "Blogger gets two-year jail sentence on trumped-up drug charges," 15 June 2012.

<sup>184</sup> RWB, "Monarchy's Red Lines Gag Morocco's Independent Media," 17 Sept 2015; CIHRS, "The Moroccan government should halt all restrictions on civil society and stop harassment of human rights defenders," 22 Sept 2015; El-Rifae, "CPJ joins call for Morocco to end harassment of journalists," CPJ, 29 Sept 2015.

<sup>185</sup> Decree Law 115 of 2011.

reporting on news stories, belongs to everyone, with the potential of citizen journalism promoted rather than suppressed.

The restriction of Article 7 is made more constrictive by the vision of journalist cards put forward by Article 8, which envisions a committee composed of members of journalists' and media organizations disseminating such cards. This committee is thereby given power to determine who will and will not be accepted into the journalistic circle. Such an approach would clearly interfere with the right to freedom of expression, and threaten to exclude certain voices from national reporting.

Article 16 of the Decree Law limits control of periodicals to Tunisians. There is no reasonable basis for this restriction, which should be removed. Article 17 requires that the chief editor of a paper be at least 30 – again, there is no clear reasonable basis for this requirement, which should be removed.

Article 13 of the Decree Law refers to a journalists' code of conduct. While the existence of such a code is to be encouraged, it should not be a matter for the authorities, but rather for journalists themselves. Involvement of the authorities in such issues is inevitably bound to tend towards a system where the authorities attempt to use the code to exert pressure on the media to be less independent. Meanwhile, Article 19 states that journalists who fail to perform their duties as laid out by the law and the journalists' code of ethics shall be subject to a disciplinary action, although the meaning and potential consequences of this are not well-defined.

Attacks on journalists in Tunisia have continued since the revolution, with journalists facing threats from police, political activists and extremist groups.<sup>186</sup>

## Conclusion

In addition to controlling the media as such, of course, control may be exerted over journalists themselves. A primary means to do so is often through the requirement that journalists be registered, long rejected by human rights law. The requirement that journalists be registered is in fact a telling example of the way that restrictive legal regimes often work – as the requirement can hide behind a purportedly legitimate purpose, to ensure the dissemination of quality reporting, and may also earn a certain support from the media sector, as journalists who have achieved the qualification in question obtain a superior status to those without it, a status they may seek to defend. The key to recognizing why such a requirement violates the principle of freedom of expression may be seen in the exclusivity of the latter position, which deprives the majority of the population of the possibility of undertaking journalistic activities, but is primarily seen through recognizing the logic of the first position – while indeed honest reporting is to be valued, setting up the governing authorities as an arbiter of reporting and reporters is bound to produce precisely the opposite, narratives and stories which flatter and support and fail to challenge the structures of power.

Restrictions on who qualifies as a journalist laid out by law are rarely fully applied in practice, however, unsurprisingly given the slippery question of defining what exactly might qualify as journalistic activity. Despite this, of course, it is important they be removed in order to prevent their use, like so many of the other provisions considered in this study, to target particular individuals who might engage in incisive reporting. Attacks on journalists in practice have been unfortunately common, however, especially in Egypt, which has become one of the most dangerous and inhospitable countries for journalists in the world, including through the apparent targeted killing of journalists attempting to cover protests.

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<sup>186</sup> See, e.g., IFEX, "IFEX-TMG concerned by attacks on journalists," 11 Jan 2012; Moamri, "Press freedom watchdog: Journalists in Tunisia under attack," Al-Araby, 18 May 2015.

## 2.5 Censorship and seizure

### □ Egypt

Article 198 of Egypt's Penal Code<sup>187</sup> allows the authorities to seize all copies of a publication in instances where one of the crimes in Articles 171-197 of Egypt's Penal Code has occurred. The article states that the law officer responsible for impounding must obtain permission from the public prosecution; and that the matter must be submitted to a court within three days, which shall make an immediate decision supporting the seizure or cancelling it. The article also requires that the paper in question publish the ruling penalizing the paper on its front page within a month of the ruling, or else the paper shall be shut down.

This article is important and harmful in several ways. In the first place, the article provides for pre-publication censorship – without supplying any criteria for such an action. This is in contrast to the sharp prohibition by human rights law of prior seizure in all but the most extreme circumstances. In addition, the article provides for seizure of materials without any form of court ruling. When the initial court ruling comes, a perfunctory decision is to be made; and while a fuller consideration of the case will take place later, it seems almost inevitable that the initial decision will prejudice the later one (in addition to which, none of the usual limitations on preliminary injunction have been stipulated). Even if a court order after the initial seizure clears the paper in question, of course, the paper will already have suffered serious economic loss, and success in the case will at best allow the paper to republish a version of the story after what may be a significant time delay.

Article 199 allows a court that is considering a case against a paper under Articles 171-197 of Egypt's Penal Code to suspend a paper upon request of the prosecutor where the paper continues to publish materials "of the type" concerning which the investigation is being conducted. In other words, prior to judgment in a particular case a paper may be suspended for continuing to publish materials advancing the sort of claim in question. Not only are the criteria of similarly overly vague, of course, but also the very fact that a paper can be suspended – a more extreme penalty than a monetary one (which should be the only penalty involved, given the illegality of criminal penalty) – without any form of final judgment, and once again with no criteria for decision provided, is clearly a violation of the right to freedom of expression. Given that the article, like that above, applies to provide further sanction to clauses that should be removed in any case – given that they apply to criticism of the authorities, not a legitimate grounds for penalization of any sort – the intent is clearly to magnify the ability of the authorities to silence criticism.

Article 200 stipulates that a paper shall be suspended for a month (or three months for weekly periodicals, or a year for less frequent publications) where it has been found guilty of a felony, or of violating Article 179 (on insulting the president) or Article 308 (the clause penalizing insult). The court has discretion to suspend a paper for half the period in question in other instances of criminal conviction, or for a full period in case of second offense within a two year period; should a third offense be committed within two years of the second offense, a full period suspension is automatically applied. The effect of Article 200, therefore, is to apply a fairly broad regime of suspension on top of the other penalties discussed above, and on top of the discretionary prejudgment suspensions or censures discussed above, again primarily relative to articles which are themselves in clear violation of freedom of expression – with the amplified penalties applied to insults, to the president or others, presenting a particularly clear example of such point.

Article 55 of Egypt's Press Law<sup>188</sup> ascribes a penalty of six months suspension, at the

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<sup>187</sup> Egypt Penal Code, Law 58 of 1937.

<sup>188</sup> Egypt Press Code, Law 96 of 1996.

request of the Supreme Press Council, to papers whose editors and editors-in-chief are not official journalists and members of the journalists' syndicate, as required by Article 54.

The authorities in Egypt in the post-revolution period have frequently censored media outlets, often without providing any sort of justification. In 2011, the authorities shut down two television channels, *TV25* and *Al Hurra*, while they were broadcasting a violent military assault against demonstrators protesting the burning of a church in upper Egypt outside the Maspero building.

In January 2014, authorities seized a publishing house printing a report by the *United Group*, a legal human rights organization, on torture and other cruel and unusual punishment in Egypt. Copies of the report were confiscated and two employees of the publishing company arrested.<sup>189</sup> Later in 2014, the authorities shut down printing of the *Arabic Network for Human Rights Information's* *Wasla* periodical, without providing an explanation.<sup>190</sup>

In addition, 2014 saw the shutting down of *Bassem Youssef's* satirical show as well as the shows of *Wael Ibrashi* and *Mahmoud Saad* – discussed above – as well as the suspension of TV show *Revolutionaries All the Way* and radio show *Om el-Donia*.<sup>191</sup>

August 2015 saw the printing of copies of *Al-Masryoun* and *Al-Sabah* halted on the request of unspecified state monitoring bodies. *Al-Sabah* was apparently pulled for criticism of Mohamed Badran, head of the Mostakbal Watan Party and purportedly close to Sisi. *Al-Masryoun* was pulled meanwhile apparently due to an article criticizing Sisi's attempts to present himself as an Islamic thinker as well as another article speculating that he risked arrest if he were to visit the United Kingdom. Other such pulling of publications also occurred in the preceding months, highlighting not only ongoing censorship, but also the relatively subtle manner in which it was conducted on the basis of state control over key media positions and over the major printing houses.<sup>192</sup>

## □ Morocco

Article 58 of Morocco's Press Code<sup>193</sup> allows the authorities to seize and destroy periodicals in a number of cases of findings of defamation, relative to insults to national values or to foreign dignitaries for instance in particular. Article 41 moreover allows the authorities to suspend or prohibit the publication of a periodical in cases where that periodical has offended or undermined the royal family, Islam or the territorial integrity of the country. As observed above, the penalization of speech relating to all such categories is inappropriate. To double down on that penalization through censorship compounds the original offense. Article 41 makes the situation even more difficult for periodicals by stating that they will remain responsible for all of their contractual obligations pertaining to labor during the period in question, compounding the financial effects of such a ruling.

Article 77 makes clear that censorship will not only be the case where a court order has been issued, by allowing administrative seizure of papers on the order of the minister of the interior, either for violating Article 41, or where that publication in his opinion violates public order. While Article 77 allows the matter to be appealed to a court, censorship on the order of the interior minister should not be possible in the first place (not to mention the problem with the grounds underlying such censorship).

Article 17 of the 2002 Decree Law on Audiovisual Communication,<sup>194</sup> also referenced by Article 43 of the 2005 Law,<sup>195</sup> allows the president of the High Authority of Audio-Visual

<sup>189</sup> See HRW, "Egypt: High Price of Dissent," 19 Feb 2014.

<sup>190</sup> See ANHRI, "The Crackdown on Civil Society Begins," 15 June 2014.

<sup>191</sup> See Freedom House, "Egypt: Freedom of the Press 2015."

<sup>192</sup> For more, see Mada Masr, "Printing, distributing and advertising: Tools to silence the press," 25 Aug 2015.

<sup>193</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>194</sup> Decree Law 1-02-212 of 2002.

Communication to suspend the licenses of broadcasters should they violate 'the prescriptions required by national defense and public security' – once again, vague language that allows for the shutting down of broadcasters should the High Authority – as already noted, not an independent agency in Morocco. The language of the relevant articles is such that it seems the High Authority in general may suspend licenses in a number of other circumstances as well, as the provisions delimiting when exactly this may occur are extremely vague in the law.

[Ali Lmrabet](#), a satirical newspaper editor, was fined and banned from working in Morocco for ten years in 2005, after a conviction following his statement that the Sahrawi activists in south-western Algeria were not hostages, the official Moroccan position, but rather refugees. The publications he had edited, *Demain* and *Demain Magazine*, were banned in 2003. When he attempted to obtain a residency permit in 2015, in order to reopen his newspapers, Lmrabet was blocked by the authorities.<sup>196</sup>

The [Lakome website](#) was shut down in 2014, as discussed below; *Badil.info*, founded as a successor website, was shut down for at least three months in 2015, as discussed above. Both were known for criticizing government corruption and human rights violations.<sup>197</sup>

## □ Tunisia

Article 21 of the Decree Law on Media Freedom, Printing and Publishing<sup>198</sup> imposes a (potentially duplicative) fine for violations of several of the unnecessary and inappropriate requirements imposed on periodicals discussed in the section on excessive control of the media above. Of even greater severity, the article states that periodicals may not be published when they are not in compliance with the articles in question, and imposes a fine for each day in which they continue to do so. Given that the requirements discussed above are of an overly bureaucratic nature, the imposition of a harsh penalty such as suspensions of publication is completely inappropriate, and could easily provide grounds for abuse through suspension of a paper on a technicality.

Article 64 of the Decree Law allows the court to order seizure of materials in cases where a 'conviction is issued', and must permit seizure or destruction of all public copies. The article goes on to state that any finding of recurrence of defamation against a particular publication will result in the suspension of the periodical until the court order is complied with. The vagueness as to when these penalties may apply is extremely dangerous, on top of which such penalties are generally excessive even in cases of clear-cut defamation.

## Conclusion

Censorship and seizure of papers are some of the most extreme in terms of their direct impact on freedom of expression. At the same time, they are less impactful on individuals than prison sentences, and ultimately largely equivalent to other mechanisms of financial control. As such, censorship and seizure often seem like blunter instruments of control, which more sophisticated repressive regimes will seek to avoid by attempting to control the output of the media in the first place. At the same time, the possibility of censorship or seizure remains an important fallback option, which as the above sections make clear has continued to be employed in certain cases. As the case of Lmrabet in Morocco further makes clear, moreover, the censorship of particularly bold journalists continues to constitute a powerful tool that may be used where necessary.

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<sup>195</sup> Law 77-03 of 2005.

<sup>196</sup> See CPJ, "Moroccan king must allow Ali Lmrabet to practice journalism," 24 July 2015; Index on Censorship, "Open letter to the King of Morocco in support of Ali Lmrabet," 27 July 2015.

<sup>197</sup> See Amnesty, "Morocco: Court orders suspension of news website, editors fined for 'false news' and 'defamation'," 17 August 2015.

<sup>198</sup> Decree Law 115 of 2011.

## 2.6 Diversity of the media

### □ Egypt

Article 52 of Egypt's Press Law<sup>199</sup> requires that privately owned newspaper be owned only by Egyptians, with no one person owning more than 10% of the capital. The article also requires that a substantial sum of money be deposited in an Egyptian bank prior to publication of the paper.

An absolute restriction against foreign involvement in newspaper sphere goes further than necessary to promote media diversity, and may in fact restrict it. Moreover, the deposit requirement is excessive, and would appear to serve the purpose of making papers more compliant to government interests, in the knowledge that substantial sums of money might be seized through suits under the numerous law restricting the media.

While new media entered the scene following the 2011 revolution, and the space for expression opened up somewhat, recent years have seen a general diminishment of media space in Egypt. Meanwhile, the rules against concentration of ownership in the press law appear to not be enforced in practice, leading to a number of large conglomerates dominating the scene.<sup>200</sup> There is little community media, in significant part likely due to various biases towards state media.<sup>201</sup> Recent years have seen a few bright spots through innovative business models and dedicated teams of journalists, however, in the form of media ventures such as *Mada Masr* and *Welad El Balad*.<sup>202</sup>

### □ Morocco

Article 12 of Morocco's Press Law<sup>203</sup> requires that all financial participants in Morocco's periodical press be Moroccan, while Article 23 imposes a fine and potential suspension of the paper in question should this clause be violated. As with Egypt, such an absolute restriction goes further than necessary to promote media diversity.

Articles 18-22 of the 2005 Law on Audiovisual Communication<sup>204</sup> include certain restrictions on excessive ownership of media outlets. While attention is necessary to ensure such clauses are fairly enforced in practice, their general intent of ensuring media diversity is positive, though of course in need of complementing through ensuring the freedom of the media as a whole.

The print sector in Morocco includes a substantial number of private publications. Broadcast media are largely owned by the state, although satellite television channels offer different perspectives.

### □ Tunisia

Article 33 of the Decree Law on Media Freedom, Printing and Publishing<sup>205</sup> provides that one person may not control more than two current affairs or general periodicals, and that no one can control more than 30% of the total circulation of such periodicals. The rules adopted by the HIAAC to accompany the Decree Law on the Freedom of Audiovisual Communication and the Creation of a Supreme Independent Body of Audiovisual Communication<sup>206</sup> stipulate that high-ranking politicians may not own TV channels, that

<sup>199</sup> Egypt Press Code, Law 96 of 1996.

<sup>200</sup> See UNESCO, IPDC, Assessment of Media Development in Egypt, 2013, 45.

<sup>201</sup> Id 46.

<sup>202</sup> For more, see Abdelhadi, "Independent journalism finds its voice in Egypt," Nieman Reports, 7 Aug 2015.

<sup>203</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>204</sup> Law 77-03 of 2005.

<sup>205</sup> Decree Law 115 of 2011.

<sup>206</sup> Decree Law 116 of 2011. For more on this decree law as well as decree law 115, see Mir, "The New Tunisian Legislative Framework," Internews, February 2012.

the same person may not be granted more than one broadcast license, that a license holder may not own a company that gauges public opinion, and that any individual with a financial interest in one media company may not own more than 5% of the shares in a licensed broadcaster.

In practice, news media sources have proliferated extensively since the fall of the Ben Ali regime, and coverage has become much more critical.

## Conclusion

The important initial phase of diversification of the media, in which government controls slacken and a wider range of viewpoints come to be represented and disseminated, is in general a natural companion to the opening up of political systems, as the competition between diverse political parties allows the space for contesting viewpoints to be advanced.

Beyond this, it is further necessary to ensure that extensive media holdings do not fall into the hands of the same individuals or corporate interests – a challenge that remains even in some of the world's more democratic states. While the presence of certain rules limiting agglomeration of control in are positive where they accompany generally open media systems, in countries where such sectors are tightly controlled they appear instead a further mechanism of control.

## 2.7 Foreign media

### □ Egypt

Article 30 of the Press Law<sup>207</sup> states that a journalist or newspaper that accepts donations, contributions, subsidies or benefits from a foreign entity, whether directly or indirectly (which the law specifies includes advertising), will incur a penalty of imprisonment and/or fine. What exactly might fall under this stipulation is left subject to a high degree of uncertainty, along with the purpose of the provision, which appears to serve the purpose of enhancing government control of journalists and newspapers.

As observed above, the operation of foreign satellite broadcasters in Egypt is subject to official permission in the form of a license. While many foreign journalists operate in Egypt, they often do so under serious threat of imprisonment or worse.<sup>208</sup>

The most infamous targeting of foreign journalists in Egypt has been the trial of [three Al Jazeera journalists](#), arrested in 2013 and sentenced in 2014 before a final ruling in 2015. While the journalists were released following a pardon in 2015, as numerous commentators have pointed out, while the pardon may have gone some small way towards rectifying the individual injustice of the situation, the structurally unjust features were left in place, on top of which the pardon effected only a small number of those arbitrarily detained.<sup>209</sup> The long process of the trial of the *Al Jazeera* journalists was marked by political bias, extensive irregularities and numerous absurdities and inconsistencies; that the rights of due process and fair trial could be so extensively and blatantly violated in a trial carefully followed by global audiences is indicative of the extent to which such problems are endemic in the Egyptian legal system.

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<sup>207</sup> Egypt Press Code, Law 96 of 1996.

<sup>208</sup> For more, see, e.g., AFTE, Report on the Status of Foreign Journalists and Correspondents in Egypt, 2011-14.

<sup>209</sup> See, e.g., Amnesty, "Egypt frees Al Jazeera staff jailed for journalism," 23 Sept 2015; Article 19, "Egypt: Presidential pardon is an inadequate step towards freedom of expression," 23 Sept 2015; CPJ, "CPJ urges Sisi to release all journalists jailed in Egypt," 24 Sept 2015.

## □ Morocco

Article 20 of Morocco's Press Code<sup>210</sup> states that owners, directors or employees of papers may not receive money directly or indirectly from foreign entities, with an exception for advertising; violation of this provisions will lead to a prison sentence and fine. While there may be a reasonable core purpose behind this provision, the clause as drafted is overly broad.

Articles 27-30 of Morocco's Press Code impose additional requirements on foreign periodicals, which include any periodical even funded in part by foreign funds. Article 28 imposes imprisonment and a steep fine for failure to follow the procedure of registration for such a periodical, as well as confiscation and destruction of the periodical itself. Article 29 allows the minister of communication or the prime minister to prohibit outside periodicals that might harm Islam, the monarchy, territorial integrity, respect for the king or public order, and proscribes a prison sentence and fine for knowing sale, distribution or reproduction of banned materials, as well as seizure and destruction of the materials in question. Article 30 imposes a second penalty of imprisonment and a fine for any form of dissemination of materials that violate the 'sacred values' mentioned by Article 29 or the 'higher interests of the nation', even if the material in question is not banned. Needless to say, the broad and vague prohibitions in these Articles are clear violations of the right to freedom of expression; foreign periodicals should not be subject to a different set of rules from local periodicals, except as necessary to promote media diversity, and as such should be able to operate and be disseminated freely.

Articles 19-22 of the Professional Journalists Law<sup>211</sup> give the authorities power to issue accreditation cards to foreign journalists, which the authorities have the power to revoke where the foreign journalists fail to show respect for national sovereignty, journalists' ethics or legislation in force.

In 2011, the accreditation of *Al Jazeera* journalists in Morocco was rescinded following their coverage of Western Sahara (the office was able to reopen in 2013 following negotiations with the government).<sup>212</sup> In 2012, *El Pais* was twice banned due to coverage of materials critical of the king.<sup>213</sup>

In January of 2015 the authorities prevented the holding of an international conference that would have brought journalists and experts from across North Africa as well as France and other countries, organized by the [Friedrich Naumann Foundation](#), a German not-for-profit foundation, to a conference on investigative journalism in Rabat, despite the fact that the Moroccan communication minister was among those scheduled to attend. In February two French journalists had their video equipment seized and were deported from Morocco, during the course of a report on Morocco's social and economic situation four years after the 'Moroccan Spring'.<sup>214</sup>

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<sup>210</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>211</sup> Law 21-94 of 1995.

<sup>212</sup> See HRW, "Morocco: Restore Accreditation to Al Jazeera," 5 April 2011; HRW, "World Report 2014: Morocco/Western Sahara," 2014.

<sup>213</sup> See AFP, "Morocco bans Spain's El Pais newspaper over royal cartoon," 18 Feb 2012; RWB, "Authorities keep media in check and reinforce online crackdown," 29 Feb 2012.

<sup>214</sup> See RWB, "Sustained Crackdown on Independent Reporting in Morocco," 5 March 2015.

## □ Tunisia

As of 2012, the distribution of foreign periodicals in Tunisia was controlled by a single company, the Tunisian Press Society, which thereby effectively obtained the ability to censor foreign publications deemed sensitive.<sup>215</sup> In general, however, foreign media today face far fewer obstacles operating in Tunisia than they do in Egypt or Morocco.

## Conclusion

While certain limited restrictions in law designed to ensure that foreign media outfits do not prevent the possibility for local media development are reasonable, foreign media in general should be able to operate and be disseminated freely, according to the same open standards applied to domestic media. In reality, a double standard is often applied across the region – while working for an international media body may in certain circumstances provide a greater degree of protection that the local media would possess, foreign journalists and media outfits are also often targeted due to the content of their reporting. While the situation has improved in Tunisia, foreign journalists in Morocco face expulsion and foreign periodicals face import bans should they tackle red lines, while in Egypt the government has on numerous occasions specifically targeted foreign journalists through harassment, threat, arrest and trial.

## 2.8 Attribution of statements and protection of sources

### □ Egypt

Article 197 of Egypt's Penal Code<sup>216</sup> states that arguing that a published statement was "no more than a repetition of rumors or stories from third parties" will never constitute an excuse. This language is problematic in that its obvious reading is that a media outlet cannot quote the opinions of individuals if there is any question that opinion might be defamatory – sharply limiting the sorts of material that can in fact be quoted, and the consequent ability of journalists to report on more contested issues. Moreover, unsurprisingly, there is no legal framework providing for whistleblower protection under Egyptian law. On the contrary, Egyptian law contains a number of provisions establishing the confidentiality and secrecy of numerous components of government information (including, e.g., The Law Prohibiting the Publishing of any News about the Armed Forces,<sup>217</sup> The Law on State Intelligence and Secrecy Services,<sup>218</sup> and The Law Regarding the Preservation and Maintenance of State Official Documents<sup>219</sup>), and imposes harsh penalties for disclosure of such information.<sup>220</sup>

Article 7 of Egypt's Press Law<sup>221</sup> protects journalists' right not to reveal their sources. The Article allows the protection to be overridden based on other requirements of law however – making for an extremely weak protection in practice.

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<sup>215</sup> See UNESCO, IPDC, Assessment of Media Development in Tunisia, 2013, 46.

<sup>216</sup> Egypt Penal Code, Law 58 of 1937.

<sup>217</sup> Law 313 of 1956.

<sup>218</sup> Law 100 of 1971.

<sup>219</sup> Law 12 of 1975.

<sup>220</sup> See UNESCO, IPDC, Assessment of Media Development in Egypt, 2013, 26.

<sup>221</sup> Egypt Press Code, Law 96 of 1996.

## □ Morocco

Article 17 of Morocco's Press Law<sup>222</sup> states that while Moroccan authors may use a pseudonym, they must indicate their real names to the director of the publication, who is under an obligation to reveal them to the prosecutor should the prosecutor so request.

Moroccan law fails to provide that journalists have a right not to disclose the identity of their sources, and that they will suffer no detriment in defamation cases should they fail to do so. Confidentiality of sources is key to journalistic effectiveness, and must be ensured.

Punishment of sources has proven an effective way for the authorities to target criticism. Thus in 2012, for example, following a story in *Akbar Al-Youm* on corruption within the former financial arms of the government, the government employees who had shared they relevant information were traced on the basis of their phone records and lost their jobs. According to the editor of *Al-Akbar Al-Youm*, Touafik Boucherine, the paper lost sources as a result.<sup>223</sup> And Mr. Boucherine himself has repeatedly faced charges fraud of one sort or another that did not stand up in court, for instance in repeated trials from 2007-2010; despite the highly questionable nature of these allegations, they were widely publicized in national newspapers.<sup>224</sup>

## □ Tunisia

Positively, Article 11 of the Decree Law on Media Freedom, Printing and Publishing<sup>225</sup> provides for the protection of journalists' sources. While the Article provides for an exception that complies with international standards, discussed above, it also suggests an exception may be found relative to 'pressing needs relating to state security' – an overly broad and vague grounds that could easily allow the state to go after those sources, such as whistleblowers, most in need of protection.

## Conclusion

Of the countries considered, Tunisia is the only one that, through the Decree Law on Media Freedom, Printing and Publishing, makes a serious effort to protect journalists' sources. In Egypt and Morocco, by contrast, the aim of the legal framework and of the authorities is clearly to discover and punish sources where they reveal information powerful players would rather have kept secret. Protection of sources is particularly important to the work of journalists, and of investigations into corrupt, dishonest, rights violating and/or anti-democratic activities undertaken by authorities or other powerful entities, and as such particularly in need of legal defense.

The above commentary has divided the means used to restrict freedom of expression and the press into a number of subsections. While this mode of organization helps to highlight the different forms of restriction employed, it is important to recognize that these forms of restriction are overlapping, meaning not only that the removal of restrictions on a piecemeal basis is unlikely to fundamentally change the system, as repression will merely take on a different form, but also that the penalizations in question may be applied together when the authorities so desire. Given that excessive sanctions attach almost across the board, this means there is scarcely a limit on the sanctions that the authorities might choose to apply in a particular case.

<sup>222</sup> Morocco Press Code, Decree 1-58-378 of 1958 (as prominently modified by law 77-00 of 2002).

<sup>223</sup> See Akkad, "A free press in Morocco? Up to a point, Lord Copper," Middle East Eye, 12 Sept 2014.

<sup>224</sup> See RWB, "Editor sentenced to six months' imprisonment on spurious charges," 15 June 2010; CPJ, "Moroccan editor given politicized sentence," 15 June 2010.

<sup>225</sup> Decree Law 115 of 2011.

The potential for aggravation of sentence is also explicitly laid out in Egypt's legal framework relating to the media, which, as the section on censorship and suspension of papers above makes clear, is designed to create a strong degree of control. Book 2, chapter 14 of Egypt's Penal Code<sup>226</sup> is specifically aimed at media offenses. Article 307 of Egypt's Penal Code moreover allows for the doubling of fines for a variety of the offenses discussed in these section in cases where the offense occurs through a publication (and one would imagine the failure to stipulate the same relative to audio-visual media is merely a matter of omission), while Article 308 limits judicial remedial discretion by imposing minimum sentences in cases involving publication of insults. While these provisions are not in themselves the most harmful, their presence indicates a general trend and design seen particularly in the legal framework of Egypt but also in those of all of the countries considered – though in Tunisia largely in that existing repressive laws remain in need of replacement – of creating an extensive set of overlapping restrictions and penalizations that extends both the underlying vagueness of the laws and the severe sanctions that attach.

On the one hand, that the laws are designed this way simply represents an efficient repressive policy, as extensive overlapping repressive frameworks apply, enabling restrictions to be applied from many different angles and complicating the tasks both of seeking to understand and to reform the systems in place. In reality, however, the existence of such extensive legal frameworks of repression is likely even more indicative of an underlying philosophy and set of interests – those in power in the countries in question, with the exception of post-revolution Tunisia, have seen the purpose of legal frameworks in the area of freedom of expression as to seek to control and limit the media, while presenting themselves as infallible and benign entities. Change in such frameworks will require that a new philosophy of rights enablement be adopted.

### 3. Recommendations

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- Press entities should be able to operate freely, without the need for licensing or oversight;
- Broadcast regulators should distribute frequencies impartially and with the aim of promoting diversity; non-terrestrial broadcasters should not be required to apply for licenses;
- Telecommunications networks, including both mobile phones and the internet, should be able to operate freely and without extensive government interference or surveillance;
- Any government entities with oversight powers over the media must be completely independent;
- Who may practice as a journalist should in no way be limited, and journalistic quality assurances should be left to self-regulation;
- Censorship, seizure of publications or suspension of media outlets should be banned in all but the most extreme cases;
- A diverse media, including a wide range of viewpoints, should be promoted;
- The protection of journalists' sources should be assured.

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<sup>226</sup> Egypt Penal Code, Law 58 of 1937.

## IV. Issue area 3: rights-violating counterterrorism and surveillance

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Restrictions on the content of speech and control over the media have long been the principle tools used by repressive regimes to restrict freedom of expression. More recently, however, and especially since the aggressive approach adopted by the United States post 9/11, counterterrorism laws have become a means to violate rights across the board and target those groups regimes in power find the most threatening. Violations perpetrated through counterterrorism laws include the extrajudicial killing, torture, arbitrary detention and the deprivation of procedural rights of individuals who may in fact have been guilty of terrorist crimes, as well as similar offenses against entirely innocent individuals. The end result of rights-violating counter-terrorism policies is not to eliminate terrorism, but rather to drive individuals towards it. Ensuring the respect for and fulfillment of rights, on the other hand, is the surest way to combat terrorism.

### 1. International standards

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Perhaps the most fundamental and widespread abuse of terrorist legislation concerns the definition of terrorism, which is often left overly broad so as to exert an extensive chilling effect and to cover actions that are not only not terrorism, but may in fact be legitimate exercise of rights, such as the right to freedom of expression. As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stipulated, any reasonable definition of the crime of terrorism must require that there was intent to cause death or serious bodily injury, or the taking of hostages, and that such intent was coupled with the aim of provoking a state of terror, intimidating a population, or compelling a government or international organization to do or abstain from any act.<sup>227</sup>

Building on problematic definitions of terrorism, counterterrorism laws often extend their rights-suppressing shadow by incorporating overly broad definitions of incitement to or support for terrorism. Expression relating to terrorism should only be criminalized where it constitutes direct incitement.<sup>228</sup> Material support similarly may only be criminalized where there is the intent to further a terrorist act.

Similarly, counterterrorism efforts often take the reasonable step of targeting groups that undertake terrorist activities. While increased attention on groups whose members have committed terrorist crimes is reasonable, it is crucial to ensure laws in such an area respect the basic criminal law requirement of intent. Prescription of organizations may only take place where a clear judicial determination can be made, on the basis of activities, that the organization aims to use terrorist aims or means.<sup>229</sup>

The right to privacy is guaranteed by Article 17 of the ICCPR. At the same time, the right to privacy is implicit in the right to freedom of expression, since it is impossible to communicate freely while being monitored. Individuals should moreover be free to express themselves anonymously online.<sup>230</sup> While a certain degree of state surveillance is allowed, it must be case-specific and on the basis of a warrant granted under probable

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<sup>227</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, E/CN.4/2006/98, 28 Dec 2005, paras 42, 50, 72.

<sup>228</sup> See Human Rights Committee, General comment no 34: Article 19: Freedoms of opinions and expression, CCPR/C/GC/34, para 46.

<sup>229</sup> See Protection of human rights and fundamental freedoms while countering terrorism, Note by the Secretary-General, A/61/267, 16 Aug 2006, para 26.

<sup>230</sup> See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011.

cause on the basis of fact.<sup>231</sup> The law should clearly lay out the relevant details of the situations under which surveillance may occur, and should lay out a judicial oversight structure for the surveillance authorities, as well as specifying inappropriate forms of surveillance and the appropriate penalties as part of a wider set of provisions of law guaranteeing the right to privacy.

## 2. Violations in law and practice

Egypt and Tunisia have recently passed new counterterrorism laws, while Morocco has been considering drafts. The counterterrorism legal framework in Egypt was amended twice in 2015, with extremely restrictive decree laws promulgated in February and August of 2015, in the second instance following the killing of Public Prosecutor Hisham Barakat in a bombing. A draft set of amendments to Morocco's counterterrorism framework has been mooted throughout 2015. In Tunisia, a new counterterrorism law was mooted following a dramatic attack on individuals at the Bardo Museum in Tunis on 18 March, and passed in July after another dramatic attack on a beach in Sousse on 26 June.

### 2.1 Overly broad definition of terrorism

#### □ Egypt

Article 86 of Egypt's Penal Code<sup>232</sup> employs an overly broad definition of terrorism, failing to clearly limit it to the context of specific grave harms as defined by international law, and defining the purpose in overly broad terms, as including the aims of 'disturbing public order' or 'endangering public safety or security', while listing as examples of terrorist activity, inter alia, harm to the environment, communications, transport, property, funds, buildings, public or private authorities, taking possession of public or private properties, obstructing the work of public authorities or obstructing the use of places of worship or educational institutes, or interrupting the application of the constitution, laws or statutes. Article 86(bis) of Egypt's Penal Code meanwhile imposes the penalty of imprisonment on whoever is involved in setting up or running an organization which aims at 'interrupting the constitutions or laws, or preventing any of the state's institutions or authorities from exercising their work, or encroaches on the freedoms and rights of citizens, or impairs national unity or peace, while Article 86(bis)(a) states that capital punishment or permanent hard labor shall be the punishment inflicted if terrorism is the method used towards such ends. Meanwhile Article 87, while not explicitly referring to terrorism as such, imposes a penalty of permanent or temporary hard labor on 'whoever tries to forcibly overthrow or change the constitution of the country.'

While Article 86 and following provisions of the Penal Code are extreme, the anti-terrorist Decree Law passed in February of 2015 goes even further.<sup>233</sup> Article 1 of that law defines terrorist entities as including

Any association, organization, group, gang, cell or other gathering, whatever its legal or factual form, that practices or whose purpose is advocating by any means inside or outside the country harm to individuals, spreading terror or putting their lives, freedoms, rights or security at risk, harming the environment, national resources, antiquities, communications, or land, air or sea transport, or public or private finances or buildings or property, or occupying or seizing property, or preventing or obstructing the operation of public authorities, judicial bodies or

<sup>231</sup> See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37, 28 December 2009.

<sup>232</sup> Egypt Penal Code, Law 58 of 1937.

<sup>233</sup> Decree Law 8 of 2015.

authorities, municipal units, houses of worship, hospitals, institutions and institutes of learning, as well as other public facilities, or diplomatic or consular missions, or regional or international organizations and agencies in Egypt, or preventing them executing some or all of their activities, or resisting them, or obstructing public and private transportation or preventing or impeding its movement or endangering it by any means, or harming public order or the safety of the community, or impeding the application of the provisions of the constitution or laws, or preventing the state authorities from exercising their work, or attacking the freedoms or other rights of citizens guaranteed by the Constitution and laws, or harming national unity or social peace or national security.

In addition to shifting to a vaguer definition of what constitutes terrorism, the language in Article 1 of Decree Law 8 of 2015 contains innumerable vague clauses that might be interpreted to classify almost any form of activity of which the authorities did not approve as terrorism. The language is particularly worrying relative to organizations that push for social and political change, such as human rights organizations, since the failure to include the requirement that terrorist charges be linked to extreme violent acts, together with the extensive vague language and inadequate parameters of terrorist intent, and in particular the discussion of efforts to seek changes in the legal framework could all be read together as pertaining to the work of organizations seeking legal reform.

Article 1 Decree Law 8 of 2015 also defines terrorists, as persons who commit, attempt to commit, incite to, threaten or plan a terrorist crime. That law does not itself define terrorist acts, suggesting that these will either continue to be defined by the Penal Code or by engaging in the sorts of activities ascribed to the terrorist entities laid out by Article 1; in either case, the definitions in question are overly broad, and by creating a category of terrorist people, rather than simply terrorist acts linked to these broad definitions, the law threatens to allow such individuals – who might in fact be guilty of no crime at all – to be tarred as terrorists and subject to the according punishments.

On 15 August 2015 new counterterrorism legislation was introduced in Egypt,<sup>234</sup> along very similar lines to the legislation already in effect. Article 2 of that law followed along very similar lines to Article 1 of the earlier Decree Law the same year.

Egypt has convicted individuals of terrorist crimes on numerous occasions. Six men were convicted by a military court in 2014 of having launched an attack on the Egyptian military, despite extensive reports of torture and violations of the right to defense and to a fair trial, and the fact that several of the accused were in detention at the time the attack occurred. The six were executed in May 2015.<sup>235</sup>

In April 2015 Mohamed Sultan, an American of Egyptian descent, was found guilty of numerous offenses and sentenced to life imprisonment (later reduced to 25 years); this charge was motivated, it seems, by Sultan's having acted as a liaison to the press on behalf of Muslim Brotherhood protestors following Morsi's ouster. Sultan was deported to the US in May.<sup>236</sup>

## □ Morocco

The law governing terrorist activities in Morocco is largely found in a set of amendments to the Penal Code that were passed into law in 2003.<sup>237</sup> Following that laws enactment, Article 218(1) of the Penal Code was amended to find as acts of terrorism acts which 'are

<sup>234</sup> Decree Law 94 of 2015.

<sup>235</sup> See HRW, "Egypt: Halt Executions of Six Men Convicted in Military Court After Unfair Trial," 4 April 2015; AFP, "Egypt executes six men convicted of killing soldiers after 'grossly unfair' trial," Guardian, 17 May 2015.

<sup>236</sup> See Sadek, "Egypt: American Citizen Sentenced to Life Imprisonment for Terrorism-Related Crimes," Library of Congress Global Legal Monitor, 16 April 2015.

<sup>237</sup> Law 03-03 of 2003, modifying Morocco Penal Code, Decree 1-59-413 of 1962.

committed intentionally in connection with an individual or collective undertaking, for the purpose of seriously undermining public order by intimidation, terror or violence, through the offenses of: (1) intentional damage to the life, integrity or freedom of people...; (2) counterfeiting...; (3) destruction...; (4) diversion or degradation of the means of transport or communication; (5) theft and extortion...; (6) manufacture, possession, transportation, circulation, or illegal use of weapons; (7) offenses related to automated data processing systems; (8) forgery...; (9) participation in an association formed with the aim of engaging in terrorist acts; (10) knowingly harboring the product of a terrorist act.

The underlying crimes that Morocco potentially considers terrorism are far broader than international law allows. The Moroccan law moreover utilizes overly vague language to define the potential intent and purpose of such acts. Together, these provisions can easily allow terrorist charges to be brought on the basis of a wide range of non-terroristic criminal activity, making terrorism a catch-all category.

As if Article 218(1) were not already broad enough, Article 218(3) stipulates that environmental harm will also constitute a terrorist offense. While harms to the environment should indeed be punished, it does not seem appropriate to address them with terrorist legislation – as Morocco in fact obviously does not do relative to factory owners within the country in practice. The blatant disparity between the words of the law and practice only serve to highlight the general manner in which laws in the region, as well as counterterrorism laws generally, fail to comply to basic principles of the rule of law by clearly defining their target, instead imagining from the outset selective application.

Article 218(4) moreover includes as terrorism the provision or management of funds with the intention that they be used to commit a terrorist act, or the provision of help or advice. While the penalization of funding, assistance or advise is reasonable where the underlying conduct is in fact terrorism, care is necessary in order to ensure that the potential vagueness inherent in extending liability in such a manner is not abused by applying liability too broadly; such concerns are of course magnified where the underlying crime of terrorism is not tightly defined.

## □ Tunisia

Prior to late July 2015 terrorist offenses were defined in Tunisia by Article 4 of the 2003 Counterterrorism Law,<sup>238</sup> which defined terrorist offenses as acts intended to sow terror or influence a state policy, to disturb public order, peace or international security, to cause harm to individuals or to property, the environment, vital resources, infrastructure, or transportation or communication systems or public services. As in the other countries considered, such a definition was overly broad, both in defining an overly extensive set of underlying offenses, and in relying upon particularly loose language as to the motivations in question. The 2003 law was reportedly used some 3,000 times in the seven years between its passage and Ben Ali's ouster.<sup>239</sup>

The new Law on the Fight Against Terrorism and the Suppression of Money Laundering in Tunisia<sup>240</sup> largely reiterates this negative framework, reinforcing it in fact through its more recent passage.<sup>241</sup> Article 13 of the Law involves an overly broad definition of the offenses that may underlie a charge of terrorism, which includes for example 'damaging private or public property, vital resources, infrastructure, transport or communication facilities, computer systems or public services.' While the article uses language on intent

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<sup>238</sup> Law 75 of 2003.

<sup>239</sup> See HRW, "Tunisia: Counterterror Law Endangers Rights," 31 July 2015.

<sup>240</sup> Organic Law 22 of 2015.

<sup>241</sup> For more commentary, see HRW, "An analysis of Tunisia's Draft Counterterrorism Law," 8 April 2015; HRW, "Tunisia: Counterterror Law Endangers Rights," 31 July 2015.

similar to that found at the international level, much rests on the restricted definition of underlying harms to ensure only the most egregious provoke terrorist sanctions; the language in question risks the potential of terrorist charges being brought in the case of a broad range of acts that do not meet the international definition. Articles 8-35 then go on to define further more specific terrorist offenses in exhaustive detail; while some such articles are in line with international treaties, many dramatically expand the potential scope of what will be considered terrorist offenses in Tunisia well into the realm of otherwise ordinary crimes.

## Conclusion

The temptation to define terrorism in overly broad terms is widely prevalent for the same sort of reason that has been considered elsewhere – such a definition places extensive discretion and power into the hands of the authorities. In practice, however, in addition to constituting a rights violation by leaving individuals in a great deal of uncertainty as to prohibited conduct, and penalizing reasonable conduct, such laws are inevitably abused by authorities in order to target groups and individuals which are engaged in criticism, such as human rights organizations and protestors seeking rights-based reforms, as well as to target minority communities.

## 2.2 Overly broad charges of promoting terrorism

### □ Egypt

Article 86(bis) of Egypt's Penal Code<sup>242</sup> applies penalties to those who knowingly assist or join organizations that fall under that provision, or who propagate the activities of such organizations. Article 1 of the Decree Law on Terrorist Entities<sup>243</sup> begins by stating that a terrorist entity will be one that 'advocates by any means' any one of the lengthy list of vague objectives that the article goes on to specify. Articles 28 and 29 of the Counterterrorism Decree Law<sup>244</sup> impose penalties for promoting directly or indirectly terrorist acts, and for the use of modern communication networks to, *inter alia*, mislead the security services or influence the course of justice. Such articles are clearly deeply problematic in the first place in that they criminalize advocacy or propagation – vague terms that do not comply with the international requirement to only penalize incitement in order not to infringe the right to freedom of expression. The use of such language is of course far more troubling in Egypt in that the definition of terrorism itself is entirely inadequate in Egypt, referring to an extremely vague list of intents, such that now advocating any one of such ends – for instance, the impeding of traffic, for example by means of a protest – could come to incur terrorist charges.

Such articles are also problematic in that they penalize those who assist or join such organizations – while the limitation that they must do so 'knowingly' is positive, given other vague provisions around the conduct and entities that will be understood as terroristic, as well as uncertainty over what exactly individuals will be required to have known and how that standard will be applied in practice, such provisions could easily be taken to apply extensively.

Article 35 of the Counterterrorism Decree Law generated extensive controversy prior to the passage of the law; the first draft threatened imprisonment should news outlets publish information contradicting official data, but after pushback the final article dropped the prison sentence; an excessive fine of at least 200,000 and up to 500,000 pounds

<sup>242</sup> Egypt Penal Code, Law 58 of 1937.

<sup>243</sup> Decree Law 8 of 2015.

<sup>244</sup> Decree Law 94 of 2015.

(approximately \$25,000-\$60,000) remained however.<sup>245</sup> As commentators have pointed out, however, imprisonment could still occur should the agency in question be unable to pay the fine, with editors held liable by article 35 as well.<sup>246</sup> Even should prison terms not be handed out, media outlets could easily be closed by fines of such a level. The penalty is all the more outrageous given that no reputable source considers data released by the Egyptian Ministry of Defense reliable. Article 36 also serves to extend the law's diminishment of freedom of information by preventing the dissemination of information on court proceedings in the terrorism context without the consent of the head of the court in question. Such a clause is of course likely to prevent discussion of the numerous potential abuses that may occur in such trials and have occurred as a matter of course in such trials in Egypt to date. All such provisions are in clear violation of human rights obligations in their own right; that they are found in a counterterrorism law is doubly abusive, suggesting the dissemination of information is considered a form of terrorism in Egypt, a suggestion likely to amplify the consequent chilling effect.

While not necessarily charges of terrorism specifically, several overly broad and vague charges circulating around the idea of threatening national security have been brought against individuals in Egypt in recent years, as well as detention without any particular charge. In the months following Morsi's removal in mid-2013, a number of journalists were detained on scant evidence and unclear charges; in September, for example, [Abu Zeid](#) was detained in Beni Suef following his publication of Articles critical of the government, and [Abu Deraa](#) was detained in the Sinai on charged of having published false news about military operations there and of having entered military zones without permission.<sup>247</sup> When Bassem Youssef's show went back on the air, the father of the producer was arrested and accused of aiding terrorism – specifically, it seems, relative to Mr. Youssef's show.<sup>248</sup>

In December 2013 [Yasser al-Serafy](#), a law professor at Cairo University, was detained by security forces following his referral to the police by the president of Cairo University on allegations of belonging to the Muslim Brotherhood and raising political issues in his lectures.

January 2014 [Emad Shahin](#), a political science professor at the American University in Cairo, was charged along with dozens of others with espionage, conspiring to undermine Egypt's security, preventing state institutions from performing their functions and providing support to a banned organization, among other broad and vague charges. Professor Shanin had previously been critical of the repressive policies of the government. In May of 2014, Professor Shahin was convicted in absentia along with several others defendants and sentenced to death.<sup>249</sup>

In 2015, an [Egyptian spokesman](#) went so far as to claim Human Rights Watch was a supporter of terrorism, for their release of a report on human rights violations committed by the Egyptian authorities.<sup>250</sup>

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<sup>245</sup> See, e.g., Mada Masr, "Press Syndicate insists Article 33 of anti-terror law is annulled not amended," 8 July 2015; Agence France-Presse, "Egypt drops two-year jail penalty for journalists in proposed anti-terror law," Guardian, 15 July 2015.

<sup>246</sup> See CIHRS & EIPR, "The New Counterterrorism Law: Another Blow to the Constitution, Encourages Extrajudicial Killing," August 2015, Section V.

<sup>247</sup> See CPJ, "Press harassed amid heightened tension in Egypt," 13 Sept 2013.

<sup>248</sup> See CPJ, "CPJ urges Sisi to release all journalists jailed in Egypt," 24 Sept 2015.

<sup>249</sup> See Kirkpatrick, "Renowned Scholar in Egypt Charged with Espionage," NYT, 22 Jan 2014; HRW, "Egypt: High Price of Dissent," 19 Feb 2014; Shahin, "Sentenced to Death in Egypt," The Atlantic, 19 May 2015.

<sup>250</sup> See Ministry of Foreign Affairs, Egypt, "Egypt Condemns Politicized and Non-Objective Human Rights Watch Report," 9 June 2015; HRW, "Human Rights Council: Panel on 'the effect of terrorism on human rights'," 30 June 2015.

## □ Morocco

Pursuant to the 2003 amendments,<sup>251</sup> Article 218-2 of Morocco's Penal Code<sup>252</sup> stipulates that glorification of terrorism will result in 2 to 6 years imprisonment as well as a fine. As already noted, terrorism itself is only vaguely defined under Moroccan law. What conduct exactly will constitute 'glorification' is also vague. As such, the provision casts a broad shadow over freedom of expression. Article 218(6) punishes knowingly providing weapons, funds, means of sustenance, correspondence or transportation, a place to meet, housing, or in any other way assisting a terrorist. By failing to limit such liability to intentional support of terrorist acts, the article threatens to penalize humanitarian assistance, for example. Article 218(8) imposes a penalty on whoever is aware of terrorist activities, but does not report them. As with the above provision, while an obligation to report criminal activity is reasonable as such, coupled with a broad framework the loose language employed in creating the reporting obligation might lead to a situation where individuals feel compelled to report any sort of suspicious activity or are punished should they not do so, creating a system in which individuals are coerced into spying on one another and leading to the possibility of retributive referrals, investigations of innocent individuals, and a general weakening of the bonds of society.

Moreover, as noted above, Article 218(1)(9) stipulates that participation in an association with the aim of committing terrorist acts will constitute a terrorist act. The clause does not clearly require that such participants themselves have the intent to commit any terrorist act, however, and as such, especially as coupled with the potentially broad designation of terrorist organizations, could easily be used to target entirely innocent individuals.

The draft counterterrorism legislation currently being considered in Morocco, instead of amending this framework, would extend the ability under the law to penalize affiliation with terrorist entities on the basis of weak requirements of intent, and to penalize speech deemed to support such entities.<sup>253</sup> That such legislation is being considered is evidence of an approach in which terrorism charges could easily come to be applied to those in no way connected to terrorism under any reasonable definition, but of whose actions or speech the authorities disapprove.

In 2013, Ali Anouzla was arrested following an article on the Arabic version of the website *Lakome*, which criticized a video that called on Moroccans to engage in jihad against the king. The article included a link to the Spanish paper *El Pais*, on which the video was embedded, which prosecutors alleged constituted incitement and material support of terrorism. *Lakome* was well known as a long-term critical voice relative to government corruption and abuse. Particularly prominently among other sensitive issues, *Lakome* had reported on the pardon by the Moroccan King, on the request of the Spanish King, of a Spanish citizen convicted of child rape in Morocco; had questioned the monarchy's budget and the King's frequent vacations; and had charged that Morocco's intelligence agencies had instigated a smear campaign against Mr. Anouzla in the months prior to his arrest. The editor of the French addition of *Lakome*, which included the same content, was not charged.

Mr. Anouzla was held for five weeks in pretrial detention, and both the Arabic and French versions of *Lakome* blocked. After his release, Mr. Anouzla's case was perpetually delayed, without the charges being dropped. Morocco also brought an action in Spain

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<sup>251</sup> Law 03-03 of 2003.

<sup>252</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

<sup>253</sup> See Kingdom of Morocco, "Morocco: House adopts draft law tightening counterterrorism legislation," 22 Jan 2015; Saliba, "Morocco: Bill to Amend Counterterrorism law," Library of Congress Global Legal Monitor, 13 Feb 2015.

against Ignacio Cambrero, the Spanish journalist who had originally posted the story in *El País*.<sup>254</sup>

2013 also saw [Mustafa Hasnawi](#), an advocate for the rights of detained members of the Islamist movement, sentenced to four years in prison, reduced to three on appeal, on terrorism charges.<sup>255</sup>

## □ Tunisia

Article 12 of Tunisia's 2003 Counterterrorism Law<sup>256</sup> punished anyone who called for the commission of a terrorist act, joins a terrorist organization, or 'uses a name, word or symbol in order to make an apology for a terrorist organization, one of its members, or its activities'. Articles 13, 16-18 and 20 similarly included vague language making it unclear what level of intent would be required of individuals. As elsewhere, these provisions were overly broad and vague, allowing prosecutions of individuals with connections of some sort to terrorist organizations but no intent to undertake terrorist acts, or potentially even of individuals attempting to provide legal or humanitarian services to persons accused of terrorism. Article 22 of the law, moreover, required the disclosure of information concerning terrorist activity to the authorities. While a requirement to disclose any information as to imminent attacks is reasonable, the provision in question was written in overly broad language, and was used for example to attempt to require lawyers to turn over all confidential information of their discussions with defendants, undermining the right to a fair trial.

Following the attack on Sousse beach on 27 June 2015, terrorist charges under Article 18 of the Counterterrorism Law were brought against Nour Edine Mbarki, the editor of *Akher Khabar Online*, which published photos of the car that allegedly transported the attacker. Charges were brought even though the website promptly removed the photo from their website after a request from the authorities. The charges followed Mr. Mbarki's refusal to reveal the source of the photo to an investigative judge.<sup>257</sup>

Tunisia's new Counterterrorism Law<sup>258</sup> is similarly problematic when it comes to the matter of support for terrorism. Article penalizes anyone who praises terrorism, without clearly defining that label.

## Conclusion

The basis of every problematic terrorism law is an inadequate definition of terrorism. The problems with such inadequate definitions are immensely expanded, however, through the presence of overly broad and vague provisions on support of terrorism, membership of terrorist organizations and promotion of terrorism. Such provisions expand dramatically the range of actions that might be penalized, and can easily come to encompass extensive activity with no terrorist component.

Of central importance in this area is extremely careful attention to the importance of intent, and ensuring a legal regime that does not punish individuals arbitrarily. In reality, the momentum of the global war against terrorism has made the use of counterterrorism laws one of the most appealing means through which repressive governments crack down on rights organizations and dissent, under claims of legitimacy in the context of an area of law in which few governments uphold international obligations.

<sup>254</sup> See Goldstein, "Now Free, Moroccan Journalist Still Faces Terrorism Charges," HRW, 19 Feb 2014; Carnegie Endowment, "Interview with Moroccan Journalist Ali Anouzla," 20 Feb 2014; Rachidi, "In Morocco, reporting about terrorism is akin to inciting it," Christian Science Monitor, 4 April 2014; Amnesty, "Morocco: Stop Using 'Terrorism' as Pretext to Imprison Journalists," 20 May 2014; Jacobs, "Freedom of Expression and State Control in Morocco," Muftah, 5 Feb 2015.

<sup>255</sup> See ANHRI, "Morocco: Appeal Court Jails the journalist 'Mustafa Al-Hasnawi for 3 Years,'" 29 Oct 2013.

<sup>256</sup> Law 75 of 2003.

<sup>257</sup> See CPJ, "Tunisia charges editor with complicity in terrorist attack," 23 July 2015.

<sup>258</sup> Organic law 22 of 2015.

## 2.3 Discretionary procedure to designate entities as terrorist and penalties thereby applied

### □ Egypt

Articles 2-7 of Egypt's 2015 Terrorist Entities Decree Law<sup>259</sup> concern the procedure by which individuals may be placed on the terrorist list. The law provides that the public prosecution shall ask appellate courts to place individuals on the list, and requires that documents supporting the request be submitted, and that a reasoned decision be promptly issued by the court in question. There is no requirement that any crime in fact have been committed, however, and the law fails to clearly provide for a reasonably weighted process of determining whether an entity should be placed on the list, since all the evidence is in the hands of the prosecution, and the judicial process is to be summary. Combined with the vagueness of the criteria laid out by the law itself, the lack of safeguards in this process suggest that any name forwarded by the public prosecution – itself likely to receive instructions from political authorities – will make its way onto the list; or failing that, that several non-terrorist entities will be placed on the list. The possibility of appeal, granted by Article 6, is not enough to correct such ex-ante procedural deficiency.

The effects of inclusion on the list are laid out by Article 7, and include the banning of the organization in question, closure of its properties and a ban on its meetings, prohibition of any funding, the freezing of funds, a ban on membership of the organization in question and advocating for it, travel bans, and bans on public positions. This list is extremely troubling, both because the penalties may be applied on the basis of an inadequate underlying definition and an inadequate process, and because the list of effects itself appears to reveal that the intent of the Decree Law is to target organizations with some degree of public status – suggesting it will be applied to organizations that are not in fact involved in terrorist activities, which are unlikely to be so public and overt. The law might hence be used to dissolve human rights organizations, political parties and the like of which the authorities disapprove with only the vaguest nod to due process, while at the same time tarring those organizations publicly with the extremely detrimental label of terrorist, and denying members the right to participate in politics on an ongoing basis. The article, like the Terrorist Entities Law in general, is moreover vague as to the differentiation between penalties applied to entities and individuals, such that individuals can potentially easily incur liability for purported association with groups, regardless of individual knowledge or intent.<sup>260</sup>

### □ Morocco

The 2003 Law on Counterterrorism<sup>261</sup> amended Article 40 of Morocco's Penal Code<sup>262</sup> to allow the penalty applied there, the prohibition of civic, civil or family rights for a period of up to ten years, to be applied in terrorist convictions. Deprivation of rights is never an appropriate penalty; deprivation of civil and political rights in particular seems particularly to indicate a penal framework aimed at political opponents rather than crime, while deprivation of family rights (in this case the right to be a guardian) is clearly an inappropriate punishment.

The 2003 Law also amended Article 595(2) of Morocco's Penal Code to allow the judicial authorities to freeze funds suspected of links to terrorism; while such freezings are

<sup>259</sup> Decree Law 8 of 2015.

<sup>260</sup> For more, see CIHRS, "Legal comment on the proposed terrorist entities law," 3 Dec 2014; CIHRS, "Law on terrorist entities allows rights groups and political parties to be designated terrorists," 28 Feb 2015.

<sup>261</sup> Law 03-03 of 2003.

<sup>262</sup> Morocco Penal Code, Decree 1-59-413 of 1962.

reasonable should there be sufficient evidence of such links, the law fails to establish any evidentiary threshold for such a holding.

## Conclusion

Measures to identify and combat terrorist organizations are not only reasonable but also necessary, in order to protect citizens from the violation of their rights inflicted by terrorist actions. Procedures to designate entities as terrorist all too often place endless discretion into the hands of the authorities, however, and hence allow for sanctions to be imposed on organizations or individuals not in fact engaged in terrorist activities, a pattern that has been demonstrated again and again. Such processes, moreover, offer an extremely powerful and convenient means by which regimes may target, tar and dismantle those who oppose them, in a major distortion of the purpose of counterterrorism laws that constitutes a major rights violation that weakens and distracts attention from effective counter-terrorism measures.

## 2.4 Surveillance

### □ Egypt

Article 64 of Egypt's Telecommunications Law<sup>263</sup> forbids the use of encryption without the consent of the security authorities, violations of which are penalized with imprisonment and fine under Article 81. It also grants national security services complete access to the records of telecommunication providers as long as they are 'exercising their power within the law.' The provision for surveillance laid out by Article 64 is clearly overly broad and likely to lead to potentially unlimited surveillance (as in fact appears to be the case). The provisions banning encryption are also in clear violation of international standards, in addition to which they criminalize essentially all internet conduct, which relies on encryption of one form or another. Article 46 of the Counterterrorism Law<sup>264</sup> allows prosecutors and investigators to surveil and record conversations as well, without any need for a court order.

In 2014 a leaked tender by Egypt's Ministry of Interior made clear plans for an even more powerful social media monitoring system.<sup>265</sup> Later in 2014 the contract to undertake the surveillance was reportedly won by SEE Egypt, sister company to a US surveillance technology company Blue Coat whose technology Egypt had apparently previously employed; such reports were denied by the two companies and the Egyptian government.<sup>266</sup> Egypt has also reportedly used technology produced by the Italian Hacking Team company.<sup>267</sup> Move to this new system represents a significant ramping up of Egypt's surveillance technology and approach, and an even more intrusive and abusive system than that previously in place. December 2014 also saw the formation of a new High Council for Cyber Security bringing together top officials in an attempt to create a more coordinated intelligence community.

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<sup>263</sup> Law 10 of 2003.

<sup>264</sup> Law 94 of 2005.

<sup>265</sup> See Amnesty International, "Egypt's plan for mass surveillance of social media an attack on internet privacy and freedom of expression," 4 June 2014.

<sup>266</sup> See Frankel, "Egypt begins surveillance of Facebook, Twitter and Skype on unprecedented scale," BuzzFeed, 17 Sept 2014; "Planet Blue Coat: Mapping Global Censorship and Surveillance Tools," Citizen Lab, University of Toronto, 15 Feb 2013; Kimball, "After Arab Spring, Surveillance in Egypt Intensifies," The Intercept, 9 March 2015.

<sup>267</sup> See "Mapping Hacking Team's 'Untraceable' Spyware," Citizen Lab, University of Toronto, 17 Feb 2014.

## □ Morocco

The 2003 Counterterrorism Law<sup>268</sup> amended Article 79 of the Criminal Procedure Code<sup>269</sup> to allow for the searching of homes without the consent of occupants. In contrast to the amended Article 79 of the code, searches should require warrants backed up by reasonable suspicion, not merely prosecutorial authorization. The 2003 Law also amended Article 595(1) of the Code of Criminal Procedure to allow the attorney general to obtain information from banks as to the movement of funds suspected of links to terrorist activities.

Numerous journalists are subject to online surveillance in Morocco. Morocco has employed spyware developed by the Italian spyware company Hacking Team, which has sold its spyware to several of the world's most repressive governments, as well as the Eagle surveillance system (also used by Gaddafi), used to intercept emails and track journalists and dissidents on social media, developed and installed by the French company Amesys, as Swiss technologies used apparently for mobile telecommunication interception and jamming. Reported surveillance included online hacking as well as phone hacking and personal surveillance. Rather than amending its approach to comply with its human rights obligations, Morocco's response to the Privacy International report has been a complaint filed by the Interior Ministry.<sup>270</sup>

## □ Tunisia

Article 8 of the Internet Regulations in Tunisia<sup>271</sup> requires ISPs to submit lists of their subscribers to the Tunisian Internet Authority every month. In contrast, such information should only be available to the authorities where required by a warrant.

In 2013 a Decree was passed in Tunisia establishing the Technical Telecommunications Agency.<sup>272</sup> The body was given the task of providing support to law enforcement into investigations of communication crimes. The Technical Telecommunications Agency, including a related oversight body tasked with oversight to ensure the protection of privacy and rights, is set up by the decree as a government-controlled body. Meanwhile Article 5 of the Decree stipulates that the Agency's activities will not be subject to public scrutiny. As such, there is little guarantee that the agency's actions will in fact be rights-respecting. This is particularly worrying given that, while it is understood not to be currently used, Tunisia still has access to extensive and intrusive Ben Ali era technologies that might be used for surveillance.<sup>273</sup>

Tunisia's new Counterterrorism Law<sup>274</sup> grants security and intelligence services the power to use special investigative techniques (Article 52-61). The law does include the positive features that approval must be obtained for surveillance, though either a prosecutor or judge may grant such approval. The law also stipulates that one-year prison sentences may be applied should such forces exercise surveillance without the necessary approval. The law remains in need of improvement by clearly defining when surveillance may be authorized and by ensuring independent oversight over surveillance activities, however.

<sup>268</sup> Law 03-03 of 2003.

<sup>269</sup> Decree Law 1-58-261 of 1959.

<sup>270</sup> See Privacy International, "Their Eyes on Me: Stories of Surveillance in Morocco," 2015; RWB, "RSF Backs Moroccan NGO Targeted by Interior Ministry," 5 June 2015; RWB, "Monarchy's Red Lines Gag Morocco's Independent Media," 17 Sept 2015.

<sup>271</sup> Regulations of 22 March of 1997.

<sup>272</sup> Decree 4506 of 2013.

<sup>273</sup> For more on such issues, see Freedom House, Freedom on the Net report, Tunisia, 2014.

<sup>274</sup> Organic law 22 of 2015.

## Conclusion

Telecommunications technology has in and of itself represented a massive boon for freedom of expression, enabling new forms of communication and expression and the sharing of and access to information. The importance of modern telecommunications tools, and the internet in particular, was demonstrated emphatically by the role of such technologies in uprisings in the Arab region. Repressive governments have also recognized the importance of such networks, however, as demonstrated by the Egyptian government's shutting down of telecommunications networks during the 2011 revolution as well as by the even more insidious and threatening practice of mass surveillance. As with counterterrorism in general, the international rhetorical and legal project of which has helped to enable mass surveillance, surveillance activities in countries of the Arab region have benefited massively both in terms of rhetorical justification and technological capacity from abuses committed in this realm in the developed countries of Europe and North America.

Just as modern telecommunications are one of the most powerful potential tools of enhanced democracy globally, the possibilities for surveillance opened up by such technologies threaten the potential of similarly dramatic systems of control and monitoring.

## 2.5 Sanctions and procedure

Needless to say, the most severe penalties are applied relative to terrorist offenses. While this is reasonable relative to properly defined terrorist offenses, which constitute some of the most violent and dangerous crimes, it is of course exceedingly problematic where terrorism is defined in an overly broad manner. The potential application of the death penalty in particular constitutes a clear and egregious human rights violation in such a context. Both Egyptian and Moroccan law allow for the death penalty, with the new Counterterrorism Law in Egypt expanding the potential application of the penalty.<sup>275</sup> The new Counterterrorism Law in Tunisia<sup>276</sup> also includes the death penalty, signaling a potential end to the moratorium on its use in Tunisia.

Moreover, laws often allow for the stretching of procedure in the context of terrorism, violating individuals' rights to due process. Thus for example the Counterterrorism Law in Egypt applies penalties on the basis of the consequences of actions with inadequate regard to the intent involved.<sup>277</sup> The law also allows for arbitrary and incommunicado detention, in clear violation of some of the sharpest of human rights obligations.<sup>278</sup> Article 53 of the law purports to grant the President certain powers to declare a state of emergency – a declaration only likely to lead to further procedural violations – in clear contradiction of the clauses of the Constitution governing the same area.<sup>279</sup> The Counterterrorism Law in Morocco<sup>280</sup> amends Articles 66 and 80 of the Code of Criminal Procedure to allow extended police detention of individuals, without providing for necessary judicial checks, as well as to allow for the prevention of communication between the accused and his or her lawyer, in clear violation of human rights obligations. The new Counterterrorism Law in Tunisia similarly allows for extended periods of time in

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<sup>275</sup> Decree Law 94 of 2015. See also CIHRS & EIPR, "The New Counterterrorism Law: Another Blow to the Constitution, Encourages Extrajudicial Killing," August 2015; and HRW, "Egypt: Counterterrorism Law Erodes Basic Rights," 19 Aug 2015. Article 4 of the law also provides for a wide jurisdictional scope, allowing the law to be applied in numerous cases of crimes committed abroad as well – expanding the implications of the law's negative provisions.

<sup>276</sup> Organic Law 22 of 2015.

<sup>277</sup> See CIHRS & EIPR, "The New Counterterrorism Law: Another Blow to the Constitution, Encourages Extrajudicial Killing," August 2015, Section III.

<sup>278</sup> See *id* Section VII.

<sup>279</sup> See *id* Section VIII.

<sup>280</sup> Law 03-03 of 2003, modifying Morocco Penal Code, Decree 1-59-413 of 1962.

detention for terrorist suspects, stipulates that their detention will be incommunicado, allows for the closing of trials to the public without stipulating a narrow set of grounds upon which such closure may be effected, and allows for the potential that evidence may be kept secret from the accused without placing clear limits on such a possibility (Articles 68 and 70).

Article 8 of Egypt's Counterterrorism Law contains yet another problem; while that law sets up a heightened and abusive regime of penalties that may be applied against whomever the government designates as terrorists, Article 8 suggests a regime of immunity may be set up for security forces – a regime that is of course already in place in reality, when the extent of killings is compared to the extent to which prosecution and punishment has been pursued, particularly for those on the highest levels.<sup>281</sup>

### 3. Recommendations

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- States must ensure that terrorist offenses are defined in accordance with international standards, and in particular that only crimes rising to the necessary level of severity are defined as terrorist;
- Penalization of statements understood to support terrorism must be limited to direct incitement of terrorism;
- Criminal penalization of indirect support to terrorist acts or membership of terrorist organizations must be limited to situations where the individual in question demonstrated an intent to commit or further the commission of terrorist acts;
- Any procedure set up to designate entities as terrorist must be overseen by independent authorities and make its decisions on the base of evidence and reasoned decisions, in a procedure respecting the principle of equality of arms. Any organization listed should be granted a fair hearing prior to any overt action against such organization on the basis of its listing;
- Relevant details of the situations under which surveillance may occur, inappropriate forms of surveillance, appropriate penalties and the structure of judicial oversight of the surveillance authorities should be clearly laid out by law. Any surveillance must be case-specific and on the basis of a warrant granted under probable cause on the basis of fact;
- Due process rights must be ensured.

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<sup>281</sup> For more on this and other related articles of the law setting out a privileged regime for security forces, see CIHRS & EIPR, "The New Counterterrorism Law: Another Blow to the Constitution, Encourages Extrajudicial Killing," August 2015, Section VI.

## V. CONCLUSION

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The above study has considered a substantial part of the legal frameworks and practice relating to freedom of expression in Egypt, Morocco and Tunisia since 2011. Tunisia is the only country that has seen substantial positive development during that period, although numerous challenges still remain. In Morocco, an extensive repressive apparatus is in place, though operated with a comparatively deft touch compared to Egypt, where an even more repressive legal framework is coupled with heavy-handed suppression of critical voices.

While the countries have arrived at different points, the underlying logic and philosophy of the repressive frameworks still being reinforced in Morocco and Egypt and still unfortunately significantly still in place in Tunisia is similar. In the first place, the legal frameworks are designed to grant the governments as much discretion as possible. In the second place, the chilling effects of the legal frameworks are intended to apply as widely as possible. Both are accomplished in significant part through overly broad and vague laws, which can be used in a wide variety of circumstances, granting the authorities the tools they need in those cases they choose to focus on, while depriving individuals of any certainty as to the type of actions or speech that will be allowed, which is replaced by general ideas as to the sorts of speech that might land one in trouble. As noted above, the vagueness and potential of selective application present in individual articles of the law is compounded by the existence of so many repressive articles of law, while the force of such laws is granted both by the excessive sanctions that apply to individual provisions, as well as the potential that numerous provisions might be stacked together to target particularly outspoken individuals.

As for the red lines themselves, the trinity noted in the first substantive section of the report is the clearest – the authorities, national sovereignty and the religious sensibilities of the majority are not to be touched. By weaving these categories together, the authorities attempt to bolster their power by declaring both that they are the nation and that they are the defenders of religion, and hence worthy of the support of the religious, attempting to assert as their own the unified source of authority. At the same time, those who challenge any of these red lines can be seen as challenging them all – an association potentially linked in the more extreme cases to the last category explored here, that of terrorism.

Such legal frameworks are clearly in violation of the human rights obligations of the countries considered as well as the rights guarantees provided by their own constitutions, and for those reasons alone any action taken under such frameworks might be considered outside the law. Even beyond those protections, however, the nature of such laws should raise questions – as by admitting both individually and collectively of excessive vagueness, complemented by an ill-defined and vague application, they fail to comply with the basic parameters of the rule of law as such.

The effects on freedom of expression are plainly apparent. In Egypt, the last five years have witnessed numerous prosecutions on the basis of the content of speech, along with continuing tight controls on the media in general. While the situation in Morocco has been significantly better in comparison, numerous prosecutions have also occurred, and a similarly comprehensive legal regime of control exists. Finally in Tunisia, several positive legal developments have taken place, although the new laws adopted themselves remain in need of further amendment and several areas of law that have not yet been updated remain in need of extensive reform – highlighting the extent of the efforts necessary to rework repressive legal frameworks. For the future, it is to be hoped both that Tunisia resists the temptation to adopt new restrictive laws or to continue to apply existing ones, and that the other countries in the region learn from the positive example being set and begin to reform their systems. Judging by current trends, however, such reform remains a faint promise.

يتناول هذا التقرير وضعية الحق في حرية التعبير في مصر والمغرب وتونس في الفترة الممتدة من 2011 إلى الوقت حيث يفحص ثلاث مجالات تؤثر على هذا الحق، على وجه الخصوص القيود المفروضة على الخطاب على أساس محتواه، القيود على حرية وسائل الإعلام والقيود المستمدة من القوانين والممارسات لمكافحة الإرهاب.

الحق في حرية التعبير له أهمية أساسية في تنمية مجتمع حر، متفتح وديمقراطي، كما أن حرية التعبير أساسية حتى يتمكن الأفراد من تنفيذ أنفسهم، التواصل، مناقشة الشؤون السياسية و أن يصبحوا مشاركين نشيطين في حكمة مجتمعاتهم.

بالتالي فإن هذه الحرية هي أيضا المجال الذي غالبا ما تكون فيه السلطات الحاكمة حريصة بشكل خاص على فرض هيمنتها و سيطرتها فيه، مع العلم أن سيطرتها على الخطاب أساسية من أجل الحفاظ على موقعها كسلطة. ضمان حرية التعبير ضد مثل هذه الهجمات له مهمة حيوية، حيث يجعل منها آلية للتصدي لانتهاكات حقوق الإنسان في جميع المجالات.

تاريخيا، واجهت كل من مصر والمغرب وتونس مشاكل مماثلة، تركزت على فلسفة وممارسة الرقابة الحكومية، الاستفادة من الأطر القانونية المقيدة و في كثير من الأحيان المستمدة من الممارسات الاستعمارية. خلال السنوات الخمس الماضية المفحوصة من قبل هذه الدراسة، يمكن ملاحظة اختلاف كبير بين البلدان التي تم فيها البحث.

في مصر، وعلى الرغم من النداءات منذ عام 2011 من أجل إصلاح الأطر القانونية الحالية المقيدة لحرية التعبير، لم يقع تقديم يدكر على هذه الأسس. تمت الموافقة على دستور جديد عن طريق استفتاء سنة 2014 الذي يحتوي على العديد من الضمانات المتعلقة بحرية التعبير، لكن بنود الدستور التي تخص حماية هذا الحق و الالتزامات الدولية لمصر كذلك تم تجاهلها خلال السنوات القليلة الماضية. مازالت الأطر القانونية القائمة، إلى غاية اليوم، تستخدم لمهاجمة والحد من حرية التعبير في مجموعة كبيرة من المجالات، وبل اضيفت إليها قوانين جديدة مقيدة للحقوق والحريات، خاصة في مجال مكافحة الإرهاب.

بنطبق الأمر كذلك على المغرب، حيث اعتمد في عام 2011 دستور جديد يحتوي على العديد من الضمانات المتعلقة بحرية التعبير؛ ولكن لا يزال عليه أن يغير إطاره القانوني وفقا للحقوق التي يضمنها الدستور. بدلا من ذلك، وكما هو الحال في مصر، لا تزال القوانين القائمة تستخدم لتقييد حرية التعبير. كان للمغرب تاريخ أقل صحابة من مصر على مدى السنوات الخمس الماضية، وعلى هذا النحو الخطوط الحمراء هي أكثر وضوحا، و من المرجح أن تفرض نسبيا القيود من خلال غرامات مالية مقارنة عوض العقوبات السجنية. كما أن التأثير على حرية تعبير كان جد محدود، مقيد بموقف أكثر صرامة اعتمده الحكومة منذ منتصف 2014 على وجه الخصوص.

في تونس، كان التاريخ الحديث أكثر إيجابية. فقد أقيمت إصلاحات إيجابية للقوانين التي تنظم عمل وسائل الإعلام منذ سقوط زين العابدين بن علي سنة 2011، لكن لا زالت تستخدم عددا من الأطر القانونية الإشكالية، إلا أن الوضع بشكل واضح أكثر حرية و انفتاحا مما كان عليه نظام ما قبل 2011. غير أن القانون الجديد لمكافحة الإرهاب الذي اعتمد في أعقاب الهجمات الإرهابية الدرامية في عام 2015 نص على عدد من الأحكام المقيدة للحقوق.

## 2 القيود على حرية التعبير على أساس المحتوى

على الرغم من هذه الاختلافات في المسار وأنواع القيود المعتمد عليها في البلدان الثلاث فإننا نجد درجة عالية من أوجه التشابه، تشمل القيود على حرية التعبير على أساس محتواها، في المقام الأول، الأحكام التي تحد من انتقاد السلطات. مثل هذه الأحكام لا يزال العثور عليها ممكنا في القانون الجنائي في البلدان الثلاث؛ المغرب ربما كان الأكثر رمزية فمادة واحدة تجمع بين منع انتقاد الملك والإسلام والأمة. في هذا السياق، نجد الإشكال كذلك في القوانين التي تمنع انتقاد القضاء والتي غالبا ما تكون مضمرة في هذه البنود التي تساعد على تقوية النمط القمعي الذي تدعي الجهات القضائية في كثير من الأحيان أنها تعمل على إصلاحه بإحداث بعض التعديلات.

على سبيل المثال، تم تطبيق قوانين تمنع انتقاد السلطات في مصر على الأفراد الذين دعوا إلى عدم التصويت أثناء الاستفتاء على دستور عام 2014، كما تم اتهام السياسي عمرو حمزاوي بإهانة القضاء في سنة 2014 بسبب انتقاد الأحكام الصادرة ضد ترويح منظمات ديمقراطية دولية. في المغرب، مغربي الراب الذين ألفوا أغاني تنتقد السلطات واجهوا النية العامة في ظل هذه الأطر القانونية، وكذلك غيرهم من الأفراد الذين انتقدوا السلطات في المناقشات الشخصية أو على صفحات الفيسبوك الخاصة بهم. ربما المستهدف من هذه القوانين المعروف والأكثر شيوعا هو الصحفي رشيد نيني، الذي تم محاكمته سنة 2011 بالسجن والغرامة المالية بسبب تحقيقات بشأن السلطات، عقب نشر مقال ينتقد رئيس جهاز المخابرات المغربية. في تونس أيضا، العديد من الأفراد الذين انتقدوا السلطات بطريقة أو بأخرى وجدوا أنفسهم عرضة للاتهامات بموجب قضايا عديدة من قانون الجنائيات، بما في ذلك على سبيل المثال الاتهامات الأخيرة ضد المخرجة إيناس بن عثمان بعد اتهامها للشرطة بالمضايقات.

النموذج الثاني من القيود على حرية التعبير على أساس محتواه يتمثل في القوانين التي تعاقب على انتهاك الآداب العامة أو الإساءة إلى الدين. هذه القوانين عادة ما تستعمل كمقيد غير متناسب مع حرية التعبير من خلال منع مناقشة الأفكار المجردة. هذه الأحكام، أكثر تعقيدا من الناحية العملية، حيث أنها تستخدم حتما في استهداف تلك الآراء القليلة، وليس تلك التي تمتلك غالبية المواقف الدينية أو المعيارية. في هذا السياق، وبشكل مثير للسخرية فإن مثل هذه المحاكمات تقترب بل وتشكل و تشمل خطاب الكراهية والإضطهاد حتى في الوقت الذي تعتمد على خطاب موضوعي يزعج مكافحة الكراهية.

يمكن ذكر حالات كثيرة من هذا الانتهاك في مصر، حيث ساهم كل من الجمهور والحكومة في اضطهاد أفراد، مثل الناشط في مجال حقوق المؤلف كارم صابر إبراهيم، الذي تمت إدانته باهانة الدين الإسلامي، محمد فهمي عبد الصياد عصفور، عمرو عبد الله ومحمود دحروج، بسبب كونهم شيعيين، بالإضافة إلى شريف جابر وكريم أشرف محمد البنا الدين أعلنوا أنفسهم ملحدين على ما يزعمه البعض، وضد العديد من الأقباط بسبب الشتائم المزعومة على الإسلام، بغض النظر عن الأسئلة التي غالبا ما تكون بعيدة عن التهم الموجهة ضدهم. في المغرب، التهم الموجهة ضد مغني الراب عثمان عتيق لا تتضمن فقط تهمة إهانة مؤسسات الدولة، ولكن أيضا إهانة الدين، مما يدل مرة أخرى على التفاعل بين الفتنين. كما تم توجيه تهمة المس بالأخلاق العامة ضد النساء اللواتي كن يرتدين فساتين ضيقة، بعد أن تعرضن لمضايقات من قبل بعض رجال، مما يدل مرة أخرى على الطريقة التي تستهدف بها هذه القوانين ضحاياها في مثل هذه مجالات. و تمت معاقبة مجموعة من الأفراد في تونس انطلاقا من هذه القوانين بسبب رسومات اعتبرت مسيئة للنبي محمد وكذلك البث أو إنتاج لعمل إبداعي أعتبر بطريقة أو بأخرى مهينا. كما يجري الحال في الأماكن أخرى، تكشف الأمثلة التونسية أن المجال الوحيد الذي تطبق فيه مثل هذه الأحكام هي متعلقة بالأراء التي تخالف وجهة نظر الأغلبية.

النوع الثالث من قيود التعبير على أساس المحتوى هو القوانين التي تفرض عقوبات بشكل مفرط، وأبرزها قوانين التي تعاقب على نشر أخبار كاذبة. هذه القوانين توفر آلية مريحة وحيادية تمكن السلطات من متابعة الأفراد الذين يزعمون خطايا لا يوافق عليه النظام الحاكم وذلك بشكل محايد. على هذا النحو، فإنها تسمح للسلطات أن تتوارى بشكل مفرط عن الأنظار معاقبة السلوك الذي لا ينبغي أن يعاقب و ممارسة تأثير سلبي كبير على الحق في حرية التعبير.

في مصر، اعتمدت هذه الأحكام في محاكمة صحفيي الجزيرة وكذلك في توجيه اتهامات ضد حسام بهجت، وهو محقق صحفي معروف ومدافع عن حقوق الإنسان. في كلتا الحالتين، ظهرت اتهامات بسبب بث أحداث ووجهات نظر فضلت السلطات عدم بثها.

في المغرب، وجهت تهم بموجب هذه الأحكام ضد حميد المهراوي، محرر في موقع معروف لإبلاغ انتهاكات حقوق الإنسان والفساد، الصحافي رشيد نيني، بعد القصة التي ينتقد فيها أحد الوزراء، والمعاطي منجب وكريمة نادر، المدافعين عن حقوق الإنسان والصحفيين بعد نشر وتقديم تقرير لمنظمة دولية يوثق انتهاكات للبيانات الشخصية والتجسس على بعض الناشطين في المغرب. في تونس، استخدمت هذه الأحكام بطريقة غير ملائمة لاستهداف فاهم بوكدوس، مراسل، في عام 2008، بعد تقاريره على الاحتجاجات ضد الأوضاع الاقتصادية السيئة وانتهاكات حقوق الإنسان والفساد في مدينة قفصة. وفي الأونة الأخيرة تم وضع ملفات ضد حجلوي نبيل، أيوب المسعودي، حكيم غانمي، ياسين عياري والصحفي الجويني لانقادهم للجيش.

أما الرابع، تثبت الأطر القانونية في البلدان التي جرت دراستها فشلا في تعريف التشهير بشكل صحيح أو في توفير مجموعة مناسبة من الدفوع والإعفاءات. أن القوانين في البلدان الثلاث تدين الشتائم بشكل غير لائق، حيث يتم ذلك بشكل مفرط الغموض و غير موضوعي و تستعمل المعاقبة بطريقة تمييزية عند التطبيق. و بصفة عامة، علاوة على ما سبق ذكره، أن القوانين عبر هذه البلدان تعجز عن تعريف التشهير بشكل كاف، و كذا عن توزيع أعباء الإثبات على نحو مناسب، و عن توفير معايير عالية بغية إظهار التشهير في حالات إثارة المسائل التي تهم عامة الناس، أو عن السماح بالدفاع عن اصدار معقول. والنتيجة هي خلق إطار قانوني يجعل المطالبة بالحق من طرف المدعي أمرا بالغ الصعوبة، و يقوي التأثيرات السلبية التي تتعلق بحرية التعبير.

ثم الصنف الخامس، حيث تفرض الأطر القانونية في البلدان المعنية عقوبات مفرطة، بما في ذلك عقوبات جنائية ضد الإهانات اللفظية. في حين أن الأطر القانونية التي تعاقب على التشهير معقولة، فمن الأهمية بمكان أن تكون أي عقوبة تفرض متناسبة مع الضرر المعني، مع التركيز على ضمان الحد الأدنى الممكن للتأثير السلبي. يتم الاعتراف على نطاق واسع أن العقوبات الجنائية على وجه الخصوص غير مناسبة، ليس فقط بسبب ثقل العقوبة المعنية بل أيضا لأنها تجعل من الدولة وكيلاً للمعاقبة المتفق عليها. و يتفق على وجوب الاعتراف بأن الغرامات النقدية المفرطة غير مناسبة أيضا، و مع ذلك فإن هذه الأخيرة يتم تطبيقها في الواقع في المنطقة بنية واضحة وباتر واضح يتمثل في منع حرية التعبير. أوضح امر بهذا الصدد إغلاق جريدة 'لو جورنال إيدومادير' بالمغرب بعد غرامة شتم هائلة سنة 2006 .

إن مجمل هذا النوع من البنود منح السلطات سلطة واسعة للتواري عن الأنظار و السيطرة المتعلقة بضبط أنواع التعبير التي سيسمح أو لن يسمح بها في الحكومات المعنية، و ممارسة تأثير سلبي يعد المسؤول عن تقييد الحقوق بشكل يتجاوز حدود القضايا التي تم التطرق إليها. بينما في بعض البلدان مثل تونس، كانت الممارسة أكثر إيجابية، وهذا يمكن أن يعزى لتطوير المناخ السياسي الإيجابي والمجال العام في البلد؛ و يبقى من المهم أن يعزز هذا المجال و أن يكون محميا بإصلاح القوانين المعنية.

## توصيات

حذف جميع الأحكام في القانون التي تفرض عقوبات إضافية على الكلام الذي يقوم باستهداف السلطات؛ وتنقيح الأطر القانونية للسماح أكثر، لا أقل، بحرية التعبير في جميع المجالات التي تهم عامة الناس؛

حذف أو تقييد جميع الأحكام الغامضة أو واسعة النطاق بشكل مفرط، بما في ذلك الأحكام التي تهدف إلى حماية 'الأخلاق العامة'، 'السيدة الوطنية' أو 'الأمن الوطني' بشكل غامض؛

حذف جميع المعاقبات على الإهانة

إعادة صياغة الأحكام الإجرائية لضمان نظام مناسب للدفاعات؛

إزالة جميع العقوبات المتعلقة بالكلام، فضلا عن غيرها من العقوبات المفرطة.

### 3 تقييدات حرية الإعلام

بالإضافة إلى القيود المفروضة على الكلام على أساس محتواه، تستخدم البلدان المعنية الأطر القانونية التي تحد من حرية التعبير بتزويد السلطات بسيطرة واسعة على وسائل الإعلام.

القوانين في مصر والمغرب تفرض سيطرة الدولة على وسائل الإعلام المطبوعة؛ وهناك قانون جديد في تونس أكثر إيجابية، على الرغم من العديد من المكونات لأن القوانين لا تزال تحتاج إلى مزيد من التعديلات الإيجابية.

يجب على الصحف الحصول على إذن للعمل في مصر والمغرب من الهيئات الحكومية الأقل استقلالا. بينما يختلف الأمر في تونس حيث الحالة أفضل بفضل القانون الجديد، حيث لا يزال يتم تضمين شرط الإعلان إلى قاض لا لزوم له في القانون. وبالإضافة إلى ذلك، فإن قطاعا كبيرا من وسائل الإعلام المطبوعة ملك للحكومة ويتم مراقبتها في مصر، بالإضافة إلى ما تؤدي إليه السيطرة الإعلامية للحكومة من تعزيز التحكم في المحتوى.

ان الانتقال إلى وسائل إعلام مطبوعة مستقلة يعتبر إشارة هامة تمكن من الانتقال إلى مجتمعات أكثر حرية على وجه العموم. ان القوانين في كل من مصر والمغرب تفرض سيطرة الدولة على وسائل الإعلام الإذاعية؛ وتبقى تونس المثال الأكثر إيجابية، على الرغم من أن عددا من الأحكام ينبغي أن يتعزز لتوفير قدر أكبر من الاستقلال. في مصر، تسيطر الدولة بشكل كامل تقريبا على البث الإعلامي، على الرغم من أن البث الفضائي يتمتع بالطبع بالمزيد من الاستقلالية نظرا لطبيعة هذا الاسلوب.

في المغرب أيضا، ينص القانون على ان السلطات تمارس مراقبة مكثفة وتتحكم في وسائل الإعلام الإذاعية. تعتبر وسائل البث أحد المصادر الأكثر أهمية وشيوعا للوصول للمعلومات في جميع أنحاء العالم؛ وبالتالي، فإن ضمان أن هذه الأشكال من وسائل الإعلام حرة ومستقلة، كما الحال مع وسائل الإعلام المطبوعة، يعتبر مؤشرا رئيسيا للمجتمعات الأكثر تحمرا.

تفرض القوانين في البلدان الثلاث سيطرة الدولة على وسائل الاتصال؛ ولقد استخدمت في تونس تلك الأطر القانونية للمراقبة أقل منذ قيام الثورة، لكنها لا تزال تحتاج إلى تعديل.

ان أهمية السيطرة الرئيسية المصرية على هذه الوسائط تمثلت بشكل كبير عندما تم قطع خدمات الهاتف وشبكة الإنترنت عام 2011؛ ولقد تم ايجاد فيما بعد انه قد تم هناك انتهاك من طرف أعلى محكمة إدارية في مصر، و لم تؤد هذه الروح الإيجابية لحكم 2011 الى إجراء الإصلاحات اللازمة.

نظراً للأهمية الرئيسية للاتصالات السلكية واللاسلكية للمجتمعات الحديثة، و توفر مساحة هامة للأصوات البديلة الآتية عن طريق شبكة الإنترنت، من الأهمية بمكان ضمان عدم تشديد سيطرة الدولة على هذه الأماكن. وتفرض القوانين في البلدان الثلاث سيطرة الدولة على الصحفيين. في جميع هذه البلدان، يحد القانون تعريف الصحفيين دون داع. وشهدت كل من الثلاث أيضا اعتداءات على الصحفيين.

وفي المغرب، تمت ادانة محمد سقراط، مدون معروف لإبلاغه عن المواضيع الحساسة، للسجن لمدة سنتين بتهم تتعلق بالمخدرات في عام 2012.

حوكمت ميتشام المنصوري، عضوة "الجمعية المغربية لصحفي التحقيق"، إلى عشرة أشهر في السجن في عام 2015 بتهمة الزنا. عبد الصمد عياش، عضو آخر في الجمعية، منع من السفر إلى الخارج على أساس مجموعة اتهامات غامضة. في مصر، كانت الهجمات على الصحفيين أشد. حيث تم قتل و احتجاز العديد من الصحفيين منذ عام 2011، غالباً أثناء تغطيتهم للاحتجاجات.

تسمح القوانين في مصر والمغرب بالرقابة. طبقت هذه الأخيرة منذ 2011 في مصر من أجل إغلاق القنوات التلفزيونية وإظهار الاستيلاء على نشر صحف ومنظمات حقوق الإنسان، و طبقت في المغرب بإغلاق الجرائد والمواقع. لا يحتمل أن تلجأ الحكومات إلى استخدام الرقابة في الكثير من الأحيان، نظراً لصعوبة احتواء المعلومات في العصر الحالي ونظراً للضجة المحتملة بعد أن تفعل ذلك؛ ويبقى الخيار قائماً، لإسهامه في توسيع شبكة من الأحكام القانونية التي ترمي إلى تقنين التواصل والتي تدل على سيطرة ضمنية.

تفرض القوانين في مصر والمغرب أيضاً متطلبات خاصة على وسائل الإعلام الأجنبية، واتخذ كلا البلدين تدابير ضد الصحفيين الأجانب والقوات مع اختلاف التغطيات. وكانت قناة الجزيرة على وجه الخصوص على الطرف المتلقي لمثل هذه الهجمات، حيث تم احتجاز العديد من الصحفيين من قناة الجزيرة الإنجليزية في مصر، في حين قد تمت معاقبة قناة الجزيرة في المغرب أيضاً بعد تغطيتها للمشاكل المتعلقة بالصحراء المغربية.

## توصيات

ينبغي أن تكون الكيانات الصحافية قادرة على العمل بحرية، دون الحاجة إلى ترخيص أو الرقابة

ينبغي توزيع المنظمين لبت الترددات بدون تحيز وبهدف تعزيز التنوع؛ و لا ينبغي أن يطالب مذيعي القنوات غير الأراضية بتقديم طلبات التراخيص؛

ينبغي أن تكون شبكات الاتصالات السلكية واللاسلكية، بما في ذلك الهواتف المحمولة والإنترنت، قادرة على العمل بحرية وبدون تدخل الحكومة أو المراقبة؛

أية كيانات حكومية تتمتع بسلطة الرقابة على وسائل الإعلام يجب أن تكون مستقلة تماماً؛

لا ينبغي لممارس الصحافة في أي حال من الأحوال أن يحد، و ينبغي أن تترك ضمانات الجودة الصحفية للتنظيم الذاتي

ينبغي حظر الرقابة ومصادرة المطبوعات و تعليق وسائل الإعلام في جميع الحالات؛

وينبغي تشجيع وسائط إعلام متنوعة، بما في ذلك مجموعة وجهات النظر المختلفة

وينبغي أن تكون حماية مصادر الصحفيين مضمونة

## 4 القيود المستمدة من القوانين والممارسات لمكافحة الإرهاب

تعتبر القيود على محتوى الخطاب والسيطرة على وسائل الاعلام منذ فترة طويلة من الادوات الاساسية المستخدمة من قبل الانظمة القمعية لتقييد حرية التعبير. غير انه في الأونة الأخيرة، وخاصة منذ العدوان الذي انتهجه الولايات المتحدة بعد [ 1 ايلول/سبتمبر، أصبحت قوانين مكافحة الارهاب وسيلة لانتهاك الحقوق تستهدف فئات الانظمة الحاكمة المعتبرة الأكثر تهديدا. الانتهاكات المرتكبة من خلال قوانين مكافحة الارهاب تشمل عمليات القتل والتعذيب والاحتجاز التعسفي والحرمان من الحقوق الاجرائية للأفراد الذين ربما يكونوا قد ادينوا بارتكاب جرائم تحتوي البلدان الثلاث على تشريعات لمكافحة الارهاب ذات طابع جد عام وغامض. ارهابية. وكذلك الجرائم المماثلة ضد أفراد ابرياء فالقوانين المعتمدة مؤخرا في تونس ومصر هي نتيجة هجمات ارهابية مأساوية. وفي حين ان الحكومات ينبغي ان تتخذ تدابير صارمة لمعالجة التهديدات الارهابية، فمن المهم ان تكون هذه التدابير المتخذة تتصدى للإرهاب، وتحترم مبادئ حقوق الانسان. النتيجة النهائية لسياسات مكافحة الارهاب وخرق حقوق الانسان ليس هو القضاء عليه، بل هي دفع الأفراد تجاهه. م جهة اخرى، احترام وتطبيق حقوق الانسان هو ضمن السبل لمكافحة الارهاب.

الإشكالية المطروحة على مستوى القوانين في البلدان الثلاث هي كونها توظف تعاريف للإرهاب بشكل مفرط. هذه القوانين تصنف مجموعة واسعة من الأنشطة على أنها إرهابية، فهي إذن لا تتمثل للشرط الوارد في القانون الدولي المتمثل في كون مفهوم الإرهاب لا ينسب إلا للجرائم التي تنطوي على عنف شديد. الأمر الذي يجعل هذه القوانين تكسب اثرا تخويفيا واسعا، حيث انها تساعد على خلق حفل إيديولوجي الذي قد تعتبر في إطاره المنظمات التي تنتقد السياسات الرسمية، مثل منظمات حقوق الانسان، كجهات ميسرة الارهاب بشكل او باخر. فعلى سبيل المثال، تجس هذا الموقف عندما زعم ناطق مصري أن "هيومان رايتس ووتش" كان من مؤيدي الارهاب في عام 2015، ويرجع استنتاجه هذا لكونهم أصدرت تقريرا ينتقد سجل حقوق الانسان في مصر.

توظف أيضا القوانين في هذه البلدان الثلاث نهم الترويج للإرهاب بشكل مفرط. حت أنها تعاقب على مجرد الدعوة إلى أهداف غامضة. ومن الواضح ان هذه المواد هي اشكاليات في حد نفسها لكونها تجرم الدعوة و الترويج و التمجيد باعتبارها عبارات غامضة ، وهذا لا يتوافق مع الشرط العالمي الذي يحث على معاقبة التحريض فقط، وذلك لعدم الاعتداء على الحق في حرية التعبير. وأكثر من ذلك ، تضخم هذه القوانين الغموض الموجود في تعاريف الارهاب التي نوقشت اعلاه مما يجعلها أكثر تعقيدا. يتعد القانون المصري ذلك إلى ربط الدعوة بالإرهاب في حالة نشر معلومات تناقض المعلومات التي تنشرها المصادر الرسمية. والمغرب بدوره خير مثال على هذه القوانين التي قد بساء استخدامها، و يتجسد ذلك من خلال أحداث عام 2013، حيث تم القبض على "علي أنزولة" ، وتوقيف موقع "لاكوم" الإخباري بسبب نشر رابط إلكتروني على الموقع، يتعلق بمقال صحيفة "البابيس" الإسبانية التي نشرت فيديو يدعو إلى "الجهاد" ، على أساس توفير دعم واضح لمضمون هذه المادة. ومؤخر في تونس، تم توجيه اتهامات مثيرة للجدل إلى "نور الدين مباركي" محرر "أخ خبر" على الانترنت، بعد تتبعه لصور سيارة قيل أنها نقلت المهاجم في الهجوم على شاطئ مدينة سوسة.

القوانين في مصر والمغرب توفر مراقبة تدخلية وشاملة بدون إذن قضائي. وقد نجحت هذه الأخيرة من خلال تنسيق بين رخصة المراقبة و الصمت حول ضرورة حماية الخصوصية. حيث مكنت هذه الأطر من توفير مراقبة مكثفة في مصر والمغرب. وفي السنوات الأخيرة اتجه كلا البلدين إلى الشركات الأجنبية مثل "الشركة الإيطالية للقرصنة" و "الشركة الفرنسية أمينيزيس" للحصول على أحدث تكنولوجيا المراقبة. أما في تونس، فالمعطيات في هذا المجال أكثر اختلاطا، لكن الوضع أفضل بكثير مما كان عليه الحال خلال نظام "بن علي"، حتى أنه قدمت مجموعة من القوانين الإيجابية، غير أنه لا تزال هناك فجوات عديدة، الأمر الذي يفسح المجال للتجاوزات وإساءة الاستعمال.

إن غموض و إفراط القوانين و الاحكام المتعلقة بالإرهاب في البلدان الثلاث ناتج عن العقوبات القسوى المطبقة في سياق الجرائم "الارهابية". لكن هناك عقوبات شديدة أخرى لا تدرج عقوبة الاعدام، معقولة بالنسبة للجرائم الارهابية بسبب درجة خطورتها، من جهة أخرى فإن تطبيق عقوبات صارمة، بما في ذلك عقوبة الاعدام، يعظم الضرر والمشاكل التي تنطوي عليها فرض عقوبات من جراء انتهاكات الحق في المحاكمة العادلة الواردة ايضا في الاطر القانونية المتعلقة بالإرهاب في هذه البلدان.

## التوصيات

يجب ان تصادق الدول على أن تصنيف الجرائم الارهابية يتم وفقا للمعايير الدولية، ولا سيما الجرائم التي تصل الى مستوى مهم من العنف و الخطورة فهي فقط عند ذلك تعد ارهابية.

يجب ان يقتصر العقاب على البيانات المعتمدة أنها تدعم الارهاب، فقط على البيانات التي تحرض مباشرة على هذا الأخير

يجب ان يكون العقاب على الدعم الغير المباشر للأعمال الارهابية او الانضمام الى عضوية منظمات ارهابية مقصورا على الحالات التي يكون فيها الشخص المعنى اظهر نية ارتكاب اعمال ارهابية.

اي اجراء يتخذ لتعيين كيانات ارهابية يجب ان تشرف عليه سلطات مستقلة تتخذ قراراتها على اساس أدلة منطقية مع احترام مبدأ مساواة الاسلحة كما ينبغي أن تمنح كل منظمة محاكمة عادلة قبل اي اجراء يتخذ ضدها.

في حالات المراقبة أو حالات مراقبة غير لائقة يتوجب اتخاذ عقوبات مناسبة، والتزام هيكل المراقبة القضائية المسؤول عن سلطات المراقبة بالقانون بشكل واضح، كما يجب أن تتوفر كل مراقبة على إذن قانوني مستند على حقائق.

يجب الحفاظ على الحق في محاكمة عادلة.

## 5 استنتاج

تعتبر الدراسة أن الحق في حرية التعبير في تونس ومصر والمغرب في السنوات الخمس الأخيرة، متعلق بثلاثة مجالات رئيسية، وتخلص الدراسة الى ان تونس هي البلد الوحيد الذي شهد تطورا ايجابيا كبيرا خلال تلك الفترة، على الرغم من ان العديد من التحديات لا تزال قائمة به. أما في المغرب، فلا يزال هناك جهاز قمعي. و مع ذلك فإنه جهاز يشغل بطريقة مقبولة نسبيا بالمقارنة مع مصر حيث تتوفر على الاطار القانوني الأشد قمعا إذ يقترن بقمع الاصوات الحاسمة.

في حين وصلت الدول الثلاث عند نقاط مختلفة، المنطق والفلسفة الذي تستند اليه الأطر القمعية لازال ايدعمان في المغرب ومصر و كذلك تونس. ففي المقام الاول، ترمي الاطر القانونية الى منح الحكومات حرية تصرف كبيرة قدر الامكان. وثانيا، فإن الأثار المخيفة للأطر القانونية يراد ان تنطبق على نطاقات واسعة. كلاهما انجز من خلال قوانين غامضة والتي يمكن استخدامها في مختلف الظروف. الأمر الذي يمنح السلطات الادوات التي تحتاج اليها في الحالات التي تختار التركيز عليها، بينما تقوم بحرمان الافراد من اي قدر من اليقين بشأن نوع الإجراءات أو الخطاب الذي سمح بإلقائه، فتحل محله الافكار العامة. الغموض وامكانية التطبيق الانتقائي في كل مادة من مواد القانون يزداد

تعقيدا بوجود هذا العدد الكبير من القوانين القمعية, في حين ان هذه القوانين تستمد قوتها من العقوبات المفروطة التي تنطبق على احكام منفردة، فضلا عن امكانية العديد من الاحكام التي قد يتم تجميعها معا في استهداف الافراد ولا سيما □□ □□

ومن الواضح ان هذه الاطر القانونية تنتهك حقوق الانسان والتزامات الدول وكذلك حقوق الضمانات المنصوص عليها في دساتيرها حتى، وبالإضافة الى ذلك، فبالاعتراف الفردي والجماعي بالغموض المفروض تكون قد أخفقت في الامتثال للبارامترات الاساسية في القانون.

الآثار المترتبة على حرية التعبير واضحة. شهدت مصر خلال السنوات الخمس الماضية العديد من المحاكمات على اساس مضمون الخطاب مع استمرار القيود المشددة على الاعلام بشكل عام. وفي حين ان الوضع في المغرب افضل بكثير مقارنة، وقعت مع ذلك، العديد من المحاكمات، كما ظهر نظام قانوني للسيطرة . واخيرا في تونس، حدثت عدة تطورات قانونية ايجابية على الرغم من ان القوانين الجديدة المعتمدة لا تزال بحاجة الى مزيد من التعديل كما أن عدة مناطق من القانون لم تستكمل و تظل في حاجة الى اصلاح شامل. يظل إصلاح الاطر القانونية المتعلقة بحرية التعبير في هذه البلدان الثلاثة من بين الاولويات الرئيسية.

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**Headquarter**

rue de Namur 72  
1000 Brussels  
Belgium  
Tel.: +32 (0)2 223 36 54

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