

# The Abolition Movement: Decriminalizing Defamation and Insult Laws

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One species of lawsuits against the press is ripe for repeal globally—the criminal prosecution of a journalist for defamation of or insult to a public official. Now is a timely occasion to discuss this challenging topic. In May 2007 in Bahrain, the Consultative Council, or the upper house of Parliament, passed important amendments that will decriminalize press offenses including defamation.<sup>1</sup> As of the writing of this article, we await action by the Chamber of Deputies on this reform measure. Bahrain's recent actions reflect a welcome and significant consensus against criminal defamation that seems to be emerging around the world.

Why are criminal defamation actions in the hands of public officials such a blunt and dangerous weapon?

This species of criminal proceedings produces a most profound and chilling impact on the press. First, the complaining public official is a powerful adversary. Illustrating this genre of antipress litigation is the 2006 case of *Lyshanko v. Ukraine*. In that case, a journalist criticized the Ukrainian acting prime minister in print for official misconduct. The acting prime minister responded by summoning Ukraine's general

prosecutor to his office and ordering him to commence a criminal defamation action. After further prodding from the head of the Parliamentary Committee for Law and Order, the general prosecutor brought charges against the reporter, and ultimately he was convicted.<sup>2</sup>

Second, the public official can call upon, at no cost, the resources of the state prosecutor and the courts to investigate and prosecute his complaint. The ease with which Ukraine's acting prime minister prosecuted a journalist at the state's expense typifies the inequality of arms—a term used by some European courts—that prevails in these prosecutions.

Third, by requiring the defendant journalist to prove truth, the state effectively jettisons the presumption of innocence. Fourth, the penalties against a journalist who is convicted of criminal defamation or insult are typically very severe: imprisonment, fines, banishment from journalism, and the stigma of a criminal conviction, all because the journalist criticized the public official. For instance, two vice-governors of the Chelyabinsk region in the Urals obtained a criminal defamation conviction in 2003 against a Russian editor and publisher. After a closed trial, the court sentenced him to a one-year term in a hard labor camp, where he ultimately served three months.<sup>3</sup>

This species of prosecution, or the mere threat of such a prosecution, creates a climate that is hostile to objective or critical reporting about government and public officials. In such a climate, public officials can act with impunity, secure in the knowledge that the press will not hold them to account, will not report their misdeeds, and will not expose their questionable public activities.

In this climate, the press cannot be said to be free. In this climate, one might reasonably expect that corrupt public officials would be safe from exposure by the press and that corruption would flourish. That, in fact, is

the case. Transparency International each year surveys and ranks the relative degrees of corruption in countries around the world. About 180 countries are ranked from the least corrupt, namely the Scandinavian countries, to the most corrupt.<sup>4</sup> Freedom House, another NGO, surveys the degree of press freedom in each of about 195 countries. Each country is identified as having a free press, a partially free press, or a press that is not free.<sup>5</sup>

When you compare the two surveys from 2007, corruption and press freedom, the importance of a free press becomes crystal clear: of the top ten most corrupt regimes, none has a free press.<sup>6</sup>

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This strong link between corruption and a press that is not free, under constant threat of criminal prosecution, helps explain the growing international consensus against such criminal prosecutions. In part, that consensus is reflected by the judgments issued by two prestigious international courts—the European Court of Human Rights and the Inter-American Court of Human Rights; the policy statements issued by the Council of Europe and the World Bank; and the findings issued by rapporteurs for the United Nations and other inter-governmental organizations.

First, and perhaps most significant, are recent decisions of the European Court of Human Rights. The court in Strasbourg has acquired a considerable reputation in the last twenty-five years in human rights issues, in general, and for protecting freedom of the press, in particular. It is a supranational court

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that can and does effectively overrule the highest courts of its forty-seven member states. These member states are spread across the globe from Siberia in the East to Greenland in the West and are home to 800 million people. The European Court has considered numerous cases after the national courts of the member states convicted journalists of criminal defamation or insult laws for having criticized public officials.<sup>8</sup> The journalists who brought the cases to the European Court claimed that their convictions violated the guarantees of freedom of expression contained in Article 10 of the European Convention on Human Rights, which all forty-seven member states had ratified.

In the overwhelming majority of these cases, the European Court has decided in favor of the journalists and against the national courts and public officials who have prosecuted the reporters. Time and again, the European Court has written critically of criminal defamation and insult laws because, among other things, they impose a disproportionately severe penalty and violate both the journalist's right to freedom of expression and the right of the public to receive news and information.

For instance, ten years ago, in Austria, a journalist was criminally convicted for labeling a right-wing politician an "idiot."<sup>9</sup> Another Austrian journalist was convicted for publishing accusations that a former chancellor was guilty of the "basest opportunism" and "immorality."<sup>10</sup> More recently, in a third Austrian case, a journalist was criminally convicted for having published charges against a prominent politician claiming that his immigration policies corresponded to those of the Nazis.<sup>11</sup> The European Court held in each case that the convictions could not stand. The European Court has, in every case it has considered, rejected imprisonment as a punishment for defamation.<sup>12</sup> The better way to resolve these disputes is in civil suits for money damages so long as due process and fair procedures are guaranteed. The European Court has overturned criminal defamation and insult law convictions in France, Spain, Austria, Belgium, Romania, Iceland, Norway, and Denmark, among others.<sup>13</sup>

The Inter-American Court of Human Rights, which usually sits in Costa Rica, has followed suit. That court hears claims from citizens in those

countries in the Western Hemisphere that have ratified the American Convention on Human Rights. When journalists file claims in the Inter-American Court, they typically claim that a member state violated the guarantee of free expression contained in Article 13 of the American Convention.<sup>14</sup> Costa Rica, for instance, convicted and sentenced a journalist named Herrera-Ulloa under its criminal defamation law.<sup>15</sup> Herrera-Ulloa's crime was that he republished news stories reporting that a Costa Rican diplomat, who brought the complaint, committed illegal acts abroad. Herrera-Ulloa filed his complaint in the Inter-American Court claiming that by convicting him as a criminal, the Costa Rican courts had violated his rights of freedom of expression. The Inter-American Court found that individuals who have influence on matters of public interest must be open to intense public scrutiny, and that their activities belong to the realm of public debate.<sup>16</sup> Consequently, Costa Rica was required to nullify Herrera-Ulloa's conviction and to pay his costs and lawyers' fees.

These two important international courts are not the only entities that have rejected draconian criminal defamation laws. Other intergovernmental organizations have spoken out as well. In the last several years, calls for the abolition of criminal defamation and insult laws have been issued by the World Bank<sup>17</sup> and the Secretary General of the Council of Europe,<sup>18</sup> and by rapporteurs from the United Nations Economic and Social Council,<sup>19</sup> the Organization of American States,<sup>20</sup> and the Organization for Security and Cooperation in Europe (OSCE).<sup>21</sup> The Secretary General of the Council of Europe, for example, characterized criminal defamation as "a particularly insidious form of intimidation" against the press. He urged all member states to "abolish criminal provisions and prevent disproportionate damages in civil cases against journalists."<sup>22</sup>

We see convergence in the way that various international organizations and authorities regard criminal defamation and insult proceedings brought by public officials against journalists. Almost uniformly, these international bodies reject the prosecutions as violating the rights of free press and the rights of people to receive news and information.<sup>23</sup>

What lies behind this broad consensus? What can explain this harmony of

views? First, these authorities recognize that in modern states the limit of acceptable criticism of public officials is necessarily wider. A public official inevitably and knowingly lays himself open to close scrutiny by the press and public and he must, therefore, display a greater degree of tolerance. Second, freedom of expression is an essential foundation in the modern state and a basic condition of progress. Third, protection must be given to expression that offends, shocks and disturbs, for that type of expression is part of the demands of pluralism, tolerance and broadmindedness required as part of the modern society. Fourth, since the press performs so vital a role as a watchdog over government, an independent judiciary must protect it against abusive attacks and censorship by public officials. To allow public officials to criminally prosecute the press for their criticism cannot be squared with democracy. To criminally punish criticism in the press is to provide incentive for corruption.

There are, in addition to the rationale of the authorities discussed above, other teachings which advocate the vindication of truth and advise people to "tell the truth even if it be unpleasant," including some widely recognized Islamic texts.<sup>24</sup> One teaching advises that the "best [form of] jihad is a word of truth to a tyrannical ruler."<sup>25</sup> People are instructed by these teachings to command the good and forbid evil, to speak for good causes, and to disapprove bad ones.<sup>26</sup> People are advised to speak about wrongs being committed and to give sincere advice to political leaders.<sup>27</sup> Individuals are entitled to make constructive criticism of governmental activity and leaders even if it entails opposing the ruling political officials.<sup>28</sup> Thought is encouraged, meaningful consensus is facilitated, and society benefits. Following these teachings, in 1990, the Organization of the Islamic Conference took a step towards joining the growing consensus against criminal defamation. It adopted the Cairo Declaration of Human Rights in Islam<sup>29</sup> to guide its member states, which included in Article 22 a guarantee of free expression:

1. Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of Shari'ah.
2. Everyone shall have the right

to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.

3. Information is a vital necessity to society.

Although these teachings continue to be relevant and suggest movement in the right direction, they are not universally applied by political leaders.

For example, in 2006, the Saudi Arabian Deputy Minister of Information and Culture, Salah Namlan, was asked to explain the Saudi practices of banning and dismissing certain journalists from writing. He replied, "My main intent and concern is for journalists not to upset the conservative fabric. If children fight with each other, you say 'go to your room.' To the writer, you say 'please do not write.' It's a way of calming things."<sup>30</sup> The Deputy Minister seems to believe that denying free speech and punishing dissent assures stability.

That view stands in stark contrast to a very different understanding prevalent in democratic countries of the relation of the people to the state when it comes to criticism. Eighty-one years ago a justice of the U.S. Supreme Court described in these words the philosophy of those in the eighteenth century who revolted against England's colonial rule and created the United States.

They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; that order cannot be secured merely through fear and punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in the worst form.<sup>31</sup>

For a state to be stable, strong, and

effective, it need not, and should not, punish criticism. True, long-range stability and strength is best achieved when the people freely exercise their right to scrutinize and criticize their political leaders. 

## Endnotes

1. Reporters Without Borders, *Deputies urged to approve press law amendments passed by upper house* (May 30, 2007), [www.rsf.org/print.php?id\\_article=22348](http://www.rsf.org/print.php?id_article=22348).

2. Eur. Ct. H.R., *Case of Lyshanko v. Ukraine*, Judgment of August 10, 2006, Application No. 00024040/02. The European Court of Human Rights found these government abuses violated Lyshanko's freedom of expression under Article 10 of the European Convention on Human Rights.

3. Parliamentary Assembly of the Council of Europe, Doc. 10568, "Honouring of Obligations and Commitments of the Russian Federation," June 22, 2005, note 220.

4. Denmark and Finland share top ranking, while Sweden, Iceland and Norway are ranked fourth, sixth, and ninth, respectively. Somalia and Myanmar together rank last. Transparency International, *Transparency International Corruption Perceptions Index 2007*, available at [www.transparency.org/policy\\_research/surveys\\_indices/cpi/2007](http://www.transparency.org/policy_research/surveys_indices/cpi/2007).

5. Freedom House, "Global Press Freedom 2007," [www.freedomhouse.org/uploads/fop/2007/pfscharts.pdf](http://www.freedomhouse.org/uploads/fop/2007/pfscharts.pdf).

6. Only two of the ten most corrupt countries have a press that can be called partially free: Tonga and Haiti.

7. Papua New Guinea is the sole country of the fifty most corrupt countries with a free press, while only fifteen of the bottom fifty ranked countries have an even partially free press.

8. For a good overview, see Dan Kozlowski, *For the Protection of the Reputation or Rights of Others: The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 COMM. L. & POL'Y 133.

9. Eur. Ct. H.R. *Case of Oberschlick v. Austria* (no. 2), Judgment of June 25, 1997, Application No. 00020834/92.

10. Eur. Ct. H.R., *Case of Lingens v. Austria*, Judgment of July 8, 1986, Application No. 00009815/82.

11. Eur. Ct. H.R., *Case of Unabhangige Initiative Informationsvielfalt v. Austria*, Judgment of Feb. 26, 2002, Application No. 00028525/95.

12. The court on one occasion did note, however, that imprisonment might conceivably be appropriate "only in exceptional

circumstances, notably where fundamental rights have been seriously impaired, as for example, in the case of hate speech or incitement to violence." Eur. Ct. H.R., *Case of Cumpana and Mazare v. Romania*, Judgment on Dec. 17, 2004, Application No. 0033348/96.

13. See, e.g., Eur. Ct. H.R., *Case of Colombani and Others v. France*, Judgment of June 25, 2002, Application No. 00051279/99; Eur. Ct. H.R., *Case of Castells v. Spain*, Judgment of April 23, 1992, Application No. 00011798/85; Eur. Ct. H.R., *Case of Schar-sach and News Verlagsgesellschaft v. Austria*, Judgment of November 13, 2003, Application No. 00039394/98; Eur. Ct. H.R., *Case of De Haes and Gijssels v. Belgium*, Judgment of February 24, 1997, Application No. 00019983/92; Eur. Ct. H.R., *Case of Dalban v. Romania*, Judgment of September 28, 1999, Application No. 00028114/95; Eur. Ct. H.R., *Case of Thorgeir Thorgeirson v. Iceland*, Judgment of June 25, 1992, Application No. 00013778/88; Eur. Ct. H.R., *Case of Nilsen and Johnsen v. Norway*, Judgment of November 25, 1999, Application No. 00023118/93; *Case of Barford v. Denmark*, Judgment of February 22, 1989, 149 Eur. Ct. H.R. (Ser. A).

14. See, e.g., I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Ser. C No. 111; See also, I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004, Ser. C No. 107.

15. I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004, Ser. C No. 107.

16. *Id.* ¶ 129.

17. James D. Wolfensohn, while President of the World Bank, declared: "If you do not have the right to voice and the ability to expose issues, which is of course so tied to the freedom of the Press, you remove the right to equitable development. It is that simple. And each country needs to ensure this right from within. It needs to listen to its own voices to get the ideas moving that can change society." See, Wolfensohn, "Press Freedom: At the Core of Equitable Development," Address by the World Bank President to the World Press Freedom Committee (November 8, 1999), excerpts available at [www.worldbank.org/wbi/news/docs/jdwwpdpdpdpfc.htm](http://www.worldbank.org/wbi/news/docs/jdwwpdpdpdpfc.htm).

18. "Decriminalize libel, says Council of Europe on the occasion of the 2006 World Press Freedom Day," (May 2, 2006), [www.erc.hrea.org/lists/hr-media/markup/msg00207.html](http://www.erc.hrea.org/lists/hr-media/markup/msg00207.html).

19. "Bearing in mind the vital role played by the media in creating broad awareness of political, economic and social issues, the fact

that many journalists [are] tried for libel is, in the Special Rapporteur's opinion, totally unacceptable. . . To conform to international standards, national legislation should provide for libel and defamation cases to be dealt with under civil law. Any fines. . . should be appropriate to the financial resources of journalists." United Nations Economic and Social Council, Civil and Political Rights, Including the Question of Freedom of Expression, Report of the Special Rapporteur, Ambeyi Ligabo (December 17, 2004), available at [www.daccessdds.un.org/doc/UNDOC/GEN/G05/106/90/PDF/G0510690.pdf?OpenElement](http://www.daccessdds.un.org/doc/UNDOC/GEN/G05/106/90/PDF/G0510690.pdf?OpenElement).

20. The OAS Special Rapporteur expressed deep concern over criminal processes for contempt or defamation, and emphasized that these were in violation of the jurisprudence of the Inter-American Court on Human Rights. Organization of American States, "Office of the Special Rapporteur for Freedom of Expression Expresses Concern Over the Deterioration of Freedom of Expression in the Region," (October 12, 2006), [www.cidh.org/relatoria/showarticle.asp?artID\\_680&LID\\_1](http://www.cidh.org/relatoria/showarticle.asp?artID_680&LID_1).

21. The Representative on Freedom of the Media of the OSCE, Miklos Haraszti, emphasized in his 2007 report ongoing efforts to replace criminal defamation laws with civil provisions. Organization for Security and Co-operation in Europe, Regular Report to the Permanent Council by the Representative on Freedom of the Media, March 9, 2007, available at [www.osce.org/documents/rfm/2007/03/23842\\_en.pdf](http://www.osce.org/documents/rfm/2007/03/23842_en.pdf). This follows recommendations made by the OSCE in 2003 to "repeal..so-called insult laws, particularly to the extent that they provide special protection for the 'honour and dignity' of public officials." OSCE and Reporters Sans Frontieres, "Libel and Insult Laws: What More Can Be Done to Decriminalize Libel and Repeal Insult Laws?" Conference Paper from the Conference on Libel and Insult Laws, Paris (November 24-25, 2003), [www.osce.org/](http://www.osce.org/)

[documents/rfm/2003/11/3346\\_en.pdf](http://documents/rfm/2003/11/3346_en.pdf).

22. Secretary General Terry Davis made this statement on World Press Freedom Day in 2006. "Decriminalize libel, says Council of Europe on the occasion of the 2006 World Press Freedom Day," (May 2, 2006), [www.erc.hrea.org/lists/hr-media/markup/msg00207.html](http://www.erc.hrea.org/lists/hr-media/markup/msg00207.html).

23. The OSCE reported that while many of its participating states had retained criminal defamation statutes on their books, most Western European countries have not prosecuted the media thereunder for decades, and a growing number of states had abolished them. Statement of the OSCE, Vienna, Austria, July 23, 2007.

24. MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 11 (1997).

25. *Id.*

26. *Al-amr bi'l-ma'ruf wa'l-nahy 'an al-munkar* (enjoining good and forbidding evil) is a cardinal Qur'anic principle embodied by the word *hisbah*. According to this principle, individuals are entitled to speak and act in pursuit of whatever in their judgment seems good, or they can forbid in words, acts or silent denunciation, evils they see committed. Qur'an III: 104, III: 110, XXII: 41; the *hisbah* principle is also found in the Sunna. See, e.g., KAMALI, *supra* note 24, at 31.

27. Encouragement of sincere advice, or *nasihah*, is found in both the Qur'an and the Sunna. See, e.g., Qur'an VII: 62, 68, 79, 93 and KAMALI, *supra* note 24, at 34-39.

28. *Naqd*, or criticism, is essential to the *hisbah* principle related in the Qur'an. The Sunna, in particular, contains additional support for criticism of public officials. For example, the first caliph is recorded as saying, "I have been entrusted with authority over you, but I am not the best of you. Help me if I am right and correct me when I am wrong." KAMALI, *supra* note 24, at 50-51. The second caliph asked in his inaugural speech for the people to rectify any aberration they might see in him. He later accepted correction from

a woman who argued against his rule on dowry. He conceded, "a woman is right and Umar is mistaken." *Id.* at 51.

29. Cairo Declaration on Human Rights in Islam (CDHRI), Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc., A/CONF.157/PC/62/Add.18 (1993). All of the GCC countries (Kuwait, Bahrain, Qatar, Oman, United Arab Emirates and Saudi Arabia), as well as Yemen, are members of the Organization of the Islamic Conference. Article 32 of the Revised Arab Charter on Human Rights, an instrument of the League of Arab States, which includes all GCC member states and Yemen, reaffirms Article 19 of the UDHR and Article 22 of the CDHRI. Article 32 declares: "1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries. 2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals." Revised Arab Charter on Human Rights, [www.umn.edu/humanrts/instate/loas2005.html](http://www.umn.edu/humanrts/instate/loas2005.html). Cf., Article 19 of the UDHR: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." General Assembly Res. 217 A (III) of 10 December 1948.

30. Joel Campagna, Princes, Clerics, and Censors, CPJ Special Report 2006, (May 9, 2006), [www.cpj.org/Briefings/2006/saudi\\_06/saudi\\_06.html](http://www.cpj.org/Briefings/2006/saudi_06/saudi_06.html).

31. *Whitney v. California*, 274 U.S. 357 (1927), at 375 (Brandeis J., concurring).