



Toward a Media Regulatory Reform in Middle East and North Africa: Workshop on Criminal Restrictions on Media Content

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Background Paper: Defamation

Protecting the “rights and reputations of others” is recognised as a legitimate restriction on freedom of expression, including in the *International Covenant on Civil and Political Rights*. However, as with any limitation on freedom of expression, it is necessary for rules on defamation to strike an appropriate balance between the need to provide adequate protection to individuals targeted by false statements while safeguarding a the public discourse.

International law requires all restrictions on freedom of expression to be proportionate and, to meet this standard, it is accepted that defamation laws should be civil rather than criminal in nature. Civil rules are sufficient to protect reputations, are less harsh in nature and are less susceptible of being abused. Defamation law is designed to protect reputations so it should include a requirement for plaintiffs to demonstrate harm to their reputation. Defamation laws should not be applied to protect abstract concepts, such as State or religious symbols, or groups, which do not have reputations as such, but individual members of a group should be able to sue if they can demonstrate that a statement would tend to lower their own individual reputation.

Corporations should be allowed to sue for defamation, since a company’s reputation is often a valuable thing. However, public bodies should be prohibited from bringing defamation actions, in recognition of the vital importance in a democracy of the ability to criticise public institutions. Officials should be able to sue for defamation in their personal capacity, but it should be recognised in law that their position as public figures opens them up to a wider degree of legitimate criticism, based in part on the need for open debate about the role of these individuals in a democracy. As a result, generally speaking the more senior the official is the higher the standard should be to demonstrate defamation. Unfortunately, some States provide special expanded protection for senior officials, which is clearly illegitimate under international law.

Defamation laws should include robust procedural standards to prevent abuse of these rules. This should include a limitation period for filing a claim, generally of one year or less from the date of publication. Expressions of opinion should either be

absolutely protected or subject to a very high standard of protection since, by definition, no one can show that an opinion is false. Better practice is also to put in place measures to deter malicious defamation cases by well-funded parties, for example through early mechanism for dismissing frivolous lawsuits, usually with costs awarded to the defendant.

Better practice is also to provide for a number of defences and justifications which absolve the defendant of liability. One is that the statement in question was true, since one can only defend a reputation one deserves (i.e. only against false allegations). If the defendant can demonstrate that their statement was true, it should absolve them of all liability.

Even if a statement is false, a defendant should benefit from a “reasonable publication” defence, whereby they are exonerated if they can demonstrate that their dissemination was reasonable, under the circumstances. This defence is made out if a defendant demonstrates that he or she took reasonable steps to verify the information before they made the statement. This defence is particularly important for journalists since even the best journalists make mistakes. If journalists were required to be absolutely certain of every fact before they published a story, it would seriously undermine their ability to inform the public. For members of the media, acting in accordance with established professional standards should be enough to satisfy this test.

The defence of innocent dissemination is analogous to the defence of reasonable publication. This protects those who lack editorial control over or knowledge of the defamatory statement. This exception is particularly important in an online context since, without it, websites like Google and Facebook would face liability for every defamatory statement posted by their users.

Certain types of statements should never attract liability under defamation law due to the overriding importance of openness in certain contexts. These include statements made during the course of legislative or judicial proceedings, as well as records of these statements.

If a statement is found to have been defamatory, the remedy should be proportionate which implies, among other things, that it should aim to redress the harm done to the plaintiff rather than punish the defendant. Non-pecuniary remedies such as a right of correction or reply should be prioritised. Even when imposing pecuniary damages, judges should consider the chilling impact that overly harsh awards may have on freedom of expression. Jail terms are never appropriate for defamatory statements, in line with the point above that defamation should not be a criminal matter in the first place.