



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

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Background Paper: Alternatives to Criminal Rules

Freedom of expression is not absolute, and it is broadly recognised that some restrictions on this right are justified. The *International Covenant on Civil and Political Rights* (ICCPR) sets out a clear test for legitimacy for these restrictions. According to Article 19 of the ICCPR, restrictions are only justified if they are clearly spelled out in law, pursue a legitimate interest and are necessary for the protection of that interest, which means, among other things, that they must be designed so as to minimally impair freedom of expression.

One implication of the requirement that restrictions should be minimally impairing is that, where possible, the State should pursue alternatives to criminal restrictions which are less restrictive of freedom of expression. Defamation is a good example. According to a General Comment issued in September 2011 by the UN Human Rights Committee, the official body responsible for overseeing States' compliance with their ICCPR obligations:

States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.

The main reasoning underlying this is that if a civil law rule (e.g. providing for damages for defamation) is effective in protecting the legitimate interest (in this case reputations) a criminal prohibition cannot be justified. It is noteworthy that many democracies – including East Timor, Georgia, Ghana, Sri Lanka, the United Kingdom and the United States – have rescinded their criminal defamation laws, while others have done away with the possibility of imprisonment for defamation. There is no evidence to suggest that decriminalisation or the relaxing of penalties have led to any increase in defamation.

Other areas where civil protections should be considered are for copyright infringement and less intrusive invasions of privacy. For copyright, despite the growing clamour among content-producers for harsh penalties, better practice suggests that criminal penalties should be reserved for only the most serious offenders, and particularly commercial offenders. Similarly, in many jurisdictions, minor invasions of privacy, for example by taking pictures in private places, are

treated as a civil matter, while more intrusive invasions, such as telephone tapping or accessing protected personal data are criminal offences.

Alternative and lighter remedies are particularly important in the digital world. Certainly it is problematic to treat offences as more serious if they involve the Internet. In recent years, several countries have proposed problematic cybercrime legislation, creating new categories of offences, often with draconian punishments, some of which cover innocuous or common online behaviours.

Too little attention has been given to pursuing other alternative remedies online. One that has been developed, but which is problematical, is notice and take-down, whereby ISPs are rendered liable if they do not take down material which is claimed to be illegal (for example due to copyright infringement or because it is defamatory). A better approach is a notice and notice system, whereby once notice is given to an ISP of a potential breach, they must notify the author who must then either defend their actions or accept to have the material taken down.

Another system which is not given enough attention in many countries is the right of correction or reply. These represent a 'more speech' approach to bad speech, which is often preferable to a sanctions-based approach. Corrections should be used to rectify simple factual errors while replies may be used for factual errors which harm a third party and which are too complex to be rectified just by a correction.

Self-regulation is another important alternative to both civil and criminal approaches, particularly with regards to the media. These systems involve a code of conduct for the media, along with a complaints body, such as a press council, to decide on complaints from individuals. The code of conduct should address issues such as accuracy in the news, fairness in how the news is gathered, protection for privacy and for vulnerable groups such as children and victims of crime, non-discrimination, respect for the presumption of innocence in reporting on criminal procedures and protection of confidential sources of information. Complaints bodies are generally limited in the sanctions they can impose beyond requiring an offending media outlet to carry a notice that they have breached the code.

These systems have advantages both for the general public, as self-regulatory systems are far more accessible for ordinary citizens than the courts, and for the media, inasmuch as it is a quicker and less onerous means of resolving breaches of professional standards. In effect, self-regulatory systems provide for media responsibility for unprofessional behaviour, but without subjecting the press to onerous legal regulation.

In a best-case scenario, self-regulatory systems should be established entirely by media bodies themselves, without any legal backing. Where the media is unable to come together to create such a system, however, it may also be established by law, as long as the media have significant input into how it operates and it is entirely independent of government.