



Statement on Criminal Defamation in Egypt

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Background

On 13 August 2012, the Egyptian general prosecutor laid criminal charges against Islam Afifi, the editor-in-chief of the respected independent newspaper *Al-Dostour*. Afifi's alleged crimes were to have insulted the newly elected Egyptian President, Mohamed Morsi, and to have spread false rumours that disturbed the peace and harmed the public interest. At a hearing on 23 August, the court adjourned the case until 16 September and ordered Afifi to be detained until then. Later that day, Morsi used for the very first time the legislative powers he had wrested back from the Supreme Council of the Armed Forces (SCAF), passing Decree 1 of 2012, which did away with pre-trial detention for journalists. Afifi was released hours later.

The case has generated intense debate in Egypt, and is widely seen as a test of the revolution, and the extent to which freedom of expression will be respected in the 'new' Egypt. The case also exposes the lack of legal reform post revolution, and the many problems and contradictions in the existing legal framework. This Statement comments on those problems and contradictions from the perspective of international law.

The charges are based on the 11 August edition of *Al-Dostour*, which the Giza Primary Court ordered to be confiscated from the newspaper's offices. An editorial in that edition had warned of a Brotherhood "emirate" taking over Egypt and called on Egyptians to join the military's fight against Islamism.

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On 12 August 2012, Morsi cancelled a decree which the SCAF had issued following the dissolution by the courts of the People's Assembly, which had allocated legislative powers to SCAF. Using his new powers for the first time on 23 August, Morsi passed Decree 1 of 2012, which amends Article 41 of the Press Law, No. 96 of 1996. The old version of Article 41 prohibited pre-trial detention of journalists except in relation to crimes set out in Article 179 of the Penal Code, which is one of the provisions under which Afifi is charged. The amendment extended the prohibition on pre-trial detention to all cases involving journalists. Article 179 makes it a crime to insult the president, punishable by up to three years' imprisonment.

The case is part of a wider crackdown on media freedom in Egypt. Earlier this month, on 7 August, the Shura Council, which is dominated by the Muslim Brotherhood's Freedom and Justice Party, to which Morsi also belongs, replaced editors at a number of the State owned and controlled newspapers. This was widely seen as an attempt by the Freedom and Justice Party to assert control over these newspapers, which are a dominant force among the print media. These moves led to two columnists being banned from writing in the State newspapers, namely Ibrahim Abdel Meguid from *Al-Akhbar* and Youssef el-Qaeed from *Al-Ahram*. Abba al-Roweini, a daily columnist for *Al-Akhbar*, had her column blocked when she refused to tone down her criticism of the Muslim Brotherhood.

A number of other journalists are also facing trial for "insulting the president". These include Abdel-Halim Qandeel, the editor-in-chief of the Egyptian weekly *Sawt Al-Omma*, and Adel Hamouda, editor-in-chief of the weekly *Al-Fagr*. Twfik Ukasha, a leading presenter on al-Faraeen TV station, has been charged with incitement to kill President Morsi in his live talk show, and his station was suspended for a month. Other journalists have been charged with insulting the General Guide of the Muslim Brotherhood "Al-Murshed", Mohamed Badeea.

The legal action taken by President Morsi is a step in the right direction. But it is only a small step and far more profound legal reform is required. The sections below outline the more serious reform needs.

Criminal Defamation

Criminal defamation laws cannot be justified as restrictions on freedom of expression, among other things because civil laws provide adequate protection for reputations. As the (then) three special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – stated in a Joint Declaration in 2002:

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Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.¹

A growing number of countries globally are repealing their criminal defamation laws to bring themselves into compliance with these standards. At a very minimum, countries should do away with the possibility of imprisonment for defamation, which is a clearly excessive penalty for this sort of wrong.

It is also highly problematical that the law in Egypt provides special protection against defamation for the president. Under international law, public officials should be required to tolerate a higher degree of criticism than ordinary citizens, due to the importance of such criticism in a democracy, the fact that they have voluntarily assumed their positions, and the fact that they have ample means at their disposal to respond to such criticism. In their 2000 Joint Declaration, the special international mandates stated:

[D]efamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as desecration laws, should be repealed.²

The Egyptian Penal Code contains a number of provisions on criminal defamation and related publishing offences which allow for imprisonment, including Articles 171- 201, Article 98F, on defamation of religion, and Articles 302-306.

False News

Similarly, laws which prohibit the publication of false news, *per se*, even where linked to some general social harm, such as undermining the public interest, cannot be justified. It is recognised that even the very best journalists make mistakes and to render them criminally liable for this is simply not legitimate. In recognition of this, leading courts in countries such as Antigua and Barbuda,³ Canada⁴ and Zimbabwe⁵ have struck down such laws. Instead of general prohibitions on false news, the law should provide protection for specific interests – such as privacy and reputation – and, in the context of the media, there should be specific remedies for erroneous statements, such as a right of correction or reply, or an appeal to a self-regulatory complaints body.

Article 188 of the Egyptian Penal Code, under which we believe Afifi was also charged, makes it a crime to disseminate, in bad faith, false news or data or false rumours or

¹ Adopted 10 December 2002. Available at: <http://www.osce.org/fom/66176?page=1>.

² Adopted 30 November 2000. Available at: <http://www.osce.org/fom/66176?page=1>.

³ *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (PC).

⁴ *R. v. Zundel* [1992] 2 731 (SC).

⁵ *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000, Civil Application No. 156/99.

forged or falsified papers if this would disturb the public peace or provoke panic among the people or harm the public interest.

Pre-Trial Sanctions

The application of pre-trial sanctions in cases involving freedom of expression – including detention, injunctions against publication and seizure of copies of a publication – poses a particular threat to freedom of expression given the potentially chilling effect of such measures. By definition, they allow for the application of restrictive measures before all of the facts have been weighed. They should, therefore, be seen as highly exceptional measures to be applied only where fully warranted by the circumstances, and only where ordered by a court.

As noted, neither of the ‘crimes’ with which Afifi has been charged are legitimate, so the issue of pre-trial detention should not even have arisen. Even where someone has been charged for an expression which may legitimately be subject to criminal proscription, such as incitement to crime, pre-trial detention should be allowed only where strictly necessary, for example to prevent the person fleeing the jurisdiction or repeating the crime.

Measures such as interim injunctions or seizure of copies of an allegedly offending publication should also be applied only where ordered by a court and where a number of conditions have been met. These include that the failure to issue the injunction would result in irreparable harm to the plaintiff which cannot be redressed through the application of subsequent measures, and proof of virtual certainty of success in the case.

Role of the Journalist Syndicate

This case also raises the problematical situation of the Journalist Syndicate and the special benefits that the Press Law and the Journalist Syndicate Law, No. 76 of 1970 bring to members. As a senior journalist, Afifi is a member of the Journalist Syndicate. However, the Syndicate has only around 6,300 members, whereas there are an estimated 15,000 journalists in Egypt.

Being a member of the Syndicate brings a number of benefits. In relation to criminal proceedings, Article 43 of the Press Law allows the Chair of the Syndicate to attend investigations against journalists and obtain copies of such investigations free of charge. Article 68 of the Journalist Syndicate Law requires permission from the public prosecutor before an investigation may be launched regarding a journalist, and pursuant to Article 69, the public prosecutor must notify the Syndicate Board of criminal complaints filed against journalists prior to the initiation of investigation. Where charges are filed, the Chair of the Syndicate has the right to attend the investigation. The law also brings other benefits to Syndicate members, including in relation to labour relations, pensions and other work benefits.

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The effect of this is to create a two-tier structure within the profession, with those who are members of the Syndicate having greater benefits and (legally protected) status. This is contrary to the rights of freedom of association and of expression, pursuant to which journalists are free to create their own organisations and associations, without discrimination.

Recommendations:

- The criminal charges against Islam Afifi, and other journalists charged with insulting the President and other senior officials, should be dropped immediately.
- The rules on criminal defamation should be removed from the Penal Code. These rules should be replaced by an appropriate set of civil defamation laws which allow for broad criticism of public officials, and which provide for adequate defences against claims of defamation and for proportionate remedies where a case of defamation has been made out.
- The rules on publishing false news should be removed from the Penal Code.
- The rules on the application of pre-trial sanctions should be reviewed and amended so as to allow for these measures in only the very most exceptional cases, where justified by the circumstances.
- The whole legal regime relating to the Journalist Syndicate should be reviewed, in consultation with interested stakeholders, with a view to determining an appropriate and human rights compliant solution, which respects the right of all journalists to freedom of association without discrimination.