



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

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Background Paper: Freedom of Expression and Privacy

The right to privacy is critical to human dignity and individual autonomy, and is important to both social interaction between people and interaction with the State. It is broadly recognised as a human right, for example in Article 12 of the *Universal Declaration of Human Rights* and Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), as well as Article 11 of the *American Convention on Human Rights* and Article 8 of the *European Convention on Human Rights*. The right to privacy is also recognised in over 100 national constitutions.

Freedom of expression is, of course, also broadly recognised as a human right, and these rights are generally mutually supporting but there can also be conflicts. Human rights protections by their nature are meant primarily to constrain State actions, rather than those of individuals. However, there is a positive obligation on States to put into place legal frameworks to ensure respect for human rights, including privacy, and to provide a remedy against breaches. Article 17(2) of the ICCPR states that “everyone has the right to the protection of the law against” interference or attacks on their privacy.

Privacy itself is a difficult thing to define. Ultimately, the question of whether or not a privacy interest is engaged depends on whether a “reasonable expectation of privacy” exists. The interpretation of this phrase varies widely between jurisdictions. For example, Google Street View, a website which provides panoramic photographs of streets around the world, has faced widely differing reactions in different countries where it operates. In the United States, privacy concerns over the project have gained little traction. However, the site has been forced to temporarily shut down operations in parts of Europe and in Australia, although in most cases it was able to restart after altering its policy to suit local sensibilities. Some jurisdictions require Google automatically to blur the faces of people captured in the street scenes or to grant users the power to “opt out” of having their property photographed.

Courts have identified four different types of privacy interests worthy of protection: unreasonable intrusion upon the seclusion of another, appropriation of one’s name or likeness, publicity which places one in a false light and unreasonable publicity given to one’s private life, the latter of which is most commonly the subject of

complaints involving freedom of expression. Generally speaking, in addressing these complaints courts will consider whether the publication can be justified in the public interest. This must take into account both the specifics of the case at hand and the need to avoid a broader “chilling effect” on freedom of expression which could deter the media from adequately performing its watchdog function in future. A broad principle of freedom of expression is that, in order to avoid this chilling effect, it is better to tolerate some excesses in expression, even where they may cause some harm, than to limit publication in the public interest.

In considering the public interest of a particular report, and the degree of the privacy interest at stake, one relevant consideration is whether the subject was a public figure whose success depends on public opinion. Modern celebrities often take significant steps to put themselves in the public eye, including by publicising private events such as a wedding or pregnancy. Such individuals, by opening their private lives to public scrutiny, can be seen as having voluntarily surrendered a measure of the privacy to which they would otherwise be entitled. Or, to put it differently, they have chosen to benefit from publicity and they do not then have right to decide when to turn it on and off.

As with other freedom of expression issues, the spread of the Internet has raised new issues around the conflict between privacy and freedom of expression. One emergent field of legislation is over the online sharing of sexually explicit images without the consent of their subjects. The practice is commonly known as “revenge porn” because it is often perpetrated by former spouses or partners, but can also be the result of hacked access to a private computer or email account. In January 2014 Israel became the first country to pass a law making the practice punishable by up to five years in prison. Similar laws have been proposed in Brazil and some US states.

In contrast to these instances where privacy and freedom of expression conflict, there are also many instances where privacy facilitates freedom of expression, something which has become more widely valued with the growth of the Internet. Control over one’s communications, including over who has access to them, is a key element of expression. Studies have shown that perceptions of control lead to more frank and extensive communications, while a loss of control leaves people feeling less free to engage earnestly. The nexus between privacy and freedom of expression has drawn increasing attention in the aftermath of Edward Snowden leaks, which revealed the extent of Internet surveillance being carried out by spy agencies in the Australia, Canada, New Zealand, the United Kingdom and the United States. Over the course of 2013 and 2014, international rapporteurs on freedom of expression at the UN and the OAS, as well as the UN High Commissioner for Human Rights, have all made positive statements about the importance of privacy and anonymity to freedom of expression in an online context.