

Inauthenticity of content in Internet regulation: Who decides and how?

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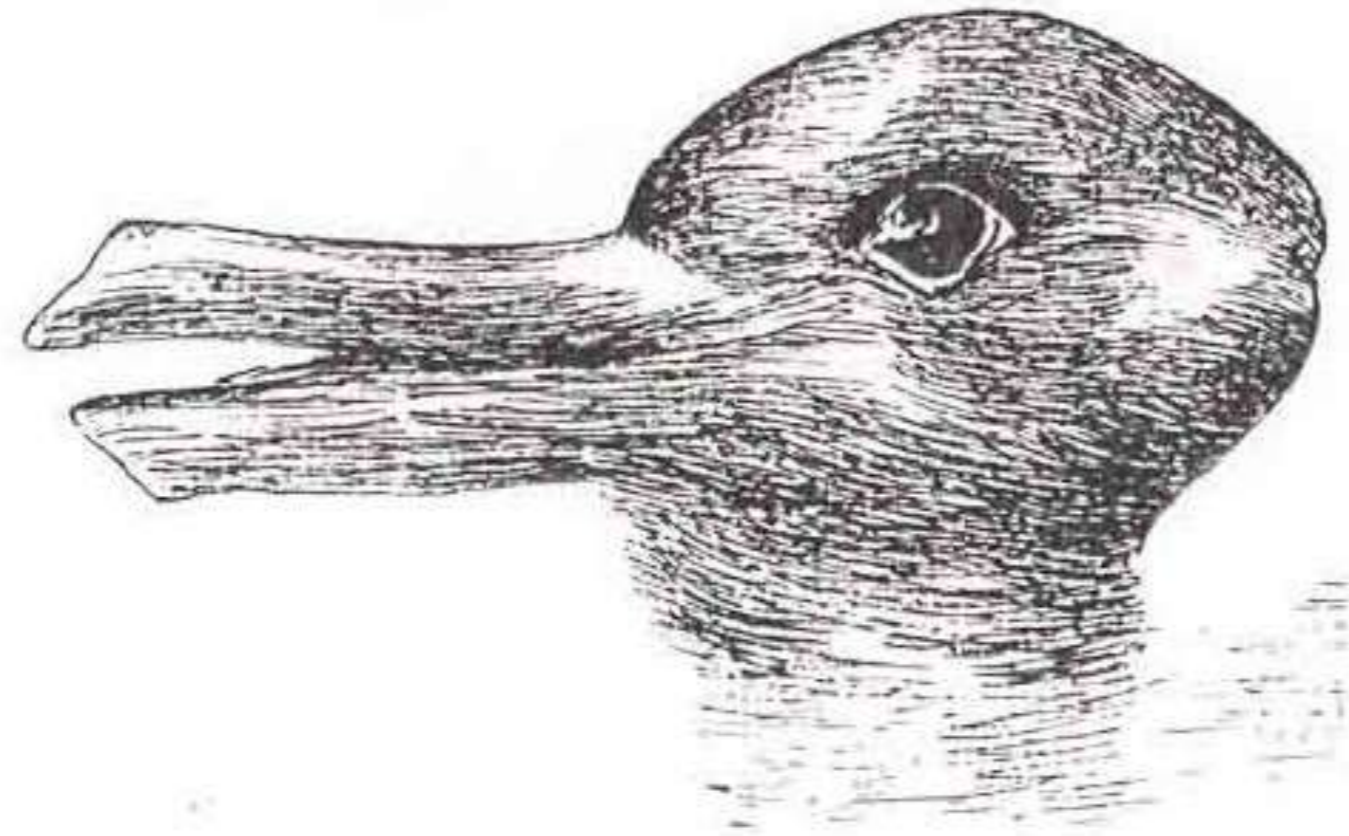
Focus

Authenticity/inauthenticity

- Much can be said of authenticity in communication
 - Not my intention
- Thankfully, not too much effort by states to legislate authenticity, cultural appropriation, etc. But
 - Recent case of Egypt suing Netflix
 - Geographical indicators enforced as part of intellectual property regimes
- But much attention is being paid to what is inauthentic/not true regarding content of communication
 - My focus is on South Asian approaches to the regulation of inauthentic content

“Fake news”/
disinformation/
misinformation

What is this?



Which answer is fake news?

And what about this from Sri Lanka?

- NASA report on “building blocks of life” portrayed by Senior Journalist as discovery of bricks on Mars
- “Fake news” that should be criminalized? Or laughed at?

<http://divaina.com/daily/index.php/puwath-2/12677-2-17>

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1st attempt India: 2018 administrative penalties against “fake news”

- In April 2018, Indian Ministry of Information & Broadcasting (MIB) announced administrative penalties against journalists found to be responsible for “fake news” by two non-governmental bodies
 - Within 24 hours, order was withdrawn
 - Within a month, Minister Smriti Irani lost the portfolio
- MIB’s administrative action focused only on journalists
 - Some non-governmental entities were going to judge “fakeness”
 - But it was pointed out that the “regulatory” bodies had government appointees
 - The penalty was the withdrawal of journalist accreditation

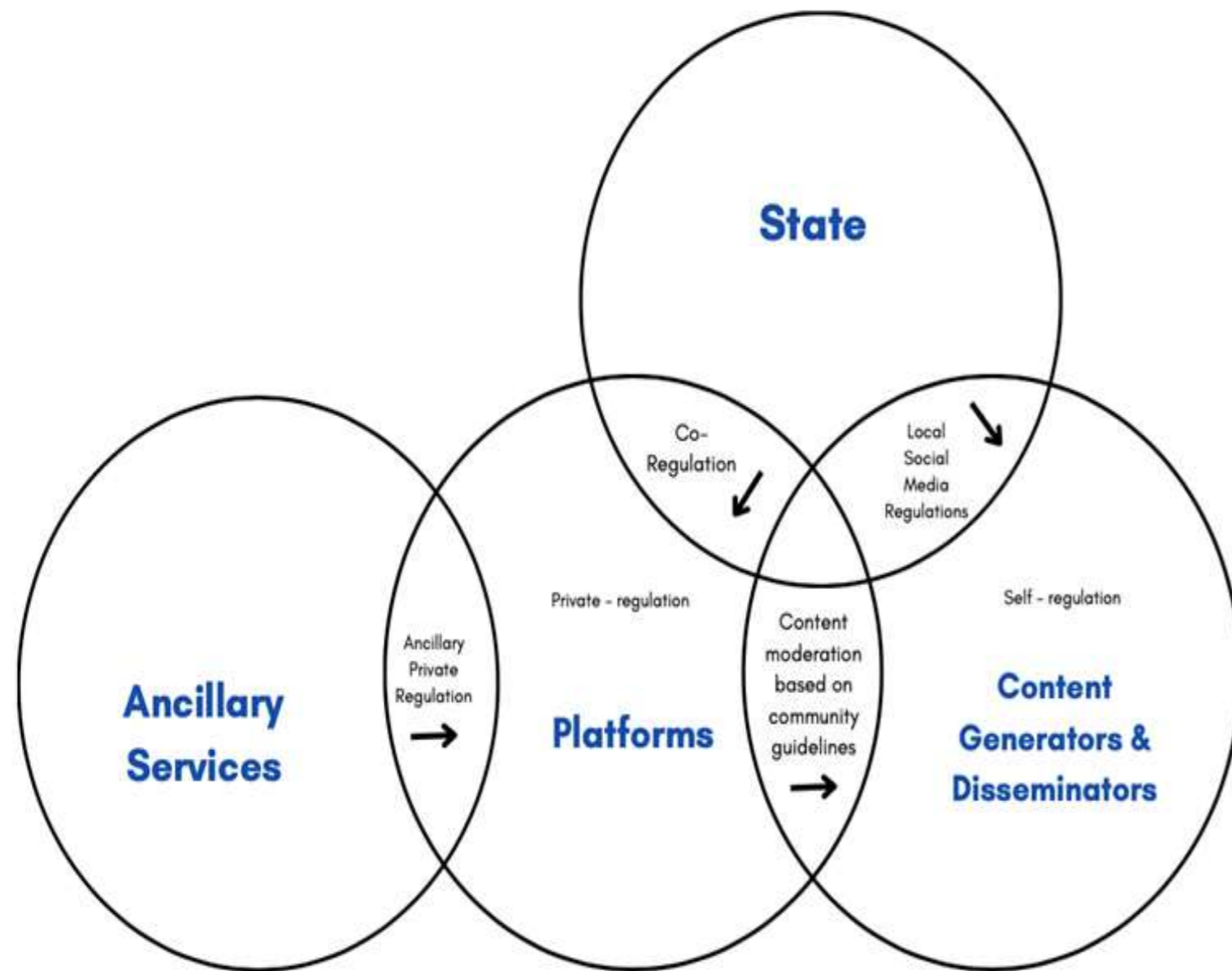
2nd attempt India: IT Rules 2023

- In April 2023, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 from MEITY
 - Authorizes a “fact check unit of the central government” to identify, “fake or false or misleading” information in respect of, “any business of the central government”
- Once notified, the intermediaries are to make reasonable efforts to not host, publish or share any information which is patently false and untrue or misleading in nature.
- Media organizations and others protested, but no change
- Perhaps the narrow scope dampened opposition
- Purely in administrative realm, no offences defined,
- But directions including takedown are possible

What's different now?

- Difference between 19th Century and 21st Century inauthentic news is that
 - Most of it is user-generated content (not from professional journalists, subject to editorial control, though they also generate dis/mis information) → too many generators of content to easily regulate
 - The unprecedented velocity of dissemination over platforms—“going viral” → conventional means too slow to stop dissemination; damage is done by the time courts act

Forms of regulation



- Content generator = creator of a post; disseminator = one who reposts/shares
- State can
 - Directly regulate, after content has been disseminated AND/OR
 - Coerce platform to take down/deprioritize/shadow ban/suspend
- Unlike the state, platforms use algorithms to regulate, with exercise of discretion by humans being exception
 - Platform may decide on criteria and engage in private regulation, OR
 - Subject itself to an industry code, where there is some external monitoring of its regulatory actions, OR
 - Be subject to co-regulation by the state, where the state steps in when private regulation is deemed inadequate

Criminal law
approach: Direct
regulation of
content
generators &
enablers

Anti-fake news law of 2018: Malaysia 1st attempt

- Under Malaysia's anti fake news law of 2018, anyone convicted of disseminating false content can be jailed for six years or fined up to RM500,000 (\$128,000; £90,400), or both; continuing offense punished by RM 3,000/day
- Former Prime Minister Najib got it approved just before the election
- Danish citizen who said on YouTube that Police took 50 mts to respond to a crime instead of the actual 8 mts was fined USD 2,550, which he could not pay, so he was imprisoned for 30 days
- Wide publicity was given to law and to the punishment



SHARING A LIE
MAKES YOU
A LIAR

STOP FITNAH INTERNET
#FITNET

Life Ma

Malaysian Law: Definition & applicability

- S. 2: “Fake news” includes any news, information, data and reports which is or are wholly or partly false, whether in the form of features, visuals, or audio recordings or any other form capable of suggesting words or ideas
- S.2: “Publication” includes (a) any written publication or publication of a nature similar to a written publication and every copy or reproduction . . . (b) any digitally, electronically, magnetically or mechanically produced publication . . .
- S. 3
 - Extra-territorial application as long as “fake news” concerns Malaysia or the person affected is a Malaysian citizen
- A statement about “the USD 5 billion 1MDB theft” would potentially be an offence under the Anti Fake News Law, and even about the Law being connected to May election

Who decided what was inauthentic?

- Extra-territorial jurisdiction?
 - Malaysia imprisoned a Danish citizen who was in the country
 - But despite explicit extra-territorial jurisdiction written into the Law, could they have punished the Wall Street Journal that broke the 1MDB story and kept it alive? The tweets from Tom Wright, the WSJ journalist?
- 1MDB scandal was disinformation before 2018 election →
 - But this changed after the election

Datuk Jailani Johari, the Deputy Communications and Multimedia Minister, explained that **fake news is information that is confirmed to be untrue, especially by the authorities or parties related to the news.** He said that 1MDB has been investigated by the police and Attorney-General and the reports have been presented to Parliament's Public Accounts Committee (PAC), which is made up of lawmakers from both sides of the divide. Jailani added that recommendations from the PAC report have been accepted and been implemented by the Government. ...

"As such, the Government views that **other than the information that has been verified by the Government, all other information is deemed as fake news,**" he said during his ministry's wrap-up on the debate of the Royal address on Wednesday (March 21).

<https://www.thestar.com.my/news/nation/2018/03/21/unverified-info-on-1mdb/#eLl1jB5clC12F7d1.99>

Anti Fake News Law: Repealed but not fully buried

- Many said it was part of Najib's election strategy
 - Some said intent was to shut down news about USD 5 billion 1MDB theft
- In August 2018, the lower house repealed the law
- In September, the upper house blocked the repeal, making necessary another vote by the lower house
- Finally, repealed in December 2019
- Brought back in 2021, limited to COVID19 related content

Bangladesh Digital Security Act of 2018

- Offences include, but not limited to,
 - S. 21 If any person, by means of digital medium, makes or instigates to make any propaganda or campaign against the liberation war of Bangladesh, spirit of liberation war, father of the nation, national anthem or national flag.
 - S. 25 (a) intentionally or knowingly transmits, publishes or propagates any data-information which he knows to be offensive, false or threatening in order to annoy, insult, humiliate or malign a person; or (b) publishes or propagates or abets to publish or propagate any information, as a whole or partly, which he knows to be propaganda or false, with an intention to affect the image or reputation of the country, or to spread confusion.
 - S. 31 (1) If any person intentionally publishes or transmits anything in website or digital layout that creates enmity, hatred or hostility among different classes or communities of the society, or destroys communal harmony, or creates unrest or disorder, or deteriorates or advances to deteriorate the law and order situation,

Who decides & how?

- Conventional criminal law approach (as in Malaysia), but with specially constituted court
 - Police will investigate; Cyber Tribunal constituted under section 68 of the Information and Communication Technology Act, 2006 (Act No. XXXIX of 2006) will decide
 - Broad language used in defining offences allows prosecution a lot of leeway, and creates uncertainty for content generators
 - According to the Center for Governance Studies, a total of 138 cases were filed against journalists under the DSA between January 2019 and August 2022, in which a total of 280 people were accused and 84 were arrested.
- Platforms have to prove due diligence to prevent offence
 - 38. No service provider shall be liable under this Act or rules made thereunder for facilitating access to any data-information, if he proves that the offence or breach was committed without his knowledge or he exercised all due diligence to prevent the offence.



Bangladeshi journalist arrested under disputed digital law

March 29, 2023



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DHAKA, Bangladesh (AP) — Police in Bangladesh arrested a journalist for an influential newspaper on Wednesday on charges of spreading false news under the contentious Digital Security Act, authorities said.

Home Minister Asaduzzaman Khan said Samsuzzaman Shams was arrested for a report published in the newspaper, Prothom Alo, on March 26, Independence Day.

The report, written by Shams, quoted a day laborer as saying that the country's independence didn't mean much to him while he struggles to survive because of high inflation and other reasons. Some other media questioned the photo that accompanied the story, saying it appeared staged. The Prothom Alo revised the story and photo.

The article was widely shared on social media, apparently embarrassing the

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Administrative
action,
prioritizing
takedown and
correction

Singapore's Protection From Online Falsehoods & Manipulation Act of 2019 (POFMA)



- Decision makers in Sri Lanka have indicated that they are looking to POFMA as a possible model for social media regulation
- Under POFMA, any minister may instruct the POFMA office, a state entity, to initiate action to correct, take down or otherwise stop the dissemination of information falling within the scope of the definition set out in section 7 of the Act. The minister determines whether the statement is false or not.
- Different from Malaysia: entire process is within the executive with the courts as backstop

Offense that carries penalty of 5 yr imprisonment and/or SGD 50,000 fine for individual or SGD 500,000 for company

- 7.—(1) A person must not do any act in or outside Singapore in order to communicate in Singapore a statement knowing or having reason to believe that —
 - (a) it is a false statement of fact; and
 - (b) the communication of the statement in Singapore is likely to —
 - (i) be prejudicial to the security of Singapore or any part of Singapore;
 - (ii) be prejudicial to public health, public safety, public tranquillity or public finances;
 - (iii) be prejudicial to the friendly relations of Singapore with other countries;
 - (iv) influence the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;
 - (v) incite feelings of enmity, hatred or ill-will between different groups of persons; or
 - (vi) diminish public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

Procedure that may be initiated by any Minister, against content generators

- 10(1) Any Minister may instruct the Competent Authority to issue a Part 3 Direction if all of the following conditions are satisfied:
 - (a) a false statement of fact (called in this Part the subject statement) has been or is being communicated in Singapore;
 - (b) the Minister is of the opinion that it is in the public interest to issue the Direction.
- 10(2) Any Minister may instruct the Competent Authority to issue a Part 3 Direction in relation to the subject statement even if it has been amended or has ceased to be communicated in Singapore.
- Part 3 Direction = “Correction Direction,” “Stop Communication Direction” that can include correction, and “Access Blocking Order”
- Not following directions is an offence

Procedure that may be initiated by any Minister against intermediaries

- 20(1) Any Minister may instruct the Competent Authority to issue a Part 4 Direction if all of the following conditions are satisfied:
 - (a) material (called in this Part the subject material) that contains or consists of a false statement of fact (called in this Part the subject statement) has been or is being communicated in Singapore;
 - (b) the Minister is of the opinion that it is in the public interest to issue the Direction.
- Part 4 direction = “Targeted Correction Direction,” “Disabling Correction Direction,” and “General Correction Decision.”
- Not following directions is an offence that can result in a fine of SGD 1 million for a company

Where South Asia is headed

Two approaches

Malaysia 2018, Bangladesh 2018, and ???

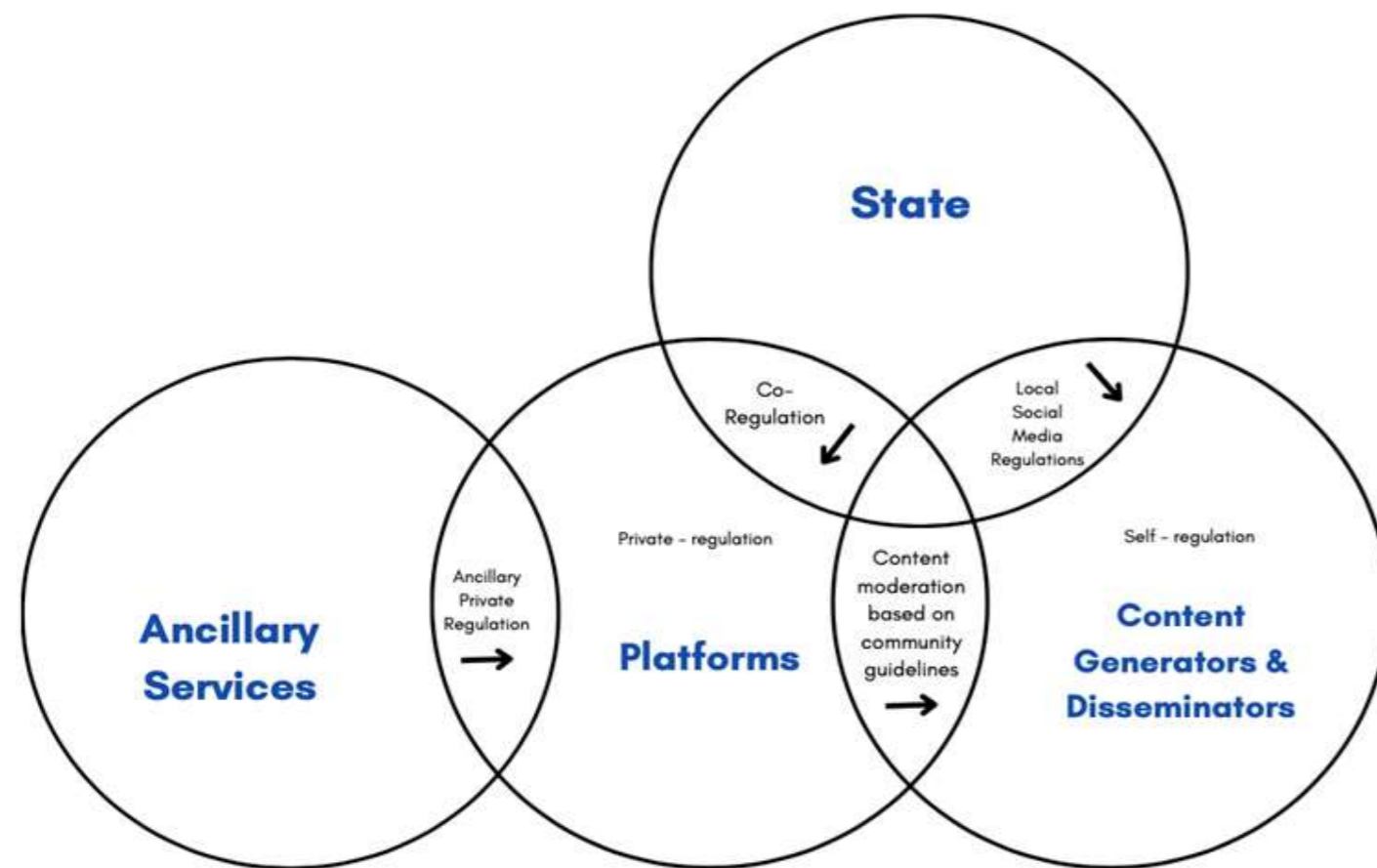
- Vaguely worded offences that allow latitude for prosecutors (and politicians in power)
- Ordinary or special courts
- Vague wording & arrests expected to result in self regulation

Singapore 2019 & ???

- Administrative action initiated by “any Minister” to get quick results (correction, takedown, block)
- Court process if directions not followed
- Broad terms such as “public interest” and exemplary punishments to result in self regulation & overbroad private regulation

Is there an
alternative?

Co-regulation



- Let platforms collectively develop industry codes, as is being proposed in Sri Lanka
- Government monitors codes and compliance & eases up on creating new offenses
 - Can continue to prosecute incitement to riot, etc. ex post under Penal Code and normal law