Remarks by Dario Milo

doi:10.1017/amp.2023.39

Yes, certainly, and thank you for the opportunity. The major development that the Panel was involved in by invitation from the Inter-American Court was to submit an expert *amicus* brief in the *El Universal* case, which was winding its way through the Inter-American Court system, and just before Christmas last year, the Inter-American Court ruled. This was a case that involved the heart of political speech. It was criticism in the form of an opinion by a journalist working for El Universal, of the then president of Ecuador. So it really was the *locus classicus* of political speech in a democracy.

The Ecuadorian courts had sentenced the journalist and the directors of the publication to three years imprisonment, a 30 million U.S. dollar fine, a staggering amount, and also a civil penalty of a civil damages of 10 million U.S. dollars, so really quite egregious sanctions visited upon them. The journalist sought asylum in America where I believe he currently works.

As I said, the High Level Panel submitted the expert *amicus* brief. The court ruled in December last year and effectively not only endorsed the existing jurisprudence of the Inter-American Court, which is essentially that there needs to be exceptional reasons for there to be criminal consequences for speech, and that is, of course, a very good proposition. But, actually, our interpretation of the judgment is that the court said that in the context of an opinion about a public official expressed by a journalist, there is no place for criminal sanction. It will automatically be a disproportionate restriction on freedom of expression, and that certainly seems to catapult the law quite significantly forward.

The Inter-American Court is in quite good company here, of course, Can, because the African Court of Human Rights, the Court of Justice for West African States, the Court of Justice for East Africa, and in addition, the Human Rights Committee have all commented on the undesirability of criminal sanctions in a defamation or an insult context.

So we regard this as yet another further international law nail in the criminal defamation context.

Can Yeginsu

Thank you very much, Professor Milo. You are absolutely right. I was counsel in the *FAJ v. Gambia* case, which has been cited with approval now by multiple regional human rights courts, not only in Africa, but all around the world.

I want to switch now from a focus on litigation before international courts to litigation before domestic courts and turn to Karuna Nundy. Karuna, you are one of India's most prominent supreme court advocates. Could you tell us a little about the Supreme Court of India's approach to international law in landmark media freedom cases, please?

Remarks by Karuna Nundy

doi:10.1017/amp.2023.40

Thank you, Can. Since 1997, the Supreme Court has taken the approach that where domestic law is silent, international law should fill the lacuna. In constitutional cases, we argue international law. We argue comparative law. But what I have found is that it is constitutional law that mostly occupies the field. One of the cases I argued along with other counsel in 2005 is still the definitive case on online free speech regarding the striking down of a provision of the Information Technology Act that governs the internet. The actual words of the law are quite intriguing—any language that was

https://doi.org/10.1017/amp.2023.40 Published online by Cambridge University Press

online, defined as a text message or something on a website, that was annoying or inconvenient "could lead to a three-year prison sentence."

The interesting bit, for the purposes of our discussion, is that it was applied to a number of journalists. It was applied to bloggers. It was applied to all sorts of people, which is why the constitutional challenge to the law became even more important. We submitted international law. We submitted Frank La Rue's excellent report on the subject. We also submitted U.S. law and the judgment is actually particularly good on the comparison between the Indian Constitution and the U.S. Constitution with regard to the freedom of expression.

Our Article 19 uses the words "freedom of expression," but not the "freedom of the press" that the U.S. Constitution does, but they converge, more or less, and it gives us the basis to cite some of the more progressive United States Supreme Court decisions as well.

But the international law was not cited in the decision. The decision is actually very good, but our international law stuff was not cited. I think this is a problem because our constitutional courts are the low-hanging fruit for the deepening of international law, and I think it is particularly important in the world today where governments are increasingly siloed and sovereign and the effects of an action in the Ukraine are felt all over. What Facebook does affects everyone, and I think the deepening of international law through the judiciary is vital.

A lot of the attacks on the freedom of the press are happening by state actors as well as non-state actors and are litigated in the criminal courts, and in the domestic courts, we almost never see international law. We see some constitutional law and not even that much, but we just see black-letter law interpretations of criminal procedure codes and penal codes. I hope that India is a mechanism in that regard, but I think bringing in these principles is very important because, of course, when we look at the Working Group on Arbitrary Detention, and when we look at other principles that have been laid down, saying that, look, you cannot be arrested and jailed, for example, for blasphemy and you cannot be kept without bail for lengths of time, particularly if you are a journalist.

I think bringing in international law to domestic courts is vital. We have done some of that through the work of the High Level Panel. I have a draft report that will be presented to the Panel on blasphemy and religious hate speech, and based on some of that research, we did trainings of judges across the world for the Bonavero Center at Oxford. And I think bringing that in to trainings and to workshops and to even more informal interactions can be one of the ways forward.

Can Yeginsu

Capacity building. Thank you very much, Karuna Nundy.

We are talking about strategic litigation in one respect. Often when one talks about strategic litigation in this context, it is litigation that is being brought to give effect to rights to protect journalists, but unfortunately, in the last five or so years, there has been the emergence of strategic litigation that is being commenced actually to shut journalism down. This is a critical issue for all of us working in the field.

I want to turn back now to Professor Milo. Some of you may know what SLAPP stands for. Some of you will not yet. I have three questions for you, Professor Milo. What are SLAPPs? How do they work? And why do they pose a threat to media freedom?

Dario Milo

Thank you, Can. This time the acronym is actually pretty useful because it stands for Strategic Lawsuits Against Public Participation or Strategic Litigation Against Public Participation. The ulterior motive is not to vindicate their reputation, because often these do arise in defamation contexts, though not always. That is not the objective, and of course, that should be the objective of an

https://doi.org/10.1017/amp.2023.40 Published online by Cambridge University Press

aggrieved, deserving plaintiff. Instead, the objective of these types of claimants or plaintiffs is to intimidate, to harass, to censor, to chill speech, to render you speechless for criticizing the plaintiff. The plaintiff could be a multinational corporation. We often see that. It could also be a very powerful politician or businessman.

I believe we are at an inflection point now as almost a perfect storm in the international and regional world, because just two weeks ago, for instance, the European Court for Human Rights for the first time used SLAPP methodology to decide a case where a Russian organ of state had sued an online publication for a retraction in relation to allegedly false statements that were made, which were, in fact, comments about the Russian organ of state. The European Court for Human Rights, in the context of finding that there was no legitimate aim that justified the forced retraction that the courts had ordered, said this was essentially a SLAPP and endorsed that thinking and that terminology.

In the *El Universal* case, which I discussed in the context of criminal defamation, it was also interesting. For the first time, as far as I know, the Inter-American Court used SLAPP methodology to categorize, and remember that context being the president suing a journalist for a comment made about their conduct.

I believe we are at an inflection point internationally. Domestically, you will also have seen developments in the UK. There is a study where the government there has called for evidence of SLAPPs, and the intention certainly seems to be to amend the Defamation Act to take this into account, apparently triggered by liable lawsuits by Russian oligarchs.

In my country, South Africa, we argued a case in February where we sought to have developed under common law a defense to SLAPPs. We do not have legislation on SLAPPs, but we said to the Constitutional Court, you can develop this as a species of your abuse of process jurisdiction, and hopefully, that judgment will come out in the next few months and also should give inspiration to similar jurisdictions where you do not have legislation, but you can perhaps turn to procedural law to address this problem.

From the High Level Panel point of view, obviously we are very interested in this issue. There is a report that Professor Webb, who is in the audience, and myself and others have been involved in where one of the aspects is SLAPPs. I was an advisor to the EU Commission, which is looking at this. The Council of Europe has now started an expert advisory process. I think we will see massive developments in the years to come.

As I said when I addressed the UK anti-SLAPP conference last year for the Panel, it seems to me that it takes a village to fight a SLAPP, and the Panel is very happy to be a resident of that village.

Can Yeginsu

Thank you very much, Professor Milo. It is an absolute priority for us now.

I want to ask David McCraw about his perspective on this from a newsroom perspective.

David McCraw

Thank you. As many of you know in the United States, it is a bit of an experiment. It is a bit of a laboratory for anti-SLAPP law. There are statutes in many states but not all states, and of course, in the United States, those additional protections where someone could make an anti-SLAPP motion to challenge at an early stage, whether a case is being brought simply to silence, it is layered on top of *Times v. Sullivan* and is layered on top of the United States in libel cases that the plaintiff has the burden of proving falsity, the publisher does not have the burden of proving truth. I think many people look at it as we have put another layer of icing on a very fine cake already.

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But the experience has been that from an international perspective, having a European solution makes a lot of sense. The reality is that all publishing is global. As a practical matter, it is very hard to geo-filter. It is not impossible, but every time I have been involved with it, it is very difficult, because stories find their way into a jurisdiction, no matter what you as the publisher do, if it is available someplace, because of email, because of people stealing it, violating our copyright and putting it up because it goes on LexisNexis, not just on the website.

Geo-filtering poses a sobering reality. Are you really going to say that the Chinese do not like that story; thus we will not bother them anymore. We will not run it. The part of the strength, the power, the influence of the internet is that we are global publishers and that we want to reach audiences. In many of these cases, it is that audience that we want to reach where there is the threat of a lawsuit.

What I would say about SLAPP and the way it works in most U.S. states is you can think of it in three ways. One is that the plaintiff bringing the case needs to show that there is a substantial basis in law and fact. Second, that it is going to be decided at a preliminary stage with the hopes of stopping the litigation early. And, in most states, there is a fee shift, unusual in the United States, where if the plaintiff loses on the anti-SLAPP motion, the defendant publisher is entitled to fees.

But the real strength of this and the real value of it for freedom of expression is: does it serve as a disincentive to litigation? If you are really talking about oligarchs, big corporations, people with resources, it is simply a financial calculation. If they bring the lawsuit and they lose, they may have proved their point, spent some money doing it, but proved their point. The real value of these kinds of statutes is the degree to which they prevent the threat before publication of a lawsuit and they serve as a disincentive afterwards. That requires some calibration, as the statutes get written, how you actually get there.

The last thing I would say is that there is some resistance in courts where what they see is a David and Goliath problem, because an individual can sue organizations like *The New York Times*. We can make an anti-SLAPP motion. Many times, a judge is going to say this looks like David and Goliath. A big corporation has yet another tool. Calibrating it to address fairness issues is important, but ultimately, when it is used to stop lawsuits, as was brought up earlier by Dario, it is not really about reputation. It is about silencing. These kinds of statutes are really important.

Can Yeginsu

David, thank you very much, indeed. I remember when the Media Freedom Coalition was created in 2019. It was the summer, pre-COVID, and I remember Chrystia Freeland on behalf of Canada, Jeremy Hunt, then foreign secretary on behalf of the United Kingdom, sharing a stage with Amal Clooney. I remember Amal's comments that the international system of protection of media freedom was broken in some respects, and that this initiative on the part of the Media Freedom Coalition had to be about applying new fixes.

Two years after COVID, I want to revisit that question. I want to turn to Hina Jilani. Hina, if you were to identify one area in this context in terms of the international framework, protecting media freedom, where would you say it is most broken and in urgent need of attention?

Hina Jilani

I would not go as far as saying that it is broken, but there is certainly something that we need to do in order to make sure that international standards are followed in national laws because it is there that actual things have to happen. International law just enunciates the principles and the standards, but when national law is either not incorporating those standards or, in fact, not implementing laws, that is the problem. Recently we have seen good laws come in, but their implementation is short of

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demonstrating any commitment to preserve the same value system upon which the respect for media freedom rests.

I would say it needs to be fixed, and I will point out a few areas, in particular, that as a practicing lawyer, I have difficulty with. One of the issues is where governments have used counterterrorism laws, et cetera, to raise an alarm about national security to an extent where they think it is justified to set international standards aside. National and domestic courts have many times allowed this to happen, including in my country, and I have seen that in India also, where we look toward the Indian Supreme Court. We think that they can do a better job than they have done in certain recent judgments. I believe that this whole question of security overcoming international standards globally has to be, in many ways, set aside.

Secondly, I think the other thing is ICCPR Article 19, and you have all discussed this just now with regard to criminal defamation. It says to protect the "reputations of others." I know that jurisprudence is evolving on this from the Human Rights Committee and other sources, but at the same time, there has to be an authoritative interpretation of that particular ground that the ICCPR gives, because we are having a lot of trouble.

I recently lost a case where I had challenged a provision of the Prevention of Electronic Crimes Act in Pakistan, where false or fake news is now considered to be defamatory, and it has been used against journalists, human rights defenders, and social commentators in general. I think these are some of the areas in which we need to look at.

SLAPPs are another problem, and we have seen SLAPPs being used for political comment, et cetera, but imagine in my country, SLAPPs being used against the Me Too movement, and it is criminal defamation that we are worried about. I think that defamation, if it has to remain, is fine if it is restricted to the domain of civil law, but criminal defamation has to go. I am afraid that the Human Rights Committee, even in its comment, has not spoken with sufficient authority to convince national courts that this is a value that we must preserve as well. These are some of the areas I think that we need to look at.

The other issue is media concentration where plural media is being denied existence because of the fact that there are so many vested interests now being created with media concentration in the hands of big media houses. This has an indirect impact on journalistic freedom because journalists are now depending a lot on policy of media houses and using self-criticism, self-censorship. These are some of the issues that need to be looked at with regard to international law, its implementation, the way that it is applied, and the sources that interpret international law and how they are to interpret it, keeping in mind the national situation of journalists and media freedom and how they can overcome the challenges to that in the national and domestic domains.

Can Yeginsu

Thank you very much, Hina. Media concentration as the other aspect to it, of course, is governments coming in and media changing hands overnight, giving rise to issues of accreditation, licensing. I recall the most popular network in the Philippines, ABS-CBN, turning off overnight. Absolutely remarkable the impact that sort of government indirect action can have.

Karuna Nundy, I want to pose the same question to you about the broken system and areas that require immediate attention.

Karuna Nundy

Human life. Getting the journalist out to safe refuge is one of the most important things but also doing it in a way that is fast and that allows for a life in journalism elsewhere. The latter is something that is quite important, because Can's report on behalf of the Panel says that 17 percent of

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journalists that continue work as journalists in other parts of the world at least have their lives safeguarded. The more countries that sign up to provide these sorts of emergency visas and proper resettlement, the greater the choice. Maybe there will be a community that speaks the particular language in which the journalist is used to reporting in.

I think there is another challenge, and that is more doctrinal, but we do have a lot of smart people on the Panel and in the room. When you have prosecutions against journalists that are ancillary for a purported violation of tax law, for example—and that is happening more and more—it would be particularly useful for international law mechanisms to be able to go into that, rather than just saying, "Oh, that is due process and let us see what happens in the end." "Due process" can have a massive chilling effect. It can result in denial of visas to other countries. It can result in denial of reporting, reportage, and entry into particular fora. It can also result in jail without bail for many years. That is something we have to wrap our heads around and maybe look at. It is always a bandwidth problem in international law, but maybe have funding for even a subcommittee of the Human Rights Committee or our Panel perhaps. To look at individual cases, go into them in depth, and say that this is a pile of rubbish, and give strength and voice to the journalists but also their advocates in the particular country.

Can Yeginsu

Karuna, that is a terrific point on other measures taken by states, short of direct targeting of journalists. I note the European Court of Human Rights in the last three or four years has really been bolstering its Article 18 jurisprudence on this and going into areas that it has not been happy to go into previously. I think regional human rights courts are really going to have to grapple with this and look at state intention in a way that they have not before.

We have run out of time. It falls on me to thank all of my co-panelists and to thank you all for joining us, and perhaps we could provide a round of applause for our panel.

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