Defeating a Patriotic Law Prosecution

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The Palestinian television journalist, Abdul Rahman Assad Aref Thaher, sent a private message on WhatsApp to a friend which stated, "Screw them and their Security Services. Such Thugs, disrespectful people."

Using electronic surveillance software, the Security Services intercepted his message, searched, and confiscated Mr. Thaher's electronic devices without a search warrant, arrested Mr. Thaher without an arrest warrant, and interrogated him at length.

The public prosecutor indicted him under the Patriotic Law for slander against the Palestinian Authority[2] and on January 1, 2022, tried him in Nablus Magistrates Court. The Magistrate found Mr. Thaher guilty and sentenced him to prison for three months.

Mr. Thaher appealed to the three-judge Nablus Court of First Instance sitting as an Appellate Court.

The Court unanimously reversed, finding that the "Slander Law," a Patriotic Law, suppressed press freedoms and legitimized abuses against journalists and human rights defendants.

Specifically, the Court found that "the facts cited by the Public Prosecutor in the context of what is attributed to him (Mr. Thaher) constitute nothing but a violation of the law and the

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[2] Article 45 of Decree-Law No. 10 of 2018.

Basic Law, which is a legal transgression by the Public Prosecution, with the aim of giving legitimacy to the behavior of the executive authority in suppressing press freedoms and liberties."

Tellingly, the Appellate Court noted that, "...the case before the Court has a political nature, since the Appellant's prosecution was the result of his journalistic work and running a television program with political implications."

The Court further found "...the indictment to be a safety valve to suppress freedoms and give legitimacy to abuses committed by the executive authority and practiced against citizens, journalists, and human rights defenders, who defend their opinions and express themselves against the threat of arbitrary arrest, without an arrest warrant, as happened with the journalists Abdul Rahman Assad Aref Thaher, the "Appellant."[3]

By any measure, this decision represents fine testament to an independent judiciary in an authoritarian regime. It may, indeed, be the first written opinion to deal with the phenomenon of the "Patriotic Law."

The authoritarian regime of Zimbabwe President Emmerson Mnangagwa introduced the term "Patriotic" to describe its bill which was intended to criminalize dissent. The Zimbabwe Patriotic Law took effect July 14, 2023. The law makes it a crime to "willfully damage the sovereignty and national interest of Zimbabwe." A defendant who partakes in a meeting which "upset" the Government will serve ten years in prison. If the meeting discusses sanctions, the sentence is ten years, and he loses his citizenship.

[3] Abdul Rahman Assad Aref Thaher vs. State Attorney. Case no. 243/2022. Nablus Court of First Instance, in its capacity as an appellate court authorized to conduct the trial on behalf of the Palestinian Arab people.

In 2022, Russia enacted another Patriotic Law which made it a crime to refer to its "special military operation" in Ukraine as a "war." Twenty-four Russians were convicted and imprisoned for violating this law.[4]

The Russian Federation, Zimbabwe, and Palestine are among the thirty countries on four continents which in recent years have enacted and vigorously enforce Patriotic Laws. They share a common deficiency: how does a speaker defend himself when he is indicted for "willfully damaging the sovereignty and national interest of his country"?

To describe such a law as a "Patriotic Law" is the ultimate cynicism. The brilliant South African solicitor, Linda Masina, LLM thoughtfully observed that, "Patriotism cannot be legislated."

The cynical vagueness of these terms invites a court to find them unenforceable as a matter of domestic law.

In reversing Mr. Thaher's conviction, the Appellate Court in Palestine relied on Zimbabwe basic law and its constitution. Could that Court, or a court in any one of the thirty countries have relied additionally on the protections of international human rights law?

First, all those countries had bound themselves to comply with Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Most bound themselves as well to Article 9 of the African Charter on Human and Peoples' Rights, the language of both those treaties is identical: any law which punishes speech must be "necessary in a democratic society and the punishment must be "proportionate."

[4] United Nations Human Rights Office of the High Commissioner. 28 August 2023.

Those precise terms originated seventy-three years ago when the European Convention on Human Rights (ECHR) was adopted by twelve countries in the Council of Europe. Ther are now forty-six signatories. Over the course of the next seventy-three years, the European Court of Human Rights (ECtHR) developed a case law which is universally recognized as having established international norms of human rights. That Court, moreover, has decided well over one thousand cases which involved an alleged violation of Article guarantees broad rights of freedom of expression. That rich case law has developed and greatly expanded the meaning of "freedom of expression." That case law has yielded one unassailable principle: for a state to punish a speaker for his speech is "not necessary in a democratic society. It is certainly not "proportionate." The inevitable result is that the State has violated its treaty obligations under Article 19 of the European Convention on Human Rights (ECHR).

In view of the identical language in both Article 19 of the ICCPR and Article 9 of the African Charter, that principle of Article 10 case law applies with equal force to cases involving alleged violations of Article 19 of the ICCPR or Article 9 of the African Charter.

There now exists a perfect troika: Article 10, Article 19, and Article 9 to protect innocent critics.

The Media Law Working Group of the International Senior Lawyers Project (ISLP, intervened in the courts in Palestine, Iraq, Tunisia, and Algeria. In each court, the Government was prosecuting a journalist or blogger for violating its cyber libel law or its Patriotic Law. ISLP argued that each country had bound itself to Article 19 of the ICCPR, and that international norms of freedom of expression insist that to punish a speaker for his provocative speech is neither "necessary in a democratic society'" or is it "proportionate." ISLP argued that if the

Government sends the defendant to prison, it will inevitably cause the Government to violate its obligations under the ICCPR.

The result of ISLP's arguments in these four cases was quite satisfactory. In each case, the court dismissed all the charges, acquitted the defendants, and set them free. The ISLP arguments freed all eleven speakers. In no case where ISLP argued, did not fail to set free the speaker. ISLP's won-loss record stands at 11-0.

The most recent of those defendant speakers is the Palestinian television broadcaster, Abdul Rahman Assad Aref Thaher.

The threat to freedom of expression, however, does not stop at the imprisonment of those speakers who criticize politicians. That threat can be measured, for instance, in the 533 journalists now languishing in prisons around the world.[5]

The threat to freedom of expression is actually the greatest in those articles that do not get published. Those articles that criticize politicians which, if published, would certainly result in jail for the journalist.

Is it possible to measure that threat? The answer is obviously, no.

Patriotic Laws (and cyber libel laws) are ubiquitous. They constitute both the armor for politicians and their weapon of choice against their critics. It would be futile to seek repeal of these laws. The defense for those critical speakers, however, is best presented in arguments that imprisoning the speaker would cause the Government to violate its treaty obligations under the International Covenant on Civil and Political Rights.

It has never failed.

[5] Reporters Without Borders. 14 December 2022.