Dario Milo and media law: is legal sky a limit for journalists?

By Issa Sikiti da Silva

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There is some substantiated regulation of what the media can do and what it cannot do, but the balance must be struck between what the law has prescribed and freedom of expression, Prof Dario Milo, Wits University media law visiting professor and Webber & Wentzel partner, said last week in Johannesburg at the two-day Regulations and Rights media conference.

The laws that impact upon the media include common law and statutory and criminal and civil, Milo said, adding that, despite these laws regulating the conduct of all persons, the media often clashes with them due to its activities. Some of these laws whose impact is particularly felt by the media include defamation, privacy, contempt of court and crimen injuria.

In addition, he said, various statutory offences include areas of national security, defence, intelligence, prosecution of crime, correctional services, and reportage of identities of minors and others in criminal cases, as well as open justice and access to information.

Consequences of not complying with law

These laws, he said, have the effect of regulating journalistic conduct and seek to ensure that power which media wields is exercised responsibly. He warned that consequences of not complying with law can lead to interdict from publishing, general and special damages, being forced to publish an apology or retraction, and legal costs (loser pays winner), among others.

Milo, who represents major corporations, newspapers, broadcasters and entertainment companies, said, however, for its efficacy and legitimacy, media law needs to be consonant with constitutional calibration of rights so that right to free speech is exercised responsibly (eg, reputation and dignity versus freedom of expression), and reflect good journalistic practice.

"We now have reasonableness as a concept that can help balance reputation and free speech," he pointed out.

Indicators of reasonableness

Milo cited the following indicators of reasonableness:

- type of speech (more latitude for political discussion)
- reliability of the source
- steps taken to verify the information
- opportunity given to plaintiff to respond and incorporating response
- tone of the article
- need to publish before establishing proof
- neutral reportage
- reasonable belief in truth, and
- compliance with 'generally accepted good journalistic practice'.

"Because of these clashes, your code of conduct has become very important," Milo said, referring to the South African Press Code, which is published by the Press Council of South Africa and reinforced by the office of the ombudsman.

"Judges set normative standards, but increasingly media codes and good practice give content. This means press codes should be carefully drafted to ensure that there is the necessary calibration of rights (privacy versus public interest) to avoid pitfalls such as a statutory media tribunal.

"This means reasoned decisions of adjudicatory bodies become more important and will be of persuasive value for courts (eg, how the ombudsman treats an analogous claim for invasion of privacy).

"Courts will be looking to journalists"

"Courts will be looking to journalists to prove the reasonableness and accountability of the media," he said, adding that decisions of the Press Council can be subject to judicial review.

As codes become increasingly vital, Milo reiterated that legislation such as the Electronic Communications Act, Films and Publications Act and the soon-to-enacted Protection of Personal Information Bill will be used in defamation cases to pin the reasonableness standard down.

"This is a unique opportunity for the SA Press Council which is currently reviewing its code. Please populate it with rules that calibrate the relevant constitutional rights which give useful and practical guidance to journalists," he concluded.

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ABOUT ISSA SIKITI DA SILVA

Issa Sikiti da Silva is a winner of the 2010 SADC Media Awards (print category). He freelances for various media outlets, local and foreign, and has travelled extensively across Africa. His work has been published both in French and English. He used to contribute to Bizcommunity.com as a senior news writer.

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