



OFFICE OF THE CHIEF JUSTICE

Justice and the Media
Speech to the South African National Editors Forum
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Introduction

It is a privilege and an honour to have been asked to address members of the press, in particular, those affiliated with such a distinguished organisation as SANEF. The American founding father Thomas Jefferson famously quipped, “If it were left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”

I assume that he said this before he was elected President. As the head of one of the branches of our South African government, I am unable to agree wholeheartedly with Mr. Jefferson’s remark. Of course, I recognize that many in the audience might share his attitude.

I have, however, drawn some inspiration from Mr. Jefferson. Like him, I am keenly aware and deeply appreciative of the media's place in our society. Indeed, without the media, there could be no constitutional democracy. The media not only provides the main forum for the great societal debate that is democracy; it also sustains that debate by supplying the information that the people need to make the political, economic, and cultural choices that constitute the fabric of our democratic society.

But the media does so much more than enabling democracy by informing and educating the people. It also ensures that the people know their rights and the ways to enforce those rights. It serves as a watchdog and indeed as one of the strongest and most important checks on the power of all three branches of government. And in a diverse society like ours, it has the potential to act as a unifying force and to provide a voice for the voiceless, marginalized and disadvantaged. For these reasons, the protection and encouragement of the free press, freedom of speech and the free flow of information are cornerstones of our Constitution's Bill of Rights.

Tonight's theme "Justice and the Media" cannot be discussed without exploring the relationship between the judiciary and the media. This is so because both have a vital role in the improvement of access to justice. The principle that brings them together is the principle of open justice. It is this principle that requires courts to open their doors to the media so the media can observe how the judicial system functions and the extent to which courts uphold the Constitution and the law and administer justice to all without fear, favor or prejudice,

By reporting on these matters, the media ensures that the judiciary is accountable and this in turn creates an atmosphere that is conducive to confidence in the judiciary. And public confidence in the judiciary is vital to the proper functioning of the courts. But to do this, the freedom of the media to report must be protected and this is the function of the courts. The relationship between the media and courts is therefore one of interdependence.

Therefore in addressing the theme for tonight I propose to focus on the relationship between the judiciary and the media and its significance in facilitating the constitutional and societal functions of both institutions. Despite the tensions that occasionally erupt between the two, this relationship is symbiotic and mutually reinforcing.

I will start by discussing the principle of open justice, which I believe lays the foundation for the relationship between the media and the judiciary. Through this principle, the media helps to give effect to important constitutional values such as the accountability of the judiciary, access to the justice system, and judicial independence.

Then, I will consider some of the responsibilities that attend the media's role in a democratic society, particularly regarding its relationship with the judiciary. I will conclude with a few remarks on the importance of that relationship to the survival of our constitutional democracy. But before I begin, I want to provide some context by discussing my vision of the judiciary and the challenges that our justice system faces.

Vision of the Justice System

Those of you who were present at my interview for the position of Chief Justice will recall that I set out my vision of the justice system. This ideal justice system is accessible to all who require its services and is run by an independent and upright, yet humble judiciary that is representative of all the beautiful and manifold diversity of our nation. There are many serious and interrelated challenges that stand in the way of the realisation of this vision. Of particular concern are the need to increase the accessibility of the courts, the need to increase the efficiency with which justice is dispensed, and the need to maintain public confidence in the judiciary.

The judiciary has taken several steps to address these challenges in the opening months of my tenure as Chief Justice. Last July, at the Second Judges Conference, the judiciary adopted a declaration outlining reforms necessary to improve the accessibility of the justice system. A group of distinguished judges has been appointed to help accomplish those steps.

This body, known as the Monitoring Committee, will make recommendations on the improvement of the judicial system including developing a working relationship with the media.

We are presently in the process of reorganizing and strengthening the office of the Chief Justice to empower it to manage all its constitutional and statutory functions. This will include the establishment of a media and communication section to deal with enquiries from the media and public. And recently, Judge Meyer Joffe of the South Gauteng High Court was appointed to lead the newly established Judicial Education Institute. Under his capable leadership, the Institute will contribute greatly to the improvement of the efficiency of the courts and thus to access to justice.

Introduction to Open Justice

The steps that have been taken so far and the reform process that will continue over the next few years should improve the operation of the justice system and address, at least in part, the challenges that we face. But the courts cannot address these challenges alone. The media is of central importance.

The relationship between the media and the judiciary is animated by the principle of open justice. This is the bond that links the two institutions. Open justice is the principle that the doors of all the courts in the nation must be open to the public and the press. This concept has been around for centuries.

It is deeply rooted in African tradition. In African societies, justice was administered in the open in the literal sense of the word. Trials were conducted under a tree; the courtroom had no walls, only a roof of leaves and branches to provide shade from the sun and shelter from the elements. Members of the community were allowed to attend the proceedings. Secret trials were foreign to traditional justice.

I recall as a boy of about 10 or 11 years of age, I once accompanied my father to a civil trial in which he was a defendant. Although I cannot now remember what the dispute was about, save that it concerned land, the scene remains vivid in my memory. I recall the men that were assembled there, under a tree, and the dignity with which the proceedings were conducted. I also remember passers-by stopping to observe.

I do not know the exact outcome of the proceedings, but since my family has occupied the same land for over 50 years, I assume my father won the case.

Today, unfettered public access to proceedings in our courts is a fundamental facet of our justice system. It is enshrined in sections 34 and 35 of the Constitution, which speak of the right to “public” hearings and trials.

Like all principles, the principle of open justice is not absolute. In certain circumstances, it may be necessary to conduct some aspects of trials behind closed doors. This is the case, for example, when testimony is given by young children or victims in sexual offence cases or evidence is led that implicates concerns of state security. And in family law matters, the Constitutional Court struck down prohibitions on the publication of evidence, but required that the identities of the parties be kept confidential.

These limitations, however, are rare, for the principle of open justice is fundamental. As the Constitutional Court has pointed out, “the requirement of openness in our society flows from the very founding values of our Constitution... in order, among other things, to ensure transparency, accountability, and responsiveness in the way courts and all organs of state function.” The rights of the media to observe and report on the administration of justice, and to have access to court papers in court proceedings stem from the right to open justice. This access, in turn, allows the media and the judiciary to work together to give effect to the Constitutional values of accountability, transparency, access to justice, and judicial independence.

Open Justice and Access to Justice

The media plays a pivotal role in ensuring that the public has the ability to make use of the courts, or, in legal parlance, “access to justice.” This phrase describes the extent to which members of the public, particularly those without much in the way of resources, have the practical capacity to seek the protection of the judicial system. Access to justice for all is a Constitutional command.

Indeed, if access to justice is restricted to those with access to power and money, then the transformational imperative of our Constitution is defeated. There are many features of the legal system which present barriers to access to justice. These include the costs of hiring counsel and the often interminable litigation process. They also include the physical distances that some have to travel to reach the courtroom and the difficulties inherent in making legal proceedings comprehensible to all in a nation of such great linguistic diversity. The media cannot do much to address these factors. They must be addressed by the judiciary itself. This is my first priority as Chief Justice. Indeed, one of the primary aims of the administrative reforms that are underway is to give the judiciary the capacity to deal with barriers to access to justice.

Yet there is a barrier that prevents many from coming to court even before they face obstacles like time and cost. I am talking about the lack of knowledge of legal rights and remedies. If a woman doesn't know her rights, how can she enforce them in court?

Our Constitution is a beautiful document. A distinguished scholar has hailed it as “the most admirable... in the history of the world.” We have remarkably progressive legislation as well, legislation that offers an even broader set of protections than those contained in the Bill of Rights. But without public awareness of these protections, they are of little value.

In this respect, the media helps give effect to the rights that are enshrined in our Constitution and in our legislation by acting as an educator. It empowers the people by making them aware of their rights, so that they can approach the courts for the remedy that they deserve. By explaining the protections contained in the Constitution, by reporting on important cases in which people have vindicated their rights, and by making court proceedings comprehensible to the man and woman on the street, the media plays a vital role in the fight to ensure access to justice for all.

Open Justice and Public Confidence

Another challenge that can only be met with the help of the media is the maintenance of public confidence in the courts. Public confidence is of the highest importance. As US Supreme Court Justice Felix Frankfurter once said, “The court’s authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction.” Courts make decisions which affect the liberty, property and dignity of individuals. While there are, ultimately, forceful means available to give effect to those decisions, force is seldom required. This is so because members of our community accept the authority of the court and voluntarily obey court orders.

The inability of the courts to force compliance with their orders is particularly evident when the targets of those orders are the other branches of government. The Constitutional Court has struck down certain legislation and constitutional amendments and required Parliament to amend others, and it has declared the conduct of the President invalid and executive policies inconsistent with the Constitution. The President and Parliament have always complied.

Apart from the constitutional requirement, court orders are obeyed because the government and the people have confidence in the integrity of the judicial process.

Furthermore, without public confidence in the ability of the courts to dispense justice, there can be no faith in the rule of law. Without faith in the rule of law, valuable relationships of trust within society begin to break down. Citizens can no longer be assured that their rights will be respected. Businesses can no longer be assured that their contracts will be honored. Victims of crime can no longer be assured that justice will be served in court. Public confidence is therefore vital. That is why courts must not only be independent and effective; they must be seen to be independent and effective.

Public confidence in the courts is based on perceptions of the justness of judicial decisions, the efficacy of the court system, and the integrity of judges. These perceptions, in turn, are based not only on the actual performance of the judiciary, but also on the accountability and transparency of the justice system. Open justice, and the media's role in giving it meaning, is critical to both.

Transparency is crucial. People cannot be expected to have confidence in a system that they cannot observe. They are rightly suspicious and resentful of decisions taken behind closed doors. As the Constitutional Court pointed out in the context of criminal appeals, were criminal appeals to be heard behind closed doors, faith in the justice system might be lost. No democratic society can risk losing that faith. The same is true for the civil justice system.

Transparency also serves as a bulwark against abuse. When proceedings take place in the public eye and in the presence of the media, the likelihood of the abuse of the parties and witnesses is significantly minimized. As the eminent jurist Lord Steyn explained:

“A... trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the... process [and] promotes public confidence in the administration of justice. It promotes the value of the rule of law.”

The principle of open justice provides the starting point for transparency. But judicial transparency doesn't mean much when most people have neither the time nor inclination to travel to court to watch the judicial process unfold in person. The media therefore has an important role in disseminating judicial proceedings and decisions to the community.

There is more to transparency, however, than the simple dissemination of information. The fact of the matter is that court procedure and legal doctrine are couched in terminology that can be difficult for the layperson to decipher. In a sense, then, court reporters are translators. They have the unenviable task of making court proceedings and judgments intelligible to the general public. It is not easy, but it is of fundamental importance. After all, people are just as distrustful of that which they cannot understand as they are of that which they are unable to observe.

Transparency is closely related to accountability. Courts exist to serve the community. When they work properly, they give effect to the rule of law and encourage the peaceful settlement of disputes.

Judges are ultimately responsible for the preservation of law and order in our community. Therefore it is inconsistent with the judicial office to encourage members of the public to disobey the law.

The public therefore has a very real and legitimate interest in assessing the extent to which the courts achieve these vital objectives. In particular, they have an interest in assessing whether courts do so without fear, favour or prejudice as our Constitution requires and whether they do so efficiently given the substantial resources that are invested in the judicial system.

The legislative and executive branches of government are primarily accountable to the people through the mechanism of elections. Judges, of course, are not elected. We cannot be removed from office because someone disagrees with our decisions. Nor can we be punished with reduced salaries or benefits or by banishment to a lonely and remote part of the country. The bedrock principle of judicial independence means that traditional methods of public accountability are unavailable to restrain the judiciary.

And there lies the paradox: though courts must be independent to do their job, they must also retain the confidence of the people and thus be accountable to them in some manner. The bottom line, therefore, is that courts must have a mechanism for accounting to the community on the achievement of vital objectives.

Open justice provides that mechanism. As the Constitutional Court has pointed out, accessible proceedings and clearly reasoned judgments render judges accountable, thereby fostering judicial excellence. It is the media, by reporting on the courts, by spreading information about important legal developments, by providing commentary on the strengths and weaknesses of legal decisions, and by drawing attention to inordinate delays in rendering decisions, that makes the mechanism of accountability work.

Accountability and transparency thus form the basis for public confidence in the judiciary. As I have said, public confidence is essential to the operation of the courts and the promotion of the rule of law. It is no less essential to the preservation of judicial independence.

Open Justice and Judicial Independence

An independent judiciary is vital to any constitutional democracy. Ours is no exception. The judicial role is meaningless without the independence necessary to impartially resolve disputes without any interference or perception of interference from any source, whether it be powerful interest groups or the other branches of government.

Earlier, I noted that courts lacked the power to raise money and enforce their rulings on their own. For that reason, the judiciary is particularly vulnerable. Public confidence in the courts, especially as manifested in public support for the principle of judicial independence, is the judiciary's only weapon.

There are two ways that the media protects the judiciary. When relations between the judiciary and the other branches are calm, the media educates the public on the place of the judiciary in the constitutional framework and the importance of the principle of independence. In times of crisis, the media can rouse public support for the judiciary when its independence is threatened.

There are indeed many examples of occasions on which the independence of the judiciary has been vindicated by the media, galvanizing public opinion so as to prevent perceived government interference with the independence of the judiciary.

The relationship between the judiciary and the media is symbiotic. Each protects the independence and freedom of the other. And without a strong, active media, fundamental judicial goals like access to justice and public confidence in the courts would be impossible to achieve. By the same token, without an independent and effective judiciary, the media's right to access important governmental information might easily be curtailed. A US Supreme Court Justice summed up the relationship well. He said:

“Both [the media and the judiciary] are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.”

Making Open Justice Work

As I have already said, access to justice and public confidence in the judiciary are fundamental to the successful operation of our judicial system. So too is judicial independence. The media is crucial to all three.

Yet for the media to play its role, there must be positive and cooperative working relationship with the judiciary. At last year's Second Judges Conference, the cultivation of this relationship was given high priority. The newly established Monitoring Committee subcommittee on media liaison provides a good starting point. Indeed one of its functions is to develop a working relationship with the media.

At the Constitutional Court, we endeavor to facilitate the media's role in the open justice process in several ways. All documents, including written arguments, are placed on our website, subject to the constraints of confidentiality and state security. They are therefore easily accessible to the media. The Constitutional Court prepares pre-hearing media summaries that, in lay language, inform the public

of the nature of the case to be heard and the arguments to be presented by the parties. Post-hearing media summaries that explain the findings and conclusions of the judges are issued concurrently with our judgments. Cameras are allowed in court to record proceedings, subject to certain conditions.

All of our courts allow print media to take notes, but not electronic media, except perhaps in motion proceedings. I am aware of the fact that the Constitutional Court and the SCA are particularly in a different position in that they hear argument and not the testimony of witnesses as trial courts do. The recording of evidence is still a rare occurrence except in high profile cases. The extent to which the evidence may be recorded is invariably influenced by other considerations such as the rights of the parties to privacy and dignity.

This is an area in which both the court and the media should work out a mutually agreed process. The newly established Monitoring Committee subcommittee on media liaison provides a good starting point for the cultivation of this relationship.

I am aware that some jurisdictions have created media-judiciary committees composed of judges and members of the press. These committees meet every so often to ensure familiarity between the institutions. They are also able to help the media resolve problems relating to access to court proceedings and to help the judiciary and other court personnel address concerns regarding the media.

This is a concept that we South Africans might do well to consider. We also may want to create the same sort of detailed guidelines on the public's right of access to legal proceedings and records that some jurisdictions have adopted.

Finally, the judiciary has committed itself to establishing principles of accountability and openness. In developing these principles, we must keep in mind the great importance of the media in giving them effect. I am conscious of the practical limit upon which we in the judiciary can expect the media to cover the courts, given the constraints of time and space and the vast universe of stories that demand comment.

Yet I am confident that the media will continue to do admirable work in giving meaning to the principle of open justice, and I am hopeful that, with increased help and cooperation from the judiciary, even more can be done in the future.

THE NEED FOR RESPONSIBLE REPORTING

As I considered what to say to this audience of distinguished journalists, I began to appreciate all the similarities between the judiciary and the media. Much like reporters, judges spend long and sometimes tedious hours sifting through facts, trying to make sense of the matter before them.

Like members of the media, judges need to be independent and impartial to do their job effectively. In both cases, this is because in order to wield power, both the media and the judiciary must first gain the trust of the public.

The power that both wield is great and irrevocable. The judiciary says what the law is. Where the Constitution is involved, the buck stops with me and my fellow justices at the Constitutional Court.

It is our job, which we undertake with the utmost gravity, to interpret the meaning of the Constitution. No one else has that authority. It is for this reason that humility is a cardinal virtue in judges. The great breadth of judicial power must always be matched by the real depth of judicial responsibility.

The media possess a similarly irrevocable power, particularly in a society where the freedom of the press is respected. Once a word is written or a news report televised, it can never be taken back. And as long as the courts play their role, media outlets can never be forced to alter their editorial standpoint or pressured into covering up the misdeeds of those with authority.

Even on those rare occasions when the media oversteps the permissible bounds of reporting and must retract a questionable report, it is generally too late. The damage will often have been done, and it is likely that many who read or heard the original story will miss the retraction.

The great and irrevocable power of the media in a democratic society should not be underestimated. With this power comes responsibility. Those who work in the media must remain cognizant that the nature of their power is magnified by their central role in the democratic society. Just as the judiciary must exercise its function with humility, so too must the media.

Reporting on the courts is difficult. Most media outlets must turn a profit to survive. It is for this reason that legal reporting all too often focuses on the vivid dramas of crime and punishment that capture the imagination of the country. Unfortunately, many legal issues of much greater impact are not quite as exciting.

Though important from the societal point of view, they are not “newsworthy” from the business standpoint. This problem is compounded by the attenuated nature of judicial proceedings and the complexity of legal doctrine.

The media must guard against misleading and inaccurate reporting. It can have serious consequences. Legal nuances, though difficult to understand, may have vastly different implications. Fortunately, this is a problem that is more easily addressed than that of inadequate coverage. Judges must do a better job of publicizing the basis and meaning of their judgments. As an institution, the judiciary can work to increase the familiarity of reporters with the judicial system. Providing educational seminars on legal matters for reporters is an idea that deserves consideration.

Without a doubt the most critical challenge in the relationship between the media and the judiciary is the risk or perception that the media, perhaps at the behest of interested factions, at times impinges on the independence of the judiciary through the vilification or intimidation of judges.

Sometimes, the judiciary and individual judges deserve the critical reporting that they receive. Sometimes, however, judges are subjected to smears that are thinly sourced and without merit. This distracts from responsible reporting.

In this country, as in others, the judiciary is a contested institution. It is also a vulnerable institution, particularly because the delicate nature of judicial deliberation and the requirement of impartiality limit the extent to which judges may issue public comments in response to the media. Given the judiciary's vital role in protecting the media and in the realization of our constitutional enterprise, those in the media must take special care that their reporting is accurate.

The responsibilities that are part and parcel of the central role and great power of the media were well-expressed by the Constitutional Court in *Khumalo and Others v Holomisa*:

In a democratic society... the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and

responsibility... If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled.

CONCLUSION

I have meant to convey that the media and the judiciary are two of the most vital pillars supporting our constitutional democracy. If I can distill this speech down to a single point, it is that these two institutions are inextricably connected. They depend on each other. Indeed, without the other, each would be unable to perform its crucial function in our constitutional democracy.

The media needs the protection of an independent judiciary. The media also benefits from the principle of access to information that is enshrined in the Constitution and given life by the rulings of the courts. Without a strong and vigilant judiciary, dark curtains might quickly be drawn over crucial sources of information, and the media's ability to report freely would be subjected to the whim of the moment.

We in the judiciary, on the other hand, need the media to report and explain our judgments. We need the media to keep South Africans informed of their constitutional rights and the processes by which they can vindicate them.

We need the media to help the public to hold us accountable for our judgments and jurisprudence and for the operation of the courts. We also need the media to inform the public about our work, so that they can have confidence in their judicial system. But importantly, we in the judiciary need the media to treat us with respect, and through responsible and honest reporting, to offer us the protection and support necessary to safeguard our independence.

I have spoken previously of a constitutional dialogue between the branches of government. I believe there should also be a dialogue between the judiciary and the media. Like all dialogues, there will be joyous moments and breakthroughs of understanding. At other times, the dialogue will be fraught with tension.

This is how it should be, and must be. What is essential, however, is that both sides respect each other, and that frank dialogue never devolves into acrimonious dispute. The fate of our young constitutional democracy might well depend on it.

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