John Oliver Manyarara Memorial Lecture 2011

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The Interconnectedness of The Judiciary and The Media and Their Ability To Protect and Broaden the Space for Free Expression

Salutations

As I was preparing for this talk I fell upon a note tucked away in the copy of a book by George Bizos. The handwritten note was from one John Manyarara. I had the privilege over the years, as we convened for MISA Trust Fund Board (TFB), to share whatever book I had been reading with him. He dutifully returned each and every copy. The last book, I imagine, to have shared with him was Bizos', *No One To Blame?* The note read in part "Thank you for the book. A good read indeed. I am sure, BJ, you will agree with me that Bizos is one of the greatest lawyers of our time."

Two things stand out in this note. First, the words 'I am sure, BJ, you will agree with me', quintessential Manyarara!! They reflected the typical Manyarara wording whenever he tried to build a consensus around a naughty issue before the TFB. I must confess I agreed with him most of the time. The second part is 'he is one of the greatest lawyers of our time'. I will revert to that later.

The Media Institute of Southern Africa (MISA), the Government of the Republic of Namibia, the United nations Educational, Scientific and Cultural Organisation (UNESCO), and the World Association of Newspapers and News Publishers (WAN/IFRA) are celebrating the 20th anniversary of the adoption of the Windhoek declaration which culmination not only in the 3rd of May being declared World Press Freedom Day but also in the birth, in our region, of MISA.

I have always thought of anniversary – the turn of a year or literally the return of the year – as a happy event. It is in most cases a time of festivities though in a few cases it can be a time of mourning. As we meet here to celebrate the 20th anniversary of the Windhoek Declaration have we dared to ask who is celebrating? Is it a celebration for the media practitioners and newspaper publishers?

Did we in our individual countries have the courage to ask that stunning question asked by Dr Gallup the people of England (not Britain) way back in 1940, at the peak of the war, "Who is Winston Churchill?" In our case, what is the Windhoek Declaration? Who is John Manyarara?

Dr Gallup was, naturally, scolded at the time for bad taste. The fact remains that he wanted to find out what the people really felt and not what the editors or public figures thought the people felt. The result of Dr Gallup's poll was interesting. Of course, 96% of the English knew all, or much, about Churchill. But 4% had never heard of him. They were farmers, most, if not all, had no radio, read no newspaper, and they all lived in one county. The identity of the county was never published and remained a secret known only to Dr Gallup (Alistair Cooke, Letter from America).

I believe a similar poll in our region will most likely have yielded different results. Our farmers may not directly know about the Windhoek Declaration or have heard of John Manyarara but the effects of the declaration and what he stood for have affected them one away or the other.

The 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press committed the SADC countries to secure press freedom and a free flow of information and ideas. The realisation was that freedom of expression is a democratic value that has to be promoted and nurtured in each country in the region. Once freedom of expression thrives then the other essential features of a democratic society will survive. At the time of declaration there were a few countries in the region recognising freedom of the press as a fundamental right.

At the political level, the majority of the countries of the SADC were either under one party system or just in the processing of democratisation. The remaining ones, though holding periodic elections in their political landscape had been dominated by one ruling party. The bulk of the media was under the sole ownership and/or control of the State. The privately owned media, excepting a few in South Africa, had no circulation beyond their national boundaries.

Two decades later, most countries have democratised and press freedom and /or freedom of expression enshrined, though in quite different formulations, in their Constitutions. For example it is to be found in Article 21(1)(a) of the Namibian Constitution, Section 16 of the South African Constitution and Section 12 of the Botswana Constitution (freedom of expression but no direct reference to press freedom though the courts have interpreted it that way). The media market has diversified and growing despite or even in spite of the State intervention.

The Windhoek Declaration was building on a solid foundation laid down earlier by Article 19 of The International Covenant on Civil and Political Rights, which provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information
   and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his
   choice.

I must emphasis that Article 19 expressly acknowledges that the right of freedom of expression carries with it “special duties and responsibilities” and may be restricted by law as far as is necessary to respect the rights and reputation of others and to protect national security or public order, public health or morals. The circumstance under which restrictions can be imposed within the scope of the Covenant is therefore limited. The restrictions must be provided by law and be necessary for respect of the rights and reputation of others and to protect national security or public order, public health or morals.

The tension arises sometimes over who should define these restrictions.

Why protect freedom of expression?

It is now universally accepted that there is one rationale for protecting freedom of speech – free speech is essential for the functioning and strengthening of democracy and it is also crucial to individual fulfilment. The most profound statement ever made about the basis for the protection of freedom of speech is that of Justice Brandeis in 1927 in Whitney v California (274 US 357).

He wrote:

“Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly

discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty….Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed…. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practised…Those who won our independence by revolution were not cowards. They did not fear political change."

Brandeis's words in Whitney have endured for ages. But those who won "our freedom" after the Windhoek Declaration were perhaps not as brave as Brandeis had imagined. For though they accepted and committed to Article 19 and indeed the Windhoek Declaration through various Conventions and inclusion in the various national constitutional provisions their deeds were otherwise. The Declaration guaranteed fundamental human rights and freedoms and embraced multiparty democracy. They required that restrictions on freedom of expression and media must, among others, be shown to be reasonably justifiable in a democracy.

Ironically, these countries retained, on the other hand, an arsenal of inherited colonial laws that tended to restrict both the freedom of expression and indeed media freedom. And in some cases new restrictions have been added. For a variety of reasons, including constraint of time, I will not deal with all of these laws. In any case, MISA has in the past two decades annually documented these laws and their impact on freedom of the press in their publication *So This is Democracy?* However, the use of one particular (colonial) law merit attention – insult laws.

These laws have consistently been used in the region by the governments against the media. The foundations of insult laws are traced to the Middle Ages where they originated as the rationale for government. In the middle ages governors or rulers were considered to be superior to the people. They were God ordained. Rulers or governors could therefore not be subjected to censure. Criticism and other conduct that was seen as demeaning to governors were perceived as a threat to the stability of the state. Insult laws were therefore enacted as a means of protecting the honour and dignity of rulers. During the colonial period they protected the honour and dignity of holders of specific high-ranking offices. At independence most former colonial countries retained these laws and are used mainly to protect the office of the President and against critics of current governments, especially journalists and the media.

Unlike other laws, insult laws do not discriminate between what is true and false. They are designed to punish publication of truths as well as falsehoods, statements of opinion and factual assertions. In effect they punish, editorial comment, political discussion and dissent from which the government wish to exclude the public. As most of the criticism comes from or through the media, these laws have tended to threaten media freedom and freedom of expression in general. The penalties upon conviction on a charge under insult laws are generally severe and therefore intimidate the media from criticising and exposing wrongdoing by public officials. The fear of incarceration or fines inhibits the exercise of freedom of expression. "This is not compatible with the concept of democratic governance, which requires that debate on public issues should be uninhibited, open and robust", writes Dr Balule (Insult laws: a challenge to Media Freedom (2008)**).**

The problem is that the very notion of insult is difficult to define as it is based generally on a subjective perception of the person who considers himself insulted. A balance therefore needs to be struck between this subjective perception and the interest of free expression. Here lies the role of the courts. As

the courts have constantly stated over the years the balance is not between two conflicting principles but "a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." (Sunday Times v UK (1979) 2 EHRR 245).

These laws have been used to a varying degrees by the SADC governments to restrict press criticism thereby inhibiting press freedom. I will not go into a detailed survey of their application in all the SADC countries, but the few examples given below will suffice (See Balule, Insult Laws: a challenge to Media freedom for a detailed study). I will take a sample of a few countries with constitutions covering both pre- and

post-Windhoek Declaration and review how the courts have navigated around the these restrictions.

Botswana, Lesotho and Swaziland

The laws of the three BOLESWA countries do criminalise the insulting of the President, King or Government and the King respectively. In Lesotho and Swaziland insult laws take the form of sedition. Punishment varies from P400 ($60) in Botswana to two years imprisonment in both Lesotho and Swaziland. To the best of my knowledge these laws have never been used against the media in these countries. Nonetheless their mere existence induces some measure of self- censorship on the media.

But other measures have been employed, for example, in Botswana. Instead of criminal prosecution the government has resorted to using financial muscle. For instance, in Media Publishers (Pty) Ltd v The Attorney General [2001] 2 BLR
485, following the publication of a number of articles in one of the newspapers critical of certain leaders of the country including the President and Vice President, a directive was issued to the effect that the government would cease advertising in the two newspapers owned by the applicant. The applicant sought an order directing that the directive not be implemented pending the outcome of the action challenging it. The applicant contended that the directive was unconstitutional as it violated their freedom of expression. The government argued that the applicant did not have the right to receive advertisements from the government for publication in their papers and that the relationship was purely a commercial one and that inasmuch as the Government voluntarily decided to advertise in the applicant's papers it was entitled, even without assigning a reason, to withdraw from advertising in those papers.

After recognising the fundamental role media plays in a democratic society the Court concluded that the governors must accept that the views of the media may not always be palatable to those who govern. And where the media goes overboard there are other remedies available. The Court went on to say:

"Government is not a consumer like any other consumer. It carries a lot of responsibilities vis-à-vis the individual.It carries the duty to protect the

individual by the constitution are not infringed. It is to the state that the individual usually looks for the protection of its rights and freedoms. For that reason the Government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment. There is nothing commercial about this. The message implicit in the directive is that an individual being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely."

The court thus ruled in favour of the applicant.

Malawi

Malawi returned to multiparty democracy in 1994 with a constitution that expressly guarantees press freedom and further providing that the human rights and freedoms enshrined in it shall be respected and upheld. It would appear that the government has hitherto forgotten to repeal or amend laws that inhibit freedom of expression such as The Protected Flag, Emblems and Names Act and the sedition provisions in the Penal Code. The Protected Flag, Emblems and Names Act, whose aim among others, is to safeguard the dignity of the Head of State makes it an offence for any person to publish any matter
'calculated to or liable to insult, ridicule or show disrespect to the President.' The penalty for contravening this provision is £1000 (sic) and imprisonment for two years.

The post-multiparty democracy governments have resorted to this law on at least two occasions. In 1996, the then President Baliki Muluzi warned opposition parties and the media that he would us the insult and sedition laws against anyone who insulted him and his government. The current President Bingu wa Mutharika's government has also invoked The Protected Flag, Emblems and Names Act to intimidate the

media. Two journalists were arrested in March 2005 after reporting that the President had moved out of the Presidential Palace because of fears that it was haunted (MISA 1997, So This is Democracy).

Zambia

Zambia emerged from one party rule in 1991 with a new Constitution that guarantees freedom of expression and media. Just like the other SADC countries, the colonial laws protecting the honour and dignity of the Head of State remained intact. Section 69 of the Zambian Penal Code prohibits the publication

of any matter with intent to bring the President into hatred, ridicule or that is insulting to the President.

The constitutionality of this section was reviewed by the Supreme Court in the case of Bright Mwape and Fred M'wembe, Masauso Phiri and Goliath Munkonge (1995-1997) ZR 118. The Court held that the provision was reasonably justifiable in a democratic society as there was no pervasive threat inherent in it which endangered freedom of expression. The court went on to observe that no one could seriously dispute that side by side with the freedom of expression was the equally important public interest in the maintenance of the public character of public figures for the proper conduct of public affairs. Therefore there was a duty to protect the public honour and character of public figures moreso where the Head of state was concerned.

There is no dispute that the sanctity of the character and honour of the office of a Head of State must be protected. What is in contention is the manner in which these laws have been applied – silencing critics rather than aimed at their proper intent. The use of these laws to insulate the office of the President against criticism undermines the media's watchdog role and denies the public access to information about their leaders. As Justice Lesetedi rightly observed in Media Publishers case"it is normally the media that forms a vehicle for communication between the governed and those that govern…. It is through the media that members of the society communicate their ideas and feelings about the way they are governed. It plays the very important role in civil society of informing the public of many matters including the way the organs of state operate and giving general information. It is the press which in many occasions has been in the forefront in the fight against abuse of power, corruption, dictatorship and other ills like blatant disregard of the rule of law committed by those that govern in many a number of countries."

It is this noble role of the media that the courts must jealously guard. Without a robust media the region and our democracy will be the poorer. In any case there is a direct corollary between the role of the Courts and that of the media in a democracy. The media is the custodian of free expression while the Courts must ensure the rule of law. The rule of law will not prevail where there is no freedom of expression because those who appear before the Courts must enjoy unfettered expression, of course, within the limits of the law.

Challenges ahead

As we close the first twenty years of the Windhoek Declaration, what are the challenges ahead? I believe we are once again tottering on the brink. The States are again trying to exert their dominance over the media. A survey of the SADC member states shows that the media freedom hitherto enjoyed is under pressure. There is an attempt by various Governments to claw back the gains made in the past decades. Zimbabwe was the first to attempt to control the media through the practice their profession. Failure to register is an offence and the media had to comply first before they could challenge the law.

The law has also been used to restrict media freedom by criminalizing critical comments about President Mugabe and his ruling ZANU-PF government.

Even those governments I called elsewhere the "benevolent democracies" have now joined the fray towards State control of the media. Botswana has passed the Media Practitioners Act requiring registration of media and journalist and also giving the Minister responsible the power to appoint both the Press Council and Appeals Board. The inability to implement the Act is due, in part, to the Law Society's refusal to cooperate with the Minister. A draft Bill on Freedom of Information has recently been discussed by stakeholders and if it passes in Parliament it will be the third Private Member's Bill to become law in the fifty years of Botswana's democracy. Until it is passed by Parliament one cannot be certain about its efficacy. What is clear

is that it does have many limitations.

South Africa is running hot on the heels of both Botswana and Zimbabwe.

The other challenge is the increased resort to defamation litigation by politicians and the appallingly high awards given by the courts. In some cases these awards can only but drive the few media outlets out of business.

Lastly, the other challenge is likely to come from technology. Writing in the pages of Network News from MISA (Vol. 1 Issue 3) in 1997 after the then government liberalisation I opined that the greatest threat to media freedom in future was likely to come from the market and technology. What is now evident is that instead of the diversity and plurality expected, the media is increasingly becoming concentrated in a few hands. Media monopolies are emerging with the attendant danger of dominating public opinion.

New technology has not only opened up the airwaves but has gone beyond state control. From the Orange Revolution in Eastern Europe through Thailand, Iran, Tunisia, Egypt and Libya it is clear that the ability to disseminate information and report on events is no longer confined to professional journalists. The general populace with access to cell phone or Internet is able to communicate beyond national borders matters and events that the state would have otherwise preferred to keep secret. The global digital age is here with us.

The question to be answered is: Will the state sit back or start controlling the flow of information and will the Internet go the route of the early information industry? Will all the flow of information now travelling the single route one day fall into the hands of a monopoly who will decide what information and when to disseminate it? Will openness give way to closed media? The power of the Internet has

generally been its integration and neutrality and not that States have not tried to influence the global flow of information through the web. The only country that has so far succeeded in that mission is the government of mainland China, as we saw in 2010, when it drove Google out of its territory by demanding control over what Google let users find. Of course, the feat requires the might and resources that only belong to a State – access to the " choke points" of a nation's communication infrastructure, the police and prisons. What Tim Wu has called The Master Switch in his ground breaking book. Could the SADC countries go this route? This is a question facing MISA as we enter the next two decades of the Windhoek Declaration.

Conclusion

As I draw to a close, I want to return to the question I raised earlier. Who is Manyarara? I first 'met' Judge Manyarara through the pages of the law reports. One case stood out in particular. The case was of professional interest to me as a student of the judiciary in post -colonial Africa. Justice Manyarara had reached statutory (constitutional) retiring age of 65 years before he concluded all cases before him. His tenure was extended to enable him to complete these cases (not to take new ones). The extension of his tenure was challenged. Little did I know then that I would soon meet him, in person.

The second time we met was in 1993 on the grounds of a Harare Hotel. Present too, were Dr Gilbert Mudenda, an economist, from Zambia and Methaetsile Leepile, a teacher turned journalist from Botswana. The occasion was the signing ceremony for the initial NORAD funding of MISA. The three of us, under the Chairmanship of Justice Manyarara, became the first trustees of MISA and stood surety for the funds. From that point onwards I (and Dr Gilbert Mudenda) was privileged to have walked beside, side by side or behind Justice Manyarara. I believe many of you will agree with me that he was a great lawyer, humorous, generous with his wisdom, a leading advocate of media freedom and indeed a great human being.

Born in Zimbabwe in 1930, Manyarara obtained a BA degree from Rhodes. Like many people of his generation he left Rhodesia and worked in various (West) African countries as a teacher and later journalist. He later qualified as barrister from the Gray's Inn in the United Kingdom. After independence he became a judge of both High Court and Supreme Court in Zimbabwe. He retied from the Bench in 1994. he was later appointed an Acting judge in Namibia where he presided over several landmark cases including the

Caprivi Treason trial

Justice Manyarara spent the last years of his life in Windhoek – the City that gave birth to the Declaration we are now celebrating. And also the home of MISA. It is therefore proper and fitting that the first lecture in his honour be delivered here in Windhoek. Equally important, Windhoek and indeed Namibians should be proud of the role they played in the advancement of media freedom, both regionally and internationally.

As a result of the Windhoek declaration and the opening of the airwaves, today's young journalists and our farmers can be saved the embarrassment of Dr Gallup's question by simply 'googling' Justice Manyarara's name from the Internet.

It has been an honour and privilege to deliver the first Justice John Oliver
Manyarara lecture. May his legacy live on in Southern Africa!

I thank you all and have a wonderful evening.