TRANSCRIPT

PROMOTING **FREE EXPRESSION** IN SOUTHERN AFRICA

John Oliver Manyarara Memorial Lecture 2015

Dr Fidelis Kanyongolo

Mbabane, Swaziland, 2015

The role of the judiciary in establishing a societal balance between media freedom and a person's right to their reputation.

Rather than focusing on the binary view of interests involved in defamation suits, the judiciary must add public interest to the equation.

The adversarial approach to the judicial process, the judiciary

At the time that we served together on the MISA TFB (MISA Trust Funds Board), we almost exclusively dealt with media only in the form of newspapers, magazines, radio and television. In most of the sub-region, online publishing and broadcasting were almost non-existent, and the citizen journalism had not yet been invented. Cell phones had not yet become ubiquitous, and media convergence was something one only read about in specialist ICT literature.

We have come a long way since then. In the here and now, media is radically different and constantly morphing into ever more novel forms and configurations. New forms of media and journalism continue to expand in reach and influence; spurred on by developments in digital technology and expansion of people's access to it.

Just to illustrate the increased access to mobile technology, consider this: at the time that I worked with Justice Manyarara on the MISA TFB, only about 4 million Africans had mobile phones, while according to some statistics, by 2012 over 500 million own mobile phones, most of which increasingly have Internet access.

Add to this the expansion of social media, through which people can publish information that affects individual reputations to millions of people across the world, without the benefit of editorial filters, then it becomes clear why judges must ground their understanding of the evolving nature of the conflict between media freedom and individual reputations in the realities of the changing media landscapes of the countries of Southern Africa.

However, in seeking to understand the changes that have manifested themselves in the Southern African media landscape in the past decade or so, it is important to avoid conflating changes in form with changes in substance.

Changes in form, in this context, refers to reforms of the institutional superstructure of press freedom. For example, the establishment of regulatory authorities, the increase in the number of media institutions, the diversification of forms of media and communication, and the re-configuration of policy and legal

frameworks.

On the other hand, changes in substance refers to the modification of the scope of press freedom that is enjoyed in practice. In practice this is a function of the relative balances of power that define the practical relationships of relevant actors such as media organisations, individual journalists, political and economic oligopolies, and members of the public.

Needless to say, changes in form do not necessarily translate into changes in substance. Improvements in legal and policy frameworks do not in and of themselves lead to improved enjoyment of press freedom in practice.

The realisation of this basic point must warn advocates of press freedom not to be lured into a sense of complacency by the illusory effect of changes of form.

Informed by an appreciation of the changing media landscape that distinguishes substance from form, we can then focus on the inter-relationships among media freedom, individual reputations and the judiciary.

Media freedom, individual reputation and the judiciary

The essence of media freedom is captured by the Constitution of Malawi which defines it as the liberty "to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information".

Grounded in the liberal notion of freedom of expression, media freedom can be argued, to borrow the words of the European Court of Human Rights in the judgment in the Handyside v United Kingdom case, to be:

"applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

One limitation on the scope of freedom of expression is the protection of individual reputation. Almost all national and international norms that guarantee freedom of expression and media freedom recognise this limitation which takes the legal form of defamation laws.

If the exercise of media freedom in particular circumstances conflicts with the protection of individual reputations, it is becomes the mandate of the courts to decide where to strike the balance between the two conflicting goals. Courts do this primarily by interpreting and applying the law of defamation which imposes liability on the defamer to pay compensation or, in the case of criminal libel, to be subjected to criminal punishment.

In interpreting and enforcing the law of defamation, courts can expand or shrink the scope of media freedom.

I propose that there are at least three areas of the judicial interpretation and enforcement of defamation laws in which the contribution of the judiciary to the protection of media freedom can be improved without compromising the essence of the legal protection of individual reputations.

Acknowledging societal interests in defamation cases

One of the best-known legal philosophers of the 20th Century was Roscoe Pound of the Harvard Law School. In his ground-breaking article published in 1944, Pound argued that the law is a tool for social engineering; a lubricant that minimises friction among individual, social and public interests. Among the individual interests that he identified were interests that concern personality which include interests in "honour and reputation."

I suggest that this framework should inform the judiciary when it is called upon to interpret and apply the law of defamation in particular cases.

Regrettable, the dominance of adversarial approaches to the judicial process, which pits plaintiffs against defendants, tend to reduce legal disputes into two dimensional conflicts involving the rights of the defendant to media freedom, on the one hand, and the rights of the plaintiff to his or her reputation, on the other.

This leaves social and public interests out of the equation.

Yet, there is no doubt in my mind that the impact of any judicial decision that finds a journalist or publisher liable for defamation extends beyond them to the "consumers" of their publications, namely the general public.

It is, therefore, only logical that the interests the public be factored into the judicial calculus for resolving conflicts between media freedom and individual reputations. Evaluations of the defamatory effect of particular publications, considerations of defences pleaded by defendants in specific cases, and assessments of compensation must pay due account to the interests of not only the particular plaintiff or defendant in that case, but also those of the public.

Neither Roscoe Pound, nor his latter day adherents, offered a blueprint for resolving particular instances of friction of interests. That is left to judges to decide in particular cases, using legal principles and rules that guide them in refereeing such conflicts.

One way of bringing the public interest into judicial discourses on defamation is to recognise media freedom as a defence to claims based on defamation. In fact in some countries in Southern Africa, media organisations that have been sued for libel have pleaded, as a defence, their right to media freedom. One of the trailblazing cases in this regard was the case of Duplessis v De Klerk which was decided by the South African Constitutional Court in 1996.

However, in some countries, including Malawi, media organisations that have been sued for defamation have rarely raised to the right to media freedom or freedom of expression as a defence to suits alleging defamation. Instead they have often relied on traditional common law defences, such as justification and privilege [briefly define the two defences]. In the case of Malawi, examples of Malawian cases in which a media organisation could have pleaded media freedom, but did not, include those of Chikhwaza v Now Publications, Chibambo v Editor, Daily Times, Chinkwita v Newsday, Ngwira v Daily Times,and Ndovi v UDF News.

The paucity of cases in which media freedom (or more generally, freedom of expression) is pleaded as a defence to defamation suits, at least in countries such as Malawi, results in a shortage of judgments in which the judiciary has the opportunity to articulate its view of the balance between media freedom and the right to individual reputation.

Remember, the courts do not undertake forays into the thickets of legal discourse unless they are invited to do so by the parties in a case. If media freedom advocates hope for courts to resolve the contradiction between media freedom and individual reputation in favour of the latter, they must in the first place ensure that media freedom is pleaded as a defence in defamation suits. By doing this they will compel courts to abandon the binary view of interests involved in defamation suits and add the public interest to the equation.

As indicated above, there will be cases where the media freedom defence is indeed pleaded and a court is faced with the task of striking the appropriate balance between the two competing imperatives of media freedom and individual reputations.

What should such courts bear in mind? In which areas of the judicial process in defamation cases, do courts have some latitude in which they can expand the protection of press freedom?

Of course I pose the question with a some caution because one should be slow in presuming to give advice

to judges, lest one be found to be in contempt of court!

Nevertheless, it is worth highlighting at least two areas in the law of defamation which present judges with the opportunities to enhance the protection of press freedom while preserving the essence of the protection of individual reputations.

In my view, these areas are those of the defence of truth and criminal libel.

Extending the "truth" defence

The judiciary can make a positive contribute to the enjoyment of press freedom by reviewing certain aspects of the defence of truth which is available to defendants in defamation cases.

In the defamation laws of most countries, a court will not find a person or organisation that is sued for defamation liable if he, she or it proves that the alleged defamation was true in fact.

Does it matter if the reporter or publisher had taken all reasonable steps to verify the truth of a statement before publishing it, only to discover post-publication that it was not true? The answer is NO; that reporter or publisher will be held liable.

Does it matter if the reporter or publisher was prevented from verifying facts before publishing them because there were legal and policy barriers that impede access to information? Once again, the answer is … NO.

In my view the current limitations on the defence of truth impose an undue burden on those who are accused of defamation. The judiciary can mitigate this burden by extending the defence of truth to defendants who prove that they took all reasonable steps to verify the truth of a statement ultimately turned out to be untrue.

In addition, courts can also offer further protection to press freedom by modifying the rules of burden of proof with respect to this defence. Instead of requiring that the "accused" prove that his or her statement was true, courts should shift the burden to the complainant to prove that the statement was false.

This will be consistent with calls by media freedom advocates, including UNESCO which in its Media Development Indicators identify one of the characteristics of a good defamation law as that the burden of proof should fall on the plaintiff.

A critical approach to criminal libel prosecutions

Judges may also use their adjudicatory role to enhance the protection of the media freedom in the context of criminal libel.

There have been decades of advocacy campaigns, including those undertaken by MISA, for the repeal of criminal libel statutes in Southern African countries. However, in most of those countries, the criminal libel remains a criminal offence that is actively prosecuted. In order to contribute to the enhancement of media freedom in its role of applying and enforcing criminal libel statutes, the judiciary must take a critical approach that reveals the substance of criminal libel cases which lies beneath their form.

Progressive judges must lift the veil of the forms of criminal libel prosecutions and focus on their underlying realities of interests and power.

This approach exposes the unprincipled enforcement of criminal libel laws which typically involves the use of the state machinery to protect the individual reputations of only those people or classes who are connected to the ruling elite. This unveiling of the realities that underlie criminal libel should lead judges to take a more cautious approach to treating this offence as a legitimate tool for protecting the reputation of individuals.

Judges must recognise that protection of individual reputation is rarely the only, or even main, reason for criminal libel prosecutions. As such, courts may be justified in nullifying decisions to commence criminal libel prosecutions on the grounds that they are motivated by improper purposes and are based on irrelevant considerations.

Further, by revealing the selective enforcement of criminal libel laws, critical judicial analysis enables courts to invalidate decisions to prosecute particular cases on the grounds that such discriminatory application of a penal statute is unreasonable and unconstitutional.

Conclusion

In seeking to strike the proper societal balance between media freedom and individual reputation, the judiciary must deliberately distinguish form from substance; judges must see beyond the forms of laws and legal actions and unveil the power relations that underlie them.

I wish to argue that focussing merely on the forms of the parties and the cause of action impedes judges from resolving the conflict between interests in individual reputation and interests in freedom of expression in a realistic manner- one which recognises interests not as mere abstractions but as substantive tools for securing real results in the real world of politics and economics.

Distinguishing formal and substantive changes in the media landscape improves the analysis of factors that influence the enjoyment of press freedom in practice. Distinguishing form and substance allows for the discrimination of underlying, intermediate and immediate causes that constrain press freedom. In turn, this facilitates the development of advocacy responses which are more strategic than those that are predicatedon a conflation formal and substantive causes.

As I said earlier, there is no better tribute to Justice John Oliver Manyarara than to reflect on issues that inhabit the nexus between media freedom and jurisprudence.

I hope I have made some contribution to that conversation, which must necessarily continue beyond tonight.

I think Justice John Oliver Manyarara would agree.