THE SOUTH AFRICAN LAW JOURNAL

VOL 125
(Part 2)
2008

## *NOTES*

# THE GAP BETWEEN CONSTITUTIONAL TEXT AND SOCIAL PRACTICE: THE ROLE OF THE PRESS*

DENNIS DAVIS
*Judge of the Labour Appeal Court*

This year these awards take place at a crucial moment in the development of our constitutional democracy. Such a democracy can flourish only where there exists a basic, shared normative framework upon which the practice of a constitution can be built. Expressed bluntly, where a community cannot establish the most rudimentary of overlapping consensus as to basic values, there can be no long-term future for a constitutional community. If we, as the citizenry, cannot agree about a core meaning of freedom, equality, dignity, democracy, accountability, transparency and integrity, then our constitution will remain a text with no more significance than a document of historical curiosity. John Rawls *Political Liberalism* (1993) understood this requirement well: he sought not the creation of firm agreements on a comprehensive conception of the good. Rather, he insisted that without agreement on a core set of principles of justice, liberal democracy was not possible.

To develop even this kind of limited consensus is never easy; how much more so in a society that has experienced some three hundred years of racist rule. For this reason the promotion of vibrant public discourse is critical to the attainment of this form of consensus. And so we arrive at the role of the press. Although our courts have appeared to eschew press exceptionalism — the idea that the press has a preferred constitutional status — the Supreme Court of Appeal has stated recently that press freedom is about the rights of all citizens to a free flow of information, by which I take it that the press is the conduit through which we, the citizens, can exchange views based upon the free flow of information to all within society. (See *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 6.)

*Speech delivered at the Legal Journalist Awards on 7 November 2007.

With this backdrop, I wish to concentrate on two related issues: the role of the citizenry in the development of public discourse and the consequent role of the press.

Recent controversies in the legal community have indicated that South Africans may not even be able to agree on the meaning and implications of freedom of expression. I make this seemingly provocative point in the context of two new responses that have been developed to squeeze the very life out of freedom of expression:

1. We may not criticize decisions of constitutionally established bodies — presumably the courts, Chapter 9 institutions and the prosecution authority — apart from the Judicial Service Commission (JSC), of course. By now I hope you have realized the expedience of this claim, for many who say the decisions of the JSC are to be obeyed uncritically do not appear to carry that argument to the prosecution service as enshrined in the Constitution, or for that matter to certain judgments!
2. Some issues are too divisive, so let us not debate them.

As to the first response, I accept readily that sitting judges cannot enter into debates about the nature and validity of decisions taken by the JSC or courts (save when sitting in court and having to deal with judgments of other, mainly lower, courts). But this is not a principle that should apply to any other member of society. Jeremy Bentham provided the complete answer to this attempt at rendering public accountability meaningless when he said that the duty of the citizen is 'to obey punctually and censure freely'.

The recent controversy that has so racked the legal community illustrates that in the view of some, no censure should be allowed. I read recently that the output of these institutions must be respected uncritically as they are what millions fought and thousands died for. What a trivialization of the struggle against apartheid! Surely people did not sacrifice so much for the construction of institutions, but rather for ideas to be implemented by those institutions; ideas which, if followed, would ensure a narrowing of the gap between the aspirations of the constitution and the degrading realities encountered by millions of historically (and currently) disadvantaged South Africans.

Turning to the question of divisive issues, the very point of freedom of expression is to allow for differences of opinion, no matter how passionately held. The Turkish Nobel Prize-winning novelist, Orhan Pamuk, said of freedom of expression that '[t]hese freedoms, which modern people long for as much as bread and water, should never be limited by using nationalist sentiment, moral sensitivities or — worst of all — business or military interests' ((53) 9 *The New York Review of Books* 25 May 2006, translated by Maureen Freely). I would add expedient populism to that list.

Of course, I understand the effect of apartheid upon the legal community. Like so much else in our public and private lives, key legal institutions reflect skewed power relationships in favour of a minority, so that in many of these institutions debate followed by a vote may shut out the voices of those who

reflect the views of a more permanent majority. But if we presume that we will invariably hold to perspectives exclusively shaped by race, we cannot have constitutional democracy; for we will never share anything of value.

Expression is about a conversation in which I open myself up to the reality of another person into whose world I then enter. I begin to see things from her perspective. We touch each other's realities and exit the process differently from how we entered it. If we fail to converse then, viewed through this prism, no constitutional community is possible.

This is not to say that we have an absence of national conversation. There are a few wonderful, brave and inspiring public intellectuals (and the list is growing) who promote discourse. But within the legal community there may, ironically, have been a larger group of such people under apartheid. In the main, the public has neglected critical public discourse and with it has made life more difficult for its conduit — the press. There is a further and even more disturbing implication concerning the absence of a national conversation. It is surely the right of each citizen to participate in the national discourse. Under apartheid that right was denied to the majority purely on grounds of race. The democratic constitution was designed to resolve this part of the national question by guaranteeing to all full, substantive rights of citizenship. But if, politically, the question of who is a South African remains unresolved in post-apartheid society, the possible creation of hierarchies of citizenship arises, and with it the denial to some of rights to be heard. In all these ways the citizenry destroys the potential of free expression.

But that does not leave the press immune from independent scrutiny. The role of the press is to promote that conversation, to interrogate its content, to afford opportunity for examination of both the cant and the meaningful. Without this engagement we cannot implement the idea of a constitution because we will fail to attain the consensus, however basic, that is a necessary condition for the kind of democracy promised in our text. We will disagree about measures to promote equality and redress the hurt and damage of the past, we will dispute the meaning of freedom of expression, disagree about the most basic meaning of corruption, divide viciously about notions of integrity and honesty.

There must exist independent obligations upon the press to inform, educate and analyze. In my view, the press report card should be marked as 'Pass, but with much room for improvement'. Let me say that law reportage has improved in quality and quantity and in many instances has acutely framed the debate around key cases — *S v Makwanyane* 1995 (3) SA 391 (CC), *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) and *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) being instances of this.

Regrettably I must add, however, that all too often reportage of key cases is superficial and lacking in any context. I sometimes wonder whether much, if any, use is made of the very clear press statements issued by the Constitutional Court when judgments are handed down. In some instances the reports of cases sound like cheerleading for one party. Others claim to

provide guidance to the legal strategies employed by counsel or the core implications of a judgment, whereas all they succeed in doing is confirming the legal ignorance of the reporter. We have no Linda Greenhouse of the *New York Times,* who provides consistently superb analytical guidance to lay audiences on the work of the US Supreme Court.

Public education about our constitutional system remains very patchy; and public awareness is affected thereby. In this connection the role of the public broadcaster is in need of intense interrogation. Public discourse about key issues needs to be promoted in and by the public broadcaster, although the rest of the media are not immune from obligation. Certainly, the owners of the press have some duty to ensure that journalists possess the resources to respond to these challenges, and editors owe it to the public discourse to promote informed debates about key cases and legal developments.

Let me cite two illustrations of failure by the press in its coverage beyond the reporting of recent cases. First, the Constitution is blamed for increasing crime as if it is the Constitution that promotes the kind of violence which, like a cancer, threatens the body of our society. Secondly, debates about the transformation of our legal system (on the rare occasion that any publication appears) tend to focus exclusively on demographic representation of the profession or the infusion of vernacular law into the legal mainstream. These are issues of major importance and I, for one, consider them to be of significance to the future of our legal system. But they are not mere jurisprudential war-cries: they are elements of a key debate about what legal system is possible in South Africa, given our history and our place in Africa and the global world. To call for vernacular law to have a greater role in the overall legal system is too important a topic to be left to populist platitudes. Even more so, the national debate must be about how law in this country can help produce a society based on ubuntu; how it can promote the dignity of every member of that community and supply him or her with the substantive elements necessary to exercise citizenship meaningfully.

In the setting and promotion of all of this conversation, the press must play a cardinal role.