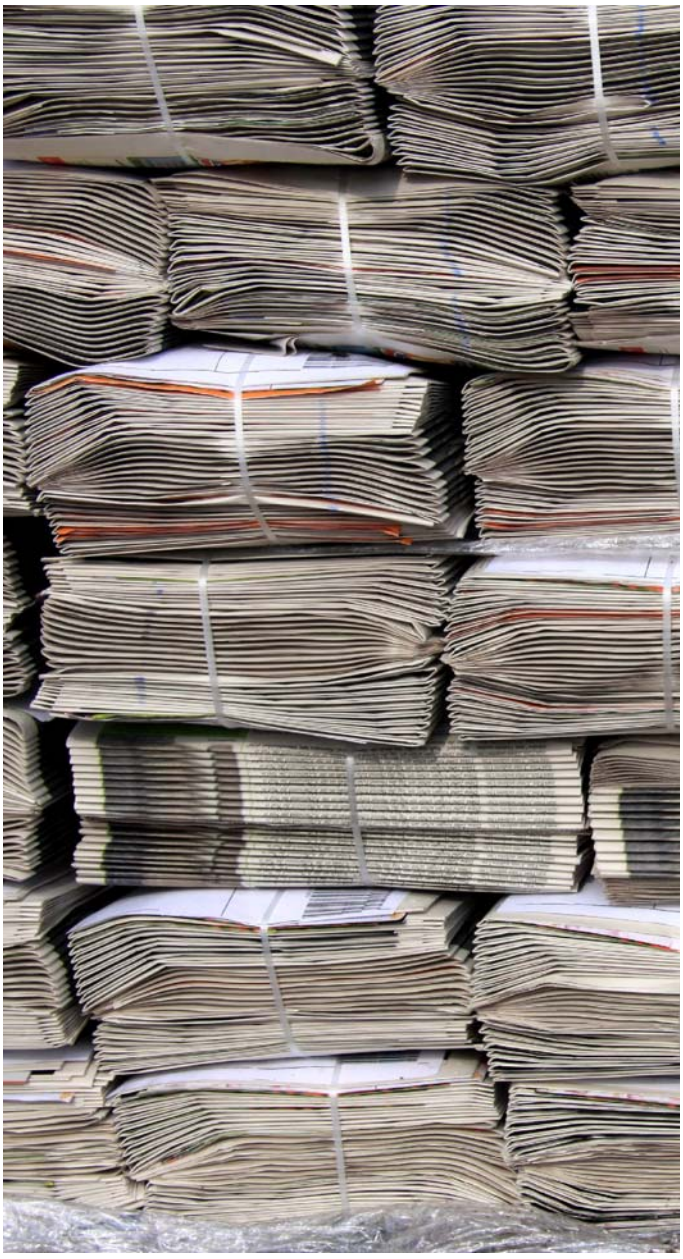
The Media, Courts and Technology

Media Coverage of the Oscar Pistorius Trial and Open Justice

This is the slightly abbreviated text of the speech which guest speaker **Deputy Chief Justice Dikgang Moseneke** delivered at the National Press Club's Newsmaker of the Year 2014 Award Ceremony. The Award went to the Oscar Pistorius Trial. In his opening remarks Justice Moseneke recognised the presence at the ceremony of Justice Mathilda Masipa, who presided at the trial and counsel who appeared in it. He said he remained 'deeply proud' of the manner in which all of those who were part of the trial allowed the nation and the world 'into our courts and into how we dispense justice'.*

AS WE ALL KNOW, something happened last year that changed the landscape of how the media reports on court proceedings. In 2014, the trial against Oscar Pistorius gained as much worldwide media attention as the missing MH370 plane. It inspired books, newspaper articles, TV channels, journal articles and blogs. Everything about the trial – the judge's rulings, the witnesses that gave evidence, and especially the verdict – clogged social media newsfeeds in our laptops and other devices for months on end. There can be no doubt that the Pistorius trial was of great interest, both at home and abroad. And it has changed irreversibly the manner in which the media and the justice system of our country converge. For my part, I want to talk about the impact of the Pistorius trial on the intersection between, or if you will, the interface between the judicial function and the media and the public. Let me warn again that I will not be talking about how the trial, which is still in an appeal process, changed the judicial system, but rather about how the Oscar Pistorius trial has changed how the public and the media have acquired greater insight and access to the judicial function. In other words, I am not going to talk about the merits of the trial, whether or not is correctly decided and least still about whether it will create a good or bad judicial precedent going forward. My concern will be how the trial has ushered in a new era in the intersection between justice and the media.

In fact, I am proud to announce that the Constitutional Court recently became the first court in Africa to have an active presence on Twitter, with a newly-accessible audience of the five-and-a-half million South Africans that currently use that social media platform.[1] I'm even led to believe that, so long as I press all the right buttons, I can post a tweet during this very speech.[2] The United States and the United Kingdom Supreme Courts have been on Twitter for some time now. We are becoming part of that elite team of apex courts adapting to the modern age. Our presence on Twitter is symptomatic of that change.



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* Deputy Chief Justice of the Constitutional Court of South Africa. I am indebted to my legal researchers Paul McGorrery, Justin Jaftha, Molebogeng Kekana and Jenalee Harrison for their invaluable help in writing this speech.

But tweeting aside, here is what I want to do tonight. I would like to start, as I do every time I consider a case, with our rightly venerated Constitution. In particular, I want to talk about the time-honoured notion of 'open justice'. We have all no doubt heard the concept summarised in that pithy quote: "justice must not only be done, it must be seen to be done.[3] I want to trace that concept across the lineage of our nation. Then, I would like to pause and look at judicial response to the public and media clamour to have full access to the proceedings in the Pistorious trial against the backdrop of the doctrine of open justice. That seminal response is to be found in the decision of Judge-President Mlambo in *Multichoice*.[4] That decision was delivered just ahead of, and as a result of, the imminent start of the Pistorius trial. The media houses made a big ask indeed from the courts. They posed serious questions about how our courts could better ensure the hallowed principle of open justice. The questions were many and complex, but even more intriguing, they were new to the judicial system. Should we let the reporters in: yes? With more than their pens and little traditional note pads: yes? With their smartphones, electronic notebooks and iPads? Or should we perhaps jam the signal in the court houses? Why, then, shouldn't we let the cameras in as well? If we do, should the cameras relay to the world instantly or at all, everything we say and do in court? Or should we rather have the cameras fixed on the judge only?

With that in mind, I would like to then discuss this new age we live in, and how, because of the rapid advancement of technology, our society is no longer one in which citizens must, or should have to, wander into courtrooms to find out what is happening. People can now see, people can now see and hear, all in the confines of their own homes, offices, villages or indeed in any other open spaces, so long as they have an active internet connection. And finally, as a reality check for all of us, I would like to evaluate the challenges for open justice as it faces the brave new world of limitless instant feeds about everything, everywhere.

Our Constitution and open justice

The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution. The preamble of the Constitution contemplates 'a democratic and open society in which government is based on the will of the people', and the text requires that our democracy shall ensure accountability, responsiveness and openness.[5] The public is entitled to have access to the courts and to obtain information pertaining to them.[6]

In traditional African culture, the shade of a tree was the place where disputes of society were mediated and resolved. It was on this soil that the community would meet for a 'lekgotla'. There was room for all to have their say. Everybody was an active participant of the process. This is how justice was done. It is the age-old concept of justice under a tree.

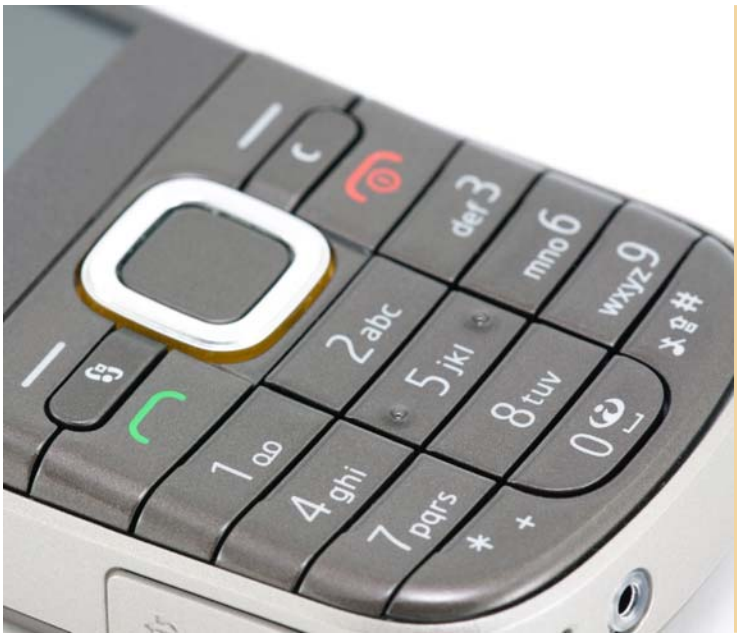
Courts play a vital role to solve conflicts in all spheres of life. This is what the Constitution promises us. The aesthetics of the Court building are a daily gentle reminder of this promise. The overarching theme of the Constitutional Court building is justice under a tree. For instance, the Constitutional Court logo depicts people sheltering under a baobab tree. As former Justice [Albie] Sachs described it, '[t]he tree protects the people, and they look after the tree.'[7] This is symbolic of the synergy between the law and the people. It gives the Court an organic ambience: a space where you feel welcome to see justice in motion.

There are innumerable quotes, many of which invoke powerful imagery, about the ills suffered by a society that does not promote open justice. It does, after all, form part of the bedrock principles of a functioning democracy, and helps to quench the people's "fundamental, natural yearning to see justice done".[8] The crispest and truest of these quotes is that "[d]emocracies die behind closed doors".[9] The principle of open justice is one which strikes at the very heart of what South Africa has been, and *is still*, trying to achieve in the post-apartheid era. We acknowledge a difficult truth: trust in government institutions in this country is hard-earned. If we do not subject ourselves to the greatest of scrutiny, how can we hope to persuade the public to recommence, or perhaps commence for the first time, that which was lost for so long: faith in the social contract. We can only move forward as a country when we voluntarily, if not happily, sacrifice certain liberties in return for the good that can be achieved in a representative democracy: uniform laws that apply to all, a social welfare system that protects the most vulnerable among us, and institutional redress when our rights are compromised. Indeed, transparency of the judicial process is so fundamental to developing public trust that 'all other checks are insufficient [and] of small account. Recordation, appeal, [and] other institutions operate as [mere] cloaks [rather] than checks; as cloaks in reality, as checks only in appearance'.[10] The arguments in favour of open justice are discussed widely, but are perhaps best summarised as:

> 'First, it assist[s] in the search for truth and play[s] an important role in informing and educating the public. Second, it enhance[s] accountability and deter[s] misconduct. Third, it ha[s] a therapeutic function, offering an assurance that justice has been done [a sense of communal catharsis]'[11]

Of course, open justice is not a novel concept in South Africa, miraculously discovered in our lifespan as a constitutional democracy. The foundational nature of a public trial has been recognised in our country since as far back as 1813.[12] And globally, the roots of the public trial have been 'traced back beyond reliable historical records',[13] with the notion being incorporated into almost every international human rights instrument.[14]

But what did happen recently, in 1994, was that time stopped, and our country was divided. Not by people, though, but by time. When the new constitution came into force, a new South Africa was born. The old South Africa, tyrannical and unjust, was now impotent in its reign, while the new South Africa was full of hope and unconstrained potential. The Constitution of the new South Africa has been applauded by Justice Ginsburg of the United States Supreme Court as 'a deliberate attempt to have a fundamental instrument of government that embrace[s] human rights [and ensures] an independent judiciary'.[15] For open justice alone, the Constitution guarantees the freedom of the press, the freedom of the media, and the right of the public to receive and discuss information and



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ideas.[16] It provides for all criminal accused the right of a fair and public trial.[17] And for all others, a fair and public hearing.[18] Even the Constitutional Court itself is architecturally designed to both ensure, and represent, open justice. For example, the courtroom includes a dedicated media box, windows on all sides, and artwork of clouds on the walls to give one the impression of being outside. Further, the logo of the Court is intended to symbolise justice under a tree. Consider this in comparison to the past, the old South Africa, with rampant practices of incommunicado detention, without any prospect of a proper trial. The old *Terrorism Act*[19] permitted a senior police officer to decide that a person should be detained without trial for up to 60 days, without any right to communicate with the outside world. While the Act had the appearance of being 'designed to combat terrorism [it in fact] itself became an instrument of terror'.[20]

There is also no shortage of comments about open justice from judges in the last twenty years, particularly when it butts heads with the right to a fair trial. In 2006, for example, the Constitutional Court was asked to decide whether it was acceptable for the Supreme Court of Appeal to restrict the media to purely visual recordings, with no audio.[21] The matter was brought before us on an urgent basis, and almost exclusively because of that, and the desire not to rush such an important decision, most of the Judges refused to allow the media to audio-record the proceedings. The now-retired and well-revered Justice Albie Sachs said that he only refused the media's request in order to 'await the establishing of appropriately negotiated procedures for guaranteeing accurate, balanced and fair reporting.'[22] The principle of open justice is, after all, a core part of the notion of participatory democracy, particularly one whose Constitution begins with the very words "democratic and *open* society".[23] It is not a principle that should be defined in haste. The public is entitled to have access to courts, and to obtain information about them. Besides the obvious space limitation of there not being enough room in a courtroom to always fit everyone, and the distance limitation of court proceedings taking place in all four corners of our country, there is also the realistic point that not everyone wants to come to court to find out what is happening. Instead, they rely on the media to tell them. And we do not want a system in which the judicial system is 'shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone'.[24] We want a system in which the public trusts that the judiciary is acting according to the 'time-honoured standards of independence, integrity, impartiality and fairness.'[25] For that to happen, we must, as far as reasonably practicable, create means for the media to access, observe and report on the administration of justice.[26] This has generally involved the media having the ability to enter the courtroom, and to access papers and written arguments.

Multichoice: enabling society a first-hand look in the courtroom

This brings me to the watershed decision of Judge President Mlambo on how to strike a balance between openness and justice. The newsmaker of the year for 2014, the Oscar Pistorius trial, posed trenchant questions on the real life meaning of open justice. In September 2014 Mr Pistorius was found guilty of culpable homicide and a firearm offence,[27] and sentenced to a maximum of five years' imprisonment.[28] But I did not come here tonight to talk about the verdict and sentence against Mr Pistorius. I was invited here to talk because the Pistorius trial broke boundaries previously unbroken. International journalists flocked here in droves. Our newspapers, our televisions, our radios, even our Facebook feeds, were flooded with information. An entire 24-hour television channel was created with the sole purpose of televising, and then discussing, the proceedings. The coverage was so extensive that one would have needed to sever all contact with the human world to not hear about the trial. And all of this was made possible because, before the trial even began, Judge Mlambo did what no South African court had before dared to do: media organisations were given permission to broadcast, live and in full Technicolor, a criminal trial.

In reaching that decision, the Judge recognised that when two constitutional rights butt heads, such as the right to free-

dom of expression and the right to a fair trial, it is not a matter of determining which right is more deserving so that courts may declare a victor and jettison the loser.[29] No, the true path is far more complex, and involves a balancing exercise to reconcile the two.[30] The media in that case, unsurprisingly, argued that '[f]reedom of expression lies at the heart of a democracy'[31] and urged the court to 'exercise its … inherent power to regulate its own'[32] processes in order to permit the broadcasting of "the entire criminal proceedings"[33] against Mr Pistorius. Mr Pistorius, on the other hand, contended that he, his counsel and his witnesses would be inhibited by the "mere knowledge of the presence of audio visual equipment, especially cameras',[34] and that media coverage as sought would 'enable witnesses … to fabricate and adapt their evidence based on their knowledge of what other witnesses have testified."'[5] The Court began by reflecting that the question is not whether the media – be they electronic, broadcast or print – should be allowed to cover court proceedings, but 'how guarantees can be put in place to ensure the public is indeed well informed about how the courts function'.[36] The learned Judge did not look favourably upon the potential situation in which only the'small segment of the community … [with] access to tools such as Twitter [are] … able to be kept informed',[37] particularly when '[our] democracy is still somewhat young and [there are still negative] perceptions that continue to persist in the larger section of South African society'.[38] But the Court did concede the valid concerns of broadcasting visual images of Mr Pistorius and his witnesses, such that they may be 'disabled … in giving [their] evidence.'[39] So the learned Judge concluded that the audio of those witnesses could be broadcasted, but no visual imagery. Ironically this was the exact opposite of what was permissible in *Shaik*, in which visual imagery was permitted but no audio. And so it was that Judge Mlambo struck a compromise, which, he believed, achieved open justice without improperly impinging on the fairness of the trial.

It was only four months later in the trial against Radovan Krejcir[40] that we saw a similar order made, permitting media coverage of another trial. And already there was improved media freedom. In the Pistorius trial, the media was required to have their cameras installed 72 hours before the trial was set to begin, and those were to be controlled in a nearby room, with no cameramen permitted in the courtroom.[41] But in *Krejcir*, two cameras were allowed to be controlled by cameramen in the courtroom itself, so long as they did not move around the court while it was in session.[42] Next, we must ask ourselves, should court orders be limited to discussing only cameras and microphones in the courtroom? Or should we begin to address intentionally the question of whether those in the gallery, including the media, should also be allowed to use their smartphones and laptops? And if so, to what extent? Should live-streaming be permitted, straight from the courtroom?

Technology in the courtroom

The question of technology in courts is a two-pronged question: what technology should the court itself use, and what technology should the court allow others to use? In response to the first question, we are making strides on that front. As I just said, we now have a Twitter account. We are also investigating the possibility of evolving into a paperless court. We are truly proud of the strides our Constitutional Court has taken to become substantially digital. It is compulsory for litigants to file court records in digital form alongside hard copies. All case records, pleadings, written argument, court judgments and orders are digital and may be accessed by the public from our website within minutes of their being issued. Parties, their lawyers and the public can track our case management online. In fact our website is visited extensively and reflects thousands of hits from all over the world week after week. This has helped courts of other countries to draw from our judicial experience and their citizens to formulate their constitutional claims.

As to the second question, of what technology people should be allowed to use in court, was the question the learned Judge Masipa had to grapple with in the course of the Pistorius trial. Before one of the witnesses gave evidence, the Judge prohibited reporters from tweeting or blogging about that witness' evidence. But then, only a day later, before that witness ever gave evidence, she changed her mind and allowed all non-participants in court to tweet and blog to their heart's content.[43] A similar *carte blanche* approach has been taken in the United Kingdom for over four years now. In December 2010 the judge hearing the bail proceedings against Wikileaks founder Julian Assange permitted reporters to tweet in the courtroom.[44] A year later, the UK Supreme Court issued a formal direction permitting "live text-based communications" such as email and social media (including Twitter) in the courtroom, in order to better promote open justice.[45] In doing so, the Lord Chief Justice urged the media: 'Twitter as much as you wish'.[46] Now my law clerks tell me that it would have been more accurate to say '*Tweet* as much as you wish', but the message remains clear: delayed information is as good as denied information. There is no reason not to, as a default position, permit *live* tweeting and whatever else from the courtroom. There is no logic in asking the media to step outside of the courtroom to press send.

And as for letting TV cameras into the courtroom, in the Constitutional Court, media houses do not need special permission to televise our proceedings live or delayed. One must however be careful here. There is a big difference between appellate proceedings where only seasoned advocates appear before appeal courts and trial proceedings where live testimony is heard from witnesses. It is indeed arguable that unmitigated publicity, particularly in relation to lay witnesses may undermine the fairness of a trial. The search for the truth may fall victim of the 'you are on camera' syndrome. Having warned as I have, in most cases, live camera footage will be more accurate than a reporter's after-the-fact summary. Whatever account they give after they leave the courtroom will inevitably be a second-hand account, their interpretation bleeding into their report. More so, mischievously selected sound bites may indeed undermine accuracy and the important context within which the words were uttered.

Challenges for open justice

Setting aside, for a moment, our celebrations about the progress we have made in encouraging greater transparency in court processes, it is important to remember that open justice is not, and has never been, absolute.[47] As I mentioned earlier,

there are competing objectives, which must be reconciled. And there are challenges, which must be tackled. Witness testimony might be altered if they see other witnesses testify. Witnesses might be intimidated by the presence of cameras. The last remnants of the *sub judice* rule may still prevent people from speaking outside of court while proceedings are still afoot. And there is also a fear that the media might manipulate audio-visual recordings out of context and mislead the public perception,[48] or, as just mentioned, that any summarised version of a case will be a second-hand account, susceptible to inaccuracies and interpretive 'spin'.[49]

Media presence: effect on witnesses

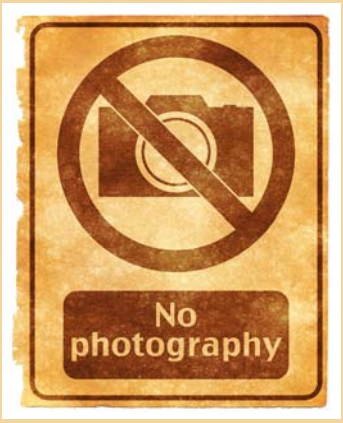
The first challenge for open justice is the effect of media presence on witnesses. We must guard very carefully against the possibility that witnesses might change their testimony. This might be a simple matter of their memory of events being subconsciously changed by what they see and hear in the media. In the Pistorius trial itself, witnesses all but confessed to being glued to their televisions.[50] I am by no means saying that this will have affected their testimony. The concern, rather, is that we cannot safely say that it did *not* affect their testimony. There is also the prospect of witnesses consciously changing their tune in response to media presence. The media's presence subjects witnesses to potential intimidation, both from others and from within themselves. Public speaking is, after all, feared by some more than death. And if rumours are to be believed, some may even fear it more than load-shedding.

But these concerns are not enough to warrant closing the courtroom doors to reporters and cameras. To prevent the possibility of witness intimidation, we would quite literally need to bar everyone from the courtroom except the litigants in every trial and subject them to stringent gag orders. Open justice demands quite the opposite.

And there are myriad measures available to protect witnesses. These range from: anonymity orders to protect vulnerable witnesses' identities[51] and allowing witnesses to testify through intermediaries[52] or with the help of a support person,[53] to closing the courtroom so that only certain people are present,[54] or even allowing witnesses to testify from a remote location via closed-circuit television.[55] Other measures might include suppression orders such as that ordered in *Multichoice* when Judge Mlambo prohibited the media from photographing or broadcasting the testimony of Mr Pistorius or his witnesses,[56] or even, as the United States has started experimenting with, allowing witnesses to wear disguises in court.[57]

***Sub judice rule*: dead as the dodo?**

In order to address the potential pitfalls of media presence in the courtroom, justice systems around the world have done what lawyers do best: they have created exceptions to a rule, the rule here being open justice. But not all of these operate in South Africa. We do not have the 'threadbare fiction'[58] of implied undertakings still present in some countries, which prevent parties from using documents discovered in litigation for any purpose other than the purpose for which they were provided.[59] And in the absence of a juror system, we also need not concern ourselves with sequestration of juries or the possibility that jurors might go home at night and Google the case.



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What may still operate in South Africa, though, is the principle of *sub judice*, which literally translates as 'under judgment'. It refers to a prohibition on publicly discussing what happens in a case until the case is finalised. In America, the rule manifests itself in the lawyers' ethical rules, prohibiting them from making statements outside of court that will be publicly broadcast and might affect the outcome of the proceedings.[60] But how, you might ask, can a statement outside of court affect the outcome of a case in South Africa, where we have no jury system?[61] The answer must surely be that it rarely could, and that the *sub judice* rule, and its relevance in South Africa, is, at the very least, on the verge of extinction.

The pedigree of the rule is yet to reach the Constitutional Court, but the Supreme Court of Appeal in 2007, in a case that did not even use the word *sub judice*, significantly narrowed the scope of the rule.[62] After a crime of horrific proportions, which I needn't detail here, the media and public's attention was grabbed. A documentary was made, and the Director of Public Prosecutions sought an order prohibiting its broadcast before the trial on the basis that it would hinder the integrity of the administration of justice.[63] First, the documentary might demonstrate inconsistencies in witness testimony that could be used to discredit them at trial. Second, witness safety may be compromised if their identities are released to the public. The Court hearing the matter considered these pitfalls to be,

at best, conjectural. If there were discrepancies, all the better that the light be shone upon them, earlier rather than later. And the witnesses' identities were already public knowledge. The Court therefore followed authorities from England,[64] Canada[65] and Australia[66] and concluded that 'a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place.'[67] As you can see, in that decision the *sub judice* rule has been whittled down considerably. About that I say nothing now. Let it be enough to observe that the social and other media blasts and immediacy make the *sub judice* rule nearly impossible to hold and to keep, for better or for worse. What is more it will be near impossible for the courts to police the rule. And, as you know, what the courts cannot police cannot be enforced.

The media's highest obligation: accuracy:

Finally, perhaps the greatest challenge for open justice, as much as it is the greatest strength as well, is the role of the media. The people do not, after all, give to the media a privilege, something to enjoy. You are instead entrusted with a sacred duty, one that if not properly carried out could topple the democracy we have fought to build. You are charged with the role of conduit. It is your responsibility to take the events that happen in a courtroom with a seating capacity of no more than a couple of dozen, and convey those events, as accurately as possible, to as many of the more-than-50-million South Africans that you can reach.

And open justice is all for nought if the media does not accurately convey what happens in the courtroom. Mistakes have been made. Even in the Pistorius trial itself some analysts incorrectly cited the provisions of s 77 of the Criminal Procedure Act[68] as applying, suggesting that a question had been raised whether Mr Pistorius could understand the proceedings. It was actually sections 78 and 79 that were brought into question, and whether some mental illness or mental defect impacted his criminal responsibility.[69] Other mistakes have been of a more trivial nature, but are nonetheless important not to make. For example, two separate media outlets recently got various Constitutional Court judges' names wrong when reporting on the same judgment[70] earlier this year.[71] We are by no means a flock of prideful egos, but we would prefer the media got our names right. That is, we ask that in carrying out your responsibilities, you worship at the altar of accuracy.

In addition to ensuring mistakes are not made, the media must also be careful not to sensationalise cases and turn them into media circuses. For example, on 16 January 2012 a headline appeared in the *Pretoria News* that read 'Judge okays child sex'. A very misleading headline, to say the least.[72] We cannot condone a situation in which a witchhunt is traipsing around in the guise of open justice, as was perhaps the case with the O.J. Simpson trial in the mid-1990's.

Conclusion

All this to say: we, the media and the courts, share a common goal. We want the public to know. Indeed, it is our shared responsibility to ensure that they do. The trial against Oscar Pistorius may have attracted great media attention, but it is the decision in *Multichoice* that will set a trend for many years to come. It has paved the way for us to begin reassessing how to achieve open justice in the technological age. My caution to us all is that in doing so, we mustn't blindly ignore the potential risks: inaccurate or sensationalised reporting or intimidation of witnesses. So while the technology is new and the language has changed, our task remains the same: a meticulous balancing exercise between many competing rights, which can only be protected through carefully considered guidance and instructions from the presiding judge in each case. A

Endnotes

1 A number of other countries' apex courts have been on Twitter for some time. The United Kingdom Supreme Court, for example, has been on Twitter for a few years now. See https://twitter.com/UKSupremeCourt, indicating that the profile was created in October 2011, though the first official tweet was on 6 February 2012, reading "Hello all, thanks for the warm welcome! We'll kick off at 11.30 with Lord Reed's swearing-in. How we'll use Twitter: bit.ly/AaGloB".

2 It was at this point in the speech that I sent a tweet from the Court's official Twitter account @ConCourtSA that read "DCJ: This tweet sent live on stage from the National Press Club". See https://twitter.com/ConCourtSA/status/599267403764215809.

3 *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256; [1923] All ER 233 at 259 per Lord Hewart CJ, as cited in *Van der Walt v Metcash Trading Limited* [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454 at para 68. Note that the original reads "justice should not only be done, but should manifestly and undoubtedly be seen to be done."

4 Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In re: S v Pistorius, In re Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others [2014] ZAGPPHC 37 (*Multichoice*). The Deputy Chair of *Advocate's* Editorial Committee, Frank Snyckers SC, appeared for the applicants in this matter

5 *South African Broadcasting Corporation Limited v National Director of Public Prosecution, Schabir Shaik and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (*Shaik*).at para 97.

6 Section 34 of the Constitution of the Republic of South Africa, 1996 (*Constitution*).

7 http://www.joburg.org.za/index.php?option=com_content&id=1188&.

8 *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980).

9 *Detroit Free Press v. John Ashcroft*, 303 F.3d 681, 683 (2002). 10 Bentham J, Rationale of Judicial Evidence: Specially Applied to English Practice: in Five Volumes, Vol 5 (Hunt and Clarke, London 1827) at 524.

11 *City of Cape Town v South African National Roads Authority Limited and Others* [2015] ZASCA 58 (*Cape Town v SANRAL*) at para 12. See also *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 29, in which the Constitutional Court held that open justice "seeks to ensure that the citizenry know what is happening … so that the people can discuss, endorse, criticise, applaud or castigate the conduct of the courts … [It also] promotes impartiality, accessibility and effectiveness, three of the important attributes prescribed for the judiciary by the Constitution".

12 *Financial Mail (Pty) Ltd v Registrar of Insurance and Others* 1966 (2) SA 219 (W).

13 *Richmond Newspapers* above n 8 at 564. The United States Supreme Court in that case went as far as saying that "although great changes in courts and procedure took place [since the 1300's], one thing remained constant: the public character of the trial at which guilt or innocence was decided." Id at 566.

14 See for example: *Universal Declaration of Human Rights* (1948) article 19 (freedom of opinion and expression); and *International Covenant on Civil and Political Rights* (1976) article 19.2 (freedom of expression).

15 http://abcnews.go.com/blogs/politics/2012/02/ginsburg-likes-s-africa-as-model-for-egypt/.

16 Section 16(1) (Freedom of expression) of the Constitution provides in relevant part that: "Everyone has the right to freedom of expression, which includes-
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research."
See also *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 22, in which the Constitutional Court held

that "[t]he media are key agents in ensuring that … the [public's] right to receive information and ideas … [is] respected".

17 Section 35(3)(c) (right to a public trial) of the Constitution provides that: "Every accused person has a right to a fair trial, which includes the right … to a *public* trial before an ordinary court". (Emphasis added.) This provision is, to a large extent, realised via section 152 of the *Criminal Procedure Act* 51 of 1977, which expressly requires all criminal proceedings to "take place in open court".

18 Section 34 of the Constitution (Access to Courts) provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair *public* hearing before a court or, where appropriate, another independent and impartial tribunal or forum." (Emphasis added.)

19 83 of 1967, particularly section 6.

20 Dugard J, *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978) at 136.

21 *Shaik* above n 5.

22 Id at para 135.

23 Id at para 97.

24 Id at para 33.

25 Id at para 32.

26 See for example Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at para 41.

27 *S v Pistorius* [2014] ZAGPPHC 793.

28 *S v Pistorius* [2014] ZAGPPHC 924.

29 *Multichoice* above n 4 at para 18, citing *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA) (*Midi Television*) at para 9.

30 Id at para 15, citing *South African Broadcasting Corporation Ltd v Downer NO and Shaik* [2006] ZASCA 90 at paras 14-5.

31 Id at para 6, citing *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7.

32 Id at para 9, citing *South African Broadcasting Corporation Limited v Thatcher and Others* [2005] ZAWCHC 63; [2005] 4 All SA 353 at paras 29 and 31, in particular relying on section 173 of the Constitution, which grants superior courts the inherent power to protect and regulate their own processes, taking into account the interests of justice.

33 Id at para 1.

34 Id at para 12.

35 Id.

36 Id at para 20, citing *Shaik* above n 5 at para 70.

37 Id at para 21.

38 Id at para 27.

39 Id at para 25.

40 *South African Broadcasting Corporation Limited v Director of Public Prosecutions, South Gauteng High Courts, Johannesburg and Others; In re: S v Krejcir and Others* [2014] ZAGPJHC 241 (*Krejcir*).

41 *Multichoice* above n 4 at Orders 2.2-2.3.

42 *Krejcir* above n 40 at Order 4.4.

43 See http://www.biznews.com/grubstreet/intelligence/2014/03/11/twitter-ban-on-pistorius-trial-lifted-but-media-lawyers-and-journalists-worried-about-rulings/

44 http://www.theguardian.com/technology/2010/dec/14/twitter-allowed-bail-hearing

45 UK Supreme Court, *Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) From Court for the Purposes of Fair and Accurate Reporting*, 14 December 2011. Section 9 of the Practice Direction does, though, limit the *carte blanche* use of live text-based communications. Members of the public that are not part of the media must directly apply to the judge, even if informally through court staff.

46 http://www.theguardian.com/law/2011/dec/14/judge-court-reporters-twitter

47 See for example *Scott v Scott* [1913] AC 417 (HL), a seminal British case on open justice from over a century ago, in which the House of Lords held there to be three exceptions to holding court proceedings in public: cases affecting "lunatics", cases affecting wards of the Court, and cases where a public trial would defeat the entire purpose of the proceedings, such as those involving trade secrets. See in particular pages 437 (per Viscount Haldane), 441 (per Earl of Halsbury) and 480 (per Lord Shaw of Dunfermline), as discussed in *A v British Broadcasting* [2014] UKSC 25 at para 29.

48 *Multichoice* above n 4 at para 19, citing *Shaik* above n 5 at para 68, in which the Constitutional Court held that "[s]ound bytes from political discourse, sometimes played over and over again on television … carry the very real risk of trivialising complex issues and converting what should be public education into public entertainment." The Supreme Court of Victoria in Australia seems to overcome this hurdle by providing their own audio-visual recordings of important decisions. See that Court's website, which provides "live, or on demand, video and audio webcasts of sentences and judgments" at http://scv2.webcentral.com.au/sentences/.

49 *Multichoice* above n 4 at para 21.

50 See Wardle B, The sub judice rule and the Oscar Pistorius case: will the crime of contempt of court ex facie curiae become abrogated by disuse? 534 De Rebus 27 (2014), commenting that "witness after witness in the Pistorius trial [has] confess[ed] to having been glued to their television screens" (*Wardle*).

51 See for example *Central Authority for the Republic of South Africa v K* [2014] ZAGPJHC 373 at para 63 (ordering anonymity of the parties to "protect the interests of the child") and *H v S* [2014] ZAGPJHC 214 at paras 1-2 (ordering anonymity because "[a]side from being a minor, as she grows up her self-esteem and dignity may be unnecessarily affected if she perceives that those who she comes into contact with are aware of her identity").

52 See for example section 170A of the *Criminal Procedure Act* 51 of 1977, which permits witnesses "under the biological or mental age of eighteen … to give his or her evidence through [an] intermediary."

53 This is, unfortunately, a protection that is currently only given to accused persons under the age of eighteen, allowing a parent or guardian to assist them, as per section 73(3) of the *Criminal Procedure Act* 51 of 1977. Witnesses and victims are not yet legislatively entitled to a support person. See for example, Galgut H, *In Camera Hearings, Closed Circuit Television, Support Persons and Vulnerable Witnesses,* Gender Law Unit, Sonnenberg, Hoffman & Galombik, noting that "[a]t present, no statutory provision is made for the appointment of a designated support person to accompany and thereby provide emotional support". Available at http://www.ghjru.uct.ac.za/sexual-offencebill/Protective-Measures.pdf.

54 See for example section 153 of the *Criminal Procedure Act* 51 of 1977, which protects vulnerable persons by giving the judge the discretion to prohibit people from being in the courtroom if the alleged offending involves a sexual offence or extortion.

55 See for example section 158 of the *Criminal Procedure Act* 51 of 1977, which gives courts the discretion to allow evidence to be given by means of closed-circuit television or similar electronic media.

56 *Multichoice* above n 4 at Orders 4.3 and 5.10.

57 See for example United States v. Jesus-Casteneda, 705 F.3d 1117, 1119 (9th Cir. 2013) (holding that allowing a witness to testify in disguise does not necessarily violate a defendant's rights).

58 *Hearne v Street* [2008] HCA 36 at paras 34, 49 and 52-3 per Kirby J.

59 See in particular Cape Town v SANRAL above n 11 at paras 27-9, holding that implied undertakings are "not part of our law". Justice Ponnan also cautioned other courts not to impulsively adopt the implied undertaking rule without engaging in the necessary analysis under section 39(2) of the Constitution of whether it accords with the spirit and objects of the Bill of Rights, despite the inherent power under section 173 of the Constitution for courts to regulate their own processes.

60 American Bar Association Model Rules of Professional Conduct, rule 3.6(a).

61 See, for example: Kriel, *Social Media in Court* [2013] DEREBUS 52 at 7, such that one would "need to show that a tweet creates a real risk that substantial and demonstrable prejudice to the administration of justice [would occur]. It would be very difficult to show that a judge would be swayed by commentary on Twitter. In South Africa, we do not have the added problem of a jury system."

62 See *Midi Television* above n 29.

63 Id at paras 5 and 22.

64 *Attorney-General v British Broadcasting Corporation* [1981] AC 303; [1980] 3 All EWR 161 (holding that "the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice", at 362), and *Attorney-General v Times Newspapers Ltd* [1974] AC 233; [1983] 3 All ER 54 (holding that a ban on publication to protect the administration of justice would be allowed only if there was a "real risk [of prejudice], as opposed to a remote possibility", at 299A per Lord Reid and 303B-C per Lord Morris).

65 *Dagenais v Canadian Broadcasting Corporation* (1995) 25 CRR. (2d) 1 at 47 (holding that a publication ban could only be ordered if there was a "real and substantial risk of interference with the right to a fair trial").

66 *Hinch v Macquarie Broadcasting Holdings Ltd v Attorney General for the State of Victoria* [1987] HCA 56; (1987) 164 CLR 15 (holding at para 32 that a publication would only amount to contempt if there was a "substantial risk of serious interference with the trial").

67 *Midi Television* above n 29 at para 19.

68 51 of 1977.

69 See Wardle above n 50. 70 *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC), a case that ironically protected freedom of expression.

71 Justice Bess Nkabinde was "Jess" Nkabinde, and Justice Johan Froneman was "Coenraad" Froneman (his middle name) in the article from January 2015. See http://mg.co.za/article/2015-01-19-da-sms-ruling-a-landmark-judgment. And Justice Van der Westhuizen was referred to, twice, as Justice van der Merwe in an another article from January 2015. See http://iolmobile.co.za/#!/article/da-victory-deserved-but-judgment-sloppy-1.1806815.

72 http://www.iol.co.za/news/crime-courts/judge-okays-child-sex-1.1452575#.VS5evfC4ddw. Note, though, that there was a retraction and apology the next day on 17 January 2012 that read "The *Pretoria News* wishes to retract the main headline … which, we believe, sensationalised a sensitive issue … We acknowledge the headline could have been better phrased and regret the inappropriate wording of the poster".