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Mr. Chairman,
Conference facilitator,
Distinguished invited guests,
Ladies and Gentlemen,

Thank you very much for having extended an invitation to my organisation, The Media Institute of Southern Africa (MISA), and to me in particular to present a paper at this very important conference. This is one of the very few conferences where senior members of the Judiciary, Executive, Legislature and the Media have been brought together to discuss their roles in a Constitutional Democracy.

Introduction

My presentation this morning will tackle the subject: "The Fourth Branch - How do the judiciary and the Media support each other in promoting, protecting and monitoring separation of powers principles in a Constitutional Democracy?"

The role of the Fourth Estate

May I begin by endorsing the doctrine, which says that the media is a Fourth Estate in a constitutional democracy. Indeed, nobody can question this doctrine. However, for the media to be regarded as a fourth estate, it needs to be very independent from any state (executive branch) interference. It is only a free press or media that can play a watchdog role of counter-checking the three other branches of the state, namely: Judiciary, Executive and the Legislature. This is why my organisation, MISA, has been very instrumental in calling for the development of a free press in the Southern African region. Actually, the role of the media is widely recognised by the judiciary and parliament. This is why courtroom designs have designated places for journalists (Press Gallery). Most parliamentary chambers have also press galleries where journalists sit to cover the deliberations. It is through the media that the general public is able to follow parliamentary and court proceedings. Sometimes, the media go beyond mere reporting or transmitting of events. This is when journalists struggle hard to unearth the administrative lapses, scandals and shortcomings of the executive, which in turn, helps parliament carry out its functions of overseeing government administration and expenditure. Equally, public opinion expressed through the media usually becomes raw material for parliamentary questions, motions and debates. Public opinion can also be taken up by the executive branch through various government ministries or cabinet itself.

How the media can support the Judiciary

The focus of my paper this morning is to look at how the judiciary and the media can forge a strategic alliance in order to enhance the doctrine of separation of powers in a constitutional democracy. One may ask, why the media and judiciary and not any other branch of government? The answer is simple. The media and the judiciary are the only two branches that have no direct political mandate from the

people to carry out their function. This usually puts the two branches in a very weak position compared to the other two, executive and the legislature. Members of parliament and the executive branches always derive their political mandate from the people through periodic elections. But to be a judge or journalist, one does not need to seek direct political mandate through elections. Because of this, the executive and legislature usually think they are above the two because they consider themselves representing the views of the voters who voted them into power. This is why politicians usually attack judges and journalists on the account that they do not represent anybody.

Some examples will do here. In Zimbabwe, President Robert Mubare has often attacked judges who passed judgements or rulings in favour of white farmers when the self-styled war veterans were on rampage of grabbing land. Mugabe's argument is simple. He said that his re-election as President of Zimbabwe was based on his political platform, which he promised Zimbabweans that he would repossess white-owned farms once voted as their leader. So, who is this judge who never went to campaign in villages to halt the implementation of a campaign platform on which Mugabe was voted into office? Mugabe refused to respect such court orders. But the independent media has tried in Zimbabwe to protect the judges by condemning the government's failure to uphold the rule of law. The media has also gone as far as protecting the integrity and reputation of some judges were targeted by government officials as "colonial agents."

Another regional example is from Zambia. Recently, President Levy Mwanawasa attacked the judges who are currently sitting to hear his election petition brought by losing opposition candidates. Mwanawasa said people should be free to comment on the case before the five Supreme Court judges because voters were more important than the courts. This was after the judges issued a stern warning against people who were making comments that were prejudicial to the case. The independent media in Zambia published various articles and commentaries, condemning Mwanawasa sentiments. Because of consistent articles and editorial comments condemning Mwanawasa, civil society, Churches and civic groups mobilised themselves and issued joint statements in support of the judiciary.

Another important point to highlight here on why the judiciary is vulnerable, unlike the other branches of government, is that they have no platform to defend themselves when under attack. For members of parliament or cabinet ministers, once under unwarranted attack, they are free to call a press conference and put their views across through the media. But when judges pass a judgement, they have no medium where they can justify or defend their position outside the courtroom. This is why they need to forge an alliance with the media. It is the media that can defend judges from unwarranted political attacks by writing stories that could make the public rise in support of judges. Therefore, the judges and journalists need to find a way of strengthening their relationship.

How the judiciary can support the media

On the other hand, Judges need to have deeper understanding of how journalists work. To appreciate the media, judges need to know how a story is developed from a mere idea to a final product. This will help judges to take judicial notice of the process of news gathering and reporting when confronted with media cases. No journalist worthy his salt wakes up in the morning to write a false story, yet we have seen several reporters being put behind bars for publishing false news. Judges should be freer with journalists and vice versa. Actually, judges play a vital role in ensuring media freedom. I must say that judges in the entire region have done a commendable job in protecting the rights of journalists.

Some regional examples on how the judges have helped to enhance press freedom.

In Zimbabwe two journalists were arrested and charged with publishing false news following a story they wrote that exposed President Robert Mugabe's relationship with his secretary. The reporters were arrested and put in detention for months. Coincidentally, few months after their arrest, Mugabe finally

married the same lady though initially the story was vehemently denied. When the matter was taken to the Supreme Court, the judges declared the law that was used to arrest the reporters as "unconstitutional."

In Botswana, authorities instructed government departments and parastatals to stop placing advertisements in the Guardian newspaper because it was critical of government officials. The newspaper challenged the decision in the high court saying their right to freedom of expression was being infringed upon. The high court ruled very favourably for press freedom and indeed the freedom of the newspaper.

The honourable judge said and quote: *"The government cannot act with a view to taking away an individual's exercise of a constitutional right as this would inhabit the individual in the full exercise of that freedom for fear of incurring punishment,"* end quote. What a victory for press freedom coming from the judiciary!

In Zambia, three reporters were arrested and charged under the State Security Act when they published a story, which exposed government plot to hold a snap referendum to decide on the contentious constitutional clauses. The police said the story breached state secrets because the matter was discussed in a secret cabinet meeting.

The high court judges ruled and I quote: *"Referenda are the known lawful ways of asking the general citizenry to decide by plebiscite certain contentious issues which the government does not want to decide on its own. I think it would surprise many and even jar their instincts to hear that in Zambia three nosy journalists have been imprisoned for twenty years for prematurely announcing government intentions to hold a referendum to decide a thorny constitutional issue."* End quote.

It is such kind of judgements from the judiciary that could help enhance media freedom thereby giving the media an enabling environment to play the watchdog role. However, I must state here that the relationship between the judiciary and the media should be carefully forged. The media should still retain its fundamental role of counter-checking and exposing shortcomings in all the branches of government, including the judiciary itself.

Let me bring in an example from Zambia. The former chief justice of Zambia Mathews Ngulube, who had been proactive in supporting media freedom. He was seen as a darling of the media and delivered good judgements that enhanced media freedom in Zambia. But last year, it is the same media, which brought his down fall. One tabloid newspaper published an expose', in which Ngulube was exposed for receiving irregular payments from then president Frederick Chiluba. The money was paid from a secret intelligence account believed to have been widely used by Chiluba to bribe his political opponents. After the story was published, members of civil society and indeed opposition leaders demanded for the resignation of Ngulube. Ngulube had no option but decided to go!

There is always a contention as to who will counter-check the media. Indeed, who will guard the guards? For me, this is a very contentious issue especially in Southern Africa where governments have been trying to regulate the media. Admittedly, there are some journalists who have misconduct themselves or abused their positions. But these few cases should be not the excuse of trying to tighten laws to squeeze the media. I have always supported the notion of self-regulation of the media through established non-statutory and voluntary press councils. We have countries that have sort of succeeded in making the press councils work in regulating the media. We need to build on this process.

Another important point is that the media is some how regulated by the public already. Once a newspaper or radio station lose credibility, the public equally may stop buying that particular newspaper or tuning in the radio station's frequency.

Conclusion

I would like to restate my earlier position that the judiciary and the media have no any option apart from working together if they are to promote, protect and monitor separation of powers principles in a Constitutional Democracy. It is only the media and the judiciary that does not go out to seek direct mandate from the people to carry out their function. This is why journalists and judges are usually amendable to unwarranted political attacks by the politicians from the executive and legislative branches of government.

Mr. Chairman, I thank you very much!