

# THE RIGHT TO FREEDOM OF EXPRESSION AND THE CRIMINAL LAW – THE JOURNEY THUS FAR

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## SUMMARY

This article seeks to set out the application of the right to freedom of expression in the particular context of criminal law, taking into account developments in other Southern African jurisdictions where appropriate. In particular, the article examines the application of the right in the context of contempt of court, sexual morality, and pornography. Possible future applications of the right are also identified. Ultimately the article affirms the primary importance of the right to freedom of expression, and argues that the right should be zealously protected.

## 1 PREFATORY REMARKS

The contribution of Professor JMT Labuschagne<sup>1</sup> to academic legal writing has been substantial, in the fullest sense of the word. His capacity for incisive argument, clarity of thought, and limpid expression are evidenced in each of the enormous corpus of his published work. Though the length of his list of publications – in areas such as delict, family law, customary law, and criminal law – is astonishing,<sup>2</sup> it is the quality of his analysis that sets his work apart. In particular, his ability as a comparativist was without peer, as he worked facilely with German, Dutch, Common Law and customary legal sources.

It is perhaps surprising, given his enormous contribution to legal writing, that Labuschagne was cited relatively infrequently by the courts. A few citations are worthy of mention. In *Christian Education SA v Minister of Education*,<sup>3</sup> his comparative analysis of corporal punishment in schools<sup>4</sup> is cited; similarly in the first case to declare sodomy to be inconsistent with the Constitution, *S v Kampher*,<sup>5</sup> his treatment of the subject matter<sup>6</sup> is cited as a

<sup>1</sup> Fondly remembered as “Lappies”.

<sup>2</sup> It is said that he would, with self-effacing humour, tell of how he would sit down to write something, only to find that he had already written it!

<sup>3</sup> 1999 4 SA 1092 (SEC) 1106H-I.

<sup>4</sup> “Tugtiging van Kinders: ’n Strafregtelik-prinsipiële Evaluasie” 1991 *De Jure* 24; and “Is lyfstraf in Skole Bestand Teen ’n Akte van Menseregte?” 1993 *Obiter* 190.

<sup>5</sup> 1997 2 SACR 418 (C) par [20].

<sup>6</sup> “Dekriminalisasie van Homo- en Soöfilie” 1986 *TRW* 167.

useful collection of case law; and also in *S v Jackson*,<sup>7</sup> where the Supreme Court of Appeal cited his 1992 article on the cautionary rule in rape as a useful repository of references.<sup>8</sup> Labuschagne's comments on the form of contempt of court which takes place *in facie curiae*<sup>9</sup> were reflected in the cases of *S v Phomadi*<sup>10</sup> and *S v Lavhengwa*.<sup>11</sup> Moreover, the Appellate Division set out Labuschagne's views on the *de minimis non curat lex* rule<sup>12</sup> in detail in the leading case of *S v Kgogong*.<sup>13</sup>

Quantifying Labuschagne's contribution to legal discourse, particularly in the area of criminal law, is a task which would require a hefty monograph. No such task can be attempted here. Instead, it is proposed to focus briefly on the development of the South African criminal law in the post-Bill of Rights era, with particular reference to the right of freedom of expression. In the light of human rights concerns, and in many instances prior to the inception of democracy and a human rights culture in South Africa, Labuschagne engaged in penetrating analysis of the basis for the continued criminalisation of a number of common law crimes, including defamation,<sup>14</sup> perjury,<sup>15</sup> blasphemy,<sup>16</sup> contempt of court,<sup>17</sup> public indecency,<sup>18</sup> *crimen injuria* in the context of voyeurism,<sup>19</sup> theft,<sup>20</sup> bigamy,<sup>21</sup> homicide in the context of euthanasia,<sup>22</sup> consensual homosexual intercourse,<sup>23</sup> bestiality,<sup>24</sup> treason,<sup>25</sup> and incest.<sup>26</sup> It is this series of articles that forms the inspiration for what follows below.

## 2 INTRODUCTION

The South African Constitution Act<sup>27</sup> represents an emphatic break with a past characterized by denial of human dignity, and commits South Africa to a

<sup>7</sup> 1998 1 SACR 470 (SCA) 474h-i.

<sup>8</sup> "Versigtighedsreël by Seksuele Sake" 1992 *Obiter* 131.

<sup>9</sup> "Minagting van die Hof: 'n Strafregtelike en Menseregtelike Evaluasie" 1988 *TSAR* 329; and "Minagting in *Facie Curiae* – Het so 'n Misdaad Werklik Bestaansreg?" 1991 108 *SALJ* 405.

<sup>10</sup> 1996 1 SACR 162 (E) 164i-165a.

<sup>11</sup> 1996 2 SACR 453 (W) 472c-f and 476d-f.

<sup>12</sup> "*De Minimis Non Curat Lex*" 1973 *Acta Juridica* 291.

<sup>13</sup> 1980 3 SA 600 (A) 603A-F.

<sup>14</sup> "Dekriminalisasie van Laster" 1990 53 *THRHR* 391.

<sup>15</sup> "Dekriminalisasie van Meineed" 1991 *TRW* 20.

<sup>16</sup> "Dekriminalisasie van Godslaster" 1986 49 *THRHR* 434. See also "Vanaf Goddelike tot Menslike Persoonlikheidsreg: 'n Regsantropologiese Evaluasie van die Ontstaan en Disintegrasie van die Misdaad Godslastering" 2001 *Stell LR* 484.

<sup>17</sup> 1988 *TSAR* 329; and 1991 *SALJ* 405. See also the case comment on "*In re Muskwe* 1993 2 SA 514 (ZHC); *R v Barbacki* 1992 76 CCC (3d) 549 (QCA)" 1994 *De Jure* 207.

<sup>18</sup> "Openbare Onsedelikheid, Nudisme en Ekshibisionisme" 1988 *SACJ* 187.

<sup>19</sup> "Dignitas en die Bestraffing van Voyeurisme" 1989 *SACJ* 339.

<sup>20</sup> "Dekriminalisasie van Diefstal? – Opmerkings nav *Kgogong* se Saak" 1981 *SACC* 62.

<sup>21</sup> "Dekriminalisasie van Bigamie" 1986 *De Jure* 68.

<sup>22</sup> "Dekriminalisasie van Eutanasia" 1988 51 *THRHR* 167.

<sup>23</sup> 1986 *TRW* 167.

<sup>24</sup> *Ibid.*

<sup>25</sup> "Menslike Outonomie en Staatlike Majestas: Opmerkinge oor die Dekriminalisasie van Hoogverraad" 1992 *SACJ* 117.

<sup>26</sup> "Dekriminalisasie van Bloedskande" 1985 48 *THRHR* 435. See also "Teoretiese Verklaring van die Bloedskandeverbod" 1990 *TSAR* 415.

<sup>27</sup> The Constitution of the Republic of South Africa, 1996.

transition to a new society characterised by a commitment to recognising the value of human beings.<sup>28</sup> In this context, the right to freedom of expression has been described as being integral to democracy, to human development, and to human life itself. Justice Marshall of the United States Supreme Court emphasised this connection when he stated that to suppress expression is to reject the basic desire for recognition and affront the individual's worth and dignity.<sup>29</sup>

The importance of freedom of expression has been acknowledged in numerous cases in the pre-constitutional era in South Africa.<sup>30</sup> Nevertheless it is notorious that South Africa has recently emerged from a past where expression was subjected to severe restrictions through various legislative enactments, thus underlining the need to protect the right to freedom of expression in our new democracy.<sup>31</sup> As Langa J (now CJ) has observed:

"The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'.<sup>32</sup>

This article seeks to set out the application of the right of freedom of expression in the particular context of criminal law, taking into account developments in other Southern African jurisdictions where appropriate. Those forms of expression expressly excluded from protection (contained in s 16(2) of the Constitution) will not however be dealt with in the confines of this article.

### 3 THE RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression<sup>33</sup> is set out in section 16 of the Constitution:

- "(1) 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.
- (2) The right in subsection (1) does not extend to –

<sup>28</sup> O'Regan J in *Bernstein v Bester* 1996 4 BCLR 449 (CC) par 148.

<sup>29</sup> *Procurier v Martinez* 416 US 396 (1974).

<sup>30</sup> *Mthembi-Mahanyele v Mail & Guardian Limited* 2002 12 BCLR 1323 (W) par [29]. For an early reference to the right, see the judgment of Schreiner JA in *Die Spoorbond v South African Railways* 1946 AD 999 1012-1013, and see cases cited in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC) fn 20.

<sup>31</sup> *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC) 1288A-B.

<sup>32</sup> *Islamic Unity Convention v Independent Broadcasting Authority supra* par [27].

<sup>33</sup> The right is discussed in some detail in Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* (1997) 111ff; Burns "Freedom of Expression Under the New Constitution" 1997 XXX CILSA 264ff; Devenish *A Commentary on the South African Bill of Rights* (1999) 187ff; Devenish *The South African Constitution* (2005) 95ff; and Currie and De Waal *The Bill of Rights Handbook* (2005) 358ff.

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

As O'Regan J stated in *South African National Defence Union v Minister of Defence*, freedom of expression lies at the heart of a democracy.<sup>34</sup>

“It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”

Freedom of expression has been universally recognised in all democracies as crucial to the growth and enhancement of the constitutional state and essential to the progress and development of humankind,<sup>35</sup> and as such is protected in almost every international human rights instrument.<sup>36</sup> As O'Regan J stated in *Khumalo v Holomisa*:

“It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.”<sup>37</sup>

According to Emerson, there are four broad special purposes served by freedom of expression: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision-making; and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.<sup>38</sup> Dworkin<sup>39</sup> suggests that these purposes can in turn be reduced to two justificatory grounds for the constitutional protection of freedom of expression: (i) the instrumental argument that the quality of government is improved when criticism is free and unfettered; and (ii) the constitutive argument that sees free speech as valuable because expression is an important part of what it means to be human. Both considerations are encapsulated in the above quotes of O'Regan J.

Freedom of expression, which carries its own inherent worth, is thus an indispensable incident of dignity, equal worth and freedom, and further

<sup>34</sup> 1999 6 BCLR 615 (CC) par [7]. See also *Woods v Minister of Justice, Legal and Parliamentary Affairs* 1995 1 BCLR 56 (ZS) 58D-E. See further the comments of Sunstein in *Democracy and the Problem of Free Speech* (1993) 19, cited in *Rivett-Carnac v Wiggins* 1997 4 BCLR 562 (C) 569A-B; and *National Media Ltd v Bogoshi* 1999 1 BCLR 1 (SCA) 9G).

<sup>35</sup> *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC) 1287E-F; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 8 BCLR 743 (CC) par [45]. See also *Handyside v United Kingdom* (1976) EHRR 737 754; and *Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd et al* (1987) 33 (DLR) (4) 174 183.

<sup>36</sup> *Islamic Unity Convention v Independent Broadcasting Authority supra* par [28].

<sup>37</sup> 2002 8 BCLR 771 (CC) par [21].

<sup>38</sup> Cited in *Fantasy Enterprises CC v Minister of Home Affairs* 1998 NR 96 (HC) 100C-101A. See also *In re Munhumeso* 1995 1 SA 551 (ZS) 557E; and *Chavunduka v Minister of Home Affairs* 2000 1 ZLR 552 (S) 558D-E.

<sup>39</sup> Cited in Davis, Cheadle and Haysom 113; and Currie and De Waal 360-362.

“serves a collection of other intertwined constitutional ends in an open and democratic society”.<sup>40</sup> It is regarded as one of a “web of mutually supporting rights” in the Constitution,<sup>41</sup> closely related to freedom of religion, belief and opinion,<sup>42</sup> the right to dignity,<sup>43</sup> the right to freedom of association,<sup>44</sup> the right to vote and to stand for public office,<sup>45</sup> and the right to assembly.<sup>46</sup>

It has been stated that:

“[T]hese rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of differing views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.”<sup>47</sup>

The right to freedom of expression, for all its significance, does not however automatically trump other rights.<sup>48</sup> In particular the right to dignity has been highlighted as at least as worthy of protection as the right to freedom of expression.<sup>49</sup> Similarly, the right to privacy<sup>50</sup> may have to be weighed up against the right to freedom of expression.<sup>51</sup>

The context for the protection of the right to freedom of expression is of primary importance. It was held in *S v Mamabolo* that:

“Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must

<sup>40</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International supra* par [45], per Moseneke J.

<sup>41</sup> Mokgoro J in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) par [27].

<sup>42</sup> S 15 of the Constitution.

<sup>43</sup> S 10 of the Constitution.

<sup>44</sup> S 18 of the Constitution.

<sup>45</sup> S 19 of the Constitution.

<sup>46</sup> S 17 of the Constitution.

<sup>47</sup> Per O'Regan J in *South African National Defence Union v Minister of Defence supra* par [8], cited in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International supra* par [46].

<sup>48</sup> See, in the context of defamation, *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 25B-E, cited in *Santam Ltd v Smith* 1999 6 BCLR 714 (D) 722B-D.

<sup>49</sup> *Mandela v Falati* 1994 4 BCLR 1 (W) 8F; *S v Mamabolo* 2001 3 SA 409 (CC) par [41]; and *Islamic Unity Convention v Independent Broadcasting Authority supra* par [30].

<sup>50</sup> S 14 of the Constitution.

<sup>51</sup> *Rivett-Carnac v Wiggins supra* 574F-G.

feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.”<sup>52</sup>

However, whilst an open and democratic society requires that pluralism, tolerance and broadmindedness should prevail, these values can, in turn, be undermined by speech which seriously threatens democratic pluralism.<sup>53</sup> Therefore, reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself, is a feature of open and democratic societies.<sup>54</sup> Given the potential which expression has for impairing the exercise and enjoyment of rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation, the right to freedom of expression is not absolute, and is subject to limitation under section 36(1) of the Constitution.<sup>55</sup>

## 4 APPLICATION OF THE RIGHT TO SPECIFIC ISSUES WITHIN CRIMINAL LAW

### 4.1 Contempt of court

The first application of the right of freedom of expression to the substantive criminal law occurred in the context of the common law crime of contempt of court, and more specifically the form thereof known as “scandalising the court”.<sup>56</sup> In *S v Mamabolo*<sup>57</sup> it was argued that the constitutional protection given to freedom of speech was incompatible with the crime of scandalising the court.<sup>58</sup> Further, it was argued that the summary procedure utilised in respect of contempt of court did not accord with the right to a fair trial.<sup>59</sup>

The court (per Kriegler J) examined the rationale for the crime of contempt of court, and held that the existence of the crime relates to the constitutional position of the judiciary as an independent pillar of State, which stands on an equal footing with the executive and legislature in terms of the doctrine of separation of powers, and yet is entirely reliant on moral authority to perform its constitutionally mandated role as interpreter of the Constitution, having “no constituency, no purse and no sword”.<sup>60</sup> The crime of scandalising the court functions to protect the authority of the courts, by criminalising the publication of comments reflecting adversely on the integrity of the judicial process or its officers.<sup>61</sup> Thus the Constitutional Court unanimously upheld

<sup>52</sup> *S v Mamabolo supra* par [37].

<sup>53</sup> *Islamic Unity Convention v Independent Broadcasting Authority supra* par [28]; and *Human Rights Commission of SA v SABC* 2003 1 BCLR 92 (BCCSA) 103G.

<sup>54</sup> *Islamic Unity Convention v Independent Broadcasting Authority supra* par [28].

<sup>55</sup> *Islamic Unity Convention v Independent Broadcasting Authority supra* par [30].

<sup>56</sup> As defined by Snyman *Criminal Law* 4ed (2002) 331 as “the publication, either in writing or verbally, of allegations which, objectively speaking, are likely to bring judges, magistrates or the administration of justice through the courts generally into contempt, or unjustly to cast suspicion on the administration of justice”. For an historical perspective on the crime, see Van Blerk “Scandalizing Justice: A Retrospect” 1994 *TSAR* 749.

<sup>57</sup> *Supra*.

<sup>58</sup> Par [2].

<sup>59</sup> *Ibid*.

<sup>60</sup> Par [16].

<sup>61</sup> Par [33].

the constitutionality of the crime, stressing the importance of its protection of the authority of the courts.<sup>62</sup>

Whilst emphasising the enormous value of criticism of the courts in a democracy, the court held that the crime constituted a justifiable limitation on the right to freedom of expression in these terms:

“On balance, while recognizing the fundamental importance of freedom of expression in the open and democratic society envisaged by the Constitution, there is a superior countervailing public interest in retaining the tightly circumscribed offence of scandalizing the court.”<sup>63</sup>

The only problem is, it isn't. Far from being “tightly circumscribed”, the crime of scandalising the court is so vague and general that it violates the principle of legality.<sup>64</sup> There is no evidence that scandalisation contempt is necessary for upholding respect for the judiciary. The standing of and respect for the judiciary should be based upon the inherent merits of the performance of the judiciary itself. Despite the arguments advanced by the court in *Mamabolo*, there does not appear to be good cause for affording judges special protection, whilst members of the legislature and executive have the same legal protection in the face of criticism as other citizens.<sup>65</sup>

There will be egregious instances of contempt. Such cases are exemplified by the case of *S v Bresler*<sup>66</sup> where the accused criticised the coloured magistrate who had found his daughter guilty of speeding, remarking that he was incompetent, and that he was a product of affirmative action, which was in turn weakening the system of criminal justice.<sup>67</sup> The accused was rightly convicted of contempt of court. However, there do not seem to be any restrictions on the judge in question making use of the law of defamation in order to defend his or her reputation.<sup>68</sup> It could be argued that judges should not descend into public controversy, but is the institution of a charge of scandalising the court not exactly that?<sup>69</sup> Besides, it is only convention and tradition that prevent extra-curial comment, and there would certainly be a forum for the expression of the views of an impugned judge.<sup>70</sup> It has even been argued that the existence of the crime undermines public confidence in the courts, since it implies judges hiding behind a special offence, and not relying on their conduct being its own vindication.<sup>71</sup> Moreover, proof of real damage to the legal system is hard to prove, and is largely assumed.<sup>72</sup>

<sup>62</sup> See par [16]-[20] and [24]-[33]. However, the court held that the summary procedure constituted an unjustifiable limitation of the right to a fair trial – see discussion at par [51]-[59].

<sup>63</sup> Par [49].

<sup>64</sup> Snyman 333.

<sup>65</sup> Labuschagne 1991 *SALJ* 408, who notes that this unequal treatment amounts to an infringement of the principle of equality.

<sup>66</sup> 2002 2 *SACR* 18 (C).

<sup>67</sup> 21d-j.

<sup>68</sup> Labuschagne “Minagting van die Hof: 'n Strafregtelike en Menseregterlike Evaluasie” 1988 *TSAR* 329 346.

<sup>69</sup> Burchell “Contempt of Court by the Media: Another Opportunity to Extend Press Freedom is Lost: *S v Harber* 1988 3 *SA* 396 (A)” 1988 4 *SAJHR* 375 385.

<sup>70</sup> Walker “Scandalising in the Eighties” 1985 101 *LQR* 359 379.

<sup>71</sup> Walker 1985 101 *LQR* 381.

<sup>72</sup> *Ibid.* See also the criticism of the *Mamabolo* case by Snyman 333-334.

The constitutionality of the crime of scandalising the court was also examined in the Zimbabwean case of *In re: Chinamasa*.<sup>73</sup> In a detailed judgment, making extensive use of comparative authorities, Gubbay CJ stressed the significance of the right to freedom of expression in powerful terms:

“It is indeed difficult to imagine a more crucial protection to a democratic society than that of freedom of expression. Without the freedom to express, interchange and communicate new ideas and advance critical opinions about public affairs or the functioning of public institutions, a democracy cannot survive. The use of colourful, forceful and even disrespectful language may be necessary to capture the attention, interest and concerns of the public to the need to rectify the situation protested against or prevent its recurrence. People should not have to worry about the manner in which they impart their ideas and information. They must not be stifled in making such exchanges.”<sup>74</sup>

Notwithstanding this eloquent prose, and whilst acknowledging that the crime limited the right to freedom of expression, the court held that such a limitation was reasonably justifiable in a democratic society.<sup>75</sup> The critical consideration in the view of the court was that criticism imputing improper or corrupt motives or conduct to those taking part in the administration of justice creates a real or substantial risk of impairing public confidence in the administration of justice.<sup>76</sup> Part of the court’s rationale was the argument that judges have no proper forum to reply to criticisms, and cannot debate the issue in public without jeopardising their impartiality (and therefore deserve protection not afforded to other public figures).<sup>77</sup> Once again, the riposte is simply that there remains an alternative and effective civil remedy for defamation where a judicial officer’s reputation is unlawfully impaired by another.<sup>78</sup> Scandalising the court constitutes an unreasonable and unjustifiable inroad upon freedom of expression,<sup>79</sup> which appears to be designed to “provide special protection for courts against harm that is more imaginary than real”.<sup>80</sup>

On the other hand, the *sub judice* rule, in terms of which publication in the press or other media of any information or commentary upon pending judicial proceedings is prohibited, on pain of a conviction for contempt of court, is not unconstitutional. The limitation of freedom of expression and freedom of the press would appear to be justifiable: “the public interest in a fair and impartial trial must prevail over the public interest in comment on matters of topical importance”.<sup>81</sup> In the Lesotho case of *Moafrika Newspaper Re: Rule nisi (R v Mokhanto)*,<sup>82</sup> the court stated unequivocally that the

<sup>73</sup> 2000 12 BCLR 1294 (ZS).

<sup>74</sup> 1306I-1307A. The right to freedom of expression is protected in s 20(1) of the Zimbabwean Constitution.

<sup>75</sup> 1312D. S 20(2)(b)(iii) of the Zimbabwean Constitution allows for a limitation of the right to freedom of expression on the basis of this proviso.

<sup>76</sup> 1309J-1310A.

<sup>77</sup> 1310B.

<sup>78</sup> Burchell 954; and Snyman 333.

<sup>79</sup> See Maré ‘Criminal Law and the Bill of Rights’ in *Bill of Rights Compendium* (1996) 2A-1 2A7.3.2.

<sup>80</sup> As per the remarks of Justice Sackville, chairman of the Australian national judges association, reported in *The Age*, 29 August 2005.

<sup>81</sup> Burchell 951, citing the author Freedman ‘Fair Trial – Freedom of the Press’ 1964 3 *Osgoode Hall LR* 52 75.

<sup>82</sup> 2003 5 BCLR 534 (LesH) par [17].



freedom of the press must be held in high regard by the courts. Nevertheless, the court concluded that the *sub judice rule* is an important and useful process to protect the proper administration of justice, and thus in cases where the potential for real or substantial risk exists, the media should proceed responsibly in publishing critical comments, taking care not to create any risk or prejudice to those pending court proceedings.<sup>83</sup> There was held to be no “real risk” that proceedings would be prejudiced in the Zimbabwean case of *S v Hartmann*,<sup>84</sup> although the court held that the “restraint” on freedom of expression<sup>85</sup> inherent in this aspect of the crime of contempt of court be upheld as permissible “to maintain the authority and independence of the courts”.<sup>86</sup>

## 4 2 Sexual morality

The right to freedom of expression arose for consideration in the case of *Phillips v Director of Public Prosecutions, Witwatersrand Local Division*.<sup>87</sup> The court was required to consider the constitutionality of section 160(d) of the Liquor Act,<sup>88</sup> which held:

“The holder of an on-consumption licence who –  
 (d) allows any person –  
     (i) to perform an offensive, indecent or obscene act; or  
     (ii) who is not clothed or not properly clothed, to perform or to appear, on a part of the licensed premises where entertainment of any nature is presented or to which the public has access ...  
 shall be guilty of an offence.”

The problem was thus, as Sachs J put it somewhat irreverently in his judgment, “whether it is constitutionally permissible to prohibit the combination of tipples and nipples” (par [64]).<sup>89</sup> In assessing the constitutionality of section 160(d) in the light of section 16 of the Constitution, the court (per Yacoob J) held that though the apparent purpose of section 160 – to determine, influence and control circumstances or behaviour at places where liquor can legally be bought and consumed, thus minimising the harmful effects of consumption of alcohol – was a legitimate interest of the State,<sup>90</sup> the reach of the provision was overbroad. The prohibition in section 160(d) was held to apply to all entertainment of every description, provided only that the conduct covered by the subsection was part of it. This clearly limits the right to freedom of expression, specifically in relation to the freedom of artistic creativity and the freedom to receive and impart information and ideas.<sup>91</sup> The majority of the court thus held that although the right to freedom of expression is not absolute, it is “integral to democracy, to human develop-

<sup>83</sup> Par [28].

<sup>84</sup> 1983 ZLR 186.

<sup>85</sup> This right is protected in s 20(1) of the Zimbabwean Constitution of 1980.

<sup>86</sup> 192.

<sup>87</sup> 2003 1 SACR 425 (CC).

<sup>88</sup> 27 of 1989.

<sup>89</sup> Par [64].

<sup>90</sup> Par [24]. The separate concurring judgment of Ngcobo J adopts the same approach.

<sup>91</sup> Ss 16(1)(b) and 16(1)(c) of the Constitution respectively.

ment and to human life itself",<sup>92</sup> and in this case the limitation of the right could not be regarded as justifiable.<sup>93</sup> The court therefore held section 160(d) to be unconstitutional.

In a lone minority judgment, Madala J dissented. Whilst he agreed with the primacy of freedom of expression, as "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every woman and man", Madala J held that the exercise of this freedom carries with it duties and responsibilities, and is subject to limitation in the appropriate circumstances.<sup>94</sup> Madala J contended that the section did not outlaw artistic expression containing nudity, but merely prohibited the concurrent serving of alcohol.<sup>95</sup> In the light of the "potentially disastrous" combination of alcohol, intoxicated men and provocative nude dancing, the limitation on the right to freedom of expression resulting from section 160(d) was justifiable, according to Madala J.

### 4 3 Pornography

The question of the criminalisation of pornography gives rise to a number of thorny philosophical issues, most notably: how to define pornography and distinguish it from erotica; how to balance the harms of pornography against our interest in freedom of expression, particularly artistic expression; and establishing what kinds of harms, if any, are caused by pornographic depictions. The determination of these matters runs parallel to, and intersects with the enquiry into the philosophical basis for the criminalization of pornography: legal moralism, paternalism, liberalism, and, most recently, feminism.<sup>96</sup> In the pre-constitutional position in South Africa, expressed in the Indecent or Obscene Photographic Matter Act,<sup>97</sup> the criminalisation of pornography was founded on overt moralism, and further, included a political dimension.<sup>98</sup> In this regard it has been said that

"(South Africans) have been subjected to a system of censorship which was intended to impose the Calvinist morality of a small ruling establishment on the entire population."<sup>99</sup>

Defining the parameters of what is "indecent or obscene" is a notoriously difficult, perhaps even unattainable, task.<sup>100</sup> The drafters of the Indecent or Obscene Photographic Matter Act tried to leave nothing to chance, defining the terms as:

<sup>92</sup> Par [23].

<sup>93</sup> Par [29].

<sup>94</sup> Par [39].

<sup>95</sup> Par [42].

<sup>96</sup> Boetzkes "Pornography" in Gray (ed) *The Philosophy of Law* (1999) 659.

<sup>97</sup> 37 of 1967.

<sup>98</sup> Mokgoro J in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 1 SACR 587 (CC) par [11].

<sup>99</sup> Van Wyk *Rights and Constitutionalism, The New South African Legal Order* (1994) 282, cited in fn 97 above.

<sup>100</sup> See Sachs J in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security supra* par [108]; and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) par [19].

“[D]epicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, Lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature”.<sup>101</sup>

A constitutional challenge to this piece of legislation, and specifically the criminalisation of the possession of such “indecent or obscene” photographic matter,<sup>102</sup> had been long anticipated, and it came in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*,<sup>103</sup> where the applicants had been found in possession of videotapes of a sexually explicit nature. Whilst the majority of the Constitutional Court struck down the section on the basis of the unjustified limitation of the right to privacy, Mokgoro J did so on the basis of the unjustified limitation of the right to freedom of expression.<sup>104</sup> In her judgment,<sup>105</sup> Mokgoro J, noting the problems associated with the definitions in the 1967 Act, stressed the centrality of freedom of expression as a *sine qua non* for every person’s right to realise her or his full potential as a human being, free of the imposition of heteronomous power.<sup>106</sup> Seen in this light, the right to receive others’ expressions may be regarded as foundational to each individual’s empowerment to autonomous self-development.<sup>107</sup>

In Namibia, in the case of *Fantasy Enterprises CC v Minister of Home Affairs*,<sup>108</sup> the equivalent provision to section 2 of the Indecent or Obscene Photographic Matter Act,<sup>109</sup> was struck down as unconstitutional, as it unjustifiably limited the right to freedom of expression.<sup>110</sup> The court held the provision to be overbroad, and thus that it constituted an unreasonable restriction on freedom of expression, though in principle the legislative objective – to uphold the standards of decency and morality in society – was not in itself problematic.<sup>111</sup>

The issue of pornography arose again more recently in the context of child pornography, under the new legislation, the Films and Publications Act of 1996,<sup>112</sup> which replaced the Indecent or Obscene Photographic Matter Act. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*,<sup>113</sup> the applicant, having been found in possession of child

<sup>101</sup> S 1.

<sup>102</sup> S 2(1).

<sup>103</sup> *Supra*.

<sup>104</sup> It bears mentioning that Didcott J, for the majority, did not pursue the freedom of expression argument as he doubted that the right to freedom of expression encompassed the “reception of information and ideas by those to whom they are communicated or presented” as well as the conveyance of information and the reception of ideas. The definition of the right to freedom of expression in s 15 of the Interim Constitution did not deal specifically with this point. However, the reformulation of the right in s 16 of the Final Constitution specifically protects the freedom to receive information and ideas, in s 16(1)(b).

<sup>105</sup> Sachs J concurred with the judgment of Mokgoro J.

<sup>106</sup> Par [26].

<sup>107</sup> *Ibid*.

<sup>108</sup> *Supra*.

<sup>109</sup> 37 of 1967, adopted when the erstwhile South West Africa was governed by South Africa.

<sup>110</sup> S 21(1)(a) of the Namibian Constitution.

<sup>111</sup> 102F-G and 103G.

<sup>112</sup> 65 of 1996.

<sup>113</sup> 2003 3 SA 389 (W).

pornography contrary to section 27(1) of the Films and Publications Act,<sup>114</sup> challenged the constitutionality of this provision on the basis of the right to privacy and the right to freedom of expression.<sup>115</sup> In respect of the right to privacy, the court held that the right was not absolute in nature,<sup>116</sup> and thus that the dictum of Didcott J in *Case; Curtis* needed to be qualified to allow for limitation of the right in respect of forms of pornography such as child pornography.<sup>117</sup> The court concluded that (just as the commission of an indecent act with a minor in one's own home would not be protected by the right to privacy) there was no right to privacy to view child pornography.<sup>118</sup>

As regards the right to freedom of expression, the court held<sup>119</sup> that any attempt to justify child pornography in artistic terms must be subordinated to the rights of children,<sup>120</sup> which the court regarded as being of paramount importance.<sup>121</sup>

On appeal,<sup>122</sup> the Constitutional Court (per Langa DCJ, as he then was) noted the difficulty in defining child pornography,<sup>123</sup> before stating that the stimulation of erotic rather than aesthetic feelings is an essential element of the definition of child pornography.<sup>124</sup> After rejecting the applicant's arguments based on a limitation of the right to equality,<sup>125</sup> the court proceeded to examine the argument founded upon the right to freedom of expression, and gave short shrift to the respondents' arguments that child pornography did not qualify as expression,<sup>126</sup> and that even if it was expression, the right to receive it was not protected under section 16 of the Constitution.<sup>127</sup> Given that the right to freedom of expression was infringed by section 27(1), the further issue for the court to decide was whether the limitation was justifiable.<sup>128</sup> Similarly, the right to privacy was held to be infringed by section 27(1), and thus the limitations enquiry was triggered.<sup>129</sup> However, Langa DCJ held, contrary to the court *a quo*, that section 28(2), which provides that a child's best interests "are of paramount importance in every matter concerning the child", does not trump other rights, but like other rights may be subjected to justifiable limitations.<sup>130</sup>

<sup>114</sup> Citing s 27(1):

"A person shall be guilty of an offence if he or she knowingly –

- (a) creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or
- (b) creates, distributes, produces, imports or is in possession of a film which contains a scene or scene of child pornography."

<sup>115</sup> Ss 14 and 16 of the Constitution respectively.

<sup>116</sup> Par [42].

<sup>117</sup> See par [43]-[44].

<sup>118</sup> Absent permission granted by the executive committee in terms of s 22(1) of Act 65 of 1996.

<sup>119</sup> Par [68].

<sup>120</sup> S 28 of the Constitution.

<sup>121</sup> Par [10].

<sup>122</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division supra*.

<sup>123</sup> Par [19].

<sup>124</sup> Par [32].

<sup>125</sup> Par [39]-[45].

<sup>126</sup> Par [48].

<sup>127</sup> Par [49].

<sup>128</sup> Par [50].

<sup>129</sup> Par [53].

<sup>130</sup> Par [55].

As regards the limitations enquiry relating to freedom of speech, the court held that despite the centrality of the right to freedom of expression, expression that is restricted (such as child pornography) is generally of little value, and is not protected under the right to freedom of expression.<sup>131</sup> Further, the court held, the purpose of the legislation is to curb child pornography, which is universally regarded as an evil in all democratic societies.<sup>132</sup> In this regard, Langa DCJ held that the State had established three legitimate objectives which the limitation aims to serve:<sup>133</sup> protecting the dignity of children,<sup>134</sup> stamping out the market for photographs made by abusing children,<sup>135</sup> and preventing a reasonable risk that images will be used to harm children.<sup>136</sup> Thus, it was concluded, that section 27(1) constitutes a reasonable and justifiable limitation on the right to freedom of expression.<sup>137</sup> The court arrived at a similar conclusion in relation to the right to privacy.<sup>138</sup>

## 5 POSSIBLE FUTURE APPLICATIONS

A few possible future applications of the right to freedom of expression fall to be mentioned, which may affect the existing substantive criminal law in relation to the common law crimes of blasphemy and bestiality, and may further impact upon the proposed anti-terrorism legislation.

Though the continued existence of the crime of blasphemy<sup>139</sup> has been called into question,<sup>140</sup> it seems that it remains part of South African criminal law. It has however been subjected to severe criticism; first, because it has been so infrequently used, and thus the crime's continued utility may be doubted,<sup>141</sup> and secondly, because its prohibition infringes both the right to equality and the right to freedom of expression.<sup>142</sup> In relation to the latter point, the narrow scope of operation of the crime (in that it is only committed in respect of the Christian conception of God) only offers protection to one set of religious beliefs, and may therefore be regarded as being discriminatory in nature.<sup>143</sup> Moreover, the right to freedom of expression is clearly limited by this prohibition, albeit that writers have suggested that the

<sup>131</sup> Par [59].

<sup>132</sup> Par [61].

<sup>133</sup> Par [67].

<sup>134</sup> Par [62]-[63].

<sup>135</sup> Par [64].

<sup>136</sup> Whilst the state produced evidence to suggest that images of children engaged in sexual conduct may be injurious to children in one of three ways – “grooming”, the reinforcement of cognitive sexual distortions, and the fueling of paedophiles’ fantasies – only the first of these, the “grooming” of children for sexual abuse by showing them acts other children have purportedly performed, was accepted as valid by the court (par [66]).

<sup>137</sup> Par [88].

<sup>138</sup> Par [91].

<sup>139</sup> Defined by Burchell 880 as “unlawfully, intentionally and publicly acting contemptuously towards God”.

<sup>140</sup> Snyman *Criminal Law* 3ed (1995) vii, in the light of the inception of the Bill of Rights, although in an earlier edition of the same work (1ed (1984) 354) the writer states that “this crime is undoubtedly part of the law”.

<sup>141</sup> Labuschagne 1991 *TRW* 43 raises this same argument in arguing for the decriminalisation of perjury.

<sup>142</sup> Burchell 880.

<sup>143</sup> *Ibid*, thus constituting a contravention of s 9(3) of the Constitution. See further the arguments of Labuschagne 1986 *THRHR* 442ff.

crime should be defined restrictively, and thus that neither mere denial of God's existence nor the expression of a *bona fide* opinion about attributes of God any longer amounts to blasphemy, and further that there must be publication in order for liability to ensue.<sup>144</sup> Should the crime of blasphemy be struck down as unconstitutional, there remains a proscription against incitement to religious hatred in the Films and Publications Act,<sup>145</sup> which prohibits the dissemination of matter which advocates religious hatred and constitutes incitement to cause harm.<sup>146</sup>

The constitutionality of the common law crime of defamation<sup>147</sup> has also been called into question in the light of the section 16 protection of freedom of expression. Burchell has argued for the decriminalisation of defamation, in the light of its "unacceptable potential to inhibit freedom of expression and media freedom".<sup>148</sup> This danger may be somewhat ameliorated if the crime only punished "serious" violations of the complainant's reputation, but whether this is in fact the case is unclear.<sup>149</sup> In any event, it appears as if only serious cases of defamation are prosecuted.<sup>150</sup>

Freedom of expression is also a crucial consideration in public order offences. In the Zimbabwean case of *Chavunduka v Minister of Home Affairs*<sup>151</sup> the "false news" provision contained in section 50(2)(a) of the Law and Order Maintenance Act (criminalising the making or publication of a false statement likely to cause fear, alarm or despondency among the public or any section thereof) was deemed a "speculative offence"<sup>152</sup> and struck down as an unjustifiable limitation of the right to freedom of expression.<sup>153</sup> Many states have recently revised their security legislation in order to counter terrorism, and South Africa is no exception in this regard, with the Protection of Constitutional Democracy Against Terrorist and Related Activities Act<sup>154</sup> coming into force on 20 May 2005. One of the "offences associated or connected with terrorist activities" detailed in section 3 of the Act is that of soliciting support for or giving support to an entity connected with engagement in a terrorist activity, where the accused knew or ought reasonably to have known or suspected that such soliciting is so

<sup>144</sup> Snyman *Criminal Law* 1ed (1984) 355. Labuschagne argues (2001 *Stell LR* 496) that what the crime of blasphemy protects today is not some form of personality rights of God, but rather the personality rights of human beings. The present crime is thus anachronistic.

<sup>145</sup> 65 of 1996.

<sup>146</sup> S 29(1)(c).

<sup>147</sup> Defined by Burchell 741 as "the unlawful and intentional publication of matter that impairs another person's reputation".

<sup>148</sup> *Ibid*, see references 741 fn 5. See also Labuschagne 1990 *THRHR* 392-393, who contends (397) that the delictual sanction for defamation constitutes sufficient protection for an individual's reputation.

<sup>149</sup> Writers such as Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 531 and Snyman 461 favour the view that the crime is limited to serious violations, but a number of other writers disagree – see Burchell 744, Van Oosten "Seriousness, Defamation and Criminal Liability" 1978 95 *SALJ* 505; and Van der Berg "Is Gravity Really an Element of *Crimen Iniuria* and Criminal Defamation in Our Law?" 1988 51 *THRHR* 54 70ff.

<sup>150</sup> Burchell 744.

<sup>151</sup> *Supra*.

<sup>152</sup> 562B-C.

<sup>153</sup> S 20(1) of the Zimbabwean Constitution, 1980.

<sup>154</sup> 33 of 2004.

connected.<sup>155</sup> If one accepts that “solicit” bears its ordinary meaning of “requesting or petitioning”,<sup>156</sup> and it is noted that negligence suffices for the purposes of fault, the breadth of the offence is evident. The right to freedom of expression, already severely limited by this provision, would better be furthered by a fault requirement of intention.

## 6 CONCLUSION

In conclusion it is submitted that South Africans have an earnest responsibility to protect freedom of expression. It is a sad fact of our history that the infringement of this right “was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans”.<sup>157</sup> It is poignant, in the light of the current rule by decree, brutal suppression of opposition and wholesale undermining of the constitution in Zimbabwe, to reflect on the statement by the Zimbabwe Supreme Court that freedom of expression has been hailed as “among the most precious of all the protected freedoms ... and ... always to be jealously guarded by the courts”.<sup>158</sup> Thus it follows that the right to freedom of expression should be all the more zealously guarded by all who cherish freedom. In closing, it is appropriate to reflect once again on the value of freedom of expression, in the words of Justice Brandeis of the United States Supreme Court:<sup>159</sup>

“Those who won our independence believed that the final end of the State was to make men free to develop their faculties ... 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 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 ... They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. 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.”

<sup>155</sup> S 3(2)(c). This provision should be read with s 17(2) of the Act, which provides that the offence is committed whether or not the terrorist activity occurs, and s 17(3) of the Act, which provides that the offence is committed irrespective of whether the actions of the accused actually enhance the ability of any person to commit a specified offence, or whether the accused knows or ought reasonably to have known or suspected the specific offence that may be committed. The penalty for this offence, if heard in the High Court or regional court, is a fine or imprisonment for a period not exceeding 15 years.

<sup>156</sup> See, eg, *Concise Oxford Dictionary of Current English* 8ed (1991).

<sup>157</sup> *Phillips v Director of Public Prosecutions, Witwatersrand Local Division supra* par [23].

<sup>158</sup> *Woods v Minister of Justice, Legal and Parliamentary Affairs supra* 58D-E.

<sup>159</sup> *Whitney v California* 274 US 375-6 (1927), cited in *Kauesa v Minister of Home Affairs* 1995 11 BCLR 1540 (NmS) 1548E-I.