THE ARTICLES IN THIS SUPPLEMENT ARE EDITED PAPERS DELIVERED AT A CONFERENCE CONVENED IN OCTOBER 1994 BY THE FREEDOM OF EXPRESSION INSTITUTE (FXI), THE CENTRE FOR APPLIED LEGAL STUDIES AND THE MEDIA DEFENCE TRUST. TITLED "MAXIMISING FREEDOM OF EXPRESSION IN THE NEW SOUTH AFRICA", THE AIM OF THE CONFERENCE WAS TO DISCUSS PRECISELY THAT. THE GATHERING WAS SPONSORED BY THE NEWSPAPER PRESS UNION OF SOUTH AFRICA AND THE FRIEDRICH EBERT STIFTUNG. A GRANT FROM THE LATTER MADE THIS REVIEW SUPPLEMENT POSSIBLE.

FXI CONFERENCE

OPENING SALVO

CONFERENCE ORGANISER JEANETTE MINNIE

WE AT FXI and all other persons in the country who cherish press freedom were abruptly shaken out of our post-election reverie when the new ANC Minister of Defence tried to use one of these laws, the notorious Protection of Information Act, in an attempt to silence the Weekly Mail and Guardian from making further disclosures about hit squad and dirty tricks allegations.

The Minister, as we know, after a public outcry, withdrew the action and it also appeared he was not personally consulted about his department's decision to gag the paper. Bureaucrats—some apparently wearing uniforms with much insignia on their shoulders—had decided to react much as they would have during the reign of the apartheid governments.

Since then attempts have been made to use other laws as well—laws formulated by a succession of apartheid regimes and designed to ensure the public will only know what the government wants them to.

The time has come for concerted action to remove these laws.

Then there is the need to strengthen the right of access to official information, i.e. information held by the government in trust of the people of this country. It does not belong to the government, it belongs to us, the people.

We at FXI are aiming to achieve reforms far beyond what the government intends. There has been much publicity around speeches by Deputy President Thabo Mbeki that the government will, during the next session of Parliament, introduce a Freedom of Information Act.

Little publicity, however, has been forthcoming about the role and function of such an Act and the relationship between the Act and the relevant clause in the Bill of Rights. If the clause on Access to Official Information in the Bill of Rights is deficient, then the Act which underpins it will also be deficient.

The Act cannot give us more rights than those contained in the Constitution, and the Constitution gives us only a limited right. In fact it does not recognise a right to know—only a need to know.

Not only do we need to strengthen our right to official information, we must also ensure that the Act will give us the means of access—the processes by which we will be able to ask for and hopefully receive information. If these processes are deficient, then never mind what our rights are, we still may not have access to official information—by bureaucratic default.

Then there are other aspects of the Constitution and its Bill of Rights that must be looked at critically.

Is the Freedom of Expression clause good enough? Some of us think it will still be too easy for Parliament to limit this right during a State of Emergency or in other circumstances which they might think suitable.

These possible limitations, which are provided for in the Constitution, must continue to be critically examined and, if necessary, challenged.

A contentious issue which has never been resolved, and possibly never may, is the issue of hate speech. As discussed at the conference, this expression manifests itself actively in racism and sexism, and it raises the question of whether the constitutional right to dignity takes precedence over the right to free expression.

Another pertinent issue is broadcasting legislation and policy. After a massive effort by the Campaign for Independent Broadcasting—of which the FXI's predecessor, the Campaign for Open Media, was the central co-ordinating body—an independent Board of the SABC was appointed. This was through a public process designed to make the Board independent of any government of the day and the influence of political parties.

But will the SABC remain independent politically from a legal point of view? The Broadcasting Act still gives the State President the power of appointing any future SABC Board. Is the Independent Broadcasting Authority really politically independent of the government? If it is, why do we have a minister with the portfolio of broadcasting? What has he got to do with it? Who legally controls broadcasting in the new provinces established after the demise of the former TBVC states—the IBA or the regional governments who constitutionally have authority over them?

How did it happen that we appear to have two sets of conflicting legislation in this regard? The latter problem was most vividly illustrated when the North West Government appointed a new Director-General of the Bophuthatswana Broadcasting Corporation—albeit only for a six-month period.

The appointment was legally in keeping with the Bophuthatswana Broadcasting Act. But it is a clear reversal of the spirit of media policies established in relation to the appointment of the SABC Board.

A very important issue up for discussion is the Publications Act which underwrites the Publications Control Board. This Board was a powerful tool of censorship in the hands of former governments.

Now its role and function appears to clash directly with the Freedom of Expression clause in the Constitution. Does this mean that the Act will be scrapped? Apparently not—the suggestion seems rather that it is to be amended so that the Board can play a classificatory role, rather than a censorship role, emulating the role of similar boards in other countries.

But what should be tackled is whether this Act should be amended at all, and whether it shouldn't just simply be repealed.

Censorship laws, access to official information, the Constitution, hate speech, broadcasting independence and the Publications Act—these are the key concerns for press freedom and the free flow of information in South Africa.

UNDER THE SURGEON'S KNIFE

MAXIMISING FREEDOM OF EXPRESSION IN THE NEW SOUTH AFRICA

As an author I have fallen foul of one provision or the other of our censorship laws countless times, to such a degree that censorship has left an ugly scar on my soul and on my psyche.

We are called upon to be plastic surgeons to remove those scars.

Creativity, normally the most enjoyable of human impulses, now comes to many of us like a difficult pregnancy and the trauma of a writer's block assails those like me with the pain that comes from a blockage of one's fallopian tubes.

We are called upon to be midwives who will nurse the nation through the pains of parturition.

MBULELO VIZIKHUNGO MZAMANE

The Minister of Home Affairs recently appointed a Task Force to report to him on the validity of the Publications Act in relation to the Freedom of Expression clause in the interim Bill of Rights.

You will recall that this is the same Rambo Kid who stormed the Durban studios of the SABC but was beaten to the draw by Kid Sifiso Zulu, famous in Ulundi circles for shooting from the hip.

The Publications Act underwrites the Publications Control Board, which has been a major mechanism of censorship in South Africa. The Publication Control Board itself has acknowledged that its rationale and activities are probably in violation of the clause in the Bill of Rights.

What remarkable hindsight!

If the Task Force finds the Publications Act substantially lacking in viability, it has to provide His Royal Minister with a report and a new draft bill soon. Our failure to become involved in the debate and influence the outcome of these deliberations could prove detrimental.

The Task Force has decided to consult with the public—apart from written submissions, it also intends to

hold public hearings—to acquaint itself with public opinion on a range of issues.

As a literary scholar, I have often wondered at the wisdom of legislation which could ban *Lady Chatterley's Lover* and allow *Songs of Solomon*, which is hard to rival as far as erotica in poetry goes, to be read by children of Sunday School-going age.

It is, indeed, an asinine phenomenon, and there is a sense in which all these expensive Task Forces, set up to establish that censorship could only have been dreamt up by people with the intelligence of donkeys, are a waste of taxpayers' money.

And yet if we should leave the issue to the machinations of government, we may find ourselves with a solution that is of validity only to the royal gatekeepers.

We may find ourselves, that is, clutching reeds in place of cultural weapons—a situation which would make of all of us sitting ducks for any knob-kierie wielding Minister.

REMOVING LEGAL IMPEDIMENTS

Removing legal impediments to freedom of expression, then, will call for certain mechanisms of legal reform.

There are still upward of a hundred laws which curtail press freedom and the free flow of information. These were formulated by successive apartheid governments and parliaments, but remain on the statute books. They are a temptation to anyone in power with a propensity for intolerance.

Soon after our new democratic government took power, you may recall, the Minister of Defence, Comrade Joe Modise, tried to use one of these laws—the Protection of Information Act—to prevent the Weekly Mail and Guardian from publishing dirty tricks allegations.

There was an outcry, from his own party even, and he withdrew the action. We would cite other examples in the short space of six months since the Government of National Unity (GNU) was formed. They all serve to show how dangerous it is for these laws to remain. They must be repealed.

We must address mechanisms of getting rid of these laws, such as urging Parliament to scrap them through a sweeping General Amendment Repeal Act—an Omnibus Act—or by litigating them against the Bill of Rights in the Constitutional Court—a much longer and more costly route—or a combination of both.

ACCESS TO OFFICIAL INFORMATION

The FXI has started a campaign to establish the right of citizens to have access to official information.

At present no automatic right to official information exists. The clause in the Bill of Rights recognises only a need to know, and not a right to know. You have to prove that you have to have access to official information in order to protect one of your other rights in the Bill of Rights.

There is also no recognition of the right of groups, such as the news media or an academic institution, to have access. Only individuals can have access. Such restrictions must go.

The FXI campaign is aimed at amending this clause in the Bill of Rights. Further, there must be a Freedom of Information Act to describe the procedure by which citizens will exercise this right of access.

We are not so myopic as not to realise that the same Freedom of Information Act may also have to define, ironic as this may sound, the areas in which citizens cannot automatically have access to information, in the interest of State Security—as in war time, for example—or to private financial information. But such information, too, must in due course be declassified.

We, therefore, welcome Deputy President Thabo Mbeki's announcement that such an Act will be adopted by Parliament in 1995.

We believe strongly, however, that there must be a public consultation process coupled with a process of raising public awareness on the issues involved. These processes must inform the drafting of the Act.

The FXI intends to implement these consultation and public awareness processes and to co-ordinate a campaign on Access to Official Information. We want much more than the present constitution provides.

We want communities—geographic or interest—to be able to influence government policies on issues which will affect those communities. Thus they must know what government is discussing and when it is holding these discussions, so that they can make interventions.

We want citizens to be able to obtain all kinds of statistics and information for business and commercial purposes.

We want teachers to know what curriculum development is taking place and how curriculae differ from region to region.

We want the news media to have maximum access to inform the public properly and to play its watchdog role.

We want access to minutes of meetings and such other information as may be in the public interest.

There must also be proper bureaucratic systems to give people access to information. Is the civil service structured in such a way that it will be able to supply information within reasonable time periods, or will people have to wait for years? How complicated will the process be? Will illiterate people be able to use it?

The FXI is presently approaching the government to tell it that it will be co-ordinating a public campaign and that it seeks representation in any task group which is established. We also want to help establish the terms of reference of such a task group. We must ensure that civil society is properly represented in such a task group.

Central to all deliberations must be the Constitution and its capacity to deliver on freedom of expression.

We must examine very closely whether the Freedom of Expression Clause in the Bill of Rights needs more protection that it currently has. For instance, Parliament can revoke this right in a State of Emergency or limit it under the Limitations Clause in the Bill of Rights. Some of us think that it may still be too easy for Parliament to limit or curtail this right. The matter needs more rigorous debate.

Another issue for consideration should be the balancing of rights in the Bill of Rights. In other words, what dangers or limits are there for Freedom of Expression in terms of the protection of other rights?

BROADCASTING REFORMS

The need, or otherwise, to review broadcasting legislation and broadcasting developments must also be discussed. Are further broadcasting reforms needed to the present broadcasting legislation, and are amendments needed to the Independent Broadcasting Authority (IBA) Act?

> "... there is a sense in which all these expensive Task Forces, set up to establish that censorship could only have been dreamt up by people with the intelligence of donkeys, are a waste of taxpayers' money."

We must also realise that there is a particular problem around the political independence of some public broadcasters, particularly, in the TBVC states, some of which are proving resistant to incorporation. Constitutionally the new regional governments have been given authority over regional public broadcasters such as BOP Broadcasting, Transkei Broadcasting and Ciskei Broadcasting.

This seems to be in straight conflict with the government's declared policy that public broadcasters must be independent of government and political control. This was the reason why the IBA was established: to enable broadcasting to be independently controlled. The question now is: Who is in control—the IBA or the relevant regional governments?

In a system of concentrated control, away from the previously marginalised and oppressed, can we completely rule out some measure of involvement by a government that now represents those previously excluded, the majority?

In what form and on what terms should such intervention be countenanced? The debate needs to go beyond point scoring, to issues of broader representation of interests, marginal or otherwise.

In the FXI's former guise as the Campaign for Open Media, it fought gallantly, through the Campaign for Independent Broadcasting, to establish independent appointment procedures for the SABC Board through public hearings, and to help establish the IBA.

We do not want to see these ideals collapsing and, if necessary, organisations must again campaign on this front, in relation to regional public broadcasters.

HATE SPEECH

Some attention, must also be paid to issues of racism, sexism, classism etc., and the question of whether this kind of speech should be legislated against and what this means in terms of censorship.

If discrimination at the work place on grounds of race, sex, religion, class, etc. is unconstitutional and violates fundamental rights, does insult along similar terms constitute a similarly grave offence?

The views of victims and those who are offended in such matters need to be solicited in more meaningful terms.

In addition, comparative studies with other societies need to be conducted, for the debate in other societies on some of the matters before us is, indeed, advanced.

LANGUAGE

How is freedom of expression possible outside of a language policy that is democratic, inclusive and non-hierarchical?

There is serious travesty of freedom of expression, in my view, when TV1 expresses English language and Afrikaans interests, and the majority languages are all clustered on CCV.

What should be constitutionally entrenched language rights in all such spheres? Is disempowerment, through taking away my language and thus my voice, not a violation of my fundamental human rights?

It seems most regrettable to me to not consider the issue of language rights as central to maximising freedom of expression and access to information.

RACE AND GENDER

The arts, media, and information fraternity—the sorority is under-represented—is a white, male club in this country. Ownership of the media and publishing houses reflect such a pattern.

In a racially fragmented society such as ours, people who run the media and publishing houses—we know that blacks and women are often junior or token—have willy-nilly been socialised into and internalised values from the dominant culture.

The arts, media and information fraternity in this country is not representative. What passes for news in our media is often views, and news often means white news. Scan through any newspaper, unless the newspaper is specifically designated black. These processes are still racial and racist.

A great deal of the practical manifestation of such a racist consciousness in any society also has to do with cultural illiteracy—and our white journalists, in particular, are culturally illiterate.

My definition of cultural illiteracy is knowing your Athol Fugard but without ever having heard of Zakes Mokae or Zakes Mda. The vast majority of people in this conference can tell you where Wits is but have no idea in which town Fort Hare is located. That's cultural illiteracy.

It is time for both inspection (of governmental performance, censorship, the Bill of Rights, etc.) and introspection (in the direction of self-criticism and the creation of conditions necessary for broader representation of our varied and variegated interests).

It is upon these extremely important matters that the laying of solid foundations for our democracy depends.

The author is patron of the FXI and rector of Fort Hare University.

CENSORSHIP

IS THERE STILL A ROLE FOR THE PUBLICATIONS CONTROL BOARD?

NORMAN MANOIM

I INTEND TO look broadly at the issues around the control of censorship—not just the censorship board because that's not the only place where censorship occurs.

Many people may agree that the current censorship form is crude and clumsy and reflects the old apartheid regime. But there are many who would not regard themselves as coming out of that censorship camp who still believe censorship of some form should exist and feel very strongly about these issues. Others come from a more libertarian standpoint who would be utterly opposed either to any form of censorship or to censorship in the forms that they might suggest.

The Minister of Home Affairs has appointed a task group that will look into the validity of the Publications Act. Some of the issues that they are concerned about are:

- the Act's validity in the light of the Constitution;
- whether there should be any limits on forms of publications as far as adults are concerned;
- whether there should be special theatres and shops provided where only adults can view material of a soft pornographic nature;
- whether the present system according to which there is classification of films should be continued, to what extent;
- whether there should be a warning system of films and videos and whether there should be continued age restrictions and plastic wrappers;
- to what extent religious convictions should be protected;
- what special measures should be taken to protect against publications and films which include multi-racial hatred or sexually exploited children or are excessively violent and concerns any other relevant matter.

The Publications Act as it stands has the notorious Section 47.2 which is a sort of definition section which has the sting. It regulates and censors publications on the following issues—blasphemy, what is now becoming more fashionably known as hate speech broadly speaking, state security and pornography and obscenity.

There are problems created by the new Constitution protecting certain kinds of speech more fully than it does other forms of speech. The Constitution creates a right and then at the back is a limitations clause, whereby all rights can be limited. The limitations clause as it is presently designed affords greater protection to political speech than it does to other kinds of speech. What was borne in mind by the drafters was that issues like obscenity, pornography and blasphemy—notwithstanding in existence of a clause on freedom of speech—will enjoy less protection than political speech. The thinking here is that freedom of speech primarily exists for a political purpose and that other speech should be less protected.

I think this needs to be challenged, but certainly it was the thinking of the drafters. It is quite clear that if pornography, obscenity, hate speech and blasphemy are put on a lower scale, then legislation restricting these areas may not be unconstitutional. What is political speech will be given greater protection. Now one can immediately see there's a problem here. Where exactly do you draw the neat lines between what is political and what is not political? Is it so easy?

An American Supreme Court justice is reputed to have said: "I don't know how to define pornography but I know it when I see it." Many people have ventured to try and find a definition of pornography and obscenity, but all of these definitions are usually value-loaded at that particular time. Pornography, which is so susceptible to so many different kinds of ideas, to your cultural perceptions, is not as easy to draft as definitions in the Tax Statute—and these themselves are quite difficult.

Definitions of pornography or interpretations by the Court generally rely on what is known as a community stand or a community value. These are tests provided in most jurisdictions as to what the community will accept. The problem with a community value is that it's not like the weather—it's not outside there. You can't go out and measure the particular thing and say that the community will actually accept pubic hair at the moment, anything more than that it won't.

It's a very, very difficult issue and at the end of the day I would suggest dishonest. Trying to suggest what the community will accept or not, is an entirely subjective matter.

There is another issue. Most of the views of what is pornography and what is obscenity are elitist. Last century in America there was man whose job it was in life to ferret out pornography. He raided the New York Art Museum where there were some paintings by some leading French painters which contained nudes and everyone was utterly horrified. The same man then raided the corner shops in the working class districts where there were postcards of the same paintings. Nobody was horrified. The poor people were prosecuted.

At the end of the day, what people see as dangerous pornography is what it does to the "rude and the crude". In the hands of the elite, it is okay. And that's what we see in this country. On the Weekly Mail Film Festival, it's okay to have all this funny French erotic stuff. Don't put it into the Roxy Bioscope out there in the southern suburbs—or in the townships. Heaven knows how those people may react!

The debate on what is pornography and how to deal with it has changed substantially in the last few decades. Previously, control around pornography came from a conservative or a religious position. The feminist position is quite different. Most feminists would not object to erotica—if one could find a definition of that; the religious purists would. The feminist censor lobby essentially sees pornography in the same way as people who want regulation against hate speech. They see it as speech that is harmful to society and requiring regulation. Regulation may take different forms, but if pornography is harmful then the State has an interest to protect society from that kind of expression, particularly because it (a) perpetrates violence against women and (b) perpetuates certain sexual stereotypes.

There was an unsuccessful attempt by some of the leading feminist writers in the US to devise legislation in this vein. But it was too widely stated in terms of American jurisprudence, and the Federal Court held that because innocent speech was going to be criminalised, this legislation was overturned.

A different outcome happened in the Canadian Supreme Court quite recently. In this case a video dealer was prosecuted under a criminal statute for distributing pornographic material. The video distributor had displayed a notice that if "Sex orientated material offends you, please do not enter—no admittance to persons under 18 years." Now video dealers don't put notices out there to protect the public, they do it precisely to entice the public. The dealer was prosecuted under the criminal code there which made it an offence to distribute pornographic material.

There is an interesting definition in the Canadian Criminal Act as to what porno material is. A dominant characteristic is that "undue exploitation of sex or of sex in any one or more of the following subjects, namely crime, horror, cruelty, and violence shall be deemed to be obscene". It was a definition that the court in Canada was happy with.

A constitutional challenge to this was thwarted. Canada has a Bill of Rights very similar to our own and the Supreme Court upheld the validity of this ban on pornography on the basis that a limitations clause in the bill justified the action. So we have two quite different results from Canada and the United States.

PRIOR CENSORSHIP

Other problems arise not only from definitions but from the mechanisms of pornography control.

The first issue is prior censorship which is, to a certain extent, how our publications system works at the moment with films. If you want to show a film publically you need a certificate beforehand. This is distinct from censorship after the fact—the fact that something can be declared undesirable.

For many libertarians, there is principle of opposition to prior censorship. Other people will say that you have got to have certainty in the system. Film distributors spend a lot of money promoting a film and it doesn't help if it suddenly gets banned the next day. At least if they knew upfront that it wasn't going to be allowed they could make certain cuts. Some people have attempted to ameliorate the system by having a film industry agreement. As in England, films can be submitted to a committee that consists of people who are sympathetic to the industry, who will look at it and then decide on what certificate to award. They won't stop a film, but they will send this or that certificate to the cinema to display. There are similar mechanisms to balance the interests in speech in advance but also to try and balance the community in protection.

The next issue is: am I liable for something criminally or civilly before it's been declared to be offensive? In other words, if I am selling a particular magazine, whether it's been declared offensive or not, am I supposed to look at it in advance and decide for myself and say: "Look this can be obscene, I could be charged. I won't distribute it"? This makes private censors out of all of us.

That is a very dangerous system, because wherever you may draw your line on obscenity, you have the effect of

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that kind of system of chilling speech. So, many American Courts say, you must have a system where you know in advance as to whether something is illegal—some kind of body has to have made a determination, otherwise you cannot be held to have committed that offence.

This raises all sorts of problems. Does it mean that you must have some censorship system in advance? Or something that declares the standing of material?

PRAGMATIC PROBLEM

There is also a pragmatic problem with censorship. Many purveyors of what some of you might consider pornography delight in the fact that they might get banned or come before some system. It creates enormous publicity around the issue, and it creates the best advertising campaign that you could want. So pragmatically, instead of protecting people, you might entice them by highlighting these things. So from a purely pragmatic, non-ideological point of view, there is a problem with this legislation as well.

> "Many purveyors of what some of you might consider pornography delight in the fact that they might get banned or come before some system."

One of the solutions to regulate pornography is to say that you must make a distinction between private and public morality. To the extent that I want to read this filth and I should have access to it, I should be allowed to do so. But where I impose this on the public as a whole or on a captive audience, then there should be some regulation.

In this view, even with all the definitions problems, even if you get it wrong, there's a compelling public interest to protect an unwilling audience.

The same may apply if somebody through the post wants to solicit you to buy their latest magazine and all sorts of porno filth and people doing unpetlike things with their animals and you don't want to see that sort of thing. That could contravene a regulation of the post office to say that you can't put that kind of material through the post, not to impose on anyone's freedom of speech. But if you do want to go to a pornographic video shop, if you do want to go to the Racy Cinema House, you should be allowed to do so.

That's one compromise. It's not going to be acceptable to many precisely because they say, it doesn't matter if we don't see the thing. It doesn't matter that people can see it in a more restrictive way. If it's harmful to society, it must go. The rejoinder to that, is if you say that all these things are harmful to society, why just stop at saying you can't just read this stuff.

Why not say to people, you should be reading this as well in order to deal with this problem in society. So why not say, not only may you not read Hustler magazine, but you must read Andrea Dworkin. To which one might respond, give me jail instead.

I want to conclude by drawing from Ronald Dworkin, a well-known legal philosopher. He raises the danger of what happens to these laws, because once you've got them on the book, you can't control who are the victims, who are the defendants.

Feminist pressure led the Canadian legislature to adopt a severe censorship law, which was upheld against constitutional challenge. But the first authors to be banned under the new Canadian statues, were not those the feminists had in mind. They were in fact prominent homosexual and lesbian authors, a radical black feminist accused of stirring up hatred against whites and, for a time, Andrea Dworkin, herself.

To compromise on freedom because we think our immediate goals more important, may mean we find the power to exploit the compromise is not in our own hands after all. Rather, it is wielded by fanatical moralists with their own brand of hate.

The author is a prominent media lawyer

BROADCASTING: DO WE NEED MORE REFORMS?

DAVID DISON

LEGISLATION regulating broadcasting needs to be constantly reviewed, in view of technological developments on the one hand, and social-economic developments on the other, not to mention the ongoing jurisprudential debate in relation to light and heavy touch regulation.

In South Africa today, the issue is whether we have adequate structural legislation in place to achieve the regulation of broadcasting in this country. Quite simply the answer is no.

Those saying that we need less legislation and not more, must remember one is dealing with the finite resource of broadcasting frequencies. This is an environment in which rules need to be developed so as to ensure an equitable distribution of broadcasting opportunities within this finite spectrum. You will hear technically-orientated people telling you that with the coming of digital and satellite technology, the availability of frequency spectrum is magically multiplied so that the entire scarcity debate becomes somewhat academic. Would that this was the case.

For the short and even medium term, the mass market will depend on analog delivery systems, and it will only be the more privileged sectors of society that will reap the benefits of digitally delivered signals. Thus scarcity is a very real consideration, and accordingly regulation is required to ensure optimal diversity within a finite set of opportunities.

The IBA Act envisages a three tier system of broadcasting, and the IBA is in the process of issuing licences to the community sector, whilst the other two tiers, public and commercial, are subject to ongoing enquiry. It appears that in respect of these two sectors, some broadcasting legislative reform is undoubtedly required.

Public broadcasting

The first question that needs to be cleared up is whether the IBA has jurisdiction over all public broadcasting in South Africa. I note that Councillor William Lane of the IBA is quoted in Business Day as saying that they have taken legal opinion to the effect that the TBVC broadcasters are not subject to the IBA Act.

My argument however is the IBA should re-think its position in this regard. I say this because of a reading of Section 69 of the Act, read with Section 45(3), where jurisdiction over all public broadcasters in the Republic is given to the IBA.

There appears to be confusion caused by the provision in chapter 6 of the Constitution that provincial governments will have control over provincial public broadcasters. I would argue, though, that such control does not exclude regulatory control by the IBA, notwithstanding regional government responsibility for such provincial public broadcasters. For example, Minister Pallo Jordan is responsible for the administration of the Broadcasting Act of 1976 which governs the SABC, but this does not exclude the regulatory power which the IBA is entitled to exert over the SABC and its various broadcasting services.

It is therefore quite proper for both the State and the IBA to have relationships of governance and control over the public broadcaster. The mere fact that the Constitution gives provincial legislatures legislative competence over provincial public media does not exclude the regulatory function of the IBA to license such provincial public broadcasters.

I believe it would be proper for the IBA to deal with the SABC public broadcaster, i.e. the national public broadcaster and the TBVC public broadcasters. It should hear the submissions of the national and regional public broadcasting players, and determine, together with them, in a process of consultation and debate, the most appropriate way forward.

The results of the public broadcasting element of the IBA's Triple Inquiry will be tabled in Parliament. Parliament will in all probability support such findings. It is then that major legislative reform in the sector of public broadcasting will be capable of being finally drawn up.

Section 2 of the Constitution provides the key for understanding how national and provincial legislation governing public broadcasting services at both national and provincial levels can be introduced.

Section 2(c) provides as follows:

A law passed by a provincial legislature ..... shall prevail over an Act of Parliament which deals with a matter (over which a provincial legislature is legislatively competent, e.g. provincial public media) except in so far as:

- *the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;*
- *the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services.*

It can be argued on the basis of this section, that public broadcasting services as a form of public service do require minimum standards across the nation for their effective provision. This in turn requires the national government to set down uniform norms or standards regarding public broadcasting services, whether national or provincial, that will apply generally throughout the country.

Because the Constitution gives the provincial government legislative competence over provincial public media, this provides an opportunity to establish provincial public broadcasting corporations in each province, separate from the SABC. The provinces could then be responsible for public radio services primarily, as television would be too expensive to establish at the regional level.

Having a provincial layer of regional public radio stations would enable the TBVC broadcasters to be re-incorporated into South Africa's public broadcasting system without failing under the central control of the SABC. For example, Radio Transkei, Radio Ciskei and Radio Algoa could be managed by an Eastern Cape Public Broadcasting Corporation.

In this way, greater pluralism and diversity would be encouraged and the specific regional needs in terms of education, culture and language could be attended to.

At the same time, the SABC could concentrate on the national level, and rationalise its operations into two public television channels and 11 to 12 national public radio stations, one of which could provide educational programming. A leaner and meaner SABC would be better able to face the dramatic changes that are taking place internationally in terms of transnational satellite broadcasting and the competition of global multinational media corporations.

The vision therefore is one which will require a new Public Broadcasting Omnibus Statute, to be presented in Parliament shortly after the IBA's findings have been confirmed. This Public Broadcasting Statute would set norms and standards to which both national and provincial public broadcasters would be required to adhere. It would be a general enabling statute, allowing for a new SABC Act, for example, a North Western Province Public Broadcasting Act, an Eastern Cape Public Broadcasting Act and so on.

In line with the Public Broadcasting Act, each of the provincial legislatures would then be empowered and guided in the drafting of their own legislation particularly in the areas of the establishment process for an independent board, public hearings for the appointment of such a board, the charter of the public broadcaster, and the ability to levy licence fees, etc.

Outside of such a legislative process, it is difficult to understand how either the SABC or the provincial public broadcasters can at this stage be talking of finalising their own statutes.

The IBA is consulting with the broadcasting industry at present as to various amendments that it requires to the IBA Act. The bulk of these are procedural in nature, but there are some substantive areas which need some comment.

Amending the grandfather licences

Section 28(9) now empowers the Authority to conduct *"inquiries into the nature and extent of the rights and obligations in relation to existing broadcasting licences"*.

This power should be read together with the amendment to Section 52 by the addition of a new sub-clause (1d) which provides that a broadcasting licence may be amended by the Authority in its discretion *"so as to comply to such extent as the Authority may deem appropriate with such of the terms, conditions, obligations or other provisions as the Authority may apply generally to all new broadcasting licences issued in the same category and which the Authority deems necessary to achieve the objects of this Act."*

Clearly these two additions now give the ability to the Authority to amend the terms and conditions of the grandfather licences.

Interestingly, however, the amendments do not actually affect the grandfather licences as they stand at present. There was a tremendous fear in the industry that that is what the amendments would do. Instead, the IBA have purported to empower themselves to amend those licences. This is significant, because it reflects the opinion that, constitutionally and in administrative law, it would be difficult if not well nigh impossible, for the IBA to diminish the rights of grandfathered licensees, without the consent of those licensees.

Clause 28 of Chapter 3 of the Constitution provides that no deprivation of any rights in property shall be committed otherwise than in accordance with the law, which law shall in turn only be permissible "for public purposes". In situations where previous licensees such as M-Net and 702 have invested millions in developing broadcasting services which are enjoyed by the public, it would be very difficult for the IBA to show that the diminishing of the rights of these pre-existing licensees was permissible on the grounds of "public purposes".

I am of the view that the IBA has introduced these amendments in order to begin the process of negotiation with

"For the short and even medium term, the mass market will depend on analog delivery systems, and it will only be the more privileged sectors of society that will reap the benefits of digitally delivered signals. Thus scarcity is a very real consideration, and accordingly regulation is required to ensure optimal diversity within a finite set of opportunities."

the existing grandfathered licensees. The grandfathered licensees are seeking amendments themselves.

It would appear to us that the IBA is attempting to establish a bargaining position viz-a-vis these licensees. It should also be remembered that the IBA has consistently blamed the Act for its inability to be flexible and to move more speedily.

Now that the IBA is going to establish "authorship" over the Act, it will be under even greater pressure to move swiftly on the licensing and re-regulation front.

Signal distributors

Minor amendments to Section 33 are intended to close a loophole that may have allowed unlawful broadcasting signal distributors to be grandfathered. Furthermore, the IBA now has the powers to amend grandfathered signal distribution licences. A completely new Section 38A proposes to place the same foreign ownership limitations on broadcasting signal distribution licensees which at present only apply to broadcasting licensees.

New procedural and evidentiary powers

A newly inserted Section 28A would empower the Authority to require persons to give evidence in connection with any Section 28 inquiry or Section 42 hearing, to deliver any relevant documents or objects and to prescribe certain procedures at these inquiries and hearings. There is in principle no objection to these powers. They are additional to the existing Section 72 notice powers which the IBA already has with regard to licensees and the production of books, records, accounts, estimates, returns and other information, as well as the Section 73 powers of inspection of authorised persons.

The very worrying element of this amendment, is 28A(5) which provides as follows:

"The chairperson presiding at an inquiry or hearing referred to in sub-section 1 may order that an examination under this section shall be held behind closed doors, but a person being examined may be assisted by an advisor."

This must surely be unacceptable to all those who uphold the rights of freedom of expression. It is a provision which would probably not survive the Constitutional Court, and one which is ill-advised. For a body which upholds freedom of expression and diversity of opinion, the provision is untenable. The IBA Act signalled the end of an era in which public and commercial interests were required to lobby government in order to obtain licences as a dispensation. This amendment is inimical to the transition.

Space stations and satellite broadcasting

The amendment of the definition of "broadcasting service" to include "a service broadcast by means of a space station" is clearly aimed at bringing broadcasting satellite services within the jurisdictional ambit of the IBA.

There is world-wide debate as to whether regulators can bring satellite services into the regulatory order. Can the IBA exert jurisdiction over a "space station"? There will undoubtedly be a legal battle in this regard, but the IBA has signalled its intention to license the stations that will be broadcast from PanAm SatIV. Critical here will be the inclusion of the Ku-band into the definition of a broadcasting services frequency band. The IBA has not purported to do this in the Act, but undoubtedly, this will be its next move.

Accordingly, the industry is going to have to evaluate very carefully whether it takes up an opposing stance in this regard. There are some that argue that the 80/20 SA-foreign ownership in broadcast rule means that if these services have to be licensed, South African licenced signal distributors would not be able to bring many of them into the country because of these prohibitive conditions.

It is argued that in this event, foreign signal distributors who are not registered in South Africa will be able to steal a march on South African signal distributors. This debate is clearly in its infancy.

The fact that the IBA is now empowering itself with wider powers is obviously worrying to the grandfathered licensees. However one must ask whether it would not be politic to allow the IBA to put its stamp on the Act, particularly when constitutional guarantees are so firmly in place.

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KICKING OVER THE STATUTES

REMOVING LEGAL IMPEDIMENTS TO FREEDOM OF EXPRESSION: MECHANISMS OF LEGAL REFORM

AMANDA ARMSTRONG

OPTIONS FOR CHANGE

There are numerous laws on our statute books which impact on freedom of expression.

A handful of these are positive, but the majority impact negatively on freedom of expression and ought to be repealed or amended. How? There are essentially two options.

Firstly, to opt for legislative reform. Secondly, to litigate in the Constitutional Court, although these options are not mutually exclusive.

LEGISLATIVE REFORM

However, the first option, namely legislative reform, has certain advantages over that of constitutional litigation:

- It may allow for a more systematic, effective, over-arching, coherent, simpler and quicker approach, as opposed to over a lengthy period of time having to rely on a series of Constitutional Court decisions;
- Those who drive the process may have greater control over the outcome thereof than would be the case of relying on the Constitutional Court;
- It may be a far better way of building a campaign around these issues, involving the media industry and organisations, engendering public debate and heightening public awareness;
- It will be a far less expensive approach than the constitutional litigation route.

If we are to opt for legislative reform, how do we go about this?

There are already a number of processes afoot:

- Firstly, there is the drafting of the new or final Constitution in accordance with the provisions of Chapter 5 of the Interim Constitution. The two critical clauses are:
  - Section 15, which is the freedom of expression clause; and
  - Section 23, which is the access to information clause,

  both of which have to be read together with s33, which is the limitations clause. Every effort should be made to ensure that in the final Constitution these clauses are as we would want them to be, and that the limitations clause, if any, impacts minimally on these two clauses.
- Secondly, Deputy President, Mr Thabo Mbeki, has appointed a Task Group to prepare a Freedom of Information Bill to be tabled in Parliament next year.
- Thirdly, the Minister of Home Affairs has appointed a Task Group to consider the Publications Act and whether it passes constitutional scrutiny. If the Task Group concludes that it does not, they are to make recommendations as to what, if anything, ought to replace the the Act.
- Fourthly, there is the legislation which deals with broadcasting: the IBA Act and the proposed amendments to it.

Then of course there are the three other statutes which hail from the apartheid days, namely the Radio Act, the Broadcasting Act, which governs the SABC, and aspects of the Post Office Act.

These statutes require amendment or repeal insofar as they relate to broadcasting. Legislation pertaining to public broadcasting in particular will need to be introduced.

These four issues, namely constitutional reform, a Freedom of Information Act, the review of the Publications Act and broadcasting legislation, all represent positive developments and there is an indication of progress being made.

There are, however, a range of statutory provisions which remain on our statute books which impact negatively on freedom of expression. The more important of these are:

- The Armaments Development and Production Act which prohibits the disclosure of certain information;
- The Defence Act provisions which empower the State President to prohibit:
  - certain communications (s101),
  - publication of information relating to the SADF and associated armed forces (s118(1)(a)),
  - publication of any statement or rumour relating to the SADF which is calculated to prejudice or embarrass the government in its foreign relations or to alarm or depress members of the public (s118(1)(b)),
  - publication of secret or confidential information relating to the defence of the Republic (s118(2)),
  - taking of photographs or the making of sketches of military premises or installations (s119),
  - inducing members of the SADF to neglect or act in conflict with such members' duties (s121);
- Although large portions of the Internal Security Act have been repealed or amended, many, if not all, of the remaining provisions are offensive. The most important, from the point of view of freedom of expression, is the section empowering the Minister of Justice to ban an organisation (s4), meaning that no person may advocate, advise, defend or encourage the achievement of any of the objects of such banned organisation, or to perform any other act calculated to further the achievement of such objects (s13);
- The National Key Points Act which prohibits the furnishing of any information relating to security measures in respect of a national key point or in respect of any incident that occurred at a national key point (s10);
- The National Supplies Procurement Act which gives the Minister of Trade and Industry extensive powers that may be exercised whenever the Minister deems it necessary or expedient for the security of the Republic in order to ensure that services and goods are available. The Act can also prohibit the disclosure of information relating to the exercise of these powers (s8A and s8B);
- The Petroleum Products Act which regulates or prohibits the publication of information concerning petroleum products (s4A);
- The Police Act which prohibits taking photographs or making sketches of certain prisoners and publishing any such photograph or sketch (s27A);
- The Correctional Services Act which prohibits taking photographs or making sketches of any prison or prisoner and the publishing of such, and which also prohibits the publishing of any false information concerning the behaviour or experience in prison of any prisoner or ex-prisoner or concerning the administration of any prison (s44);
- The Protection of Information Act which has particularly problematic and far-reaching provisions. The Act prohibits the publication or communication of certain material, as well as the retention and use of such material;
- The Public Safety Act which confers wide powers on the State President to declare the existence of a state of emergency (s2) and to issue emergency regulations in terms thereof (s3). In prior states of emergency, detailed regulations severely restricted the right to freedom of expression. This potential power ought to remain one of our concerns;
- Certain provisions of the Inquests Act; and
- Aspects of the Mental Health Act.

This list of problematic provisions is far from exhaustive, but it at least identifies the more important.

These provisions as outlined in all probability will not withstand constitutional scrutiny. They ought to be repealed in their entirety or amended insofar as they infringe, inter alia, the right to freedom of expression and the right to access to information.

One way of approaching the problem would be to campaign for a single omnibus statute which could address the necessary amendments to, or repeal of, these various provisions.

The sooner such legislation is introduced, the better, since we ought to take advantage of the present momentum which exists in South Africa.

The first step would be to approach the appropriate Ministers with a view to gaining their support and the support of their Departments for such an omnibus statute.

If and when this is obtained, it would be appropriate to then motivate for the appointment of a Task Group to prepare the necessary legislation.

CONSTITUTIONAL LITIGATION

Constitutional litigation is an option worth considering in the following circumstances:

- Firstly, where a legislative reform programme does not achieve what we would want it to. Thus, one would be able to bring to the Constitutional Court a constitutional challenge to an existing statute of Parliament or to a Bill before Parliament.
- Secondly, the legislative reform programme obviously focuses on legislation and subordinate legislation. There may, however, be administrative decisions taken and acts performed by the executive organs of state which infringe one's rights as contained in the Bill of Rights.

Furthermore, the Bill of Rights applies to all law in force, including the common law and customary law. Thus, in a defamation case, a defendant may be able to argue, in addition to the defences which he/she may have at common law, that the common law rules in respect of defamation infringe the right to freedom of expression, and the Court will then have to decide this point.

I turn now to the questions of the relief which one may seek, who enjoys these rights, who has locus standi in these constitutional cases and the jurisdiction of the Courts.

As regards the relief which one may seek, s7 of the Chapter on Fundamental Rights states that when an infringement or a threat to any right entrenched in the Chapter is alleged, a person is entitled to apply for appropriate relief, which may include a declaration of rights.

As regards the issue of who enjoys these rights, the position is not absolutely clear and unfortunately will have to be resolved in some instances by way of litigation. Certainly, a number of the rights contained in Chapter 3 ought to be enjoyed by not only natural persons, but also juristic persons. It would seem that the right to freedom of expression and to access to information are such rights.

On the question of locus standi, the Constitution introduces important changes to the common law and provides that where there is an infringement of or threat to any right entrenched in the Bill of Rights, the following persons may litigate:

- A person acting in his/her own interests;
- An association acting in the interests of its members;
- A person acting on behalf of another person who is not in a position to seek such relief in his/her own name;
- A person acting as a member of or in the interests of a group or class of persons; or
- A person acting in the public interest.

However, it is anticipated that the issue of standing will give rise to substantial controversies in the future.

As regards the question of the jurisdiction of the courts, this is rather complex.

- Firstly, there are the Magistrates Court and other courts such as the Income Tax Court. Where it is alleged before such court that a law or provision of such law is invalid and contradicts the Constitution, the presiding officer may postpone proceedings to enable the matter to be referred to the Supreme Court.
- Secondly, there is the Supreme Court. Once a matter is before the Supreme

Court, this court may find that a decision regarding the validity of the law or provision is material to the adjudication of the matter. It may also find that there is a reasonable prospect that the relevant law or provision will be held to be invalid. The Supreme Court may then either deal with the issue itself, if it has jurisdiction in terms of the Constitution, or refer it to the Constitutional Court where that body has exclusive jurisdiction.

- Thirdly, there is the Constitutional Court. This court decides on the constitutional validity of laws emanating from the national Parliament, whilst the Supreme Court deals with the constitutional validity of laws emanating from the provincial legislatures—subject, of course, to the appellate jurisdiction of the Constitutional Court.

However, it is not entirely clear as to what will happen when an alleged violation concerns the constitutionality of a law of Parliament in proceedings before the Supreme Court. It seems the pragmatic approach, and the approach being taken, is that the Supreme Court ought to be able to hear the matter and to dispense interim remedies pending the final determination of the inquiry into the statute's constitutionality by the Constitutional Court.

In concluding, I would advise against constitutional litigation unless the facts of the case are good and the merits are favourable. We would want to avoid adverse decisions of the Constitutional Court on matters of fundamental importance. In other words, litigants need to to take cognisance of the political and social realities at any given point in time, and phrase their cause of action accordingly.

The author is a media lawyer

SHOULD HATE SPEECH BE REGULATED?

LENE JOHANNESSEN

WHAT TO DO about advocacy of national, racial, religious or other hatred (hereafter referred to as "hate speech") is one of the most vexed questions in the jurisprudence of freedom of expression. There are several reasons for this complexity. First, speech that a government views as advocating hatred may be regarded by many individuals as the legitimate expression of political belief.

The great difficulty of drafting a statute that proscribes only the most worthless forms of hate speech has resulted in the use of such statutes around the world to suppress dissent and punish speech, especially by members of minority groups (or, in the case of South Africa, of the majority group!). Second, the rights that anti-hate speech statutes seek to protect often are as fundamental as the right to freedom of expression. Thus, attempting to strike a balance between the two rights risks impairing core aspects of one or the other.

The particular South African experience before and during the Apartheid years was one of very rigid control of hate speech or what was perceived to be hate speech. Section 47(2)(c) and (d) of the Publications Act and the Internal Security Act of 1982 are but some examples of laws which kept tight control of expression and ideas which the government of the time considered to be advocating of national or racial hatred.

However, if one looks at how these acts, which on the surface appear to be race neutral and not protective of one group over the other, have been applied during the years of Apartheid (itself one of the grossest examples of state sanctioned hate speech the world has ever seen) it becomes clear that control of hate speech in South Africa up until now in reality has exclusively been control of anti-apartheid views.

Coming from that experience, South Africa now has a Bill of Rights which at the same time protects the right to freedom of expression and the right to equality and human dignity. Currently, a governmental task force is working on redrafting the Publications Act in order for it to comply with those new constitutional provisions. The great challenge for this task force is to draft an act which strikes a balance between those potentially conflicting constitutional rights, without limiting either of them unduly. Another issue which will become relevant in the context of hate speech regulation in the very near future is the question of introducing criminal sanctions for the dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination and racial violence speech and for membership of racist organisations as well as outlawing such organizations.

During his recent trip to the United States President Mandela signed the UN Convention on the Elimination of All Forms of Racial Discrimination which demands that member states penalize such racist activity. Following the President's signature a process leading to ratification of the Convention has been started to enable South Africa to become party to this convention. Part of this process will involve drafting legislation penalizing racist speech and activities, and here again the challenge will be to do so without unduly restricting the rights to freedom of expression and association. The following presentation will try to give examples of how other jurisdictions, national as well as international, have sought to strike this balance, in order to provide some guidance as to how to do it in this country. I will also try to highlight some of the potential dangers of hate speech regulation and will not try to hide my own bias, namely that in cases of public interest freedom of expression and the free exchange of information and ideas must take precedence over the right to dignity and equality.

INTERNATIONAL STANDARDS

Four of the major human rights treaties authorize governments to punish the advocacy of hatred on national, racial or religious grounds.

- The Inter-American Convention on Human Rights expressly requires states parties to declare such advocacy a criminal offence, and the International Covenant on Civil and Political Rights expressly requires that hate speech be prohibited by law. The Covenant has become particularly interesting in the South African context, since President Mandela also signed this treaty during his recent visit to the United States, which should lead to ratification in the near future.
- The European Convention on Human Rights and the African Charter on Human and Peoples' Rights permit, although they do not expressly require, a proscription in law.

The strongest and arguably most controversial prohibition is found in the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 4 of CERD requires states parties to declare a criminal offence "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, ... the provision of any assistance to racist activities" and participation in "organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination". The potential for conflict between Article 4 of CERD and freedom of expression is acknowledged in the opening paragraph of Article 4, which reflects an effort to avoid such a conflict. The measures to be taken by state parties are to be adopted "with due regard to the principles embodied in the Universal Declaration of Human Rights..", which inter alia protects the right to freedom of expression and association.

The Committee on the Elimination of All Forms of Racial Discrimination, which is the protective body of CERD, has paid lip service to the notion that the freedom of expression and association "are not irreconcilable" with the obligations created by Article 4, and to the "due regard" clause of that article, while expressing clear preference for the application of the norms stated in Article 4.

Furthermore, members of the Committee have interpreted Article 4 as not requiring the notion of intent and appears to endorse the notion that it is based on absolute liability.

The requirements of Article 4 of CERD has given rise to a case, recently decided by the European Court of Human Rights, which clearly illustrates the potential for conflict between very broadly drafted hate speech regulation and freedom of expression.

In July 1985, the Danish National Television (Danmarks Radio) broadcast an interview with members of a group of youths, called the Green Jackets. In the broadcast, members of the Green Jackets expressed extreme and highly offensive views of a racist nature, including support for the practice of eugenics and apartheid.

The interviewer, Mr Jens Olaf Jersild, with the approval of the editor of the programme, Mr Lasse Jensen, intended the programme to be an informative portrait of the group, however unpleasant its views, in order to stimulate greater public awareness of the existence of the group and the dangers it posed.

In 1985 the existence of violent racism in Denmark was unknown to the public at large, and the journalists thus considered it to be matter of public interest to have this group exposed on television. The interviewer and the editor did not in any way indicate support for the Green Jackets and their views and the feature was broadcast as part of a news and current affairs programme known for its investigative and non-sensationalist journalism.

Apart from the racist expressions, the programme gave an account of the social background of the members of the group, along with details of the various group members' criminal activities, also of a non-racial nature. One important aspect of the feature was the revelation by the Green Jackets that the police did not do anything to prevent the racist harassment of immigrants in the area, since the police allegedly perceived it to be just "kids' stuff". The programme furthermore included an interview with a social worker from the Green Jackets' neighbourhood.

The broadcast led to a public outcry and calls for the authorities and the police to act to prevent further racially motivated assaults by the group. A mobile police station was subsequently posted in the area and vast amounts of funds were allocated by the municipal authorities in order to upgrade the area and to deal with the widespread socio-economic problems. Attempts were also made to stop the allocation of council flats in the area to immigrants in light of the threat of harassment they would face if moved to the area.

Following the broadcast of the programme three members of the Green Jackets were charged with and convicted of making statements "publicly or with the intention of wider dissemination" which threatened, insulted or degraded members of other racial or ethnic groups, in violation of Article 266B of the Danish Penal Code. Article 266B was amended in 1971 prior to Denmark's ratification of the UN Convention on the Elimination of All

Forms of Racial Discrimination, which, as outlined above, requires that member states, in their implementation of the Convention, penalize the dissemination of ideas based on racial superiority or hatred.

Jersild and Jensen were charged and convicted of complicity in making the racist statements public. They appealed their convictions to the High Court of Denmark, which upheld the convictions, and subsequently to the Supreme Court, which is the highest court of Denmark. The Supreme Court, by majority decision, held that freedom of expression in this case did not outweigh the legitimate interest in protecting members of minority groups against racist propaganda. It found that Jersild and Jensen had assisted in disseminating the racially discriminatory remarks and therefore upheld their convictions.

Following the Supreme Court decision a case was brought before the European Commission of Human Rights on behalf of the journalist, Jens Olaf Jersild, who submitted that the conviction was a violation of his right to freedom of expression guaranteed in Article 10 of the European Convention on Human Rights. A majority of the Commission found that the conviction of Mr Jersild constituted a violation of Article 10 and referred the matter to the European Court of Human Rights.

On 23 September 1994 the Court, by a majority of 12 judges against 7, found that Mr Jersild's rights to freedom of expression under the ECHR had been violated. One of the determining factors for the Court was the fact that the applicant did not make the objectionable statements himself, but assisted in their dissemination in his capacity of television journalist responsible for a news programme.

Furthermore, it was important for the Court that the item in question, when considered as a whole, did not from an objective point of view appear to have as its purpose the propagation of racist views and ideas and that the purpose of the applicant in compiling the broadcast in question was not racist. In other words the journalist did not have the intent to spread racist propaganda, but merely report on an issue of public interest.

Had this matter been determined according to CERD, which does not require intent and which probably imposes absolute liability in matters arising from Article 4, it is doubtful whether the conviction of the journalist would have been set aside.

I have gone into this matter in some detail because I believe it highlights some of the dangers of overinclusive hate speech regulation, which run the risk of limiting the rights of bona fide journalists to cover and expose issues of grave public interest.

INDIA

Section 295A of the Indian Penal Code makes it an offence for anyone "with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India" to insult or attempt to insult the religion or religious beliefs of that community. The Supreme Court ruled that this section does not prohibit each and every act of insult to religion but only those aggravated forms of insult which tend to disrupt public order.

A serial broadcast on Indian television, titled Tamas, portrayed the communal tension and violence between Muslims and Hindus and Muslims and Sikhs in Lahore just before the partition of India. The Central Board of Film Censors considered the programme suitable for unrestricted exhibition under the Cinematograph Act 12952. The petitioner, a private citizen, applied to the Supreme Court for an order preventing its broadcast on the grounds, inter alia, that it was likely to incite people to violence and to stir up feelings of hatred between people of different religions.

The Supreme Court denied the petition on two grounds. First, the film censorship board had unanimously approved the film for general viewing, and "a court should be slow to interfere with the conclusion of a body specially constituted for this purpose." Second, the film, viewed in its entirety and from the standpoint of an average person, was "capable of creating a lasting impression of this message of peace and co-existence" and was more likely to "prevent incitement to [public order] offences in the future" than to stir up violence.

The Court noted that the potency of the motion picture is as much for good as for evil: "if some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep, strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers of religion."

GERMANY

Article 5 of the German Constitution (Grundgesetz), the provision which protects freedom of opinion and expression, expressly permits limitation of the right "by the provisions of the general laws". The "general laws" include the Criminal Code.

Article 9(2), Article 21(2) and Article 18 of the Constitution go much further.

Article 9(2) outlaws associations whose activities aim to undermine the criminal law, the constitutional order or international understanding. Under Article 21(2) of the Constitution political parties may be declared unconstitutional by the Federal Constitutional Court if their objectives include the obstruction or abolition of the democratic order. Article 18 of the Constitution declares that individuals who abuse the exercise of their basic human rights, including freedom of expression, "in order to combat the free democratic order", forfeit those rights.

Sections 130 and 131 of the Criminal Code protects groups of society, in particular different national or racial groups, against defamation and violence.

Section 185 protects against an offence to personal honour. According to Article 192, proof of the truth of a statement is no defence under Article 185 "when the insult arises from the manner in which the assertion was made or disseminated or from the circumstances in which it was made".

Articles 130 and 131 have been of limited importance for the actual work of the German courts. In 1982 only 12 percent of prosecutions against right-wing extremists took place under these provisions. Forty-four percent of prosecutions were brought under other sections of the Criminal Code for the dissemination of propaganda and the use of emblems of anti constitutional organizations; 32,5 percent of charges were brought for violations of articles of the Criminal Code connected with violence. The remaining 11,5 percent of prosecutions were divided between convictions for criminal defamation under Article 185 and for condemnation of the President of the Federal Republic, the State, its symbols and constitutional organs under Article 90.

UNITED STATES

US law diverges from the international standards and indeed from the law and practice of many countries. The US Supreme Court has ruled that speech may not be prohibited, regardless of how offensive it may be, unless there is a clear and present danger that it will incite imminent, unlawful action.

A US federal intermediate appellate court (the Seventh Circuit Court of Appeals) ruled that speech which causes psychic pain is protected, even if it is directed at survivors of racial violence, so long as the pain is caused by the speech's cognitive or emotive content. A Nazi group announced plans to demonstrate in front of the Village Hall of Skokie, Illinois, a predominantly Jewish community that included some 5,000 survivors of the Nazi Holocaust.

In response, the village enacted several ordinances designed to prevent or neutralize the demonstration, including forbidding the dissemination of any materials that promoted or incited racial or religious hatred. Such materials were defined to include the "public display of markings and clothing of symbolic significance" such as Nazi uniforms and swastikas.

The appellate court, in ruling the ordinance unconstitutional, rejected for several reasons the village's argument that it had the right to prevent the "infliction of psychic trauma on resident Holocaust survivors". First, the court reasoned that there was no principled way to distinguish between the symbolic speech sought to be prohibited here and other offensive or provocative speech that the Supreme Court had ruled was constitutional. "Public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Second, the village's residents were not a "captive audience" since they could avoid the village hall area during the demonstration.

SOUTH AFRICA

It is clear from the discussion above that the South African Constitution provides that a reasonable balance should be struck between the potentially conflicting rights, since they both enjoy constitutional protection. Since South Africa is soon to become a party to the Convention on the Elimination of All Forms of Racial Discrimination it becomes imperative to draft legislation which will protect both rights, since the Convention, in my personal view, is over broad in its limitation of the freedom of expression.

It is also clear that in drafting hate speech legislation South Africa will be in line with most other countries as well as with international human rights norms. Having said that, however, I want to stress that one must keep in mind the potential for abuse of such legislation, as has been seen in the past in this country, when such legislation was used exclusively to censor and punish anti-apartheid views.

I will also point to the danger, intentionally or not, to be overinclusive and set aside one right in the protection of another. I believe that the case I referred to before the European Court of Human Rights, Jersild v. Denmark, illustrates well the potentially damaging effect such legislation can have on serious investigative reporting, however well the intention of introducing such legislation was and however much one wants to combat racism.

Furthermore, I believe it is important to keep in mind that in South Africa race issues and politics substantially overlap. As a result, even valid political dialogue in South Africa involves questions of race. Regulation of racist speech and publications therefore inevitably runs the risk of chilling the political debate within the country.

Finally, I will warn that one must not believe that such legislation actually helps to prevent racism. The evil manifested in racist speech is not the sight or sound of the words themselves but the racist attitudes which underlie them. I find it highly doubtful whether censorship or penal laws are efficient ways of curbing and preventing racial hatred. The problem lies in racist attitudes, not in their free communication.

However, I appreciate that the values expressed in the sections on equality and dignity in the Bill of Rights are important values and acknowledge that society wants to make a moral statement by outlawing racist views and activities. I just do not believe that they will do much to curb the roots of the evil.

WHAT'S NEEDED

On the basis of this outline I will stress that draft legislation, be it in the form of censorship legislation or penal laws or both, to curb hate speech should include the following:

- a requirement of racist intent to spread the racist views;
- it should apply only to public dissemination of such views. By "public dissemination" I would include dissemination to workplaces, educational institutions, etc;
- special provisions should be made to protect otherwise legal political activity;
- it should include a "due regard" clause which will make it imperative always to weigh up the conflicting fundamental rights in applying such legislation;
- there must be a public interest defence in order to protect bona fide discussion and reporting on issues of public interest
- one may want to include a requirement that only when hate speech will cause real and severe damage to the public order may it be prohibited. This will be in line with the United States "clear and present danger" doctrine and can also be found in Israeli legislation on freedom of expression.

Inclusion of these limitations on hate speech regulation would in my view go a long way to reconciling the interest in the conflicting constitutional rights.

The author represents the Media Defence Trust and the Centre for Applied Legal Studies

THE FLIP SIDE OF THE COIN

ALLISTER SPARKS

We are fortunate to have a Constitution guaranteeing freedom of speech and of the media. But it is not enough. One can guarantee freedom of speech, but still deny information.

Censorship can take two forms: it can prohibit publication, or it can withhold information at source. We have a guarantee against one. Now we need an insurance against the other.

We need a Freedom of Information Act. I was delighted to hear a public pledge by Deputy President Thabo Mbeki that we are to have one. I hope it is the right kind of Freedom of Information Act.

What we are asking for is every citizen's right, not a special press right. The right of access of the media is no more than the right of access of the citizen—exercised by the media on behalf of the totality of citizens. We, the media, have to be the eyes and ears of the wider citizenry in the modern nation-state. That is our democratic role, our Fourth Estate duty.

The apex of a free media's role is investigative journalism. That is our watchdog role at its best, when the citizenry is alerted to wrongdoing and can act as a jury to deliver a verdict on their rulers.

It is the ultimate exercise of the journalist's role, and the ultimate rest of the government's willingness to permit the media to perform that role. In other words, the ultimate test of the government's commitment to democracy. A Freedom of Information Act commits a government to face that test.

The best functioning democracies have a Freedom of Information Act. In general they guarantee a right of access to any information in the possession of Ministers, government departments and other public authorities, limited only by certain exceptions and exemptions necessary for the protection of matters of genuine national security.

FXI CONFERENCE

But there is a flip side to this coin. If we as the media claim it is our role to serve the democratic process by keeping the citizenry informed, then we must be true to that role. We must exercise it responsibly and competently.

So I would suggest that the Freedom of Information Act we are asking for should accompany laws requiring media companies to make a specific commitment to media training and the upgrading of journalistic standards.

There is a precedent. Australia has a law called the Training Guarantee (Administration) Act of 1990, and it compels Australian companies to commit a specified percentage of their total annual wage bills to training programmes. Our Government may want to consider having a similar law applying to all companies. Particularly in view of South African business's poor record of investment in training.

Training is an economic, social and political necessity, and nowhere more than in our media. The juniorisation of our newsrooms is exceeded only by the increase in their responsibilities and workload, and if we succeed in a plea for a Freedom of Information Act those responsibilities and workloads will increase.

The error rate, already unacceptably high, will soar even higher.

Already we—along with the press world-wide—have a crisis of credibility with a public that regards us as unscrupulous hucksters out to make a quick buck from sensationalising any event, exploiting any incident of private grief or misfortune, and who don't give a damn for the facts as we go about our business of hassling people and assassinating characters.

And in the new South Africa there is also a perception that the media is overwhelmingly white-owned and white-controlled, part of the old establishment stacked against the new regime and sneeringly disparaging of it.

If the public is not with us, if it is likely to applaud if the government acts against us, then no amount of constitutional clauses can protect us. We of the media are the ultimate defenders of our own freedom. So as we ask for this free access to information, let us accept the reciprocal commitment to train and upgrade our standards.

The author is executive director of the IAJ

PROBING THE LIMITS

HOW SOUTH AFRICA'S NEW CONSTITUTION AFFECTS FREEDOM OF EXPRESSION AND PRESS FREEDOM

DENNIS DAVIS

I FOUND VERY strange the paucity of coverage about the hearings into candidates for the Constitutional Court. This is the one institution that is likely to play a greater role in protecting freedom of expression of the media than any other institution.

To my mind, the extent of coverage has been really pathetic. I might add that elements of civil society such as gender groups only graced themselves in disgrace by saying absolutely nothing during the whole week of hearings.

Which goes to show you that a constitutional right to freedom of expression on its own is, per se, pretty useless unless it's going to be used.

SPEECH AND EXPRESSION

Section 15 of the Constitution says that every person shall have the right to freedom of speech and expression which will include freedom of the press and other media and the freedom of artistic creativity and scientific research. It goes on to say "all media financed by or under the control of the state, shall be regulated in a manner which ensures impartiality of expression and diversity of opinion". There are a series of interesting propositions with regard to this section.

Firstly, the first clause, sub-clause 1, is very wide. I'm not quite sure why these two words are used: "speech" and "expression". If you look at most constitutions, normally either speech or expression is contained.

One of the difficulties within the Constitution, and of many constitutional programmes is, what do we mean by "expression"? Is obscenity expression? We've even had cases of violent activity in certain countries where the courts have said that, for example, violent speech is constitutionally protected but not violent action.

The point, however, is that if you give these words "speech" and "expression" their full meaning, then there is a fairly wide ambit of protection insofar as the first part of the clause is concerned.

The second part of the clause is freedom of the press and other media, and the third is freedom of artistic creativity and scientific research. This is thus very wide and I think that issues such as obscenity et al will clearly be within this particular context.

OBSCENITY

I find it utterly extraordinary that Chief Buthelezi, Minister of Home Affairs, having announced in August in Parliament that he was, in fact, going to scrap or amend the Publications Act, later joined a case against Hustler magazine in the Pretoria Supreme Court, arguing that the limitations on freedom of expression pursuant to our censorship laws are justifiable in terms of the Constitution's limitation clause.

One wonders what kind of commitment this government actually has to freedom of expression—or does Chief Buthelezi now have a different view of our freedom of expression bearing in mind his chance to exercise himself physically in the studios of the SABC?

I raise this because I think that freedom of speech and expression, in fact, is wide enough to take into account these particular issues, and I do not think that we will, in fact, get ourselves into the American difficulties of what we mean by obscenity.

In the US it was argued that obscenity, when it excited the prurient interests of human beings, was in a sense not expression and therefore should be excluded from constitutional protection. The reason I suggest that this won't happen in South Africa is two-fold.

One, because I'm suggesting to you the words "speech and expression" combined with freedom of artistic creativity make for a very wide ambit.

Secondly, because one should be very cautious before utilising American precedent in a South African context, particularly in this area. If you take, for example, the cases which stem from US versus Roth, dealing with whether obscenity was in fact freedom of expression, much of it hinges on the court grappling with the problem of a non-existent limitation clause.

In America you don't have a limitation clause so the courts have to limit the right in terms of looking at the right. In the South African context we now have a two-stage enquiry. On the one hand, what is the right that is being protected? Two, is there some basis upon which that right can be limited? What I'm suggesting to you is a wide ambit for the protected right. I'll deal with the limitation clause below.

HORIZONTAL RIGHTS

Now we come to this interesting issue of freedom of the press and other media. Why interesting? Because there is a great debate in South Africa at present as to whether our Bill of Rights applies vertically exclusively or whether it applies vertically and horizontally.

For those of you who are not lawyers, it's got nothing to do with aerobics. What it has to do with is simply: does the Bill of Rights only apply between an individual and the State? Or does it apply between third parties? Now I have already been chastised by a well- known lawyer when I said that I thought the Bill of Rights was as incoherent on this point as the book written about Lady Di. I was told not to be flippant and act as a buffoon.

In fact, it is incoherent and it is very difficult to know where the Bill of Rights actually reaches to. But I think we can say clearly the Bill of Rights applies horizontally in the case of the media, where an individual sues the press with regard to defamation.

I think we see indications of this already with regard to the Winnie Mandela interdict case where there was an acknowledgement at least by our Supreme Court that the section applied horizontally. If it didn't, then that particular decision would have made no sense. Thus on the matter of prior restraint, the finding meant that the press could not be restrained for publishing material which might prima facie, have some damaging effect on Mrs Mandela.

> "So now we're going to get two kinds of hate speech, hate speech which we say is political and therefore to a large degree that can't be limited, and other forms of hate speech where the test is not so high because it doesn't relate to free and fair political activity."

Such a decision only makes sense on the basis that the Bill of Rights now applies where an individual seeks to sue for defamation or prevent publication from a private newspaper. What I'm suggesting in relation to this particular clause is that the Bill of Rights does, in fact, apply both horizontally and vertically.

With regard to the question of freedom of artistic creativity, a fascinating issue arises. Could, for example, Salman Rushdie's *The Satanic Verses* be banned in South Africa? Assume for the moment there is an argument that it really offends people's religion and conscience, etc. Could you, in fact, ban such a document in South Africa when there is a entrenched right to freedom of artistic creativity? Once more the whole issue would have to turn on the limitation clause. But what I simply want to highlight for you, is the sheer breadth of this particular provision and its implications not only in relation to pornography but also in terms of real literature.

IMPARTIALITY AND DIVERSITY

Sub-paragraph 2 says that all media financed by or under the control of the State should show impartiality and the expression of diversity of opinion.

When I was assisting in drafting the Democractic Party's Bill of Rights, not that I'm a member of that particular party, we tried to persuade them unsuccessfully, and hopefully this might be taken up in the final Constitution, to provide for ensuring that all media guarantee impartiality and diversity of opinion.

Our argument is—why should there be a difference between the SABC and the major private media? I'm sure there are members of the press here who think that's a disgraceful comment. But we did not think there was a distinction between public and private power. The point, however, is that it does raise an interesting issue—what does it mean, for example, in relation to the SABC?

This is not a right: it doesn't say we have a right. It says it shall be regulated in such a manner. Does this mean some mandatory command to the legislature to provide for legislation whereby the SABC has to deal with itself impartially? I don't know.

The final point in relation to the SABC is this. I have no doubt that as the SABC is an organ of state, the whole of the Constitution applies to it. I have been contemplating this myself in relation to the difficulties that we've been having with our own programme (Future Imperfect). The issue is whether in fact Section 23, the right to information, and Section 24 the right to administrative justice, cannot be used to ensure that the SABC would have to give you reasons as to why they do or don't want a programme, particularly if they have promised you before.

I have absolutely no doubt that the SABC can be held to account in relation to this Constitution for a wide range of broadcasting issues, far wider than would be the case under the guarantee of 15.1.

PUBLIC OFFICIALS AND HATE SPEECH

There are obviously issues about our law of defamation and particularly the problems of strict liability which have clearly been added to in the latest case with regard to Lothar Neethling's success in suing the Vrye Weekblad and Weekly Mail. The question which arises is—will the South African courts follow the New York Times versus Sullivan principle, namely unless malice exists, a public official cannot sue the press for defama-

tion? Could that apply under 15.1? I think there's a possibility that it can.

Alternatively it could by utilising section 35.3—that is to interpret the benefit of common law to accord with the spirit or purport of this Constitution. Whether our courts go as far as New York Times versus Sullivan is uncertain. What I am reasonably certain about is that the Neethling principle as developed by the Appellate Division that a state official can sue the press for defamation is unlikely to stand the test of constitutional time.

What about hate speech? Will, for example, our judges follow the one Canadian case where, in fact, the limitation clause was used successfully to ensure that certain hate speech legislation relating to the holocaust was upheld? Or will they go the way of a second case whereby it was found that the limitation clause was too wide and too vague, and accordingly a prosecution for disseminating Nazi material regarding the holocaust was set aside?

My own feeling about this is that hate speech legislation is going to be upheld in South Africa under our limitation clause given the history of our country.

LIMITATIONS

All of these considerations that I've made depend on the limitation clause in the Constitution. This becomes very fascinating. What is the content which our courts will give to this vexed notion that none of our rights in our Bill of Rights are absolute, that each has to be limited in terms of Section 33, the limitation clause?

More interesting even, is the complete confusion in the drafting of Section 33 because we now have two tests for assessing whether in fact the limitation is justifiable or not. If you, for example, take a number of the rights which are protected in the Constitution, not only must the state prove that its actions were reasonable and justifiable in an open and democratic society based on freedom and equality, in order to justify limitation of freedom of speech, but they also have to show that it was necessary.

Now it is interesting that with regard to freedom of expression, where freedom of expression relates to free and fair political activity, the necessary provision applies. That means there is a stricter test upon our courts than would otherwise be the case.

It might be a good thing, in the sense that it will be very, very difficult to stop the press from publishing material relating to political activity. But what about right-wing, hate speech? So now we're going to get two kinds of hate speech, hate speech which we say is political and therefore to a large degree that can't be limited, and other forms of hate speech where the test is not so high because it doesn't relate to free and fair political activity.

In addition to this, once you've put in a two-tier test where you say certain rights can be limited but only under extreme circumstances, does that mean that the court drops the threshold for everything else allowing the legislator free reign?

If you want my guess, I have no doubt that there are people on the Constitutional Court who are going to take that view. I think there are others who will take the other view. But we are in for interesting times in the determination of that section which ultimately holds the key to everything that I've said in relation to freedom of expression.

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