

**De gustibus non est disputandum:  
Regulating offensive advertising  
in a democratic South Africa**

by

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## Summary

The Advertising Standards Authority's system of self-regulation compares favourably with that of similar bodies in many other countries. Its advertising code regulates, amongst others, offensive advertising. This study investigates whether the limitations imposed by the South African advertising code accord with the provisions of the South African Constitution. In order to examine this critically, an interpretative, comparative review of the literature on this topic was conducted.

Offensive advertising is a form of freedom of expression that is protected in South Africa. It is accepted as such in constitutional jurisprudence, both in South Africa and internationally. The advertising code may therefore only limit advertising freedom insofar as the limitations of s 36 of the *Constitution of the Republic of South Africa, 1996* permit it.

In terms of s 36, the South Africa advertising code needs to constitute a 'law of general application'. As a contract between advertisers and the Advertising Standards Authority, and also based on the advertising code's legal underpinning in broadcast advertising, the code is 'law'. Moreover, as a published document based on international advertising principles, the code is furthermore also accessible; and it has general application.

However, the vague terminology employed in the offensive advertising clause means that the clause constitutes an unenforceable contract term. It is not sufficiently clear and precise to qualify as 'law of general application', with the exception of the provisions on gender offence, the offensive advertising provisions are not formulated with sufficient precision so as to enable advertisers to reasonably ascertain prior to publication whether an advertisement is likely to be acceptable.

The Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority NO 2002 (4) SA 294; 2002 (5) BCLR 433* para 30 highlighted the categories of offensive material that can be expected to be regulated in a democratic society, if fairness and a diversity of views representative of South African society is to be

achieved, namely material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population .

The study concludes that in respect of sex, nudity, violence, and language, advertising material should be limited to appropriate media placement in that the South African advertising code should aim to protect children and unwilling adult recipients from offence occasioned by encountering such material, rather than preventing moral deterioration.

The study also concludes that when dealing with religious convictions, race, sexual orientation, ethnic or social origin, age, disability, and culture, the prohibitions on advertising should mirror the provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (Act 4 of 2000), dealing with hate speech: If a category of offence is to be banned, such offence cannot be merely shocking but must result in hate speech. The *Promotion of Equality and Prevention of Unfair Discrimination Act* is a direct result of the requirement in the *Constitution, 1996* that national legislation must be enacted to prevent or prohibit unfair discrimination.

Finally, the study proposes amended provisions relating to offensive advertising for the South African advertising code: Firstly, it is proposed that an advertiser's freedom of expression should be curtailed in a manner that ensures fairness and a diversity of views broadly representing a democratic South African society. Secondly, the proposal aims to ensure that offensive advertising provisions accord with the value system of the *Constitution, 1996*, when collectively weighing up the requirements and factors provided for in s 36 of the *Constitution, 1996*, together with all other relevant factors.

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## Glossary of terms

### **ACA**

Association for Communication and Advertising of South Africa

### **AMS Directive**

Audiovisual Media Services' Directive of the European Union

### **BCAP**

British Broadcast Committee of Advertising Practice

### **BMCC**

Broadcast Monitoring and Complaints Committee of the Independent Communications Authority of SA

### **British advertising codes**

Collectively referring to the British Code of Advertising, Sales Promotion and Direct Marketing; the British Radio Advertising Standards Code; and the British Television Advertising Standards Code

### **British advertising regulator**

Advertising Standards Authority of the United Kingdom

### **British broadcast regulator**

Office of Communications in the United Kingdom(OfCom)

### **British non-broadcast advertising code**

British Code of Advertising, Sales Promotion and Direct Marketing

### **British radio advertising code**

British Radio Advertising Standards Code



**British television advertising code**

British Television Advertising Standards Code

**Canadian advertising clearance division**

Advertising Clearance Division of the Canadian advertising regulator

**Canadian advertising code**

Canadian Code of Advertising Standards

**Canadian advertising regulator**

Advertising Standards Canada (ASC)

**CAP**

Committee of Advertising Practice of the United Kingdom

**CAPs**

Collectively referring to the British Broadcast Committee of Advertising Practice and the Committee of Advertising Practice of the United Kingdom

**CARU**

Children's Advertising Review Unit of the National Advertising Division of the Council of Better Business Bureaus of the United States

**CBBB**

Council of Better Business Bureaus of the United States

**ICC**

International Chamber of Commerce

**ICC code**

Advertising and Marketing Communication Practice code of the International Chamber of Commerce



**NAD**

National Advertising Division of the Council of Better Business Bureaus of the United States

**NARB**

National Advertising Review Board of the Council of Better Business Bureaus of the United States

**South African advertising code**

Code of Advertising Practice as administered by the Advertising Standards Authority of South Africa

**South African advertising regulator**

Advertising Standards Authority of South Africa

**South African broadcast regulator**

Independent Communications Authority of SA (ICASA)

**South African broadcast regulator's code**

The statutory Code of Conduct for Broadcasting Services, administered by the Independent Communications Authority of SA (ICASA)

**South African broadcast programming code**

The voluntary broadcast programming code of the Broadcast Complaints Commission of SA (BCCSA)

**United States advertising regulator**

Collectively referring to the National Advertising Division, the National Advertising Review Board, and the Children's Advertising Review Unit of the National Advertising Division of the Council of Better Business Bureaus of the United States



***United States broadcast regulator***

Federal Communications Commission of the United States (FCC)

# Chapter I - Orientation

## 1. Introduction

*De gustibus non est disputandum.*<sup>1</sup> There will always be a different point of view on issues of taste and decency, since these issues are influenced by personal views and choices.<sup>2</sup> For example, a print advertisement showing a woman wearing a slip, resting against a sound system, and raising the slip of her dress up her thighs, with the caption "Make her vibrate!" may be offensive to some readers, appealing to others, while some may respond indifferently to the advertisement.<sup>3</sup>

To create an advertisement that consumers would notice in the myriad of advertising, an advertiser will inevitably offend some people.<sup>4</sup> The subjective element involved in offensive advertising could vary from a bathroom tissue too explicit in its cleanliness claim; graphic portrayals of digestive functions; shampoos that promise way more than clean hair; all manner of indecent exposure; lack of respect for death and the dying, or featuring death row criminals;<sup>5</sup> inappropriate use of a national icon; exploitation of physical disabilities; self-actualisation presented by a cigarette brand, and, on the other hand, anti-smoking advertisements that go too far in depicting the damage smoking can cause.<sup>6</sup>

Themes and images such as these are generally employed by advertisers in marketing communications, and these themes and images are limited by the social

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<sup>1</sup> Loosely translated, 'one cannot dispute about taste'.

<sup>2</sup> Reinhard "De gustibus non est disputandum" (2001) *AAAA management conference* (unpublished and unnumbered).

<sup>3</sup> Advertising Standards Canada *Ad complaints report* (2002) 14.

<sup>4</sup> Waller "Attitudes towards offensive advertising: an Australian study" *The journal of consumer marketing* (1999) 288-294.

<sup>5</sup> The example of death row prisoners refer to a Benetton campaign.

<sup>6</sup> Reinhard *De gustibus* (unpublished and unnumbered).

mores of the particular time and place of creation.<sup>7</sup> Therefore, what was regarded as overly sexually explicit yesterday would not necessarily be regarded as such by the social mores of tomorrow.

Arguably, every society in the modern world would want rules to ensure that advertising does not significantly mislead or offend. Given this objective, it is desirable that freedom of commercial expression - advertising freedom - be maintained to the fullest extent possible,<sup>8</sup> and that restrictions that advertising codes impose on advertising freedom do not unnecessarily stifle creativity.<sup>9</sup>

However, regulators and the public alike could have differing views on issues of taste and decency since these issues are influenced by personal views and choices. Due to the subjective nature and interpretation on the question of what constitutes offensive advertising, the regulation of offensive advertising can be perceived as a form of censorship. Talk of "scientific evaluation" in the field of censorship is arguably fatuous due to the subjective nature of offence.<sup>10</sup> Historically, and in the area of censorship specifically, South Africa has in the past applied legal restrictions generally related to sex, nudity, bad language, violence, and religion.<sup>11</sup> These restrictions were vague in both their content and application.<sup>12</sup>

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<sup>7</sup> Hackley "Ethical perspectives on the postmodern communications Leviathan" *Journal of business ethics* (1999) 15-26.

<sup>8</sup> Lord Borrie QC "Is self-regulation still the best way to protect advertising freedom?" *ISBA annual conference*, London [www.asa.org.uk](http://www.asa.org.uk) (accessed March 2001).

<sup>9</sup> Woker *Advertising law* 228; Lord Borrie *Self-regulation* [www.asa.org.uk](http://www.asa.org.uk) (accessed March 2001); and Boyle "Freedom of expression and democracy" in Heffernan (ed) *Human rights: a European perspective* (1994) 211.

<sup>10</sup> Marcus "Fine distinctions: scientific censorship and the courts" *SA journal on human rights* (1988) 82-86, 83.

<sup>11</sup> See, for example, Van der Westhuizen "Do we have to be Calvinist puritans to enter the new South Africa? (A review of current trends in the Publications Appeal Board)" *SA journal on human rights* (1990) 425-439, 425.

<sup>12</sup> Bohler-Müller "The discourse of pornography: a feminist perspective" *Obiter* (2000) 167-176, 167.

The offence caused by advertising could, however, fundamentally affect consumer confidence in advertising.<sup>13</sup> Therefore, to ensure that the public continues to perceive advertising as an informative service rather than a tool employed to cause offence, it is generally argued that it is in the interests of the marketing communications industry itself to ensure that offensive advertising is regulated.<sup>14</sup> For this reason, one finds industry imposed restrictions on the content of advertising in most European countries, the United States of America, Canada, New Zealand, South Africa, Latin America, and Asia and the Pacific.<sup>15</sup>

Two principal factors, namely tradition and opportunity, determine the form that advertising regulation takes in a specific country.<sup>16</sup> This form can vary from a system that is primarily self-regulated by the marketing communications industry to a system where the law extensively regulates advertising content. Thus, each country's regulatory system is likely to reflect its cultural, commercial, and legal traditions.<sup>17</sup>

There is a tendency to regard the regulation of the content of advertising in South Africa as self-regulatory. This is actually not the case. The South African regulatory system is a hybrid system made up of a mixture of the common law and legislation, as well as a self-regulatory system based on the South African advertising code, as administered by the South African advertising regulator.<sup>18</sup> The legal framework for

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<sup>13</sup> European Advertising Standards Alliance *Self-regulation – a statement of common principles and operating standards of best practice* [www.easa\\_alliance.org](http://www.easa_alliance.org) (accessed June 2008).

<sup>14</sup> European Advertising Standards Alliance *Advertising self-regulation in Europe - an analysis of advertising self-regulatory systems and their codes of practice in 22 European countries* (2001) 13; Boddewyn *The case for advertising self-regulation* (1999) 2.

<sup>15</sup> European Advertising Standards Alliance *Advertising self regulation bodies and systems* [www.easa-alliance.org](http://www.easa-alliance.org) (accessed May 2008); Anonymous "Courts back ASA against human rights attack" *The in-house lawyer* (February 2001) (unnumbered).

<sup>16</sup> EASA *Analysis* 14, 19.

<sup>17</sup> EASA *Analysis* 19. See Chapter II for a discussion on self-regulation.

<sup>18</sup> Clause 2 of the Preface to the South African advertising code; *Electronic Communications Act* (Act 36 of 2005); and Business Practices Committee "Report in terms of section 10(1) of the Harmful Business Practices Act 1988 (Act No 71 of 1988)" (Report No 15) (18 May 1992) *Government Gazette* 13988 23.

the control of advertising content in South Africa is therefore partly self-regulated and partly state-regulated.

The ICC publishes an advertising code, the ICC code, which sets out the suggested general principles that should be included in advertising codes. Self-regulatory bodies worldwide, including the South African advertising regulator, are moulded on the ICC code, which prescribes that advertising must be legal, decent, honest and truthful, prepared with a due sense of social responsibility, and respect for the principles of fair competition.<sup>19</sup>

Clause 1 of Section II of the South African advertising code regulates offensive advertising. With the introduction of the South African interim Constitution in 1994,<sup>20</sup> it became apparent that the continued regulation of offensive material, based on a rationale and application that did not truly take the rights to privacy and freedom of expression into account, would be contrary to these constitutionally entrenched rights.<sup>21</sup>

The provisions of Clause 1 of Section II of the South African advertising code were drafted in 2001.<sup>22</sup> It appears from a reading of its provisions that the South African advertising regulator intentionally echoed the provisions of the *Constitution, 1996*, implying as it does that the regulation of offensive material will be dealt within the spirit and requirements of privacy and freedom of expression as provided for in the *Constitution, 1996*.

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<sup>19</sup> International Chamber of Commerce *Advertising and marketing communication practice – consolidated ICC code* (August 2006) [www.iccwbo.org](http://www.iccwbo.org). See also Boddewyn *Global perspectives on advertising self-regulation: principles and practices in thirty-eight countries* (1992) 4; EASA *Analysis* 14. See also Clause 1 of Section I of the South African advertising code.

<sup>20</sup> *Constitution of the Republic of South Africa, 1993* (Act 209 of 1993).

<sup>21</sup> Refer the following sections of the interim Constitution: Section 13 dealing with privacy; s 14 dealing with religion, belief and opinion; and s 15 dealing with freedom of expression. Refer to the following sections of the Constitution of the Republic of South Africa, 1996: Section 14 dealing with privacy; s 15 dealing with freedom of religion, belief and opinion; and s 16 dealing with freedom of expression.

<sup>22</sup> Refer service issue 8 of the South African advertising code (July 2001).

Clause 1 of Section II reads:

- 1.1 No advertising may offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- 1.2 Advertisements should contain nothing that is likely to cause serious or wide-spread or sectoral offence. The fact that a particular product, service or advertisement may be offensive to some is not insufficient grounds for upholding an objection to an advertisement for that product or service. In considering whether an advertisement is offensive, consideration will be given, *inter alia*, to the context, medium, likely audience, the nature of the product or service, prevailing standards, degree of social concern, and public interest.

The South African advertising regulator currently uses this clause as the measure upon which to assess offensive advertising in South Africa. Therefore, this clause will be critically examined in this study.

## 2. Aim and research problem

The aim of this study is therefore to consider whether the control of offensive advertising in South Africa constitute a violation of the fundamental right to freedom of expression under the South African Bill of Rights in the *Constitution, 1996*.<sup>23</sup> As an adjunct to the study's main concern, the following question is also posed: Is commercial expression, specifically advertising, a protected form of expression under the South African Bill of Rights?

If so, does the *form* of control constitute law of general application; and if so, is the *content* "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>24</sup>

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<sup>23</sup> Section 16 of the *Constitution, 1996*.

<sup>24</sup> Section 36(1) of the *Constitution, 1996*.

When terminology such as “good taste”, “decency” or “offensive” are employed as part of a legal restriction,<sup>25</sup> one has to question whether such terminology can be sufficiently clear and precise, focussing on reasonable and justifiable limits to the right to freedom of expression in a democratic society, to satisfy the requirements of s 36 of the *Constitution, 1996*, or whether such terminology could lead to the inevitable conclusion that the applicable standards are arbitrary. For whilst notions of morality may differ, the bottom-line question for a court is “what is the law?”<sup>26</sup>

In achieving the aim of this study, four research problems essentially need to be addressed:

1. The forms of advertising regulation, in South Africa and internationally, need to be considered on a comparative basis.
2. Is advertising protected expression in terms of the South African Bill of Rights?
3. Do the offensive advertising provisions in the South African advertising code constitute law of general application within the meaning of s 36(1) of the *Constitution, 1996*? In particular, this necessitates a consideration of whether the offensive advertising provisions are *clear and precise*.

This research problem may necessitate the need to propose alternative provisions for the regulation of offensive advertising.

4. Depending on the outcome of the third research problem, it needs to be considered whether the offensive advertising provisions, whether in their current format or as alternative provisions, meet the criteria for limiting freedom of expression in terms of s 36(1) of the *Constitution, 1996*.

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<sup>25</sup> Refer Clause 1 of Section II of the South African advertising code.

<sup>26</sup> *Executors of McCorkindale v Bok* NO 1884 (1) SAR 202, 216.

As freedom of expression can impinge on individual privacy and safety,<sup>27</sup> a further question that is particularly apposite for this study would be: Should parents be granted unlimited discretion in the guidance of their children or has the state the obligation to protect children? In this context, one needs to be mindful of the fact that unlike, for example films, the elective element is in most instances not present in advertising. Before the screening of films, viewers are normally made aware of so-called parental guidance notices, whereas with advertising no such guidance exists.

This study is, however, not merely aimed at a critical analysis of existing literature. Whereas theoretically, the constitutional issues pose the difficult questions, the aim herein is practical. The intention is to develop and propose self-regulatory rules for the control of offensive advertising that is fitting for a democratic South Africa.

It is recognised that there are numerous studies that examine the human rights of privacy and freedom of expression.<sup>28</sup> Furthermore, Pretorius<sup>29</sup> touches on the legal issues concerning the constitutionality of the regulation of broadcast content, but his primary concern is with the constitutional implications on the statutory regulation of the licensing of broadcast services. Pretorius therefore deals with the restrictions on broadcast *activity* (the aspect of freedom of expression that is governed by s 16(1)(a)), rather than the regulation of broadcast *content* (the aspect of freedom

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<sup>27</sup> Ovey & White *Jacobs & White - the European Convention on human rights* (2006) 277.

<sup>28</sup> Refer, for example, Burns *Communications law* (2009); Woolman, Roux & Bishop (eds) *Constitutional law of South Africa* (2008); Currie & De Waal *The bill of rights handbook* (2005); Van der Schyff *Limitation of rights - a study of the European Convention and the South African bill of rights* (2005); Colvin (ed) *Developing key privacy rights* (2002); Cowen "Can 'dignity' guide South Africa's equality jurisprudence?" *SA journal on human rights* (2001) 34-58, 34; Venter *Constitutional comparison – Japan, Germany and South Africa as constitutional states* (2000); Woker *Advertising law in South Africa* (1999); Burchell *Personality rights and freedom of expression: the modern action injuriarum* (1998) and Van Wyk et al (eds) *Rights and constitutionalism – the new South African legal order* (1994).

<sup>29</sup> Pretorius "Freedom of expression and the regulation of broadcasting" *SA journal on human rights* (2006) 47-75, 47.

of expression that is governed by ss 16(1)(b) and 16(2)).<sup>30</sup> No study, however, looks at the constitutional perspective on the regulation of offensive advertising with a view to drafting of a clause that will regulate offensive advertising.

Such a study is relevant. Apart from the possible advantages that the self-regulation of offensive advertising may hold for the marketing communications industry itself,<sup>31</sup> it seems that the public demand some kind of control over offensive advertising.<sup>32</sup> Furthermore, in the matter of *Islamic Unity Convention v Independent Broadcasting Authority NO*, the Constitutional Court recognised the following:<sup>33</sup>

The regulation of material that is indecent, obscene or offensive to public morals, offensive to religious convictions or feelings of sections of the population ... are **important areas** with which the government, or the relevant regulatory authority, might be expected to concern itself [provided that] the **regulatory provisions** are **in line with the Constitution** (my emphasis).

A study of the control of offensive advertising in a democratic South Africa is also current. The Department of Trade and Industry commented in its *Consumer Law*

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<sup>30</sup> Pretorius *Regulation of broadcasting* concluded, with reference to English, European, Canadian, American and South African jurisprudence, that "the right to freedom of expression does not confer an unqualified right to broadcast".

<sup>31</sup> Refer, for example, EASA *Analysis 13*; and Miller "The FTC and voluntary standards: maximizing the net benefits of self-regulation" *Cato journal* (1985) 897-903, 902-903. See also Massmart *Annual report* (2005) 52, in which it is stated "... we are mindful of the reputational damage that can result from irresponsible behaviour. Our Chains pay scrupulous attention to ensuring that they ... [a]void ... offensive advertising".

<sup>32</sup> Advertising Standards Authority of South Africa *Research report* (2003) (unpublished); Advertising Standards Authority (United Kingdom) *Research report* (2002) (unpublished); Teinowitz "'Morality vote' numbers worry advertising execs – some fret about new conservatism in public taste" [www.adage.com/news.cms](http://www.adage.com/news.cms) (accessed November 2004); Swanepoel "Sat vir seks in advertensies" *Sarie* (January 2005) 110-4.

<sup>33</sup> 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 30.

*Benchmark Study*<sup>34</sup> that South African legislation is not specific enough with regard to issues such as offensive advertising, and Lowe<sup>35</sup> has suggested that to change perceptions on the issue of gender and the media, offensive advertising should be targeted. A turn toward more conservative public values could pave the way for stronger public support for government curbs on certain kinds of media or advertising content, resulting in a stricter regulation of what constitutes offence in programming and advertising.<sup>36</sup> In this context, it is interesting to note that in the 2004 American elections a fifth of voters in the United States of America listed "moral values" as one of their most important reasons for voting.<sup>37</sup> By comparison, only 19% named terrorism as their top concern.<sup>38</sup>

### 3. Research methodology

Given that one cannot dispute about taste, at first blush there does not appear to be a uniform and objective standard against which offensive advertising can be measured. Should this conjecture be proven correct, it is unlikely that the regulation of offensive advertising could ever be constitutionally and legally sanctioned.

To examine this conjecture critically, an interpretative, comparative literature review will be conducted. In an era of cosmopolitan constitutionalism, in which lawyers and judges increasingly look beyond their own borders and borrow ideas from other jurisdictions, a comparison of legal practices in different countries could assist in broadening an evaluator's horizons, expand an evaluator's sense of what is possible, and dispelling any sense of false necessity.<sup>39</sup> Since the *Constitution, 1996* provides

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<sup>34</sup> Department of Trade and Industry *Consumer benchmark study (2004)* [www.dti.gov.za/ccrdlawreview97](http://www.dti.gov.za/ccrdlawreview97) (accessed May 2004).

<sup>35</sup> Lowe "Making every voice count: a Southern Africa study" *Gender and development* (2007) [www.oxfam.org.uk](http://www.oxfam.org.uk) 2 (accessed December 2007); and SAMS0 and Gender Links *Gender image workshop – chapter 7: sex sells, or does it?* [www.genderlinks.org.za/docs/training](http://www.genderlinks.org.za/docs/training) (accessed May 2003).

<sup>36</sup> Teinowitz *Morality vote* [www.adage.com](http://www.adage.com) (accessed November 2004).

<sup>37</sup> Teinowitz *Morality vote* [www.adage.com](http://www.adage.com) (accessed November 2004).

<sup>38</sup> Teinowitz *Morality vote* [www.adage.com](http://www.adage.com) (accessed November 2004).

<sup>39</sup> Goldsworthy (ed) *Interpreting constitutions – a comparative study* (2007) 3.

that when interpreting the Bill of Rights, a court, tribunal or forum must “promote the values that underlie a democratic society, must consider international law and may consider foreign law”, an interpretative, comparative literature review seems permissible.<sup>40</sup> The provisions of s 39 of the *Constitution, 1996* require of the courts and other interpreters of the Bill of Rights to consider international law and explicitly allow them to consider foreign law.

Ideally, in comparing various jurisdictions one should have full knowledge of the workings of all these jurisdictions. This is, however, generally an unattainable human ideal.<sup>41</sup> The Constitutional Court has also urged caution in using comparative Bill of Rights jurisprudence and foreign case law,<sup>42</sup> explaining that historical differences, socio-economic and political culture, and history all have an impact.<sup>43</sup> Notwithstanding the imposing body of comparative jurisprudence and literature, the interpretation of the right to freedom of expression is heavily dependent on the manner in which the right fits within a particular constitutional scheme. Kriegler J made this point forcibly in *S v Mamabolo (E TV and Others Intervening)*:<sup>44</sup>

[36] In any event, before one could subscribe to such a wholesale importation of a foreign product, one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve ... [37] ... Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must

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<sup>40</sup> Woker *Advertising law* 204 with reference to s 39 of the *Constitution, 1996*.

<sup>41</sup> Venter *Constitutional comparison* 257.

<sup>42</sup> Klug “South Africa: from constitutional promise to social transformation” in Goldsworthy (ed) *Interpreting constitutions – a comparative study* (2007) 289.

<sup>43</sup> Venter *Constitutional comparison* 19-20.

<sup>44</sup> 2001 (3) SA 409 (CC); 2001 (5) BCLR (CC).

feel its way ... [38] There are more important features to be considered when deciding on the suitability in our jurisprudence of the proposed North American model for drawing the line between permissible comment on judicial affairs and scandalising. The most important of these is to be found in the plain wording of section 165(4) of the Constitution ... [39] ... [W]here the Constitution itself contemplates legislative protection of these judicial qualities, it would be difficult to uphold an argument that any measure to that end which, even minimally, limits one or other of the fundamental rights contained in the Bill of Rights, is an unjustifiable infringement. It follows that a test which proceeds from such hypothesis would be inappropriate ... [40] There is yet another and no less fundamental reason why one should be slow to engraft such a test on to our law: the two are inherently incompatible, and they are incompatible because they stem from different common law origins and subsist in materially different constitutional regimes...<sup>45</sup>

It is clear from the *Mamabolo* judgment that that foreign principles and approaches should not be imported into South African law unless such foreign principle or approach is “significantly preferable” and compatible with the South African legal system.

The Constitutional Court further noted in *S v Makwanyane and Another*<sup>46</sup> that comparative Bill of Rights jurisprudence and foreign case law “will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law”, but “will not necessarily offer a safe guide to the interpretation” of the Bill of Rights. Accordingly, there is an important caution against uncritical borrowings from comparative jurisprudence and, in particular, from *First Amendment*<sup>47</sup> jurisprudence emanating from the United States.<sup>48</sup>

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<sup>45</sup> At paras 36-42.

<sup>46</sup> 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 para 37.

<sup>47</sup> *First Amendment to the United States Constitution of 1787*.

<sup>48</sup> Davis “Freedom of expression” in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 222.

Like South Africa and the United States, Canada, the United Kingdom and the European Community also recognise a fundamental right to freedom of expression, and have laws and rules that prescribe the content of advertising. While the laws and rules applicable in these jurisdictions are not identical to those of South Africa, the jurisprudence of these jurisdictions can nevertheless be instructive and can be relied on by South African courts in addressing the issue here under consideration. The Constitutional Court noted in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison and Others*<sup>49</sup> that international experience is to be considered “with a view of finding principles rather than extracting rigid formulae”, and with the purpose of seeking “rationales rather than rules”. Whereas the degree of shared foundations found in various jurisdictions clearly influences the level of comparability of constitutional systems,<sup>50</sup> it does not follow that practices appropriate in one country are universally applicable.

Another benefit of a comparative study is that it can on the one hand explain differences by reference to institutional, political, social, and cultural circumstances. On the other hand, if it turns out that some approaches to constitutional interpretation are almost universal, that might strengthen one’s argument.<sup>51</sup> However, as cautioned in *Mamabolo*,<sup>52</sup> before the importation of a foreign product can be approved, it must not only be significantly preferable in principle, but it must also be likely that its perceived promise will be realised in practice in the South African legal system and in the society it has been developed to serve.

An internationally comparative examination of the hybrid regulatory system in South Africa, which controls advertising content, requires an analysis of leading jurisdictions favouring freedom of expression as well as jurisdictions favouring self-regulation of advertising content. The number of jurisdictions selected must be large enough to permit adequate comparison at a suitable level of analysis. Whilst sample size in

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<sup>49</sup> 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 para 57.

<sup>50</sup> Venter *Constitutional comparison* 262.

<sup>51</sup> Goldsworthy *Interpreting constitutions* 3.

<sup>52</sup> At para 40.

qualitative research is an issue that is often debated in the literature, a consensus appears to be a minimum of two to four cases.<sup>53</sup> The main jurisdictions in this study are the United Kingdom, the United States of America, and Canada, and the study furthermore includes reference to the case law of the European Court of Human Rights.

An examination of the jurisprudence of the European Court of Human Rights would be instructive given the human rights framework in South Africa. The rich jurisprudence of case law and opinion that emanates from the deliberations of the European Court of Human Rights enables a meaningful analysis of human rights from the perspective of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>54</sup> <sup>55</sup> The pronouncements of the European Commission and the authoritative judgments of the European Court of Human Rights have had far-reaching consequences for the contracting parties of the *European Convention*, and may be regarded as persuasive authority for other countries.<sup>56</sup> The *European Convention* seems to be the most effective regional convention on human rights.<sup>57</sup>

The South African self-regulatory system has principally modelled itself on the British system, which is well developed and generally regarded as an example of a model advertising self-regulation system. The British self-regulatory system will therefore be instructive as a self-regulatory jurisdiction representative of the European approach to the regulation of offensive advertising.

Given South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South

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<sup>53</sup> Harker "Achieving acceptable advertising: an analysis of advertising regulation in five countries" *The international marketing review* (June 1998) 101-118, 112.

<sup>54</sup> 213 UNTS 222, entered into force on 3 September 1953, as amended by Protocols No's 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>55</sup> Naidu "The right to freedom of thought and religion and to freedom of expression and opinion" *Obiter* (1987) 59-73, 68.

<sup>56</sup> Naidu *Freedom* 61 footnote 6.

<sup>57</sup> Shelton *Remedies in international human rights law* (2001) 160; Naidu *Freedom* 59.

Africans of all ages, classes, and colours",<sup>58</sup> the South African hybrid regulatory system cannot simply continue to model itself on a European approach.

Accordingly, one cannot merely ignore the vast body of constitutional jurisprudence coming out of the United States. The *First Amendment* of the United States reads: "Congress shall make no law ... abridging the freedom of speech, or of the press".<sup>59</sup> This has given rise to a vast body of constitutional jurisprudence, and the United States is arguably the world's best-known proponent of the protection of free speech.<sup>60</sup> However, one should be cautious about drawing lessons from *First Amendment* jurisprudence.<sup>61</sup> *First Amendment* protection and South African freedom of expression protection are inherently incompatible as they have different common law origins and subsist in materially different constitutional regimes.<sup>62</sup> The United States Constitution and the *First Amendment* in particular, "is a wholly different kind of instrument" than the South African Constitution.<sup>63</sup> Of fundamental difference, in the context of this study, is that the South African constitution does not rank the right to freedom of expression above other protected rights, and is not unqualified, like the right to freedom of speech in the United States. Furthermore, the *First Amendment* does not have a limitation clause at all.<sup>64</sup> *First Amendment* jurisprudence is over-protective of freedom of speech, and is premised on the principle of content neutrality, a principle that Woolman Roux & Bishop<sup>65</sup> suggest is difficult to reconcile with the specific content prohibitions of s 16(2) of the

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<sup>58</sup> *Shabalala and Others v Attorney-General, Transvaal and Another* 1995 (12) BCLR 1593 (CC); 1996 (1) SA 725 (CC) para 26.

<sup>59</sup> *First Amendment*.

<sup>60</sup> Marcus & Spitz *Expression* 20-12. This is not expressly stated in Woolman Roux & Bishop (eds) *Constitutional law* (2008).

<sup>61</sup> Woolman Roux & Bishop (eds) *Constitutional law of South Africa – student edition* (2007) 359.

<sup>62</sup> Marcus & Spitz *Expression* 20-12; and *Mamabolo* para 40. This is not expressly dealt with in Woolman Roux & Bishop (eds) *Constitutional law* (2008).

<sup>63</sup> *Mamabolo* para 40.

<sup>64</sup> Currie & De Waal *Handbook* 165.

<sup>65</sup> *Constitutional law – student edition* 359-360.

*Constitution, 1996*.<sup>66</sup> Milo, Penfold & Stein<sup>67</sup> accordingly point out that the approach to freedom of speech in the United States “may be characterised as a ladder with discrete rungs of values and levels of justification [whereas] the South African approach [to freedom of expression] is more like a slide with a gradual decreasing burden of justification as the value of speech decreases”.<sup>68</sup>

Accordingly, in that these two jurisdictions do not share the same foundations, the constitutional system in the United States is to be considered “with a view of finding principles rather than extracting rigid formulae”, and with the purpose of seeking “rationales rather than rules”.<sup>69</sup> If the approach to constitutional interpretation in the United States turns out to be consistent with the approaches in other jurisdictions that have constitutional regimes similar to that of South Africa, this consistency might strengthen one’s argument.<sup>70</sup> However, one cannot lose sight of the caution in *Mamabolo*<sup>71</sup> that before the importation of a foreign product can be approved, it must not only be significantly preferable in principle, but it must also be likely that its perceived promise will be realised in practice in the South African legal system and in the society it has been developed to serve.

Furthermore, the content of national advertising is self-regulated in the United States, meaning that the United States is a leading jurisdiction favouring both freedom of speech and the self-regulation of advertising content, and accordingly, the regulation of offensive material, and more specifically advertising, has to form part of this study.

Canada is a further leading jurisdiction favouring both freedom of expression, as well as the self-regulation of advertising content. Canada operates in a constitutional

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<sup>66</sup> Refer chapter III for a discussion of the constitutional regime in the United States, and in particular in respect of freedom of speech.

<sup>67</sup> “Freedom of Expression” in Woolman Roux & Bishop (eds) *Constitutional law* (2008).

<sup>68</sup> At 42-13.

<sup>69</sup> *Coetzee v Government* para 57. See also Venter *Constitutional comparison* 262.

<sup>70</sup> Goldsworthy *Interpreting constitutions* 3.

<sup>71</sup> At para 40.

framework similar to that of South Africa, and it is another country with a self-regulatory advertising system.<sup>72</sup> Although the *Canadian Charter of Rights and Freedoms* does not apply where common law rules are invoked in disputes between purely private parties,<sup>73</sup> structural parallels as well as the currency of freedom of expression decisions under the Charter make Canadian jurisprudence an important point of reference.<sup>74</sup>

In examining the regulatory framework for the control of offensive advertising in the abovementioned jurisdictions, and being mindful of the limitations that comparative research imposes, a critical examination of other regulatory bodies that are involved with the regulation of offensive material, in these jurisdictions, may aid in further insight.

### 4. Chapter overview

In **Chapter II**, the different forms of advertising regulation, and specifically statutory and self-regulatory controls, will be critically and comparatively evaluated. The hybrid advertising regulatory system in South Africa is also critically discussed, taking specifically into account the best practice requirements for self-regulation, as well as the extent of supportive statutory controls.

In **Chapter III**, it will be considered whether advertising is a protected form of freedom of expression; and whether the South African advertising code constitutes a “law of general application” that may limit freedom of expression. The content of advertising should therefore be controlled in a manner that ensures effective regulation without unreasonably and unjustifiably limiting freedom of expression in a manner inconsistent with s 36 of the *Constitution, 1996*. In that s 36(1) provides that

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<sup>72</sup> See chapter III for a discussion of the Canadian constitutional regime, and in particular in respect of freedom of expression.

<sup>73</sup> *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 (SCC).

<sup>74</sup> Marcus & Spitz *Expression* 20-11-2. This is not expressly stated in Woolman Roux & Bishop (eds) *Constitutional law* (2008).

only a law of general application may limit a right in the South African Bill of Rights, it is determined in this chapter whether the South African advertising code constitutes “law”, is readily accessible, and its provisions are generally applicable as “law of general application”. In addressing these issues, comparative constitutional perspectives will be taken into account.

The question to be critically evaluated in **Chapter IV** is whether the criteria used to determine whether advertising material is offensive, as provided for in Clause 1 of Section II of the South African advertising code, can be regarded as sufficiently clear and precise to constitute “law of general application” within the meaning of s 36(1) of the *Constitution, 1996*, or whether it rather constitutes an unconstitutional and unenforceable contract term, given its vague terminology. If this is found to be the case, provisions conforming to the constitutional requirements of s 36(1) of the *Constitution, 1996* will be proposed. These questions are again explored on a comparative basis.

In **Chapter V**, the provisions relating to offensive advertising as contained in the South African advertising code, whether in its current form or in an amended format, depending on the findings in the previous chapter, will then be critically evaluated in terms of the s 36 criteria of the *Constitution, 1996*, on a comparative basis and in order to determine the final provisions for the control of offensive advertising.

In the final chapter, **Chapter VI**, the self-regulatory rules for the control of offensive advertising in South Africa, that is constitutionally reasonable and justifiable, will be proposed.

## Chapter II - Regulation of advertising

### 1. Introduction

Woker suggests that it is generally accepted that the content of advertising should be regulated.<sup>1</sup> This ensures that rivals play by the same rules.<sup>2</sup> Although only a small proportion of the millions of advertisements published each year are false, misleading, unfair, offensive, or socially irresponsible, or are perceived as such by the marketplace,<sup>3</sup> Sinclair points out that “[e]very industry has its charlatans and advertising is no exception”.<sup>4</sup> These offenders “hamper the functioning of the market system, harm or insult consumers, and reduce the overall credibility of advertising”.<sup>5</sup> It is therefore generally argued that it is both in the public interest and in the interest of the marketing communications industry that advertising be regulated to secure the confidence of consumers and government alike,<sup>6</sup> and achieve the necessary credibility and reputation to inspire public confidence in advertising.<sup>7</sup>

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<sup>1</sup> Woker *Advertising law in South Africa* (1999) 9; Woker “Legitimate protection of the public or censorship? Advertising controls and the right to freedom of speech” *SA mercantile law journal* (1997) 291-309, 307.

<sup>2</sup> Lord Borrie QC “Is self-regulation still the best way to protect advertising freedom?” *ISBA annual conference*, London [www.asa.org.uk](http://www.asa.org.uk) (accessed March 2001).

<sup>3</sup> Harker “Achieving acceptable advertising: an analysis of advertising regulation in five countries” *The international marketing review* (June 1998) 101-118, 106; Boddewyn *Global perspectives on advertising self regulation: principles and practices in thirty-eight countries* (1992) 4.

<sup>4</sup> Sinclair *The South African advertising book: making the other half work too* (1993) 55.

<sup>5</sup> *National Brands v Kwality Biscuits* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2003; and Sinclair *Advertising book* 55.

<sup>6</sup> Lord Borrie *Self-regulation* [www.asa.org.uk](http://www.asa.org.uk) (accessed March 2001).

<sup>7</sup> European Advertising Standards Alliance *Advertising self-regulation in Europe - an analysis of advertising self-regulatory systems and their codes of practice in 22 European countries* (2001) 13; and *Kwality Biscuits* (ASA Final Appeal Committee ruling).

The question, therefore, is not whether advertising ought to be controlled, but rather who should be responsible for exercising the imposition of restraints on advertising, and where to draw the line in respect of the rules applicable to advertising content.<sup>8</sup>

### 2. Forms of advertising regulation

It is accepted that advertising should be effectively regulated without unnecessarily stifling creativity.<sup>9</sup> Traditionally, two forms of advertising regulation exist, namely statutory regulation,<sup>10</sup> and self-regulation.<sup>11</sup> Advertising is mostly self-regulated in developed countries.<sup>12</sup> Thus, we find that advertising content is self-regulated in most European countries, the United States of America, Canada, New Zealand, South Africa, Latin America and Asia / the Pacific.<sup>13</sup>

Statutory regulation and self-regulation should, however, not be regarded as mutually exclusive alternatives.<sup>14</sup> Self-regulation has been described as “a judicious middle way between total exemption from all rules - whether laws, codes or policies - that govern any behaviour and total subjection to statutory or bureaucratic controls that govern all behaviour”.<sup>15</sup> Self-regulation may thus be viewed as an alternative to detailed legislation, but not to legislation itself, as self-regulation is designed and developed to work within and to complement statutory controls producing a result

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<sup>8</sup> Woker Advertising law 10-11.

<sup>9</sup> Woker Advertising law 228.

<sup>10</sup> The common law is, for ease of discussion, included in the category of *statutory regulation*.

<sup>11</sup> EASA Analysis 13.

<sup>12</sup> Fenwick *Civil liberties and human rights* (2007) 306 with reference to Akdeniz Walker & Wall (eds) *The internet, law and society* (2000) 6-14; *Kwality Biscuits* (ASA Final Appeal Committee ruling).

<sup>13</sup> European Advertising Standards Alliance *Advertising self regulation bodies and systems* [www.easa-alliance.org](http://www.easa-alliance.org) (accessed May 2008).

<sup>14</sup> Business Practices Committee “Report in terms of section 10(1) of the Harmful Business Practices Act 1988 (Act No 71 of 1988)” (Report No 15) (18 May 1992) *Government Gazette* 13988.

<sup>15</sup> Barnes & Blakeney “Advertising regulation in Australia: an evaluation” *The Adelaide law review* (1982) 22-60, 29.

that neither system of control could achieve on its own.<sup>16</sup> For as consumers and business require the protection and predictability of law supplemented by ethical business practices, only then will both consumers and business have the confidence to take full advantage of the benefits of a market economy.<sup>17</sup>

Self-discipline is sometimes mentioned as a further option, but in a self-disciplinary system, there are no formal controls.<sup>18</sup> Advertisers are restrained by their competitors who may run better advertisements and by consumers who would respond to unacceptable advertising with the *power of the purse*. In addition, honest traders would be governed by their own conscience; by ethical business practices; or by their fear of earning a bad reputation.<sup>19</sup> However, as the history of the advertising industry demonstrates that this *laissez-faire* approach does not adequately control the abuses of advertising,<sup>20</sup> it will not be discussed any further.

The legal framework for the control of advertising content in South Africa is a hybrid system in which advertising is partly self-regulated and partly state-regulated. It is a mixture of the common law and legislation, as well as the self-regulatory system based on the South African advertising code,<sup>21</sup> which is administered by the South African advertising regulator.

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<sup>16</sup> EASA *Analysis 13*, 19. The *Consumer Protection Act* (Act 68 of 2008) intends to prescribe the principles applicable to advertising content (refer Chapter 2, Fundamental consumer rights, Part E (Right to fair and responsible marketing), articles 29 to 39), and furthermore expresses the desire for industries to self-regulate prior to government involvement (refer Chapter 3, Protection of consumer rights and consumers' voice, Part A (Consumer's right), article 69 dealing with the enforcement of rights by a consumer; and article 70 dealing with alternative dispute resolution; and Chapter 4, Business names and industry codes of conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes. See also EASA *Analysis 13*.

<sup>17</sup> Council of Better Business Bureaus *Annual report* (1989) 9.

<sup>18</sup> Boddewyn *Global perspectives* 4.

<sup>19</sup> Boddewyn *Global perspectives* 6.

<sup>20</sup> Refer, in general, Nevett *Advertising in Britain: a history* (1982); and Turner *The shocking history of advertising* (1952).

<sup>21</sup> Advertising Standards Authority of South Africa *Code of advertising practice* (2008); and [www.asasa.org.za](http://www.asasa.org.za).

In discussing this hybrid system the focus will firstly be on a critical and comparative evaluation of the South African self-regulatory system before turning to the statutory and common law system that also governs advertising content.

### 2.1. Self-regulatory framework<sup>22</sup>

The following elements are characteristic of a sufficient and effective advertising self-regulatory system:

#### 2.1.1. Independence

In a self-regulatory system, it is in the interest of fair competition that the administrator of the system is not also a competitor in the market place.<sup>23</sup> This means that the administrator must be seen to be impartial, and that the operation and decisions of the administrator should be made independently of government, specific interests, and interest groups.<sup>24</sup>

The South African advertising regulator is such an independent body and is responsible for self-regulating advertising content in South Africa.<sup>25</sup> The same can be said of the British advertising regulator;<sup>26</sup> the Canadian advertising regulator;<sup>27</sup> and the United States advertising regulator.<sup>28</sup>

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<sup>22</sup> It falls outside the ambit of this study to discuss the criticisms and benefits of self-regulation. See generally Woker *Advertising law* 17; and Boddewyn *Global perspectives* 717.

<sup>23</sup> *Kwality Biscuits* (ASA Final Appeal Committee ruling); *EASA Analysis* 14.

<sup>24</sup> European Advertising Standards Alliance *Self-regulation – a statement of common principles and operating standards of best practice* [www.easa\\_alliance.org](http://www.easa_alliance.org) (accessed June 2008).

<sup>25</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 4; and *Rape Crisis 'Charlize Theron' v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1999.

<sup>26</sup> Lawson "Challenging the Advertising Standards Authority" *New law journal* (2001) 526-527; Boddewyn "Outside participation in advertising self-regulation: the case of the Advertising Standards Authority (U.K.);" *Journal of consumer policy* (1983) 77-93, 92-93; [www.asa.org.uk/asa/about](http://www.asa.org.uk/asa/about).

<sup>27</sup> [www.adstandards.com/en/standards](http://www.adstandards.com/en/standards).

<sup>28</sup> Boddewyn *Global perspectives* 129-130.

In the United States the principle of independence is, however, negated through the print media, which set individual standards that vary from one publication to another based on each publication's audience and management.<sup>29</sup> As the mandate of the United States advertising regulator specifically excludes undesirable advertising from its ambit,<sup>30</sup> regulation by individual print media owners fills this potential gap. In addition, the broadcast media licensed by the United States broadcast regulator are subject to regulator's regulations, with the result that each of the major networks have their individual *Standards and Practices* rules, which determines the acceptability of commercials for their particular audiences. Commercials are pre-screened based on these rules.<sup>31</sup> Accordingly, in the United States - unlike in South Africa, the United Kingdom and Canada - there is no uniform standard for offensive advertising content, as the decision of what constitutes offensive advertising content is media owner specific.

### 2.1.2. Contractual relationship

Businesses cannot be compelled to participate in self-regulatory activities, since self-regulatory systems are normally based on an agreement between members of an industry to, amongst others, accept and act in accordance with a code of practice.<sup>32</sup> The mandate of the South African advertising regulator, a juristic person exercising a public function, is no exception. The relationship between the South African advertising regulator and its members and the power vested in the South African advertising regulator also arises out of contract.<sup>33</sup> Although freedom of contract is given a high premium, it has long been the approach of the South African courts that they are entitled to interfere in contractual relationships in certain

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<sup>29</sup> Boddewyn *Global perspectives* 131.

<sup>30</sup> Boddewyn *Global perspectives* 132.

<sup>31</sup> Boddewyn *Global perspectives* 131; Dessart *Standards and practices* [www.museum.tv](http://www.museum.tv) (accessed May 2008).

<sup>32</sup> *Telematrix* para 27; and Boddewyn *Global perspectives* 4, 135; *EASA Analysis* 13.

<sup>33</sup> *Turner v The Jockey Club of South Africa* 1974 (3) SA 633 (AD); and *Rape Crisis* (ASA Final Appeal Committee ruling).

instances: The common law has always recognised that contracts, which are contrary to public policy, are unenforceable. However, the Bill of Rights should be employed to determine public policy, taking a balanced approach and weighing up all of the relevant constitutional provisions.<sup>34</sup> For example, in *Brisley v Drotzky*,<sup>35</sup> Cameron JA stated the following:

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights ...What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith ... On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons ...is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity ...<sup>36</sup>

In *Nestle (SA) Pty Ltd v Mars Inc*<sup>37</sup> the South African Supreme Court of Appeal correctly enforced the terms of the South African advertising code in determining that the South African advertising regulator had incorrectly refused to entertain Mars' complaint against Nestle, and that the South African advertising regulator was contractually bound to consider it.

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<sup>34</sup> Hopkins "The influence of the bill of rights on the enforcement of contracts" *De rebus* (2003) 22, 25.

<sup>35</sup> 2002 (4) SA (1) SCA.

<sup>36</sup> At paras 92 to 95.

<sup>37</sup> 2001 (4) SA 542 (SCA).

The relationship between the Canadian advertising regulator and its members, and the power vested in the Canadian advertising regulator also arises out of contract.<sup>38</sup> This is also true of the relationship between the United States advertising regulator and its members.<sup>39</sup> Unlike the South African advertising regulator, where individual legal entities are members via their trade associations, resulting in indirect membership,<sup>40</sup> individual legal entities in the United States and Canada are members of the advertising regulators. In their efforts to ensure fair-trade practices, it is a paradox that United States government regulatory bodies find themselves required by anti-trust law to prohibit the kinds of industry-wide agreements and sanctions upon which the self-regulation of advertising is based in other developed countries.<sup>41</sup>

Whilst the regulation of advertising content in the United Kingdom also arises out of contract, the British advertising regulator has no contractual relationship with advertisers, advertising practitioners, or media owners.<sup>42</sup> The British advertising regulator has instead contracted with the two CAPs, namely *CAP (Broadcast)* and *CAP (Non-broadcast)*. In turn, the CAPs contracted with trade associations representing marketers, agencies, and media owners.<sup>43</sup> Therefore, much like in South Africa, individual legal entities have indirect membership, albeit that such membership is of the CAPs and not the British advertising regulator itself.

### 2.1.3. Code of conduct

The European Advertising Standards Alliance suggests that the differences between self-regulatory advertising codes in use today are insignificant by comparison with

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<sup>38</sup> The Canadian advertising regulator has over 160 members, which include leading Canadian advertisers, advertising agencies, media organisations, and suppliers to the advertising sector (refer [www.adstandards.com](http://www.adstandards.com))

<sup>39</sup> [www.nadreview.org](http://www.nadreview.org).

<sup>40</sup> *Telematrix* para 4.

<sup>41</sup> Boddewyn *Global perspectives* 136; Harker *Acceptable advertising* 114. It does not, however, fall within the ambit of this stuffy to discuss this any further.

<sup>42</sup> *R v Advertising Standards Authority, ex parte Insurance Services plc* (1989) 2 Admin law review 77.

<sup>43</sup> [www.asa.org.uk](http://www.asa.org.uk).

the major differences between national laws affecting advertising, over which self-regulation has no control.<sup>44</sup> The reason for the uniformity in advertising codes is that all these codes have their origins in the ICC code.<sup>45</sup> In some countries, national codes have been developed well beyond the ICC code, but are still based on the same premise: that advertising must be legal, decent, honest, and truthful, prepared with a due sense of social responsibility and the respect for the principles of fair competition.<sup>46</sup>

Codes are more flexible than regulation by statute: they can be readily revised to respond to new circumstances, and responsibility for their enforcement lies with those who have specialised knowledge of the sector and of what are reasonable and fair standards.<sup>47</sup>

The South African advertising code, as administered and determined by the South African advertising regulator;<sup>48</sup> the British non-broadcast advertising code;<sup>49</sup> the British radio advertising code;<sup>50</sup> and the British television advertising code,<sup>51</sup> as administered by the CAPs and determined by the British advertising regulator;<sup>52</sup> as well as the Canadian advertising code,<sup>53</sup> as administered and determined by the

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<sup>44</sup> EASA *Analysis* 16.

<sup>45</sup> EASA *Statement* [www.easa\\_alliance.org](http://www.easa_alliance.org) (accessed June 2009); *Rape Crisis* (ASA Final Appeal Committee ruling).

<sup>46</sup> EASA *Analysis* 14.

<sup>47</sup> *Business Practices Committee Report*.

<sup>48</sup> *South African code of advertising practice* (2008); and [www.asasa.org.za](http://www.asasa.org.za).

<sup>49</sup> The Committee of Advertising Practice *British code of advertising, sales promotion and direct marketing* (2003); and [www.cap.org.uk](http://www.cap.org.uk).

<sup>50</sup> The Broadcast Committee of Advertising Practice *Radio advertising standards code* (2002); and [www.cap.org.uk](http://www.cap.org.uk).

<sup>51</sup> The Broadcast Committee of Advertising Practice *Television advertising standards code* (2002); and [www.cap.org.uk](http://www.cap.org.uk).

<sup>52</sup> Lawson *Challenging the ASA 526-527*; [www.asa.org.uk](http://www.asa.org.uk).

<sup>53</sup> Advertising Standards Canada *Canadian code of advertising standards* (November 2007); and [www.adstandards.com](http://www.adstandards.com).

Canadian advertising regulator,<sup>54</sup> are all based on the same premise as the ICC code. These codes therefore differ in detail rather than in principle, dealing with all forms of marketing communication rather than just with what was traditionally regarded as advertising.<sup>55</sup>

It would appear that these advertising codes all intend regulating advertising in two ways: Firstly, ensuring that advertising is not harmful or misleading; and secondly, ensuring that certain standards are maintained. A distinction can thus be drawn between advertising regarded as harmful or misleading, and advertising regarded as undesirable.<sup>56</sup> Offensive advertising falls within the latter category.

Although the United States advertising regulator does not administer a comprehensive advertising code like other self-regulatory bodies,<sup>57</sup> its specific mandate is to control harmful or misleading advertising. Undesirable advertising is specifically excluded from its ambit. In addition, the CARU, the United States children's advertising unit, responds to public concerns and promotes responsible children's advertising. This is not only with regard to issues of truth and accuracy, but includes the promotion of socially responsible advertising that is sensitive to the special needs of children.<sup>58</sup>

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<sup>54</sup> [www.adstandards.com](http://www.adstandards.com).

<sup>55</sup> Refer Clause 4.1 of Section I of the South African advertising code; the definition of "advertising", Canadian advertising code; Introduction, Clause 1.1 of the British non-broadcast advertising code; and Clause 1 of the British radio advertising code dealing with advertisements.

<sup>56</sup> Refer Clause 1 of Section I of the South African advertising code; the Canadian code; the Preface of the British non-broadcast code; the Foreword of the British radio advertising code; and the Foreword of the British television advertising code.

<sup>57</sup> National Advertising Division *The [American] advertising industry's process of voluntary self-regulation – policies and procedures* [www.nadreview.org](http://www.nadreview.org) (accessed August 2007); Harker *Acceptable advertising* 102.

<sup>58</sup> NAD *Policies and procedures* [www.nadreview.org](http://www.nadreview.org) (accessed August 2007) - Section 1 dealing with *Advertising monitoring* and Section 2 dealing with *Filing a complaint*; and Boddewyn *Global perspectives* 132-3.

Like other advertising codes, the intention of the United States advertising code is to promote the highest standards of truth and accuracy in national advertising and to promote responsible advertising to children.<sup>59</sup> Where the United States advertising code, however, conflicts with other advertising codes is that it does not set out ethical standards of professional conduct, and accordingly does not deal with offensive advertising. However, the approach that has been taken by individual media owners to offensive advertising fills this potential gap.<sup>60</sup> Individual stations pre-screen material to determine its acceptability based on individual commercial clearance guidelines.<sup>61</sup> This is as a result of the requirement imposed by the United States broadcast regulator that a broadcast station must ensure that, amongst others, advertising content does not offend the sensibilities of their individual viewers, failing which the broadcast station may be fined or its license revoked.<sup>62</sup> The result is that there is no uniform standard in the United States by which offensive advertising is judged.

### 2.1.4. Functions

Internationally, standards and principles are set that self-regulatory bodies should endeavour to meet in order to offer an effective system for the control of advertising content.<sup>63</sup> These standards and principles are the following: The reason for the uniformity in advertising codes is that all these codes have their origins in the ICC code.<sup>64</sup> In some countries, national codes have been developed well beyond the ICC code, but are still based on the same premise: that advertising must be legal,

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<sup>59</sup> Boddewyn *Global perspectives* 129-30.

<sup>60</sup> Boddewyn *Global perspectives* 131.

<sup>61</sup> Weisman & Monagan "Back to the basics – clearing your copy" *Advertising & Trademark Law Seminar* (June 2004) (unpublished and unnumbered); Anonymous "I have a great commercial, so why won't the networks air it?" [www.library.lp.findlaw.com/articles](http://www.library.lp.findlaw.com/articles) (accessed February 2003); Boddewyn *Global perspectives* 131; and Dessart *Standards and practices* [www.museum.tv](http://www.museum.tv) (accessed May 2008).

<sup>62</sup> *Communications Act of 1934*.

<sup>63</sup> See, for example, *EASA Analysis*; *EASA Advertising self-regulation*; and Boddewyn *Global perspectives*.

<sup>64</sup> *EASA Statement* [www.easa\\_alliance.org](http://www.easa_alliance.org) (accessed June 2009); *Rape Crisis* (ASA Final Appeal Committee ruling).

decent, honest, and truthful, prepared with a due sense of social responsibility and the respect for the principles of fair competition.<sup>65</sup>

- ***A self-regulatory body normally<sup>66</sup> offers voluntary pre-publication advice to practitioners.<sup>67</sup>***

The South African advertising regulator does not offer such advice itself. Advertisers who wish to ascertain whether their advertisements conform to the principles contained in the South African advertising code may, however, voluntarily approach the ACA advisory service for an opinion. The ACA represents advertising practitioners in South Africa, and is a member association of the South African advertising regulator.

The South African position is very similar to the situation in the United Kingdom, where the CAPs and not the British advertising regulator offer pre-publication advice.<sup>68</sup> Also, in Canada the Canadian advertising clearance division, which operates separately and apart from the Canadian advertising regulator, provides voluntary advisory and copy clearance services.<sup>69</sup>

In the United States, the United States advertising regulator does not offer a pre-publication vetting service. However, as has already been stated, the

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<sup>65</sup> EASA Analysis 14.

<sup>66</sup> Barnes & Blakeney *Advertising regulation* 29.

<sup>67</sup> Working on the principal that prevention is better than cure, most national self-regulatory bodies provide copy advice, on request, to advertisers and agencies on the acceptability of proposed advertising campaigns (this service is called copy advice) (refer EASA Analysis 15). In some countries, certain categories of advertising have to be submitted to the self-regulatory body for clearance before they can be broadcast or published. This is known as pre-clearance. It superficially resembles copy advice, but whereas copy advice is not usually binding, pre-clearance is. In some cases pre-clearance is a legal requirement applicable to all advertising in a particular medium (for example television) or product category (for example medicines or tobacco) while in others it may be used by a self-regulatory body as a sanction against advertisers who have breached the codes (refer EASA Analysis 16).

<sup>68</sup> EASA Analysis 117.

<sup>69</sup> Canadian advertising code 10.

individual media owners vet advertising content, including offence, against standards based on each media owner's audience and management discretion.<sup>70</sup>

- **A self-regulatory body normally<sup>71</sup> monitors advertisements in various media.<sup>72</sup>**

The South African advertising regulator does not monitor advertising, but relies solely on complaints to initiate its processes. The same is true of the Canadian advertising regulator.

The British advertising regulator, however, monitors advertisements and will, in appropriate circumstances, intervene to stop an advertisement, which it considers in contravention of the British codes, even if no complaint has been received.<sup>73</sup> The United States advertising regulator also monitors both traditional advertising, such as broadcast and print consumer, as well as new media, including the Internet, in order to investigate the acceptability of claims.<sup>74</sup>

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<sup>70</sup> Boddewyn *Global perspectives* 131.

<sup>71</sup> Barnes & Blakeney *Advertising regulation* 29.

<sup>72</sup> So many advertisements appear each year that it would be quite impossible for any organisation to examine every one. However, some self-regulatory bodies monitor advertising on their own initiative, dealing with apparent code breaches in the same way as they would complaints. Often such monitoring concentrates on specific media or categories of advertising, particularly those where there may be some public concern (refer EASA *Analysis* 15).

<sup>73</sup> [www.asa.org.uk](http://www.asa.org.uk).

<sup>74</sup> NAD *Policies and procedures* [www.nadreview.org](http://www.nadreview.org) (accessed August 2007) - Section 1 dealing with *Advertising monitoring*; Council of Better Business Bureaus *Annual report* 4; Boddewyn *Global perspectives*; Harker *Acceptable advertising* 115.

- **A self-regulatory body normally<sup>75</sup> deals with competitor and consumer complaints.<sup>76</sup>**

Generally, the advertising industry<sup>77</sup> actively polices itself by lodging complaints against others' advertising if such advertising appears to be in breach of the advertising code. Consumers, collectively or individually, are also afforded an opportunity to object to advertising directly to the advertiser via the self-regulatory body.<sup>78</sup> It is clear from the provisions of the South African advertising code that in addition to companies in competition with each other, any person, including government or departments of State, may complain about a breach of the South African advertising code, whether the person is a member or not.<sup>79</sup> The British advertising regulator,<sup>80</sup> the Canadian

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<sup>75</sup> Barnes & Blakeney *Advertising regulation* 22.

<sup>76</sup> Sometimes complainants have misunderstood the advertisement, have not read it properly, or have complained about matters not covered by the advertising code. When a self-regulatory body receives a complaint, it will first decide whether the complaint concerns a matter that can be considered by a complaints committee. Complaints from individual consumers are normally handled free of charge. Some self-regulatory bodies charge for dealing with disputes between advertisers (refer EASA *Analysis* 14). If the self-regulatory body decides that the complaint warrants consideration by a complaints committee, the advertiser is afforded an opportunity to respond to the complaint. Where the advertiser agrees to change the advertisement since the complaint resulted from an unintentional mistake or omissions, the complainant is informed of the outcome (refer EASA *Advertising self-regulation* 14). If the advertiser disagrees with the complainant, or fails to respond, the case is referred to the complaints committee. Both the complainant and the advertiser are informed of the complaints committee's decision. If either party disagrees with the decision, most self-regulatory bodies have an appeals system (refer EASA *Analysis* 15).

<sup>77</sup> Traditionally, the advertising industry consists of three parts: the advertisers who pay for the advertising; the advertising agencies responsible for the form and content of the advertising; and the media that carry it.

<sup>78</sup> The *Consumer Protection Act* expresses the desire for industries to self-regulate prior to government involvement (refer Chapter 3, Protection of Consumer Rights and Consumers' Voice, Part A (Consumer's right), article 69 dealing with enforcement of rights by a consumer and article 70 dealing with alternative dispute resolution; and Chapter 4, Business Names and Industry Codes of Conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes. See also EASA *Statement* [www.easa\\_alliance.org](http://www.easa_alliance.org) (accessed June 2008).

<sup>79</sup> *Nandos v Uthingo* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001.

advertising regulator,<sup>81</sup> and the United States advertising regulator<sup>82</sup> also respond to complaints from individuals, organisations, or competitors. However, all these self-regulatory bodies, including the South African advertising regulator, only initiate a formal investigation once it has been determined that the complaint meets the criteria for pursuing an investigation.<sup>83</sup>

o **A self-regulatory body normally<sup>84</sup> imposes sanctions when necessary.<sup>85</sup>**

Self-regulation amounts to more than self-restraint on the part of individual companies or entities.<sup>86</sup> Therefore, advertising codes would be incomplete without effective sanctions to enforce compliance. A self-regulatory system needs to ensure that advertisements, which fail to comply with the advertising code, are quickly corrected or removed in an effective manner.<sup>87</sup>

Most advertisers and advertising agencies use conventional media and, therefore, the threat of a withdrawal of advertising privileges has generally

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<sup>80</sup> EASA Analysis 116-8; [www.asa.org.uk](http://www.asa.org.uk).

<sup>81</sup> Canadian advertising code 3.

<sup>82</sup> Boddewyn *Global perspectives* 130-2; Harker *Acceptable advertising* 109-115.

<sup>83</sup> Clause 8.2 of the Procedural Guide of the South African advertising code; Advertising Standards Canada *Ad complaints report (2002)* 3; EASA Analysis 118; Boddewyn *Global perspectives* 132.

<sup>84</sup> Barnes & Blakeney *Advertising regulation* 22.

<sup>85</sup> Generally speaking, self-regulation has the backing of the advertising industry, so in most cases advertisers accept the decision of a self-regulatory body, even if they do not agree with it. Self-regulation cannot, however, depend on voluntary compliance with its decisions - it must be able to enforce them. If the complaints committee upholds the complaint, the advertiser is asked to withdraw the advertisement or change it within a specific period of time (EASA Analysis 15). In cases where advertisers refuse voluntary co-operation, self-regulatory bodies have at their disposal a variety of sanctions. These include, for example, instructing the media to refuse the advertisement, or adverse publicity through the publication of decisions. On those rare occasions where all else fails, the self-regulatory body may refer the case to the statutory authorities, which have the power to prosecute the advertiser (EASA Analysis 15).

<sup>86</sup> Canadian advertising code 15.

<sup>87</sup> Boddewyn *Global perspectives* 4; EASA Analysis 13.

proved to be effective, as advertisements stopped by a self-regulatory body can be costly for companies, in terms of reputation and financially.<sup>88</sup> Thus, where advertisers, advertising agencies, and the media are involved in the advertising self-regulatory process - like in South Africa,<sup>89</sup> the United Kingdom,<sup>90</sup> and Canada<sup>91</sup> - the chances of compliance are greatly enhanced as the self-regulatory body is given teeth.<sup>92</sup> If, however, a small independent printer or 'back-yard' printer carries the advertisement the sanctions can generally not be enforced.

In the United States, however, only advertisers and advertising practitioners are involved in the self-regulatory system.<sup>93</sup> As the media are not involved in the self-regulatory system in the United States, but rather set their own individual standards based on each medium's audience demographics and management requirements,<sup>94</sup> the United States advertising regulator only has the power of persuasion.

In South Africa, the United Kingdom and Canada, on the other hand, self-regulatory bodies can draw on a number of sanctions, which compel advertisers to change or withdraw their advertising:<sup>95 96</sup>

- *Refusal of further advertising space*  
Where an advertiser refuses to comply voluntarily with a ruling of the South African advertising regulator, the regulator can issue what is

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<sup>88</sup> [www.asa.org.uk](http://www.asa.org.uk).

<sup>89</sup> Preface, Clause 3 of the South African advertising code.

<sup>90</sup> [www.asa.org.uk](http://www.asa.org.uk).

<sup>91</sup> [www.adstandards.com](http://www.adstandards.com).

<sup>92</sup> *Telematrix* para 27; and *Harker Acceptable advertising* 110.

<sup>93</sup> *Boddewyn Global perspectives* 130.

<sup>94</sup> *Boddewyn Global perspectives* 131; *Council of Better Business Bureaus Annual report* 4.

<sup>95</sup> *EASA Analysis* 118.

<sup>96</sup> It is not within the ambit of this study to critically evaluate these sanctions.

termed an *Ad-Alert* to its member associations to request their members not to publish the unacceptable claim and/or material in future.<sup>97</sup> This sanction is also available to the British advertising regulator<sup>98</sup> and the Canadian advertising regulator.<sup>99</sup>

- o *Pre-publication advice*

The South African advertising regulator can also impose mandatory pre-publication advice on all advertising for a specific advertiser for a period of normally six months, if certain criteria are met.<sup>100</sup> The British advertising regulator can impose a similar sanction.<sup>101</sup> In the case of outdoor advertising, advertisers found to have breached the British codes' rules on taste, decency or social responsibility may be required to seek mandatory pre-publication advice for a two-year period.<sup>102</sup>

- o *Adverse publicity*

The South African advertising regulator can also order an advertiser to publish an advertisement in which the South African advertising regulator's ruling is summarised in a prescribed form, in the media of the South African advertising regulator's choice.<sup>103</sup> This can be costly for an advertiser, both in terms of reputation and financially, as an advertiser has to pay for the advertising space booked by the South African advertising regulator as well as the production costs of the

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<sup>97</sup> Clause 15.4 of the Procedural Guide of the South African advertising code.

<sup>98</sup> [www.asa.org.uk](http://www.asa.org.uk); EASA Analysis 118.

<sup>99</sup> Advertising Standards Canada *Trade dispute procedure* [www.adstandards.com](http://www.adstandards.com) (accessed November 2007) - Clause 6.11 deals with failure to comply with procedure or comply with decision.

<sup>100</sup> Clause 14.3 of the Procedural Guide of the South African advertising code.

<sup>101</sup> [www.asa.org.uk](http://www.asa.org.uk).

<sup>102</sup> EASA Analysis 118; Jardine "How far can you go before an ad is banned?" *Marketing* (1999) 14.

<sup>103</sup> Clauses 14.6 and 14.6 of the Procedural Guide of the South African advertising code; and, as an example of the application of this sanction, *Kentucky Fried Chicken / Chicken Licken* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2004.

advertisement. This sanction is unique to South Africa and has no equivalent in other self-regulatory systems.

o ***A self-regulatory body normally<sup>104</sup> publicises its decisions.<sup>105</sup>***

The South African advertising regulator publishes its decisions on its website at the conclusion of its investigations.<sup>106</sup> This is in line with the actions of the United States advertising regulator,<sup>107</sup> the Canadian advertising regulator,<sup>108</sup> and the British advertising regulator.<sup>109</sup> As the media, government departments, the advertising industry and consumer bodies, normally read these decisions, the publication of these decisions constitute a form of adverse publicity. These decisions are also reflected in the annual reports of these self-regulatory bodies.

***In summary, the South African advertising regulator is a sophisticated and well-developed system of self-regulation, which compares very favourably with that in many other countries.<sup>110</sup> The actions of the South African advertising regulator do, however, raise interesting questions about censorship.<sup>111</sup>***

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<sup>104</sup> Barnes & Blakeney *Advertising regulation* 22.

<sup>105</sup> Most self-regulated bodies publish its decisions on a regular basis (EASA Analysis 15).

<sup>106</sup> Clause 14.4 of the Procedural Guide of the South African advertising code.

<sup>107</sup> Boddewyn *Global perspectives* 130-1.

<sup>108</sup> Canadian advertising code 15.

<sup>109</sup> www.asa.org.uk; and EASA Analysis 118.

<sup>110</sup> De Jager & Smith *Advertising and the law* (1995) 21.

<sup>111</sup> Woker *Advertising law* 16, note 39. It is not, however, within the ambit of this study to debate this issue further. On censorship in South Africa, see, for example, Van Rooyen "Censorship in a future South Africa: a legal perspective" *De jure* (1993) 283-296; Van der Westhuizen "Do we have to be Calvinist puritans to enter the new South Africa?" *SA journal on human rights* (1990) 425-439, 425; Van der Vyver "Censorship in South Africa by JCW van Rooyen" *De jure* (1988) 182, 182; Marcus "The wider reaches of censorship" *SA journal on human rights* (1985) 69; Haysom & Marcus "'Undesirability' and criminal liability under the Publications Act of 1974" *SA journal on human rights* (1985) 31.

### 2.2. Statutory framework<sup>112</sup>

#### 2.2.1. Legal recognition

Self-regulatory bodies can be divided broadly into two types: those created or acknowledged by statute, and those that are purely voluntary organisations having no statutory authority.<sup>113</sup> The former category principally relates to self-regulatory bodies that are created or acknowledged in respect of broadcast media, but this acknowledgment does extend, in certain instances, to non-broadcast media.<sup>114</sup> What follows, is an evaluation of the regulatory framework within which the South African advertising regulator operates, against the backdrop of other relevant jurisdictions:

##### 2.2.1.1. Broadcast media

The South African advertising regulator falls within the former category. In terms of the *Electronic Communications Act*,<sup>115</sup> the South African advertising code is the accepted standard to which all broadcast advertising in South Africa must conform. The Act further stipulates that, in accordance with the provisions of the *Independent Communications Authority Act*,<sup>116</sup> the *Broadcast Monitoring and Complaints Committee* (BMCC) of the South African broadcast regulator must deal with non-adherence to the advertising code. Broadcasters are therefore legally bound to familiarise themselves with the principles contained in the South African advertising code and to ensure that their advertisements conform accordingly. Marcus & Spitz<sup>117</sup> are of the opinion that the result is that the South African advertising code has the status of delegated legislation. The effect of this statutory recognition of the

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<sup>112</sup> It falls outside the ambit of this thesis to discuss the criticisms and benefits of statutory regulation vis-à-vis self-regulation.

<sup>113</sup> EASA Analysis 19.

<sup>114</sup> For a discussion of the benefits of a self-regulatory body not only being a creature of contract, but of law, refer chapter III, para 3.2.1.

<sup>115</sup> Act 36 of 2005.

<sup>116</sup> Act 13 of 2000.

<sup>117</sup> Marcus & Spitz "Expression" in Chaskalson et al (eds) *Constitutional law of South Africa* (1999) 20-52A footnote 1. This view is not dealt with in Woolman et al (eds) *Constitutional law of South Africa* (2009).

South African advertising code is that, whilst the South African advertising regulator's status as an independent body remains unaffected, the South African advertising code enjoys statutory backing.

The European Parliament adopted the *Audiovisual Media Services' (AMS) Directive* in 2007, which updated the 1989 *Television without Frontiers Directive* – the then centrepiece of advertising regulation in the European Union. The *AMS Directive* deals with broadcasting in the European Union, and recognises that self-regulation and co-regulation play an essential complementary role to statutory legislation and encourages European Union Member States to make more use of such systems.

In line with the *AMS Directive*, the situation in the United Kingdom is therefore similar to that in South Africa. The British broadcast regulator<sup>118</sup> contracted out its responsibility to regulate the content of broadcast advertising to the British advertising regulator. Sections 319(2) and 325 of the *Office of Communications Act* require that the British advertising regulator should ensure that “generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”. The British broadcast regulator therefore provides a ‘legal backstop’, enforcing compliance both with the broadcast codes and with decisions of the British advertising regulator through its licensees.<sup>119</sup>

This means that the regulation of the content of broadcast advertising, including the regulation of offensive advertising, is mandated by statute in both South Africa and the United Kingdom,<sup>120</sup> even though these codes are still self-regulatory codes.<sup>121</sup>

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<sup>118</sup> *Office of Communications Act 2002*.

<sup>119</sup> [www.cap.org.uk](http://www.cap.org.uk).

<sup>120</sup> *EASA Analysis 14*.

<sup>121</sup> Anonymous “Courts back ASA against human rights attack” *The in-house lawyer* (February 2001) (unnumbered).

In the United States, there is no statutory recognition of the United States advertising regulator. The United States broadcast regulator<sup>122</sup> has the responsibility to oversee the acceptability of the content of programming and advertising, and a broadcast station can be fined or its license revoked if advertising content that is not truthful, or is false, misleading or deceptive, or offends against the sensibilities of their viewing audience is broadcast. Accordingly, individual stations therefore pre-screen material to determine its acceptability based on individual commercial clearance guidelines.<sup>123</sup>

There are no similar provisions in the Canadian *Radio-television and Telecommunications Commission Act*. The Canadian advertising system is voluntary and is not mandated by statute.

In view of the above discussion, it is therefore clear that in the United States, the United Kingdom, and in South Africa, offensive broadcast advertising is legally regulated. Whereas the self-regulatory advertising codes dealing with offensive advertising in South Africa and the United Kingdom are legally recognised, there is no similar code provision in the United States, as broadcasters are required not to publish offensive advertising content due to a broadcasting licence condition.

### **2.2.1.2. Non-broadcast media**

South African legislation provides no legal recognition of the South African advertising regulator or the South African advertising code in non-broadcast media. However, the *Consumer Affairs (Harmful Business Practices) Act*<sup>124</sup> prohibits advertising that is likely to unreasonably prejudice or deceive consumers.<sup>125</sup> The *Consumer Affairs Act* thus serves as a 'legal backstop' in that the South African advertising regulator is able to refer unresolved matters falling within the ambit of this

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<sup>122</sup> *Communications Act*.

<sup>123</sup> Boddewyn *Global perspectives* 131; Anonymous *Great commercial* [www.library.lp.findlaw.com](http://www.library.lp.findlaw.com) (accessed February 2003); Weisman & Monagan *Clearing your copy* (unpublished and unnumbered).

<sup>124</sup> Act 71 of 1988.

<sup>125</sup> *Woker Advertising law* 41.

Act to the Department of Trade and Industry. It is likely that the *Consumer Protection Act* will recognise the South African advertising code by law.<sup>126</sup>

Advertising standards concerning misleading and comparative advertising in the European Union are governed by *Council Directive 84/450/EC (as amended by Directive 97/55/EC)*. The Directive applies minimum standards to protect against misleading advertisements.<sup>127</sup> In the United Kingdom, this Directive has been implemented into law through the *Control of Misleading Advertisements Regulations 1988*,<sup>128</sup> which gives the Director General of Fair Trading the power to apply to court for an injunction against an advertisement that is considered misleading, to prevent the same or similar claims being made in future advertisements.<sup>129</sup> Before doing so, however, reg 4(4) obliges the Director General to have regard to the “desirability of encouraging the control, by self-regulatory bodies, of advertisements ...” It was held in *R v Advertising Standards Authority, ex parte Matthias Rath*<sup>130</sup> that reg 4(4) gave the British codes an “underpinning of subordinate legislation”, albeit this fell “short of direct statutory effect”. Lawson points out that, while this observation is doubtless true, there must remain an element of doubt as to whether the oblique reference to the British advertising regulator in reg 4(4) means that the British advertising regulator is “prescribed by law”.<sup>131</sup>

Given that the *Consumer Protection Act* is likely to recognise specific industry bodies, based on certain criteria, it is submitted that Lawson's critique is not of concern in a South African context, and that the enactment of the *Consumer Protection Act* is

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<sup>126</sup> *Consumer Protection Act*, Chapter 3, Protection of Consumer Rights and Consumers' Voice, Part A (Consumer's right), article 69 dealing with the enforcement of rights by a consumer; and article 70 dealing with alternative dispute resolution; and Chapter 4, Business Names and Industry Codes of Conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes.

<sup>127</sup> Pinto “Putting advertising claims to the test” *Managing intellectual property* [www.managingip.com](http://www.managingip.com) (accessed December 2003).

<sup>128</sup> [www.asa.org.uk](http://www.asa.org.uk).

<sup>129</sup> [www.asa.org.uk](http://www.asa.org.uk); EASA Analysis 119.

<sup>130</sup> [2001] EMLR 582.

<sup>131</sup> Lawson *Challenging the ASA* 526-527.

likely to result in the South African advertising code being granted the status of delegated legislation in broadcast and non-broadcast media.

In the United States, the United States advertising regulator works effectively because of voluntary industry co-operation, since it does not have legal authority to enforce its decisions.<sup>132</sup> If an advertiser is unwilling to adhere to a recommendation of the United States advertising regulator, a notice of intent is issued to the advertiser, explaining that, if the advertiser fails to respond or comply with the decision of the panel within ten days, the appropriate government agency<sup>133</sup> will be informed by letter, and the complete file turned over to that agency upon request.<sup>134</sup> Government agencies in the United States therefore also act as a 'legal backstop' to the self-regulatory United States advertising regulator.

The Canadian advertising regulator relies on the criminal legal system as a 'legal backstop' to regulate advertising. The Bureau of Competition Policy, established in terms of the *Competition Act*, issues guidelines on misleading advertising. These guidelines are legally enforceable.<sup>135</sup>

It is therefore clear that all four jurisdictions in question operate on the basis that the self-regulation of advertising content has a 'legal backstop'. It is also evident that whereas all the self-regulatory bodies, except for the United States advertising regulator, deal with advertising content on the basis that advertising content must be legal, decent, honest and truthful, prepared with a due sense of social responsibility and the respect for the principles of fair competition,<sup>136</sup> the 'statutory backup' systems are only concerned with misleading advertising. There is thus an

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<sup>132</sup> Boddewyn *Global perspectives* 130-1.

<sup>133</sup> Refer, for example, the Federal Trade Commission (FTC), the Food and Drug Administration (FDA); the U.S. Postal Service; the Federal Communications Commission (FCC); the Bureau of Alcohol, Tobacco and Firearms of the Internal Revenue Service (IRS); and the Securities and Exchange Commission (SEC).

<sup>134</sup> Boddewyn *Global perspectives* 132-3.

<sup>135</sup> Business Practices Committee *Report* 23.

<sup>136</sup> EASA *Analysis* 14.

anomaly between broadcast and non-broadcast advertising content insofar as statutory recognition / backup is concerned, whereas this disparity does not exist on the self-regulatory front.

### 2.2.2. General legal framework

In South Africa, there is no overarching legislation concerning the content of advertising, but there is nevertheless a significant body of fragmented legislation that cannot be ignored.<sup>137</sup> Whilst some of these statutes, making up this body of fragmented legislation, prohibit misleading statements,<sup>138</sup> others relate to the control of specific goods and products<sup>139</sup> or intellectual property.<sup>140</sup> Racism and hate speech is also controlled by statute,<sup>141</sup> and there is also so-called 'censorship legislation'<sup>142</sup> such as the *Films and Publications Act*.<sup>143 144</sup>

In the United Kingdom, like South Africa, the legislative regulation of advertising is limited to framework legislation as opposed to detailed legislation.<sup>145</sup> In addition to legislation covering in principle rather than in detail, amongst others, misleading advertising,<sup>146</sup> there is also 'censorship legislation'.<sup>147</sup>

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<sup>137</sup> See, for example, Guideline 9 to the South African advertising code, which lists sixty four statutes making up the body of fragmented legislation. It is not necessary, for purposes of this study, to list or deal with each one of these statutes but only those statutes that concern offensive material. See also Business Practices Committee Report 16.

<sup>138</sup> Refer, for example, the *Consumer Affairs Act* (Act 64 of 2008).

<sup>139</sup> For example, the *Medicines and Related Substances Control Act* (Act 101 of 1965) makes all medicines liable for registration by the Medicines Control Council.

<sup>140</sup> *Trade Marks Act* (Act 194 of 1993).

<sup>141</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* (Act 4 of 2000).

<sup>142</sup> Refer, for example, Johannessen "Judgment of the European Court of Human Rights, 23 September 1994 – Jersild v Denmark" *SA journal on human rights* (1995) 123-132, 132.

<sup>143</sup> Act 65 of 1996.

<sup>144</sup> For a critical analysis of statutory regulations relating to offensive material, see Chapter IV.

<sup>145</sup> EASA Analysis 13, 77; In-house lawyer *Courts back ASA* (unnumbered).

<sup>146</sup> *Control of Misleading Advertisements Regulations*.

<sup>147</sup> *Theatres Act 1968*.

In the United States there are few other sectors of business, which are subjected to as many types of federal, state, and local legislation as the advertising industry.<sup>148</sup> At the heart of advertising law in the United States are three basic doctrines:<sup>149</sup> Substantiation; deception, and unfairness.<sup>150</sup> In addition, there is also 'censorship legislation'.<sup>151</sup> The situation in Canada is no different.<sup>152</sup>

It is thus clear that all four jurisdictions have introduced 'censorship legislation'.<sup>153</sup> Self-regulation is, however, considered more flexible in dealing with "soft" issues such as taste, decency, and sexism.<sup>154</sup> These issues will be critically analysed in the following chapters.

### 3. Concluding comments

In most European countries, the United States, Canada, New Zealand, South Africa, Latin America, and Asia and the Pacific, the content of advertising is controlled on a statutory and self-regulatory basis.<sup>155</sup> These two forms of regulation are not regarded

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<sup>148</sup> Boddewyn *Global perspectives* 135-6.

<sup>149</sup> Boddewyn *Global perspectives* 136; Weisman & Monagan *Clearing your copy* (unpublished and unnumbered); Harker *Acceptable advertising* 114.

<sup>150</sup> *Federal Trade Commission Act (15 United States Code sections 41-58, as amended)*

<sup>151</sup> Refer, for example, 18 *United States Code* section 1464; Cutri & Jarosch "What did the Super Bowl reveal ... about decency?" (June 2004) *Advertising & trademark law seminar* Chicago (unpublished and unnumbered).

<sup>152</sup> [www.adstandards.com](http://www.adstandards.com).

<sup>153</sup> These statutes will be critically discussed in Chapter IV.

<sup>154</sup> Boddewyn "Advertising self-regulation: true purpose and limits" *Journal of advertising* (1989) 19-27, 21.

<sup>155</sup> Woker *Advertising law* 9; Fenwick *Civil liberties* 6-14; *National Brands* (ASA Final Appeal Committee ruling); EASA *Analysis* 13; EASA *Bodies and systems* [www.easa-alliance.org](http://www.easa-alliance.org) (accessed May 2008); In-house lawyer *Courts back ASA* (unnumbered).

## Chapter II Regulation of Advertising

as mutually exclusive alternatives.<sup>156</sup> Whilst self-regulation is an alternative to detailed legislation, it is not an alternative to legislation itself.<sup>157</sup>

In South Africa, the United Kingdom, and Canada, the content of offensive advertising is covered in self-regulatory advertising codes and regulated by an independent advertising regulator. With the exception of Canada, these advertising codes are recognised by statute in regulating broadcasting. In the United States offensive material is also covered in its broadcast legislation, but it is left to the individual media members to determine whether material is medium appropriate. Furthermore, 'censorship legislation' that could affect the regulation of offensive advertising, is in force in all four these jurisdictions.

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<sup>156</sup> Business Practices Committee Report 41.

<sup>157</sup> EASA Analysis 13.

## Chapter III – Advertising and freedom of expression

Given that the regulation of offensive advertising as well as 'censorship legislation' is in place in Canada, South Africa, the United Kingdom and the United States, the next question to consider is whether advertising amounts to a protected form of freedom of expression. Thereafter, the question whether the South African advertising code constitutes "law of general application" that may limit freedom of expression, needs to be answered before it can be critically discussed whether the regulation of offensive advertising, as administered by the South African advertising regulator, is a permissible limitation on freedom of expression.

### 1. Introduction

In determining whether advertising can be considered a protected form of freedom of expression, it is suggested that the meaning and interpretation of the right to freedom of expression and the right to free speech must firstly be established.

In its first judgment dealing with freedom of expression, a unanimous South African Constitutional Court articulated the values underlying the guarantee of freedom of expression in the following way:<sup>1</sup>

Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.

Freedom of expression lies at the heart of democracy and facilitates the search for truth and self-fulfilment by individuals and society generally.<sup>2</sup> In this sense, freedom

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<sup>1</sup> *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) para 8.

<sup>2</sup> Davies "Freedom of expression" in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 219. See also *Wingrove v The United Kingdom* (1997) 24 EHRR 1; *SANDU v Minister of Defence* para 7; *R v Zundel* [1992] 2 SCR 731; *Open Door Counselling and Dublin Well Woman v Ireland*

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# Advertising and Freedom of Expression

of expression promotes the ideals of pluralism, tolerance, and broad-mindedness, which are seen as central to the democratic process and to the personal development of individuals.<sup>3</sup> As freedom of expression is seen as indispensable to democracy, the importance of this right in a democratic society is emphasised in many jurisdictions,<sup>4</sup> and given South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours",<sup>5</sup> freedom of expression is no less important in South Africa than it is in, for example, the United States of America.<sup>6</sup> In the absence of freedom of communication, there is no democracy.<sup>7</sup> Moreover, as the value system of the *Constitution of the Republic of South Africa, 1996* is premised on the values of an open and democratic society based on human dignity, equality, and freedom,<sup>8</sup> these values have been elaborated by the courts and extended to include values such as *ubuntu* and reconciliation.<sup>9</sup>

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(1993) 15 EHRR 244; *Gay News Ltd and Lemon v United Kingdom* (1982) 5 EHRR 123; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Handyside v The United Kingdom* (1976) 1 EHRR 737 at 754.

<sup>3</sup> Coppel *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (1998) 327.

<sup>4</sup> Refer, for example, Burns "The regulation of telecommunications in South Africa" *Comparative and international journal of South Africa* (1999) 301-316, 303; Davis *Freedom of expression* 218; *Handyside* at 754; *Sunday Times*; *Gay News*; and *Zundel*.

<sup>5</sup> *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) para 26.

<sup>6</sup> *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 para 37. See also, for example, Woker "Legitimate protection of the public or censorship? Advertising controls and the right to freedom of speech" *SA mercantile law journal* (1997) 292-309; and Van der Westhuizen "Freedom of expression" in Van Wyk *et al* (eds) *Rights and constitutionalism: the new South African legal order* (1994) 288.

<sup>7</sup> Jacq & Teitgen "The press" in Delmas-Marty (ed) *The European Convention for the protection of human rights. International protection versus national restrictions* (1992) 59.

<sup>8</sup> Section 36(1) and s 39(1) of the *Constitution, 1996*.

<sup>9</sup> Cheadle "Limitation of rights" in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 373-3 with reference to *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 185.

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It has been said that in a democracy, individual adult members of society are responsible moral agents.<sup>10</sup> This means that in a democracy it is recognised that adults have a capacity for making moral judgments and responding accordingly.<sup>11</sup> Accordingly, in a democratic South Africa, society at large and individuals personally, need to hear, form and express opinions and views freely on a wide range of matters, even where those views are controversial and shock, offend or disturb the population or any sector thereof,<sup>12</sup> since freedom of expression is an implementation of the individual freedom of thought.<sup>13</sup> Thus, in *Handyside* the European Court of Human Rights emphasised the importance of the right to freedom of expression, which, it said, “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”.<sup>14</sup>

Given the importance of freedom of expression in a democratic society, advertisers do not hesitate to rely on freedom of expression to justify controversial advertising campaigns.<sup>15</sup> However, the constitutional protection of freedom of expression was not originally designed for the benefit of advertising or commercial expression,<sup>16</sup> as this form of expression primarily relates to the promotion of goods or services for

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<sup>10</sup> *SANDU v Minister of Defence* para 7. See also Davis *Freedom of expression* 219.

<sup>11</sup> Refer, for example, Holmgren “Self-forgiveness and responsible moral agency” *The journal of value inquiry* (March 1998) 75-91.

<sup>12</sup> See, for example, *SANDU v Minister of Defence* para 8-9; and *Mamabolo* para 37; *Government of the RSA v Sunday Times* 1995 (2) SA 221 (W); 1995 (2) BCLR 182 (T) at 226H.

<sup>13</sup> Naidu “The right to freedom of thought and religion and to freedom of expression and opinion” *Obiter* (1987) 59-73, 68.

<sup>14</sup> *Handyside* para 48.

<sup>15</sup> See, for example, *Teazers v M Huckle & Others* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2006; and Van der Westhuizen *Freedom of expression* 290.

<sup>16</sup> Van der Westhuizen *Freedom of expression* 289-90; Marcus “Freedom of expression under the Constitution” *SA journal on human rights* (1994) 140-148, 147-148.

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profit.<sup>17</sup> For example, free political debate, which is necessary to enable people to make informed choices, is different from the explicit portrayal of sexual intimacy,<sup>18</sup> raising the question as to whether the ambit of freedom of expression in South African law includes advertising as protected expression within the ambit of s 16 of the *Constitution, 1996*.<sup>19</sup>

## 2. Freedom of expression and advertising

### 2.1. Scope of freedom of expression

Section 16 of the *Constitution, 1996* guarantees freedom of expression. The right to freedom of expression is two-sided in nature: not only is it the right to impart information but also the right to receive information.<sup>20</sup> In *Laugh It Off*, Moseneke J, writing for the Constitutional Court, noted that, “unless an expressive act is excluded by s 16(2) it is protected expression”.<sup>21</sup> Given this potentially wide scope of expression, Sachs J, in a separate but concurring judgment in the matter of *Laugh It Off*, pointed out in relation to commercial activity that “whether the activity is primarily communicative in character”<sup>22</sup> would determine its expressive content. The approach adopted by the Constitutional Court in this matter is in line with the

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<sup>17</sup> See also *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC); 2005 (5) BCLR 743 (CC) para 84 where Sachs J quotes Codero “Cocaine-Cola, the velvet Elvis, anti-Barbie: defending the trademark and publicity rights to cultural icons” (1997-1998) 8 *Fordham intellectual property media & entertainment law journal* 599, 650.

<sup>18</sup> Davis *Freedom of expression* 218.

<sup>19</sup> As to the sanctity of freedom of expression, and the arguments that have been presented to explain the rationale behind the high ranking afforded to free expression by human rights advocates, see in general Van der Westhuizen *Freedom of expression* 267-71; and Milo, Penfold & Stein “Freedom of expression” in Woolman Roux & Bishop (eds) *Constitutional law of South Africa* (2008) 42.

<sup>20</sup> Section 16(1)(b) of the *Constitution, 1996*. See also *Stanley v Georgia* 394 US 557 (1969) 564.

<sup>21</sup> *Laugh It Off* para 47. Moseneke J referred with approval to *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) paras 14-15; and *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) para 51.

<sup>22</sup> *Laugh It Off* para 85.

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approach in Canadian law:<sup>23</sup> Activity that does not convey or attempt to convey a meaning and thus has no content of expression should not be protected.

Unless expression falls into one or more of the three categories of expressive activity set out in s 16(2) of the *Constitution, 1996*, namely “propaganda for war”;<sup>24</sup> “incitement of imminent violence”;<sup>25</sup> and what is commonly referred to as “hate speech”,<sup>26</sup> it constitutes protected expression.<sup>27</sup> Section 16(2) is therefore defining the boundaries beyond which the right to freedom of expression does not extend, and is serving as an internal limitation to the general right to freedom of expression in s 16(1) by removing an entire area of speech beyond the ambit of the right to freedom of expression.<sup>28</sup> For example, child pornography and nude dancing, as a point of departure, are constitutionally protected.<sup>29</sup> The balancing and limitation of rights are not conducted within s 16 of the *Constitution, 1996*.<sup>30</sup>

This definitional approach adopted in s 16(2) of the *Constitution, 1996* is similar to the “licensing” provision in article 10(1) of the *European Convention for the Protection of*

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<sup>23</sup> Hogg “Interpreting the charter of rights: generosity and justification” (1990) 28 *Osgood Hall law journal* 817; *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; *R v Keegstra* [1990] 3 SCR 697.

<sup>24</sup> Section 16(2)(a) of the *Constitution, 1996*.

<sup>25</sup> Section 16(2)(b) of the *Constitution, 1996*.

<sup>26</sup> Section 16(2)(c) of the *Constitution, 1996*.

<sup>27</sup> *Laugh It Off* para 47.

<sup>28</sup> *Islamic Unity Convention v Independent Broadcasting Authority* NO 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 para 10; Johannessen “A critical view of the constitutional hate speech provision” *SA journal on human rights* (1997) 135-150, 139; Milo, Penfold & Stein *Freedom of expression* 42-6; and Marcus & Spitz *Expression* 20-58. This is not expressly stated in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

<sup>29</sup> Milo, Penfold & Stein *Freedom of expression* 42-6 – 42-8 with reference to *De Reuck v Director of Prosecutions* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 47 and *Phillips v DPP, Witwatersrand Local Division* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) para 17.

<sup>30</sup> Milo, Penfold & Stein *Freedom of expression* 42-9.

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*Human Rights and Fundamental Freedoms*.<sup>31</sup> In that this article states that the right to freedom of expression as set out in article 10(1) “shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises”, article 10(1) also provides an internal limitation of the primary article 10(1) right to freedom of expression. A licensing system, as a manner in which freedom of expression can be limited, is therefore not restricted to those grounds set out in article 10(2), which provides for the criteria which makes the limitation of freedom of expression permissible.<sup>32</sup> The “licensing” provision in article 10(1) does not, however, extend to content requirements relating to licences,<sup>33</sup> which must meet the limitation requirements provided for in article 10(2) of the *European Convention* to constitute a permissible limitation of freedom of expression.

## 2.2. Broad interpretation of freedom of expression

“Expression” is a wider concept than “speech”.<sup>34</sup> Whereas “speech” arguably relates to utterances with some intelligible content intended to inform, ask, or persuade, “expression” may include appeals to the emotions or the senses, through, for example, sound or colour.<sup>35</sup> Moseneke J further commented in *Laugh It Off* that the phrase “freedom of expression” in itself is indicative of an expansive approach to the constitutional protection of expression.<sup>36</sup> Thus, freedom of expression should be “delineated generously”.<sup>37</sup>

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<sup>31</sup> 213 UNTS 222, entered into force on 3 September 1953, as amended by Protocols No's 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>32</sup> Fenwick H *Civil liberties and human rights* (2007) 277.

<sup>33</sup> Fenwick *Civil Liberties* 278; and *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, 338-9.

<sup>34</sup> Milo, Penfold & Stein *Freedom of expression* 42-32.

<sup>35</sup> Van der Westhuizen *Freedom of expression* 264.

<sup>36</sup> At para 47. See further *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 48; Milo, Penfold & Stein *Freedom of expression* 42-32; Davis *Freedom of expression* 220, 228; Burns *Telecommunications* 304.

<sup>37</sup> *Laugh It Off* para 47. Moseneke J referred with approval to *Zuma* paras 14-15; and *Williams* para 51.

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Freedom of speech, as protected in the *First Amendment* of the United States,<sup>38</sup> provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

Freedom of expression, as protected in South Africa, Canada, and in the *European Convention*, embraces within its ambit a wider range of expressive activities than does the *First Amendment*.<sup>39</sup> The European Court of Human Rights has repeatedly emphasised that article 10 of the *European Convention* protects not only information and ideas, which are received favourably or with indifference, but also those that shock, offend or disturb.<sup>40</sup> Equally, in the United Kingdom it is accepted that article 10 protects in substance and in form a right to freedom of expression which others may find insulting.<sup>41</sup> For example, in *O'Shea v MGN Ltd*,<sup>42</sup> the Divisional Court held that a pornographic advertisement, which may have been regarded by many as lacking in dignity and moral value, and degrading to women, was a form of protected expression. Also, in Canada the Federal Court of Appeal held in *Weisfeld v Canada*<sup>43</sup> that "[e]xpression is not limited to words, oral or written, but encompasses myriad forms of communication, including music, art, dance, postering, physical movements, marching with banners, etc as long as the activity conveys or attempts to convey a meaning".<sup>44</sup>

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<sup>38</sup> *First Amendment to the United States Constitution of 1787*.

<sup>39</sup> Woolman, Roux & Bishop (eds) *Constitutional law of South Africa – student edition* (2007) 362.

<sup>40</sup> See for example, *Handyside* at 754; *Coppel Human rights* 328.

<sup>41</sup> *Amos Human rights law* (2006) 417 with reference to *Percy v DPP* (2002) Crim LR 835.

<sup>42</sup> (2001) All ER (D) 65 para 37.

<sup>43</sup> [1995] 1 FC 68.

<sup>44</sup> See also *Davis Freedom of expression* 220.

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### 2.3. Commercial freedom of expression

Commercial freedom of expression primarily relates to the advertising of goods or services for profit.<sup>45</sup> Sachs J, in a separate but concurring judgment in *Laugh It Off*, commented that the fact that expressive activity has a commercial element should not in itself determine whether such expressive activity is protected.<sup>46</sup> The Cape High Court in *City of Cape Town v Ad Outpost (Pty) Ltd and Others*,<sup>47</sup> where it was found that advertising constitutes protected expression, echoed the reservations expressed by Sachs J in *Laugh It Off*.<sup>48</sup> An analysis, which focuses on the distinction between commercial and non-commercial expression, is thus rejected in South African law.<sup>49</sup>

This distinction has its origin in the United States. In the Supreme Court decision of *Central Hudson Gas and Electric Corp v Public Service Commission of New York*<sup>50</sup> it was found that the *First Amendment* accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.<sup>51</sup> The rationale for this distinction relates to the fact that the *First Amendment* is cast in absolute terms and is not subject to textual limitation, resulting in a clear line being drawn between protected and unprotected speech. Consequently, relatively large classes of speech, such as commercial speech, have been defined as “non-speech” and have received no constitutional protection at all.<sup>52</sup>

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<sup>45</sup> Marcus & Spitz *Expression* 20-50. This is not expressly stated in Woolman Roux & Bishop (eds) *Constitutional law* (2008).

<sup>46</sup> *Laugh It Off* para 84.

<sup>47</sup> 2000 (2) SA 733 (C); 2000 (2) BCLR 130 (C).

<sup>48</sup> Sachs J in *Laugh It Off* para 84. See also Illsley “How to tell a take-off from a rip-off: trade mark parody and freedom of expression in South Africa” Notes and comments, *SA journal on human rights* (2006) 119-125, 123-4.

<sup>49</sup> Illsley *Trade mark parody* 123-4.

<sup>50</sup> 447 US 557 (1980).

<sup>51</sup> At 561 – 566. Refer also Janis, Kay & Bradley *European human rights law* (2000) 200.

<sup>52</sup> Milo, Penfold & Stein *Freedom of expression* 42-6; Marcus & Spitz *Expression* 20-12.

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It was not until the case of *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*<sup>53</sup> that the United States Supreme Court extended *First Amendment* protection to pure commercial advertising, which did no more than propose a commercial transaction at a particular price. Since the *Virginia State Board* decision, the United States courts voided several restrictions on free speech in accepting that *First Amendment* protection could be extended to advertising.<sup>54</sup> Thus, in *United Reporting Publishing Corporation v California Highway Patrol*,<sup>55</sup> it was said, “[t]he current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and non-commercial speech”.<sup>56</sup> To the extent that the commercial speech doctrine might be evolving, it appears to be moving in the direction of providing greater - rather than less - protection for commercial speech.<sup>57</sup>

Sachs J's rejection of the distinction between commercial and non-commercial expression in *Laugh It Off*<sup>58</sup> is also in line with the approach in Canada. In *Ford v Quebec (Attorney-General)*<sup>59</sup> the Supreme Court of Canada rejected an argument that commercial expression was not included in the protection of s 2(b) of the *Canadian Charter*.<sup>60</sup> Moreover, in *Rocket v Royal College of Dental Surgeons of*

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<sup>53</sup> 425 US 748 (1976) 762.

<sup>54</sup> See, for example, *Peel v Illinois Attorney Registration and Disciplinary Commission* 496 US 91 (1990); *Shapiro v Kentucky Bar Association* 486 US 466 (1988); *Posados de Puerto Rico Associates v Tourism Co of Puerto Rico* 106 SCT 2968 (1986); *Bates v State Bar of Arizona* 433 US 350 (1977); and *Linmark Association v Township of Willingboro* 431 US 85 (1977).

<sup>55</sup> 146 F 3d 1133, 1136 (CA) 1998).

<sup>56</sup> At para 6254.

<sup>57</sup> Ogletree, Miller & Jessamy “Utility affiliates: why restrict use of names and logos?” *Public utilities fortnightly Arlington* (1999) 34-9.

<sup>58</sup> *Laugh It Off* para 84; *Illsley Trade mark parody* 123-4.

<sup>59</sup> [1988] 2 SCR 712.

<sup>60</sup> *Canadian Charter of Rights and Freedoms*.

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*Ontario*<sup>61</sup> it was held that freedom of expression as protected by s 2(b) includes commercial speech such as advertising.

While the European Court of Human Rights, as illustrated by its judgment in *Markt Intern and Beermann v Germany*,<sup>62</sup> has been reluctant to find a violation of the *European Convention*, when mere commercial speech is at issue, the European Court of Justice of the European Union requires that expression have a commercial aspect if its restriction is to raise a question under the mainly economic treaties under which it operates.<sup>63</sup> The conflict in the approach of these two courts is highlighted in the reactions of these Courts to an Irish prohibition on publication in Ireland of information on abortion services available in the United Kingdom. In *Society for the Protection of Unborn Children v Grogan*<sup>64</sup> the European Court of Justice refused to find this prohibition incompatible with European Community law. Although the Court agreed that it had the power to assess the compatibility of national legislation with fundamental rights, and particularly those laid down in the *European Convention*, it could do so only with respect to legislation within the scope of Community law. The European Court of Justice believed that the absence of an economic aspect to the case at hand precluded it from pronouncing on the application of article 10 of the *European Convention*.<sup>65</sup> When the same restriction came before the European Court of Human Rights in *Open Door*, however, a violation of article 10 of the *European Convention* was found. The Court noted that the information suppressed was, information about services lawful in Britain, and Irish law does not deny women access thereto. The European Court of Human Rights believed that the restriction on

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<sup>61</sup> [1990] 2 SCR 232.

<sup>62</sup> (1990) 12 EHRR 161.

<sup>63</sup> Janis, Kay & Bradley *European human rights* 202.

<sup>64</sup> [1991] 11 3 CMLR 849.

<sup>65</sup> Janis, Kay & Bradley *European human rights* 202-3.

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this information created a risk to the health of women seeking abortions,<sup>66</sup> and accordingly embraced commercial speech as protected expression.<sup>67</sup>

Accordingly, the rejection of the distinction between commercial and non-commercial expression in South African law is in line with the approach presently adopted in Canada and by the European Union. Furthermore, as stated earlier, it appears as if the commercial speech doctrine in the United States is also moving in the direction of providing greater protection for commercial speech.<sup>68</sup>

In determining whether an activity constitutes protected expression, said Sachs J in *Laugh It Off*, one should reject the simple distinction between commercial and non-commercial expression, rather asking, “whether the activity is primarily communicative in character or primarily commercial”.<sup>69</sup> Adopting this stance, it means that an advertisement that is primarily commercial, rather than primarily communicative, is not likely to constitute protected expression. This is in line with the approach in Canadian law. In considering the scope of freedom of expression as contained in the *Canadian Charter* activity, which does not convey or attempt to convey a meaning and thus has no content of expression, or which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct.<sup>70</sup> To this extent, one can take note of the judgment of the United States Supreme Court in *Virginia State Board*,<sup>71</sup> where the Supreme Court pointed out that advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason and for what price. Similarly, the European Court of Human Rights has recognised that advertising performs a useful function in society, namely to provide

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<sup>66</sup> Janis, Kay & Bradley *European human rights* 203.

<sup>67</sup> Quinn “Comparative commercial speech” in Heffernan (ed) *Human rights - a European perspective* (1994) 241.

<sup>68</sup> Ogletree, Miller & Jessamy *Names and logos* 34-9.

<sup>69</sup> *Laugh It Off* para 85.

<sup>70</sup> Hogg *Charter rights* 817; *Irwin Toy* 927; *Keegstra* 218.

<sup>71</sup> At 765.

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individuals with the means of discovering the characteristics of services and goods on offer.<sup>72</sup>

### 2.4. Subordinate position of commercial freedom of expression

In the decision of *Northern Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others*<sup>73</sup> the Durban and Coast Local Division of the High Court held that advertising as a protected right “occupies a subordinate position in the scale of constitutional rights values”.<sup>74</sup> In that s 16(1) read with s 36 of the *Constitution, 1996* does not explicitly distinguish between different levels of constitutional protection, a judicial distinction must be drawn between expression which forms part of the core of freedom of expression and expression which is “at some remove from this core”, as there are elements of a right that constitute its core values and others that are at the periphery of protection.<sup>75</sup> Commercial expression is, however, not necessarily removed from the core of freedom of expression and is therefore best positioned within the protected fringe of the guarantee of freedom of expression.<sup>76</sup> Woolman Roux & Bishop correctly point out that this judicial distinction should not occur at the stage of determining what forms of expression are protected by the *Constitution, 1996* but at the limitation stage.<sup>77</sup>

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<sup>72</sup>*Casado Coca v Spain* (1994) 18 EHRR 1 para 51.

<sup>73</sup>2002 (2) SA 625 (D) 633.

<sup>74</sup>*Roundabout Outdoor* 635.

<sup>75</sup>In this respect, Milo, Penfold & Stein *Freedom of expression* 42-13, footnote 1, argue that South African freedom of expression jurisprudence is likely to share common features with Canadian freedom of expression jurisprudence. See also Marcus & Spitz *Expression* 20-57, footnote 2; *Khumalo v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 BCLR para 21; *Roundabout Outdoor* 634; and *Bernstein and Others v Bester and Others* 1996 (2) SA 751; 1996 (4) BCLR 449 where core and peripheral values to the right to privacy were considered and the protection afforded each distinguished.

<sup>76</sup>*Roundabout Outdoor* 634.

<sup>77</sup>*Constitutional law – student edition* 362.

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The *Canadian Charter* adopts a content-neutral approach to defining expression.<sup>78</sup> In the absence of an express content-based distinction between levels of protection afforded to expression, the Canadian courts have developed a distinction between expression at the core of the guarantee, and that, which is further removed from the core. The Canadian courts believe that not all expression is equally worthy of protection and that not all infringements of free expression are equally serious.<sup>79</sup> This distinction has been considered an important factor, and has arisen particularly when the justifiability of limitations on free expression has been at issue.<sup>80</sup>

The European Court of Human Rights consistently affords a higher level of protection to publications and speech that contribute towards social and political debate, criticism, and information – in the broadest sense. Artistic and commercial expressions, in contrast, receive a lower level of protection.<sup>81</sup>

In a South African context, to the extent that the value of freedom of commercial expression may count for less than other forms of expression, an evaluation can only be made at the limitation enquiry as envisaged in s 36 of the *Constitution, 1996*.<sup>82</sup> This approach would accord with the approach adopted by the courts in terms of the *Canadian Charter* and the *European Convention*.

## 2.5. Concluding comments

*Laugh It Off* dealt with the use of parodied trademarks on t-shirts, and not advertising. Thus, whilst the Constitutional Court has not, to date, expressly determined whether advertising as a form of commercial speech is an entrenched

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<sup>78</sup> Marcus & Spitz *Expression* 20-51. This is not expressly stated in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

<sup>79</sup> *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.

<sup>80</sup> Currie & De Waal *The bill of rights handbook* (2005) 179. See also Keegstra; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825; and *Canadian Broadcasting Corp v New Brunswick (Attorney-General)* [1996] 3 SCR 480.

<sup>81</sup> Ovey & White *Jacobs & White - the European Convention on human rights* (2006) 320 with reference to *Vgt Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 159 para 71.

<sup>82</sup> *Ad Outpost*.

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right in terms of the *Constitution, 1996*, it certainly paved the way for such acceptance. The High Court decisions of *Roundabout Outdoor* and *Ad Outpost* have, however, answered this question in the affirmative.<sup>83</sup>

Milo, Penfold & Stein suggest that in terms of s 16(1)(c), which protects freedom of artistic creativity, no distinction should be drawn between *art* as a product, and the process of creating art, and also that the term *art* should be broadly defined to include, for example, the making of films and music.<sup>84</sup> It is submitted that such a broad interpretation of *art* should therefore also be inclusive of the making of advertisements.

Furthermore, given the wide interpretation given to expression by South African courts, all forms of commercial speech are likely to be considered protected 'expression', with any differentiation between their treatment and that of other forms of expression occurring at the limitations stage of analysis, to accept advertising as expression that is protected in terms of the *Constitution, 1996*, would be in line with international jurisprudence:<sup>85</sup> As has been pointed out, in Canada, advertising as a form of commercial expression is entitled to the protection granted by the *Canadian Charter*,<sup>86</sup> And the European Court of Human Rights has also accepted that commercial advertising cannot be excluded from the scope of the *European Convention*.<sup>87</sup> The term "expression" also included advertisements in the United

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<sup>83</sup> *Ad Outpost; Roundabout Outdoor*.

<sup>84</sup> *Freedom of expression* 42-52 and 42-57 – 42-58.

<sup>85</sup> Currie & De Waal *Handbook* 379-380; Woolman Roux & Bishop *Constitutional law – student edition* 379-380.

<sup>86</sup> Section 2(b) of the *Canadian Charter* states that everyone has the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication". See, for example, *Ford v Quebec; Irwin Toy; Rocket v Royal College; Ramsden v Corporation of the City of Peterborough* [1993] 2 SCR 1084; *RJR McDonald Inc v Attorney General, Canada* [1994] 1 SCR 311. See further Whyte, Lederman & Bur *Canadian constitutional law - cases, notes and materials* (1992) 19-28, 22-51; Hogg *Constitutional law of Canada* (2000) 31, 40; Woker *Legitimate protection* 299.

<sup>87</sup> Schermers "Freedom of expression" in Heffernan L (ed) *Human rights - a European perspective* (1994) 208-9.

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Kingdom jurisprudence,<sup>88</sup> and advertising is also seen as protected speech under the *First Amendment*.<sup>89</sup>

Not only can inoffensive advertising be considered as a protected form of freedom of expression. Offensive advertising can also be regarded as protected.<sup>90</sup> The focus of this thesis now needs to shift to the question whether the South African advertising code, as administered by the South African advertising regulator, constitutes a “law of general application” which may limit a right in the South African Bill of Rights.<sup>91</sup>

### 3. Limiting freedom of expression

#### 3.1. General

Limitations ought to be the exception and not the rule.<sup>92</sup> The existence of a general limitation section does not mean that the rights in the Bill of Rights can be limited for any reason.<sup>93</sup> Thus the Constitutional Court warned in *Dawood; Shalabi; Thomas v Minister of Home Affairs*<sup>94</sup> that, “[w]e must not lose sight of the fact that rights enshrined in the Bill must be protected and may not be unjustifiably infringed”,<sup>95</sup> and commented in *Islamic Unity as follows*:

It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the

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<sup>88</sup> *Amos Human rights law* 417 with reference to *Smithkline Beecham plc v Advertising Standards Authority* [2001] EMLR 23.

<sup>89</sup> Refer, for example, *Virginia State Board* 762.

<sup>90</sup> Woolman Roux & Bishop *Constitutional law – student edition* 369.

<sup>91</sup> Section 36(1) of the *Constitution, 1996*. Refer also Cheadle *Limitation of rights* 360.

<sup>92</sup> Erasmus “Limitation and suspension” in Van Wyk et al (eds) *Rights and constitutionalism: the new South African legal order* (1994) 642.

<sup>93</sup> Currie & De Waal *Handbook* 164.

<sup>94</sup> 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

<sup>95</sup> At para 54.

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public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.<sup>96</sup>

In a South African context, persons should not have an absolute right to stand anywhere and say whatever they want without having regard to the Constitution's value system of an open and democratic society based on human dignity, equality and freedom, *ubuntu* and reconciliation.<sup>97</sup> It is clear from the above that freedom of expression is not regarded as an absolute right in South Africa.<sup>98</sup> Van der Schyff suggests that the s 36 limitation provisions in the *Constitution, 1996* can be seen as instruments that stimulate an honest and open debate in a democracy.<sup>99</sup> To accommodate the conflict between entrenched rights and social interests, every democratic society imposes its own restrictions on freedom of expression having regard to factors such as culture, history and tradition. These views may change with time, depending on developments in society, as well as changes in attitude in other jurisdictions.<sup>100</sup>

Each right has a history.<sup>101</sup> Thus constitutional protection and limitation of freedom of expression has to be interpreted within the context of appreciating where South African society comes from and where it wants to go. South African society has a history of denial of the values of equality, freedom, openness, reconciliation, and tolerance; of race discrimination, sexism; and an obsession with secrecy in the face of perceived onslaughts. It is also a society that is conscious of a history of state censorship which especially related to sex, nudity, bad language, violence, and

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<sup>96</sup> At para 15. See also Woolman, Roux & Bishop *Constitutional law – student edition* 369.

<sup>97</sup> Section 36(1) and s 39(1) of the *Constitution, 1996*. Refer also Naidu *Freedom 72; Cheadle Limitation of rights* 373-3 with reference to *Makwanyane* par 185.

<sup>98</sup> Refer, for example, *Islamic Unity* para 15; and Currie & De Waal *Handbook* 163. See also Sharpe & Swinton "Limitation of charter rights" in Sharpe & Swinton *The charter of rights and freedoms* (1998) 42.

<sup>99</sup> Van der Schyff *Limitation of rights – a study of the European Convention and the South African bill of rights* (2005) 239.

<sup>100</sup> Van der Westhuizen *Freedom of expression* 264; Cheadle *Limitation of rights* 358.

<sup>101</sup> Cheadle *Limitation of rights* 363.

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religion,<sup>102</sup> and which was aimed not only at preserving white minority rule but also at enforcing the morality of a small group by the instrument of the law.<sup>103</sup> The Constitutional Court in the matter of *Islamic Unity* recognised that:

The regulation of material that is indecent, obscene or offensive to public morals, offensive to religious convictions or feelings of sections of the population ... are important areas with which the government, or the relevant regulatory authority, might be expected to concern itself [provided that] the regulatory provisions are in line with the Constitution.<sup>104</sup>

This expectation also finds application in, for example, the United States: The Supreme Court in *Ginsberg v New York*<sup>105</sup> dealt with a matter in which the Appellant was convicted of selling adult magazines to a 16-year-old boy. The Supreme Court acknowledged that “[t]he wellbeing of its children is, of course, a subject within the State's constitutional power to regulate”.<sup>106</sup>

With the introduction of the interim Bill of Rights in South Africa in 1994, it became apparent that the continued regulation of offensive material, based on the previous rationale and application, would be contrary to the rights to privacy and freedom of expression as entrenched in ss 13 and 15 of Chapter 3 of the *interim Constitution, 1993*.<sup>107</sup> These rights were also entrenched in the *Constitution, 1996* in ss 14 and 16 respectively. Although the same grounds of restriction such as defamation, obscenity, and contempt of court may be invoked today, as in the past, the crucial difference is, or ought to be, that such restriction is now exercised in the application

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<sup>102</sup> See, for example, Van der Westhuizen “Do we have to be Calvinist puritans to enter the new South Africa? (A review of current trends in the Publications Appeal Board)” *SA journal on human rights* (1990) 425-439, 425.

<sup>103</sup> Van der Westhuizen *Freedom of expression* 273; Bohler-Müller “The discourse of pornography: a feminist perspective” *Obiter* (2000) 167-176, 167.

<sup>104</sup> *Islamic Unity* para 30.

<sup>105</sup> 390 US 629 (1968).

<sup>106</sup> At 639. Also see, for example, *Sable Communications, Inc v FCC* 492 US 115 (1989).

<sup>107</sup> Constitution of the Republic of South Africa (Act 209 of 1993).

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of law based on a democratic mandate, and within principles that recognise the role of freedom of expression in sustaining a democracy.<sup>108</sup> Thus, in *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others*<sup>109</sup> the Constitutional Court stressed that censorship in general is not constitutionally unacceptable.<sup>110</sup> It is rather a question of whether the nature and range of a particular restriction is reasonable and justifiable, held the Constitutional Court, as long as such regulation would “ensure fairness and a diversity of views broadly representing South African society”.<sup>111</sup>

### 3.2. Two-stage analysis

The exercise of the right to freedom of expression is subject to s 36 of the *Constitution, 1996*, which provides for a two-stage analysis in determining whether there has been an infringement of a constitutional right.<sup>112</sup> The first stage of the analysis involves a determination of the scope of the right. Accordingly, if a “law of general application” restricts an activity that falls within the protected scope of the right, is a second stage justification analysis triggered, drawing on the factors listed in s 36(1) to determine whether the infringement of the right is justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>113</sup> This two-stage analysis therefore allows the courts to interpret rights generously and broadly at the first stage and reserve any qualification of the right for the second stage of the analysis.<sup>114</sup>

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<sup>108</sup> Boyle “Freedom of expression and democracy” in Heffernan L (ed) *Human Rights: a European perspective* (1994) 211.

<sup>109</sup> 1997 (3) SA 514; 1996 (12) BCLR 1599 para 2.

<sup>110</sup> *Islamic Unity* para 23.

<sup>111</sup> *Islamic Unity* para 23.

<sup>112</sup> See, for example, *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* 2002 (2) SA 625 (D) at 633; and *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 21. See also Motala & Ramaphosa *Constitutional law – analysis and cases* (2002) 34-3.

<sup>113</sup> Iles “A fresh look at limitations: unpacking section 36” *SA journal on human rights* (2007) 68-93, 71; Cheadle *Limitation of rights* 360.

<sup>114</sup> Iles *Unpacking section 36* 71 with reference to *Zuma* para 21; Currie & De Waal *Handbook* 166.

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### 3.2.1. First stage

At the first stage of the inquiry, a court is required to examine only the values that underlie the right and the practices that serve those values. There should be no balancing of competing values.<sup>115</sup> The first stage of the two-stage approach should therefore be confined to defining the content and boundaries of the right.<sup>116</sup>

Accordingly, if the expressive activity in issue falls within the ambit of s 16(1) of the *Constitution, 1996*, and if there has been a restriction or interference with the means of communication, whatever form it may take, a *prima facie* infringement of the right to freedom of expression will be regarded as having occurred.<sup>117</sup> This right needs to be given as broad a construction as the language of s 16 permits, and must be interpreted so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>118</sup>

As discussed earlier,<sup>119</sup> in the context of restrictions on the content of advertising, only advertising, as Sachs J put in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*,<sup>120</sup> that is "primarily communicative in character [rather than] primarily commercial", will pass the hurdle of the first stage of the inquiry in terms of s 36. Where the scope of regulation is extended beyond expression envisaged in s 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in s 36 of the *Constitution, 1996*.<sup>121</sup> In the *Canadian Charter of Rights and*

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<sup>115</sup> Iles *Unpacking* section 36 72.

<sup>116</sup> Iles *Unpacking* section 36 75; Currie & De Waal *Handbook* 166.

<sup>117</sup> Cheadle *Limitation of rights* 367.

<sup>118</sup> Section 1 of the *Constitution, 1996*. See further Zuma at paras 17 and 18; *Roundabout Outdoor* 633; Van der Westhuizen "Freedom of expression" in Van Wyk et al *Rights and constitutionalism: the new South African legal order* (1994) 272.

<sup>119</sup> Refer Chapter III, para 2.

<sup>120</sup> 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 85.

<sup>121</sup> *Islamic Unity* para 12; Burns "The regulation of telecommunications in South Africa" *Comparative and international law journal of South Africa* (1999) 301-316, 308.

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*Freedoms* it is also specifically stated that if the restriction violates any of the guarantees contained in the *Canadian Charter*, the next step is to examine whether the restriction is acceptable in terms of s 1 of the *Canadian Charter* (the Canadian limitation clause).<sup>122</sup>

### 3.2.2. Second stage

The second stage of the enquiry concerns the justification for the limitation in accordance with the requirements of s 36. This only becomes necessary where a *prima facie* infringement has been demonstrated.<sup>123</sup> Although it is often said that the factors in s 36(1) of the *Constitution, 1996* borrow from *Makwanyane*,<sup>124</sup> the fact is that *Makwanyane* borrows from the factors used in Canadian jurisprudence,<sup>125</sup> as a comparison between s 36(1) and s 1 of the *Canadian Charter* indicate that they are very similar in content.<sup>126</sup> The general test is the same: he who imposes the limitation must illustrate that such limitation is reasonable and justifiable in a democratic society.

There are, however, also differences between the Canadian and South African texts: The values specified in the *Constitution, 1996* include not just democracy and freedom but equality and dignity too. In this regard, the Canadian courts have held that the values of freedom and democracy also embody the “inherent dignity of the human person, commitment to social justice and equality”.<sup>127</sup> The *Constitution, 1996* furthermore spells out the factors to be taken into account, while the Canadian text does not. This is a difference in form only, because many of the factors listed in s

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<sup>122</sup> Hogg *Constitutional law* 817.

<sup>123</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2003 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 48; *Cheadle Limitation of rights* 361.

<sup>124</sup> *Currie & De Waal Handbook* 17 with reference to *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388; 1995 (12) BCLR 1579 para 18.

<sup>125</sup> *Cheadle Limitation of rights* 370; *Iles Unpacking section 36 69* with reference to *Zuma* paras 21-22 and *Makwanyane* paras 105-107, 110, 134.

<sup>126</sup> *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C); 2000 (2) BCLR 151 (C) at para 71.

<sup>127</sup> *R v Oakes* [1986] 1 SCR 103, 200.

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36(1) owe their origins to Canadian jurisprudence,<sup>128</sup> albeit filtered through the decisions of the South African courts.<sup>129</sup> Section 36(1) of the *Constitution, 1996* does not, however, demand a number of requirements to be met before a limitation is regarded as reasonable and justifiable.<sup>130</sup> Although s 36 specified various factors, which may be taken into consideration when deciding whether a right may be limited, these factors do not constitute a closed list and other relevant factors may also be taken into account.<sup>131</sup>

The generality of the limitation clauses of the *Canadian Charter* and the *Constitution, 1996* furthermore distinguishes these constitutions from those constitutions which have individualised limitation clauses operating within particular rights and freedoms clauses, such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>132</sup> and those constitutions which have no limitation clause at all, such as the *First Amendment to the United States Constitution of 1787 (First Amendment)*.

The *First Amendment* is cast in absolute terms and is not subject to textual limitation. This results in a definite line being drawn between protected and unprotected rights. Consequently, relatively large classes of speech, such as commercial speech, are defined as “non-speech” and receive no constitutional protection at all.<sup>133</sup>

The *European Convention* does not contain a single approach to limiting the scope of the right it protects: Some of the articles themselves define conduct as outside the protection of such article when it might otherwise be viewed to be within. Furthermore, within the boundaries of articles 8 to 11 provision is made for limitations

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<sup>128</sup> *Oakes* 200.

<sup>129</sup> *Makwanyane* para 85.

<sup>130</sup> *Woker Advertising law in South Africa (1999)* note 78 at 211. See also *S v Makwanyane* para 185.

<sup>131</sup> *Iles Unpacking* section 36 77.

<sup>132</sup> 213 UNTS 222.

<sup>133</sup> *Marcus & Spitz Expression* 20-12. This is not expressly dealt with in *Milo, Penfold & Stein Freedom of expression*.

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where certain qualifying conditions are satisfied. Each of articles 8 to 11 sets out a Convention right in the first paragraph, but then qualifies it by listing limitations in the second paragraph.<sup>134</sup>

Article 10(2) of the *European Convention* specifies the circumstances under which the right to freedom of expression may be limited:<sup>135</sup> An interference with the guarantee of freedom of expression can be justified only if it is prescribed by law, if it serves one or more of the legitimate aims listed in article 10(2),<sup>136</sup> and if it is necessary in a democratic society.<sup>137</sup> Otherwise, the interference will constitute a violation of the right.<sup>138</sup>

### 3.3. Law of general application

#### 3.3.1. Law

Section 36(1) of the *Constitution, 1996* stipulates that only law of general application may limit a right in the South African Bill of Rights.<sup>139</sup> This is a minimum requirement for the limitation of a right.<sup>140</sup> In this regard, the requirement of legality is the first requirement to be satisfied in justifying interference under s 36(1). This is because the courts do not justify interference if it transpires that the interference does not enjoy some or other basis in law.<sup>141</sup> The first distinction is between law and conduct.<sup>142</sup> This

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<sup>134</sup> Ovey & White *European Convention* 218.

<sup>135</sup> Coppel *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (1998) 327.

<sup>136</sup> Article 10(2) of the *European Convention* makes reference to “the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

<sup>137</sup> Fenwick *Civil liberties* 278.

<sup>138</sup> Coppel *Human Rights Act* 334; Johannessen “Judgment of the European Court of Human Rights, 23 September 1994 – Jersild v Denmark” *SA journal on human rights* (1995) 123, 126.

<sup>139</sup> See also, for example, Cheadle *Limitation of rights* 360.

<sup>140</sup> Currie & De Waal *Handbook* 168.

<sup>141</sup> Van der Schyff *Limitation* 240-241.

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does not mean that interference need to rely on a legal rule in the strict sense of the word, but that it must be authorised by law.<sup>143</sup> Kriegler J elaborated on this in *Du Plessis v De Klerk*,<sup>144</sup> saying that it is irrelevant whether a rule is “statutory, regulatory, ... founded on the [common law] or a tribal custom”. “Law” in s 36(1) therefore refers both to statutory and non-statutory law.<sup>145</sup> It was, for example, accepted in *Mamabolo* that the common law offence of contempt of court amounted to “law”;<sup>146</sup> and in *Khumalo v Holomisa*<sup>147</sup> the same conclusion was reached in respect of the common law of delict. It was also confirmed in *S v Thebus NO*,<sup>148</sup> that where a restriction is recognised in common law, it constitutes “law of general application”.<sup>149</sup>

### **Contractual relationship**

The South African advertising code, as administered by the South African advertising regulator, arises from the contractual relationship between the South African advertising regulator and its members.<sup>150</sup>

Under the constitutional regime mandated by s 8 of the *Constitution, 1996*, freedom of expression has clear horizontal potential.<sup>151</sup> In essence, s 8 requires that where the

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<sup>142</sup> Motata & Ramaphosa *Constitutional law* 34-47.

<sup>143</sup> Rautenbach “General introduction to the bill of rights” in *The bill of rights compendium* 1A-53; and Currie & De Waal *Handbook* 147.

<sup>144</sup> 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) para 136.

<sup>145</sup> Van der Schyff *Limitation* 242.

<sup>146</sup> At para 57.

<sup>147</sup> 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) para 37, 41.

<sup>148</sup> 2003 (6) SA 505 (CC); 2003 (2) BCLR 319 (CC) para 65.

<sup>149</sup> See further Currie & De Waal *Handbook* 169.

<sup>150</sup> *Turner v The Jockey Club of South Africa* 1974 (3) SA 633 (AD); and *Rape Crisis ‘Charlize Theron’ v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1999. See further *Nestle (SA) Pty Ltd v Mars Inc* 2001 (4) SA 542 (SCA).

<sup>151</sup> Davis *Freedom of expression* 227; Cheadle & Davis “The application of the 1996 Constitution in the private sphere” *SA journal on human rights* (1997) 44-66, 55; Van der Walt “Progressive indirect horizontal application of the bill of rights: towards a co-operative relation between common-law and

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rules of the common law limit a right in the Bill of Rights, such limitation must be evaluated in terms of s 36(1). Section 8(2) makes it clear that the Bill of Rights can bind natural or juristic persons. The “Bill of Rights [therefore] applies to all law ...”,<sup>152</sup> including the common law. The common law of contract therefore amounts to “law within the meaning of s 36(1) of the *Constitution, 1996*, which provides that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application ...” The application of fundamental rights should accordingly also cover non-statutory private-law rules such as the South African advertising code, which are determined by the common law of contracts.<sup>153</sup>

In light of the *Constitution, 1996*, no one can draft a contract without a very clear idea of what rights are entrenched in the Bill of Rights.<sup>154</sup> Cameron JA elaborated on the subject as follows:

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights.<sup>155</sup>

Section 1 of the *Canadian Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The Canadian Supreme Court of Appeal

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constitutional jurisprudence” *SA journal on human rights* (2001) 431-363, 343-344, 341 with reference to, amongst others, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

<sup>152</sup> Section 8(1) of the *Constitution, 1996*.

<sup>153</sup> See, for example, *Jockey Club*; and *Motala & Ramaphosa Constitutional law* 43-51 – 34-53.

<sup>154</sup> See, for example, Bracher “The over-riding power of the Bill of Rights” *Without prejudice* February (2005) 11-12.

<sup>155</sup> *Brisley v Drotzky* 2002 4 SA 1 (SCA); 2002 12 BCLR 1229 (SCA) para 92.

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said in *R v Orbanski; R v Elias*<sup>156</sup> that the “prescribed by law” requirement in s 1 “is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary”. The meaning of the term, the Court held, “must be expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements”, or “may also result from the application of a common law rule”. The European Court of Human Rights also accepted that the words “prescribed by law” are not necessarily restricted to statute law. The expression also covers unwritten law, subordinate legislation, royal decrees or even international law, if such law is adequately accessible and formulated with sufficient precision to enable the citizen to regulate his or her conduct.<sup>157</sup>

It is accordingly clear that common law of contract amounts to “law”, and that the South African advertising code constitutes “law” within the meaning of s 36(1) of the *Constitution, 1996*. The South African advertising regulator itself has consistently held that the *Constitution, 1996* envisages that freedom of expression can be limited by contract,<sup>158</sup> and that it would be necessary to examine the limitations of the code in the context of s 36.<sup>159</sup> Whilst the South African advertising regulator does not give reasons for this finding, its conclusion finds resonance in ss 8(2), 8(3)(b) and 39(2) of the *Constitution, 1996*:

### Section 8. Application

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

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<sup>156</sup> [2005] 2 SCR 3 para 36 where *R v Therens* [1985] 1 SCR 613 para 60 is quoted with approval.

<sup>157</sup> *Groppera Radio* 340-1; and *Sunday Times* 270-1. Also see Eissen “The principle of proportionality in the case-law of the European Court of Human Rights” in MacDonald, Matscher & Petzold (eds) *The European System for the protection of human rights* (1993) 125; Schermers *Freedom of expression* 203.

<sup>158</sup> *Nandos v Uthingo* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001.

<sup>159</sup> *The South African Sugar Association v Monsanto* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1998.

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- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

### Section 39. Interpretation of Bill of Rights

- 2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Thus insofar as the South African advertising code, as a contract arising from common law rights and obligations, limits freedom of expression, such limitation must be evaluated in terms of s 36(1) of the *Constitution, 1996*. Milo, Penfold & Stein<sup>160</sup> would appear to concur, commenting that irrespective of whether restrictions on advertising are imposed by statute or through self-regulation, such restrictions have to be examined in terms of s 36.

### **Empowering legislation**

It can furthermore be argued that the South African advertising code constitutes "law" given its underpinning in legislation. In terms of the *Electronic Communications Act*,<sup>161</sup> the South African advertising code is the accepted standard to which all broadcast advertising in South Africa must conform. Marcus & Spitz<sup>162</sup> are of the opinion that the resultant effect is that the South African advertising code has the status of delegated legislation. It is likely that the enactment of the *Consumer Protection Act*,<sup>163</sup> which replaces the *Consumer Affairs Act*,<sup>164</sup> will furthermore

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<sup>160</sup> *Freedom of Expression* 42-9. See also Marcus & Spitz *Expression* 20-53.

<sup>161</sup> Act 36 of 2005.

<sup>162</sup> *Expression* 20-52A footnote 1. Milo, Penfold & Stein *Freedom of expression* is silent on this issue.

<sup>163</sup> *Consumer Protection Act* (Act 68 of 2008).

<sup>164</sup> *Consumer Affairs (Harmful Business Practices) Act* (Act 71 of 1988).

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recognise the South African advertising code by law as the legal standard for non-broadcast advertising.<sup>165</sup>

In the United Kingdom, the British broadcast regulator<sup>166</sup> contracted out its statutory responsibility to regulate the content of broadcast advertising to the self-regulatory British advertising regulator. The British broadcast regulator therefore provides a 'legal backstop', enforcing compliance with the broadcast codes and with the decisions of the British advertising regulator through the British broadcast regulator's licensees.<sup>167</sup>

Fenwick is of the opinion that bodies such as the British advertising regulator are likely to be classified as functional public bodies on the basis that they are acting in a public capacity.<sup>168</sup> Lawson, however, questions this as he is of the opinion that it is not clear that the British advertising code falls within the permitted restrictions of article 10(2) of the *European Convention*,<sup>169</sup> as he is not convinced that the indirect reference to the British advertising regulator in reg 4(4) means that it is "prescribed by law".<sup>170</sup>

The case law in the United Kingdom is instructive on whether the South African advertising code constitutes "law" given its underpinning in legislation. In *R v Advertising Standards Authority Ltd, ex parte Matthias Rath BV*,<sup>171</sup> Turner J held that the British advertising code met the requirements that interference be "prescribed by

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<sup>165</sup> *Consumer Protection Act*, Chapter 3, Protection of Consumer Rights and Consumers' Voice, Part A (Consumer's right), article 70 dealing with alternative dispute resolution; and Chapter 4, Business Names and Industry Codes of Conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes.

<sup>166</sup> *Office of Communications Act 2002*.

<sup>167</sup> [www.cap.org.uk](http://www.cap.org.uk).

<sup>168</sup> Fenwick *Civil liberties* 298.

<sup>169</sup> Lawson "Challenging the Advertising Standards Authority" *New law journal* (2001) 526-527.

<sup>170</sup> Lawson *Challenging the ASA* 526-527.

<sup>171</sup> [2001] EMLR 582.

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law"; and that the British advertising code has an underpinning of subordinate legislation: the *Control of Misleading Advertisements Regulations 1988*. In the absence of a self-regulatory code, which met the implicit approval of the Director General of Fair Trading, direct action against the advertiser could have been taken under the regulations, albeit that they are less specific than the elaborate provisions of the British advertising code.<sup>172</sup>

It was furthermore found in *Matthias Rath* that reg 4(4) of the *Control of Misleading Advertisements Regulations* gave the British advertising code an "underpinning of subordinate legislation", albeit this fell "short of direct statutory effect".

Given that the South African advertising code is expressly recognised in the *Electronic Communications Act* read with s 57 of the *Independent Communications Authority Act*,<sup>173</sup> and that the *Consumer Protection Act* will in certain instances recognise specific industry bodies, it is submitted that Lawson's critique is not of concern in a South African context, and that the enactment of the *Consumer Protection Act* will have the resultant effect that the South African advertising code has the status of delegated legislation in broadcast and non-broadcast media.

Arguably, the South African advertising code is thus based on empowering legislation.<sup>174</sup> It is therefore submitted that law prescribes the advertising codes of both the South African advertising regulator and the British advertising regulator, even though these codes are still self-regulatory codes.<sup>175</sup>

In addition, it has been suggested that article 10(1) of the *European Convention* is also instructive on whether restrictions upon freedom of expression are imposed by a private body, which is exercising functions on behalf of the state. Article 10(1), which

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<sup>172</sup> *Matthias Rath* para 26.

<sup>173</sup> Act 13 of 2000.

<sup>174</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) para 23.

<sup>175</sup> Anonymous "Courts back ASA against human rights attack" *The in-house lawyer* (February 2001) (unnumbered).

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protects the right to freedom of expression, provides that the right to freedom of expression includes “freedom to hold opinions and to receive and impart information and ideas **without interference by public authority ...**” (my emphasis). Coppel suggested that the term “interference by a public authority” in article 10(1) makes it clear that various regulatory bodies would also fall within the scope of freedom of expression, as provided for in article 10(1) on this basis, and that these would include for example, the British advertising regulator.<sup>176</sup> In *Wingrove*, for example, the distribution of the applicant’s film was restricted by the British Board of Film Classification (BBFC), which refused to grant a certificate to it. The BBFC is formally a private body, but is designated under s 4 of the *Video Recordings Act 1984* as the authority responsible for the issue of certificates to video works. It was accordingly held that the BBFC is a public authority within the meaning of article 10(1).

It is submitted that given the regulatory framework within which the South African advertising regulator operates, and the comparative position of the British advertising regulator as enunciated through the judgments of the European Court of Human Rights and the English courts, the South African advertising code should also be regarded as “law” given its legal underpinning.

### **Public policy considerations**

A further consideration that would point to the submission that the South African advertising code should constitute “law of general application” within the meaning of s 36(1) of the *Constitution, 1996* is that of public policy considerations.<sup>177</sup> As pointed out by Mahomed DP:<sup>178</sup>

To leave individuals free to perpetuate advantages, privileges and relations, quite immune from the discipline of Chapter 3, would substantially be to allow the ethos

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<sup>176</sup> Coppel *Human Rights Act* 332.

<sup>177</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) paras 26 and 27.

<sup>178</sup> *Du Plessis v De Klerk* para 75.

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and pathology of racism effectively to sustain a new life, subverting the gains which the Constitution seeks carefully to consolidate.

Furthermore, the Constitutional Court in the matter of *Islamic Unity* recognised that:

[T]he regulation of material that is indecent, obscene or offensive to public morals, offensive to religious convictions or feelings of sections of the population ... are important areas with which the government, or the relevant regulatory authority [like the South African advertising regulator], might be expected to concern itself [provided that] the regulatory provisions are in line with the Constitution.<sup>179</sup>

The Supreme Court of Appeal accepted in *Telematrix* that the South African advertising regulator “is an independent body set up and sponsored by the advertising industry to ensure that the industry’s system of self-regulation works ‘in the public interest’” and that “[t]he main purpose of the [South African advertising] code is to protect consumers and to ensure fair play among advertisers”.<sup>180</sup>

The case law in the United Kingdom, where the regulation of advertising content also arises out of contract,<sup>181</sup> is instructive in this consideration. In *R v ASA* the Divisional Court recognised that the British advertising regulator exercises a public law function, as, if the British advertising regulator did not exist, its functions would probably, be exercised by the Office of Fair Trading.<sup>182</sup> Furthermore, Turner J held in the *Matthias Rath* case that the decisions of the British advertising regulator are a matter of public interest and that the publication of these is therefore a matter of public rather than private law, saying that the public has an expectation that a public body will publish its opinions in a manner and time that is appropriate.<sup>183</sup>

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<sup>179</sup> *Islamic Unity* para 30.

<sup>180</sup> Para 4.

<sup>181</sup> *R v Advertising Standards Authority, ex parte Insurance Services plc* (1989) 2 Admin law review 77.

<sup>182</sup> See also *R v Committee of Advertising Practice, ex parte the Bradford Exchange Ltd* (unreported, July 31, 1990)(QB).

<sup>183</sup> *Matthias Rath* para 30

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Therefore, given the South African advertising regulator's accepted regulatory role to ensure that the marketing communications industry's system of self-regulation works in the public interest to protect consumers and to ensure fair play among advertisers,<sup>184</sup> and given the Constitutional Court's acceptance that the regulation of *offensive material* is an area of importance,<sup>185</sup> it is further submitted that public policy considerations dictate that the South African advertising code should be subject to limitation in terms of s 36.

It submitted that the South African advertising code accordingly constitute "law" within the meaning of s 36(1) of the *Constitution, 1996*, whether as a contract, as empowering legislation, or due to public policy considerations. The next consideration in terms of s 36(1) is whether the South African advertising code is accessible, clear and precise, and generally applicable in order to constitute "law of general application".<sup>186</sup>

These requirements as enunciated by the South African courts on a reading of s 36(1) are in line with the decision in *Barthold v Germany*<sup>187</sup> that article 10(2) of the *European Convention* requires the restrictions imposed on freedom of expression to be "both accessible and formulated with sufficient precision" so as to enable interested parties to regulate their conduct and appreciate the risk of sanction.

In the *Rath* case, Turner J accepted, on the authority of *Barthold*, that the British advertising code meets the purposive intentions of article 10(2) being readily accessible, and sufficiently clear and precise to enable any person, who is minded

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<sup>184</sup> *Telematrix* para 4.

<sup>185</sup> *Islamic Unity* para 30.

<sup>186</sup> *Dawood* para 47. Refer also the minority judgment of Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) paras 96-104. The majority expressly refrained from taking a position in this regard (para 50).

<sup>187</sup> (1985) EHRR 383.

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to place advertisements to know what are likely to be acceptable and to know what the consequences of infringement are.<sup>188</sup>

Moreover, in Canada, it is permissible in terms of s 1 of the *Canadian Charter* to argue that an enactment is so vague that it does not satisfy the requirement that a limitation on Charter rights be “prescribed by law”.<sup>189</sup>

### 3.3.2. General application

The *law* must be general in its application. This means that the *law* must be sufficiently clear, accessible and precise that those that are affected by it can ascertain the extent of their rights and obligations. Furthermore, this does not mean that the *law* must apply to everyone, but that the *law* must apply equally to all and it must not be arbitrary in its application.<sup>190</sup>

#### **Equal application**

A provision that restricts freedom of expression may not provide for a unique set of circumstances or cater for a specific person.<sup>191</sup> The South African advertising regulator correctly held in the matter of *Eskort v Enterprise Foods*<sup>192</sup> that the South African advertising code in principle has general application,<sup>193</sup> Relating to all material falling within its definition of “advertising” and applying to the advertising of

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<sup>188</sup> *Matthias Rath* para 26.

<sup>189</sup> Refer, for example, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76; and *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69.

<sup>190</sup> *Currie & De Waal Handbook* 169-170; and *Motala & Ramaphosa Constitutional law* 34-48 – 34-49.

<sup>191</sup> *Van der Schyff Limitation* 244; and *Motala & Ramaphosa Constitutional law* 34-61.

<sup>192</sup> Clause 4.1 of Section I of the South African advertising code.

<sup>193</sup> Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA 2007 with reliance on the judgment of *National Coalition for Gay and Lesbian Equality NO v Minister of Justice NO* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 34.

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members and non-members alike.<sup>194</sup> The South African advertising code is accordingly generally applicable.

### **Accessible**

A provision, which limits freedom of expression, should be accessible, in the sense that it is publicly available and comprehensible, such that the citizen has an adequate indication of the rules applicable in a particular case. This flows from the need for legal certainty, as laws should be in the public domain and within reach of those affected by them if arbitrary interferences are to be avoided. This does not mean that the law must be publicly promulgated.<sup>195</sup> In the separate opinion of Mokgoro J in *President v Hugo*, “[a] person should be able to know the law”.<sup>196</sup> In addition, in *Dawood* the full court said, “rules must be stated in a clear and accessible manner”.<sup>197 198</sup>

A limitation provision should simply be clear enough to be comprehended, even if it entails foreseeing or predicting wide powers resulting from such provision.<sup>199</sup> It is assumed, for these purposes, that people act with the benefit of appropriate legal advice and even highly technical, with the result that even complex regulatory laws may be deemed sufficiently comprehensible.<sup>200</sup>

The South African advertising code, the British advertising codes, and the Canadian advertising code are all based on the same premise as the ICC code. The South African advertising code sets out the rules pertaining to advertising content,<sup>201</sup> the

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<sup>194</sup> Refer, for example, *Telematrix*.

<sup>195</sup> *Van der Schyff Limitation* 245.

<sup>196</sup> At para 102.

<sup>197</sup> At para 47.

<sup>198</sup> *Currie & De Waal Handbook* 171.

<sup>199</sup> *Van der Schyff Limitation* 246.

<sup>200</sup> *Gropper Radio* 341-2; *Sunday Times* 245.

<sup>201</sup> Refer Sections I to V of the South African advertising code.

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procedures applicable in matters before the South African advertising regulator,<sup>202</sup> as well as the sanctions that can be imposed.<sup>203</sup> Furthermore, the South African advertising code is published through a third party publisher in hard copy, as well as being published on the South African advertising regulator's website. Abridged versions of the South African advertising code are furthermore made available to consumers through the Department of Trade and Industry's provincial consumer offices.<sup>204</sup>

Accordingly, as a public document based on international principles, every person who wishes to place an advertisement has access to the South African advertising code, and is in a position to ascertain the limits applicable to advertising content as well as the consequences should the code's provisions be infringed. The South African advertising code is thus accessible within the meaning of s 36(1) of the *Constitution, 1996*.

### **Clear and precise**

A provision that limits freedom of expression must also be comprehensible in order to allow those affected by it to predict the result of their actions or lack of action under it to an acceptable degree.<sup>205</sup> The application of the provision must be foreseeable: rules must be formulated with sufficient precision to enable the citizen to regulate his conduct in accordance with them. There may be no breach of this requirement merely because a legal provision is ambiguous, or because a restriction is based upon a discretionary power, if there is sufficient indication of the circumstances in which the discretion may be exercised.<sup>206</sup>

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<sup>202</sup> Refer the Procedural Guide to the South African advertising code.

<sup>203</sup> Refer Clause 14 of the Procedural Guide to the South African advertising code.

<sup>204</sup> The *Consumer Code* is a simplified summary of the South African advertising code to guide consumers about advertising rules. This summary does not replace the South African advertising code but provides an easy reference for consumers to better know and understand their rights.

<sup>205</sup> Van der Schyff *Limitation* 245.

<sup>206</sup> *Sunday Times* 245. See also Currie & De Waal *Handbook* 171-172; and Coppel *Human Rights Act* 337.

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The apparent problem with regulating advertising on the grounds of unacceptable or offensive standards is that such standards can, to a certain degree, be arbitrary or subjective, and are not necessarily foreseeable as prescribed. The question is thus whether offensive advertising as provided for in Clause 1 of Section II of the South African advertising code, can be regarded as sufficiently clear and precise to constitute "law of general application", or rather whether it constitutes an unconstitutional and unenforceable contract term given its vague terminology.<sup>207</sup>

Motala & Ramaphosa points out that the definition of *obscenity* in the (then) *Indecent or Obscene Photographic Matter Act* failed the test for law of general application, as it did not enable citizens to conform their behaviour to a discernable standard; and that the Constitutional Court in *Case v Minister of Safety and Security* should not have even engaged in a proportionality analysis.<sup>208</sup> Equally, should the offensive advertising clause in the South African advertising code not be regarded as "clear and precise", it would not meet the "law of general application" requirement of s 36(1) of the *Constitution, 1996*, and it would therefore not even be necessary to consider the further criteria listed in s 36(1)(a)-(e).

### 3.4. Concluding comments

Advertising, and even offensive advertising, is a protected form of freedom of expression. The regulation of advertising should therefore comprise of a comprehensive framework of principles, which function in such a way that advertising is effectively regulated without unreasonably and unjustifiably limiting freedom of expression in a manner inconsistent with the *Constitution, 1996*.

Section 36(1) provides that only a law of general application may limit a right in the South African Bill of Rights.<sup>209</sup> Applying this requirement to the South African

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<sup>207</sup> Le Roux "Does the Constitution have any implications for ordinary contractual relationships?" *Juta's business law* (2002)132-134, 132.

<sup>208</sup> *Constitutional law* 34-63.

<sup>209</sup> Section 36(1) of the *Constitution, 1996*; *Cheadle Limitation of rights* 360.

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advertising code, it has been seen that this code constitutes “law” within the meaning of s 36(1) of the *Constitution, 1996*, is readily accessible, and its provisions are generally applicable as “law of general application” within the meaning of s 36(1). The question that will be critically explored in the next chapter is whether the advertising code, and in particular the offensive clause, is “clear and precise” within the meaning of s 36 of the *Constitution, 1996*.

## Chapter IV – Offensive advertising: clear and precise

### 1. Introduction

The question to be critically evaluated in this chapter is whether offensive advertising, as provided for in Clause 1 of Section II of the South African advertising code, can be regarded as sufficiently clear and precise as to constitute “law of general application” within the meaning of s 36(1) of the *Constitution of the Republic of South Africa, 1996* or whether it rather constitutes an unconstitutional and unenforceable contract term given its vague terminology.<sup>1</sup>

In addressing this question, one needs to take cognisance of South Africa's history of censorship where the legal restrictions were vague in their content and application.<sup>2</sup> These legal restrictions generally related to sex, nudity, crude language, violence, and religion.<sup>3</sup> However, in the context of a democratic South Africa, the Constitutional Court has recognised that one would expect that material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population, should be regulated.<sup>4</sup> In that the *Constitution, 1996* demands that regulation should “ensure fairness and a diversity of views broadly representing South African society”,<sup>5</sup> these restrictions

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<sup>1</sup> Le Roux “Does the Constitution have any implications for ordinary contractual relationships?” *Juta's business law* (2002)132-134, 132.

<sup>2</sup> Bohler-Müller “The discourse of pornography: a feminist perspective” *Obiter* (2000) 167-176, 167.

<sup>3</sup> See, for example, Van der Westhuizen “Do we have to be Calvinist puritans to enter the new South Africa? (A review of current trends in the Publications Appeal Board)” *SA journal on human rights* (1990) 425-439, 425.

<sup>4</sup> *Islamic Unity Convention v Independent Broadcasting Authority NO 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC)* para 30.

<sup>5</sup> *Islamic Unity* para 23.

## **Chapter IV**

### **Offensive advertising: Clear and Precise**

should be exercised based on a democratic mandate and within principles that recognise the role of freedom of expression in sustaining a democracy.<sup>6</sup>

## **2. Offensive advertising: the advertising codes**

The South African advertising code provides that advertising may not offend against “good taste” or “decency” or be “offensive to public or sectoral values and sensitivities” unless such offence is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>7</sup> The British television advertising code provides that the British advertising regulator will not investigate a matter where advertising is criticised simply for not being in “good taste” as “there are often large and sometimes contradictory differences in views about what constitutes ‘bad taste’”.<sup>8</sup> The British radio advertising code similarly acknowledges that standards of “taste” are subjective and individual reactions can differ.<sup>9</sup> These provisions, by implication, raise questions as to the limitations imposed by the South African advertising code based on *good taste*. For apart from freedom of expression considerations, there are many and sometimes contradictory views about what constitute *bad taste*.<sup>10</sup> Furthermore, the South African advertising code's qualification of “unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” mirrors the language of s 36 of the *Constitution, 1996* and thus reflecting its intention to impose limitations on offensive advertising, taking into account the freedom of expression landscape in South Africa.

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<sup>6</sup> Boyle “Freedom of expression and democracy” in Heffernan L (ed) *Human rights: a European perspective* (1994) 211.

<sup>7</sup> Clause 1.1 of Section II of the South African advertising code.

<sup>8</sup> Clause (1) of the Background to Section 6 – Harm and offence of the British television advertising code.

<sup>9</sup> Clause 9 of Section 2 of British radio advertising code.

<sup>10</sup> [www.bcap.org.uk](http://www.bcap.org.uk); Cutri & Jarosch “What did the Super Bowl reveal ... about decency?” (2004) *Advertising & trademark law seminar* (unpublished and unnumbered).

## **Chapter IV**

### **Offensive advertising: Clear and Precise**

The South African advertising code also provides that advertising should not contain anything that is “likely to cause serious or wide-spread offence”.<sup>11</sup> This mirrors the British advertising codes. The British non-broadcast advertising code and the British television advertising code both provide that advertising should not contain anything that is “likely to cause serious or widespread offence”,<sup>12</sup> and the British television advertising code furthermore qualifies the limitation “serious or wide-spread offence” as being “against generally accepted moral, social or cultural standards”.<sup>13</sup> In addition, the British television advertising code also prohibits advertising that “offend[s] against public feeling”.<sup>14</sup>

The British television advertising code defines these “shared standards” that may not be offended as, amongst others, (1) the portrayal of death, injury, violence (particularly sexual violence), cruelty or misfortune; (2) respect for the interests and dignity of minorities; (3) respect for spiritual beliefs, rites, sacred images etc; and (4) sex and nudity, and the use of offensive language.<sup>15</sup> The British radio advertising code also provides that (1) “offensive and profane language must be avoided”;<sup>16</sup> (2) “salacious, violent or indecent themes, or sexual innuendo or stereotyping likely to cause serious or general offence, should be avoided”;<sup>17</sup> (3) “references to minority groups should not be stereotypical, malicious, unkind or hurtful”;<sup>18</sup> (4) “references to religious or political beliefs should not be offensive, deprecating or hurtful, and the use of religious themes and treatments by non-religious groups should be treated

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<sup>11</sup> Clause 1.2 of Section II of the South African advertising code.

<sup>12</sup> Clause 5 of the General Rules of the South African advertising code; and Clause 6(1) of Section 6 – Harm and Offence of the British television advertising code.

<sup>13</sup> Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

<sup>14</sup> Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

<sup>15</sup> Section 6(1)(1) – Harm and offence of the British television advertising code.

<sup>16</sup> Clause 9(a) of Section 2 of British radio advertising code.

<sup>17</sup> Clause 9(b) of Section 2 of British radio advertising code.

<sup>18</sup> Clause 9(c) of Section 2 of British radio advertising code.

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with extreme care”,<sup>19</sup> and that (5) “those who have physical, sensory, intellectual or mental health disabilities should not be demeaned or ridiculed”.<sup>20</sup> In more general terms, the British non-broadcast advertising code provides that the grounds of offence relate to (1) “race”, (2) “religion”, (3) “sex”, (4) “sexual orientation”, and (5) “disability”.<sup>21</sup> These provisions attempt to provide an intelligible standard to assist in the determination of the scope of the limitations on offensive advertising.

The Canadian advertising code addresses similar concerns, albeit in more specific terms: Advertising shall not (1) “condone any form of personal discrimination, including that based upon race, national origin, religion, sex or age”;<sup>22</sup> (2) “appear in a realistic manner to exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, unlawful behaviour”;<sup>23</sup> (3) “demean, denigrate or disparage any identifiable person, group of persons, firm, organisation, industrial or commercial activity, profession, product or service or attempt to bring it or them into public contempt or ridicule”;<sup>24</sup> and shall not (4) “undermine human dignity; or display obvious indifference to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population”.<sup>25</sup>

In considering whether advertising is offensive, the South African advertising code provides that factors such as (1) context, (2) medium, (3) likely audience, (4) the nature of the product or service, (5) prevailing standards, (6) degree of social

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<sup>19</sup> Clause 9(d) of Section 2 of British radio advertising code.

<sup>20</sup> Clause 9(e) of Section 2 of British radio advertising code.

<sup>21</sup> Clause 5 of the General Rules of the South African advertising code.

<sup>22</sup> Clause 14(a) of the Canadian advertising code.

<sup>23</sup> Clause 14(b) of the Canadian advertising code.

<sup>24</sup> Clause 14(c) of the Canadian advertising code.

<sup>25</sup> Clause 14(d) of the Canadian advertising code.

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concern, and (7) public interest will be taken into account.<sup>26</sup> This open-ended list attempts to provide an intelligible standard against which to determine the scope of the limitations on offensive advertising. The British non-broadcast advertising code also lists similar factors, but for the criteria of “degree of social concern” and “public interest”.<sup>27</sup> Furthermore, the factors mentioned in the British non-broadcast advertising code are a closed list.<sup>28</sup> The ICC code provides that advertising should not “offend standards of decency currently prevailing in the country and culture concerned”,<sup>29</sup> thus effectively echoing the “prevailing standards” factor.

The South African advertising code furthermore acknowledges that the fact that a product, service or advertisement may be offensive to some is “not in itself sufficient ground for upholding an objection” based on offence.<sup>30</sup> The Canadian advertising code contains a similar acknowledgment.<sup>31</sup> Thus, where individual offence arises out of the advertising of a product such as a condom, a service such as prostitution, or an advertisement featuring nudity is not enough to find objectively that the advertising is offensive. For this reason, the British television advertising code provides that cases are not decided on the number of complaints received,<sup>32</sup> and the British non-broadcast advertising code acknowledges that the fact that a product is offensive to some is “not sufficient grounds for objecting” to an advertisement.<sup>33</sup> However, the British non-broadcast advertising code states something quite different to the South African advertising code: It expressly provides that product specific offence is not a sufficient basis for lodging a complaint.

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<sup>26</sup> Clause 1.2 of Section II of the South African advertising code.

<sup>27</sup> Clause 5 of the General Rules of the South African advertising code.

<sup>28</sup> Clause 5 of the General Rules of the South African advertising code.

<sup>29</sup> Article 2 of the General Provisions of the ICC code.

<sup>30</sup> Clause 1.2 of Section II of the South African advertising code.

<sup>31</sup> Clause 14 of the Canadian advertising code.

<sup>32</sup> Section 6(1)(2) – Harm and Offence of the British television advertising code.

<sup>33</sup> Clause 5 of the General Rules of the South African advertising code.

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In assessing whether the provisions in the South African advertising code relating to offensive advertising are “clear and precise” in order to constitute “law of general application” as required by s 36(1) of the *Constitution, 1996*,<sup>34</sup> a discussion of the concept of vagueness becomes essential. Thereafter, the categories of offence that can be identified through the judgments of the South African advertising regulator, the British advertising regulator, and the Canadian advertising regulator will be critically evaluated in order to critically examine the current offensive advertising provisions in the South African advertising code; and to determine whether more specific self-regulatory rules for the control of offensive advertising should be developed.

### **3. Vagueness**

Van der Westhuizen<sup>35</sup> has suggested that a prohibition cannot rest upon an uncertain foundation, as proscribed activities that are vaguely defined deter persons refraining from exercising their rights for fear of transgressing the prohibition. On this premise, he argues that open-ended concepts such as “offensiveness” and “indecent” should be avoided,<sup>36</sup> stating that “offensiveness”, for example, could easily be used as a vehicle to deal with material which is regarded as unpopular, unpleasant, or disagreeable.<sup>37</sup> However, he argues further that if there is an interpretation of a restriction that is reasonably capable of being read consistently with the *Constitution, 1996*, such interpretation should be adopted on the proviso that the interpretation is not unduly strained.<sup>38</sup>

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<sup>34</sup>Section 36(1) of the *Constitution, 1996*.

<sup>35</sup> “Freedom of expression” in Van Wyk et al (1994) *Rights and constitutionalism: the new South African legal order* (1994) 272-3.

<sup>36</sup> Van der Westhuizen *Freedom of expression* 272-3.

<sup>37</sup> Van der Westhuizen *Freedom of expression* 273.

<sup>38</sup> *Islamic Unity* para 18 with reference to *Investigating Directorate, Serious Economic Offences No v Hyundai Motor Distributors (Pty) Ltd* NO 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 23-24.

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The terms “indecent”, “obscene”, “offensive” and “harmful” do not have a fixed meaning as such. Van den Heever JA said in *Marruchi v Harris*<sup>39</sup> that “[i]n abstracto a word has no meaning; it conveys a meaning only when used in a certain society in which a convention exists as to its connotation”. In this regard, Van Rooyen suggested that the terms “indecent”, “obscene”, “offensive” and “harmful” have been interpreted by South African courts to have a limited meaning over the years:<sup>40</sup> “Indecent” is that which is grossly offensive; “obscene” is usually described as that which is calculated to excite lust; “offensive” is not that which is only displeasing but that which is repugnant, mortifying or painful; and “harmful” is that which depraves or corrupts. Material that is merely vulgar or in poor taste does not amount to indecent material.<sup>41</sup> Van Rooyen thus essentially argued that the terms “indecent”, “obscene”, “offensive” and “harmful” were defined through jurisprudence. Whilst it may be argued that even these defined meanings are still too vague, open-ended, and arbitrary, Van Rooyen at the very least illustrates that terms such as “indecent”, “obscene”, “offensive” and “harmful” can be more specifically defined within a given contextual framework.

In Canadian jurisprudence, however, it has been pointed out that absolute precision in the law exists rarely, if at all.<sup>42</sup> Accordingly, Canadian law applies the margin of appreciation doctrine, which would appear to be a sliding scale and its application will depend on its context.<sup>43</sup> Certainty is not required.<sup>44</sup> As the standard can never specify all the instances in which it applies, it is rather a question of whether an intelligible standard has been provided for exercising discretion. A law should provide “an adequate basis for legal debate” and “analysis” by “sufficiently

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<sup>39</sup> 1943 OPD 15, 18-19.

<sup>40</sup> “Absolute rules of morality?” *Tydskrif vir regs wetenskap* (1992) 85-91, 87.

<sup>41</sup> Van Rooyen *Absolute rules* 87.

<sup>42</sup> *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 985-986.

<sup>43</sup> *Ovey & White European Convention* 233.

<sup>44</sup> *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, 645.

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delineat[ing] an area".<sup>45</sup> Differently put, a law must set an intelligible standard both for those governed by the prohibition and for those who must enforce it.<sup>46</sup> The decision of the Ontario High Court of Justice in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*<sup>47</sup> is particularly instructive on this issue:

The Charter requires reasonable limits that are prescribed by law; it is not enough to authorise a board to censor or prohibit the exhibition of any film of which it disapproves ... It is accepted that law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of any official; such limits must be articulated with some precision or they cannot be considered to be law.<sup>48</sup>

In the United States, case law suggests that it is not the use of a vague term itself that is unacceptable, but rather the fact that these terms are not specifically defined in the applicable legislation. For example, in the decision of *United States v Capital Traction Co*<sup>49</sup> a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding" was held to be void for uncertainty. The United States Court of Appeals for the District of Columbia Circuit said that an element that is "the very essence of the law itself" is too indefinite and uncertain in the absence of any definition, as its interpretation cannot be left to the court without any guidance.<sup>50</sup> This approach was also adopted in the United States Supreme Court's consideration of the acceptability of the *Communications Decency Act of 1996 (CDA)* in the matter of *Reno, Attorney*

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<sup>45</sup> *Nova Scotia* 645-646.

<sup>46</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Grayned v City of Rockford* 408 US 104 (1972) 109.

<sup>47</sup> (1983) 147 DLR (3d) 58.

<sup>48</sup> (1983) 147 DLR (3d) 58.

<sup>49</sup> 34 App DC 592 (1910).

<sup>50</sup> At 596, 598.

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*General of the United States v American Civil Liberties Union*.<sup>51</sup> Section 223(a) of the CDA criminalised the “obscene or indecent transmission” of messages to any recipient under 18 years of age; and s 223(d) prohibited the “sending or displaying to a person under 18 of any message that, in context, depicts or describes, in terms *patently offensive* as measured by contemporary community standards, sexual or excretory activities or organs”. The United States Supreme Court held that the CDA’s “indecent transmission” and “patently offensive display” provisions abridged “the freedom of speech” protected by the *First Amendment*, as the use of these undefined terms would result in uncertainty about just what they mean, in the absence of a specific definition in the CDA.<sup>52</sup> It would seem that the United States takes a narrower approach than the South African courts in requiring that the applicable legislation must define the meaning of a vague term, rather than considering whether an interpretation of a restriction is reasonably capable of being read consistently with the *Constitution, 1996* without such interpretation being unduly strained.<sup>53</sup>

Accordingly, in the context of a clause dealing with offensive advertising, a “balance must be struck between the duty of [the South African advertising regulator’s adjudication committees]<sup>54</sup> to interpret [the offensive advertising clause] in conformity with the *Constitution, 1996* in so far as it is reasonably possible, and the duty of [the South African advertising regulator’s rule making committee]<sup>55</sup> to create and update the South African advertising code in such a way that it is] reasonably clear and precise, enabling [the marketing communications industry] to understand what is expected of them”.<sup>56</sup> This raises the question whether the offensive advertising clause is capable of being interpreted consistently with the *Constitution,*

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<sup>51</sup> 521 US 844 (1997).

<sup>52</sup> At 870-879.

<sup>53</sup> *Islamic Unity* para 18 with reference to *Hyundai Motor Distributors* para 23-24.

<sup>54</sup> Refer Preface, Clauses 6 and 8 of the South African advertising code.

<sup>55</sup> Refer Preface, Clause 2 of the South African advertising code.

<sup>56</sup> *Islamic Unity* para 18 with reference to *Hyundai Motor Distributors* para 23-24.

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1996 while at the same time remaining sufficiently clear and precise as to enable the adjudication committees of the South African advertising regulator<sup>57</sup> to handle complaints in a consistent manner. Moreover, one must ask whether any intelligible standards have been provided in the South African advertising code to assist in the determination of the scope of the intended prohibition.<sup>58</sup> To answer these questions, the determination of offensive advertising by the regulators of advertising content will be critically evaluated.

#### **4. Interpretation of and approach to offensive advertising**

Generally, the approach to what constitutes offensive advertising is uniform amongst the South African advertising regulator, the British advertising regulator, and the Canadian advertising regulator, in that similar criteria are adopted in the respective offensive advertising clauses:

##### **4.1. Offensive to some**

The opinion of an ethnic, cultural, or religious group may be advanced more strongly than the general public view on the very same issue. This means that in just about any controversial constitutional matter, the public will have an opinion on both sides of the argument.<sup>59</sup>

As the regulators of advertising content aim to reflect rather than shape public opinion, rather than being “social engineers”,<sup>60</sup> the South African advertising code provides that “[t]he fact that a particular product, service or advertisement may be offensive to some is not in itself sufficient grounds for upholding an objection to an

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<sup>57</sup> Refer Preface, Clauses 6 and 8 of the South African advertising code.

<sup>58</sup> *Islamic Unity* paras 18 and 22.

<sup>59</sup> Du Plessis “Between apology and utopia – the Constitutional Court and public opinion” *SA journal on human rights* (2002) 1-40, 4.

<sup>60</sup> *Virgin Mobile v Bohnen* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2006; and CAP “Help note on religious offence” [www.cap.org.uk](http://www.cap.org.uk) (accessed May 2008).

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advertisement for that product or service"<sup>61</sup> and that "it is not the quantity of complaints that is determinative, but the validity of the complaints".<sup>62</sup> Furthermore, the Final Appeal Committee of the South African advertising regulator has held that, similar to a court, the marketing communications industry cannot be regulated by a public vote or opinion poll.<sup>63</sup> Issues are therefore not decided based on the numbers of persons who have complained. Rather, complaints based on offensive advertising content have to be accessed objectively.

The United Kingdom follows a similar approach to the number of complaints.<sup>64</sup> For example, the British television advertising code provides that cases should not be judged on the number of complaints received.<sup>65</sup>

Public opinion is of little relevance in the objective assessment of matters pertaining to the interpretation of the Bill of Rights.<sup>66</sup> The Constitutional Court has made it clear that it will not resort to head counting as a reliable means of substantive reasoning.<sup>67</sup> In this regard, the statement of Chaskalson CJ in the matter of *S v Makwanyane and Another*<sup>68</sup> should be taken into account:

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to

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<sup>61</sup> Clause 1.2 of Section II of the South African advertising code. Refer Clause 5.3 of the General Rules of the British non-broadcast advertising code; and Note (2) of Section 6 of the British television advertising code for a similar provision.

<sup>62</sup> Clause 3.9 of Section I of the South African advertising code.

<sup>63</sup> *Rape Crisis 'Charlize Theron' v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1999; *Nampak v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of the SA) 1999.

<sup>64</sup> CAP "AdviceOnline: taste and decency" [www.cap.org.uk](http://www.cap.org.uk) (accessed May 2008).

<sup>65</sup> Section 6(1)(2) – Harm and offence of the British television advertising code.

<sup>66</sup> Cockrell "Rainbow jurisprudence" *SA journal on human rights* (1996) 1-44, 19.

<sup>67</sup> Du Plessis *Public opinion 2*.

<sup>68</sup> 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

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uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution ... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in our courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.<sup>69</sup>

The Constitutional Court has therefore correctly emphasised the importance of not simply equating constitutional adjudication with public opinion, arguing that such a move could amount to trampling fundamental values by favouring the majority.<sup>70</sup> After all, the whole point of a Bill of Rights is to put certain issues beyond the reach of the influence of the majority, and to establish them as objective legal principles to be applied by the courts.<sup>71</sup>

In accordance with this constitutional approach, the South African advertising regulator does not merely decide whether advertising is offensive by counting the number of complaints received. For example, in the matter of *Virgin Mobile v Moller & Others*,<sup>72</sup> the South African advertising regulator had to consider whether a television commercial for Virgin Mobile made a mockery of the Christian faith and whether the commercial portrayed the concept of heaven in an offensive manner by including angels in the form of seductively clad women with wings. In dismissing the complaints, the South African advertising regulator, however, acknowledged that, “numerous complaints were received, and continue to be received, in a short

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<sup>69</sup> At para 88.

<sup>70</sup> Van der Schyff *Limitation of rights – a study of the European Convention and the South African bill of rights* (2005) 239.

<sup>71</sup> Du Plessis *Public opinion 2*.

<sup>72</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2006.

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period of time from the Christian public who constitute the majority faith in South Africa".

It is interesting that in dismissing complaints based on offence, the South African advertising regulator does, however, appear to consider small numbers of complaints as an operating factor, but on a negative basis. For example, in the matter of *Nipple Caps & G Strings v Limbouris*<sup>73</sup> the show *Nipple Caps & G Strings* was promoted on a billboard on which a stripper on her back, with her leg around a pole, was featured. In dismissing the complaint, the South African advertising regulator pointed out that:

[T]he billboard has been displayed over a large area for a significant period. Despite this prominent exposure, this is the only complaint received. While this is not a deciding factor, it is indicative that the advertisement did not cause serious wide-spread or sectoral offence.

Public opinion may thus have relevance to an enquiry,<sup>74</sup> but it is not regarded as a substitute for the duty vested in the South African advertising regulator.<sup>75</sup> The task of a self-regulatory body is to interpret the advertising code and to find factually what an advertisement means and come to a conclusion honestly applying its mind.<sup>76</sup> To use low level of complaint as an indication that a particular advertisement is not regarded as offensive, incorrectly amounts to reliance on implicit public opinion. If anything, the number of complaints received in a particular matter can only be a factor that must be objectively weighted and assessed.

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<sup>73</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2007.

<sup>74</sup> *Makwanyane* para 88.

<sup>75</sup> *Tiger Foods Brands Limited 'Fattis & Monis' v Yeomans and Stone* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2002; *Hi-Fi Corporation v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001.

<sup>76</sup> *Rape Crisis* (ASA Final Appeal Committee ruling).

#### **4.2. Interpretation**

In deciding whether certain immoral conduct is intolerable to society, Lord Devlin posed the following question:<sup>77</sup>

How is the law-maker to ascertain the moral judgments of society? ... It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgment may largely be a matter of feeling. It is the viewpoint of the man in the street ... the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.

The South African advertising regulator adopted a similar approach, holding that the test for determining whether a provision of the South African advertising code has been violated cannot depend upon the subjective views of individuals or a particular section of the community.<sup>78</sup> The impact of the advertisement on a reasonable person must be objectively assessed.<sup>79</sup> The law does not take into account those on the extremities of the spectrum, but rather the “reasonable person”.<sup>80</sup> The remarks of Harms AJA in *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd*<sup>81</sup> are apposite:

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<sup>77</sup> Devlin *The enforcement of morals* (1965) 15.

<sup>78</sup> *Hi-Fi Corporation* (ASA Final Appeal Committee ruling); *Nandos v Uthingo* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001; *Fattis & Monis* (ASA Final Appeal Committee ruling); *Dumisa v Med-Lemon* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2003.

<sup>79</sup> *Anton Venter v SASOL (Pty) Ltd* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1997.

<sup>80</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others In re: Application for Declaratory Relief* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 786; *S v Coetzee NO* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) para 97; *Human & Rousseau Uitgewers (Edms) Bpk v Snyman NO* 1978 (3) SA 836 (T); *Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 (1) SA 379 (C).

<sup>81</sup> 1993 (2) SA 307 (A).

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The problem in this case is, however, that it is not possible to classify the consumers of these products because they are purchased by members of all sectors of the population irrespective of race, or level of literacy or sophistication. The notional consumer is therefore as elusive as the reasonable man and it is unlikely that he will be found on any suburban bus.<sup>82</sup>

This fictional reasonable person is thus a normal balanced right-thinking person who gives a meaning to a particular advertisement, within the context as a whole, which can reasonably be attributed thereto.<sup>83</sup> Consequently, the current view of the South African advertising regulator is that the reasonable person will not take offence at an advertisement, which embraces matters of personal predilection, taste and the like,<sup>84</sup> since the hypothetical reasonable person is neither hypercritical nor over-sensitive.<sup>85</sup> The British advertising regulator follows a similar approach, where account must be taken of the average consumer who is reasonably well informed, reasonably observant and circumspect.<sup>86</sup>

The consequences that flow from this approach mean that the reasonable person is one who gives reasonable meaning to an advertisement and excludes a person who is prepared to provide an interpretation that cannot reasonably be attributed

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<sup>82</sup> At 315J.

<sup>83</sup> See *Demmers v Wylie and others* 1980 (1) SA 385 (AD) 842H; *Nandos* (ASA Final Appeal Committee ruling); *Etv S'Camto and Another v Wolder* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001; *Fattis & Monis* (ASA Final Appeal Committee ruling).

<sup>84</sup> *Etv S'Camto* (ASA Final Appeal Committee ruling); *Hi-Fi Corporation* (ASA Final Appeal Committee ruling); *Dumisa v Med-Lemon* (ASA Final Appeal Committee ruling).

<sup>85</sup> *Etv S'Camto* (ASA Final Appeal Committee ruling); *Hi-Fi Corporation* (ASA Final Appeal Committee ruling); *Nandos* (ASA Final Appeal Committee ruling); *Dumisa v Med-Lemon* (ASA Final Appeal Committee ruling).

<sup>86</sup> Pinto "Putting advertising claims to the test" *Managing intellectual property* [www.managingip.com](http://www.managingip.com) (accessed December 2003) with reference to judgment of the European Court of Justice (Fifth Chamber) in Case C-220/98 of *Estée Lauder v Lancaster Group* [2000] ECR I-117.

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thereto, with the result that the assessment of the impact upon a reasonable person is thus objectively assessed.

The provisions of the South African advertising code must be read in a way that gives effect to the fundamental values of the *Constitution, 1996*.<sup>87</sup> The *Constitution, 1996* provides that when “interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.<sup>88</sup> It follows that any tribunal such as the South African advertising regulator should read self-regulatory provisions in a way that give effect to the fundamental values of the *Constitution, 1996*.<sup>89</sup>

The test for determining whether advertising is offensive has to be objective. The application of the test of the fictional reasonable person serves as a helpful guide in this respect. This test should prevent hypercritical or oversensitive views from guiding a decision and ensure rather that objective factors influence a decision. For it is ultimately a question of giving a reasonable interpretation of an advertisement taken into account all objectively relevant factors, whilst guided by the requirements of the *Constitution, 1996*.

In *National Coalition for Gay and Lesbian Equality NO v Minister of Justice NO*<sup>90</sup> Ackermann J appeared to distinguish between the “private moral views of a section of the community, which are based to a large extent on nothing more than prejudice”<sup>91</sup> and “religious views and influences”<sup>92</sup> of members of the community.

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<sup>87</sup> *Rape Crisis* (ASA Final Appeal Committee ruling); *Etv S’Camto* (ASA Final Appeal Committee ruling); *Dumisa v Med-Lemon* (ASA Final Appeal Committee ruling); *Hi-Fi Corporation* (ASA Final Appeal Committee ruling); *Nandos* (ASA Final Appeal Committee ruling); *Fattis & Monis* (ASA Final Appeal Committee ruling); *Dumisa v Med-Lemon* (ASA Final Appeal Committee ruling).

<sup>88</sup> Section 39(2) of the *Constitution, 1996*.

<sup>89</sup> *Good Hope FM v Venables & Others* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2005.

<sup>90</sup> 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

<sup>91</sup> At para 37.

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Therefore, Meyerson insists that rights may be limited only by “public reasons” that resonate for all people as reasonable.<sup>93</sup> Meyerson uses the label “public reasons” as a description of the type of reasons that are to be utilised in that debate. By using public reasons, second-guessing takes place through reasoning and analysis that is acceptable to all reasonable people.<sup>94</sup> Koering-Joulin suggests that the degree of fuzziness, which surrounds decisions of offence, is attributable to mainly two factors: Firstly, offence varies according to time and place. Secondly, the concept of offence is that which the court or regulator allows the widest margin of error.<sup>95</sup>

Whereas public offence is the offence accepted and shared by a particular social group, critical offence is that body of generally accepted forms of reasoning which is used to second-guess the public mores.<sup>96</sup> From what position do judges and regulators employ critical offence to test the public's morality on any given issue? Cockrell provides the answer, and suggests that critical offence should be utilised from what he has termed an “ideal spectator” or “ideal observer” position.<sup>97</sup> From this “ideal spectator” standpoint judges and regulators are better able to see the problems inherent in public opinion. Having identified those problems, judges and regulators are in a position to provide reasons for refuting that offence as faulty.<sup>98</sup> Critical morality thus acts as a screen for public offence. Only that public offence

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<sup>92</sup> At para 38.

<sup>93</sup> Meyerson *Rights limited: freedom of expression, religion and the South African Constitution* (1997) 17.

<sup>94</sup> Du Plessis *Public opinion* 28.

<sup>95</sup> Koering-Joulin “Public morals” in Delmas-Marty (ed) *The European Convention for the protection of human rights. International protection versus national restrictions* (1992) 84.

<sup>96</sup> Du Plessis *Public opinion* 12.

<sup>97</sup> Cockrell *Rainbow jurisprudence* 44, explaining an “impartial spectator” or “ideal observer” as follows: “According to this analysis, something is wrong if and only if an impartial spectator or ideal observer would disapprove of it; an ideal observer is defined to be disinterested, well informed, vividly aware of the relevant facts, and so forth.”

<sup>98</sup> Du Plessis *Public opinion* 13.

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which survives the scrutiny of critical offence has any role to play in constitutional adjudication.<sup>99</sup>

#### **4.3. Context**

The primary consideration in the evaluation of any advertisement in terms of the South African advertising code is the “probable impact of the advertisement as a whole”, bearing in mind the surrounding circumstances that are relevant to the particular advertisement.<sup>100</sup> This is also the approach adopted in Canada, where the context and content of the advertisement is also considered a relevant factor in assessing an advertisement’s conformity with the Canadian advertising code.<sup>101</sup>

However, in looking at an advertisement as a whole, due regard must be paid to each part of its contents, visual and oral, and to the nature of the medium through which it is conveyed.<sup>102</sup> Not just a specific part of an advertisement, but the advertisement taken as a whole must to be considered. Fixating on one line or one statement in an advertisement may have the result that too much significance is attributed to that line or statement, without consideration of the impact of that particular line or statement in the context of the entire advertisement.

The context of the content of an advertisement is a further guideline in making a judgement as to whether it offends or not. Knowledge of context might lead, for example, to a finding as a matter of probability that an advertisement is “tongue in cheek” rather than offensive.<sup>103</sup> For example, in the United Kingdom, Pfizer Consumer Healthcare’s advertisement for throat lozenges showed a tiger with its jaws around a man’s throat. This would normally have been considered “light-hearted”, but a tiger mauled a circus trainer soon after the advertisement

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<sup>99</sup> Du Plessis *Public opinion* 13.

<sup>100</sup> See Clause 3.2 of Section 1 of the South African advertising code.

<sup>101</sup> [www.adstandards.com](http://www.adstandards.com).

<sup>102</sup> *Etv S’Camto* (ASA Final Appeal Committee ruling); [www.adstandards.com](http://www.adstandards.com).

<sup>103</sup> *National Brands Limited v Mexican Embassy* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1996; [www.adstandards.com](http://www.adstandards.com).

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appeared.<sup>104</sup> This example clearly highlights that one cannot divorce an advertisement from surrounding circumstances.<sup>105</sup> For example, facts such as whether the product being advertised is a product used by all and sundry or is relatively expensive having regard to the purpose it is intended to serve,<sup>106</sup> could be relevant to the consideration of offence. Furthermore, in the promotion of a cause, sensitivity, social concern and public opinion are surrounding circumstances to be considered in interpreting such an advertisement.<sup>107</sup> In the matter of *Etv S'Camto*,<sup>108</sup> which promoted sex education in an attempt to curb the HIV/AIDS pandemic, the South African advertising regulator held that it would be dangerous to try to restrict public debate about the dangers of early sex, an issue so critical to the well being of the nation. The South African advertising regulator concluded that a *bona fide* attempt by a charitable foundation to promote sex education to try to prevent early sexual activity and thereby curb the spread of HIV/AIDS cannot be an irresponsible act.

All these criteria have therefore to be looked at objectively,<sup>109</sup> and each case would have to be decided separately and objectively on its own facts.<sup>110</sup>

In summary, the application of the fictional reasonable person test endeavours to give a reasonable interpretation to an advertisement taking into account all objectively relevant factors. A proper reasonable interpretation of an advertisement calls for the advertisement to be judged as a whole with all elements of the advertisement, and not just a specific part of it, being considered.

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<sup>104</sup> Anonymous "Tasteless animal ads spark ASA complaints" *Marketing Week* (1999) 13.

<sup>105</sup> [www.adstandards.com](http://www.adstandards.com).

<sup>106</sup> *The South African Sugar Association v Monsanto* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1998.

<sup>107</sup> *Rape Crisis* (ASA Final Appeal Committee ruling).

<sup>108</sup> ASA Final Appeal Committee ruling.

<sup>109</sup> *Rape Crisis* (ASA Final Appeal Committee ruling); *Etv S'Camto* (ASA Final Appeal Committee ruling).

<sup>110</sup> *Mexican Embassy* (ASA Final Appeal Committee ruling); Advertising Standards Canada *Ad complaints report – year-end summary* [www.adstandards.com](http://www.adstandards.com) (accessed December 2007).

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The nature of the medium in which an advertisement is published should further guide a decision maker in ensuring that all elements relevant to that particular medium have been taken into account and the context, in which the advertisement is published is a further guideline. So too are surrounding circumstances, such as product relevance and public events, of further assistance in looking at all criteria objectively. Such a reasonable interpretation must, however, always be guided by the requirements of the *Constitution, 1996*.

#### **4.4. Nature of the product or service**

Advertising self-regulatory authorities generally suggest that product relevance plays a role in considering whether a particular execution is likely to offend. For example, breasts are important if one is advertising a bra;<sup>111</sup> and it is generally accepted that “unclad” males and females may be used in perfume and underwear advertisements.<sup>112</sup> The South African advertising regulator has explained the concept of product relevance in *Sun International v Falkson*<sup>113</sup> stating that:

The mode of dress is product relevant as the respondent is advertising its upmarket holiday resort for summer holidays, and swimming is one of the many activities that the respondent's clients indulge in at these resorts. The partial nudity that is portrayed in the advertisements is the type of nudity that a person would see on a beach.

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<sup>111</sup> Reinhard “De gustibus non est disputandum” AAAA management conference (2001) (unpublished and unnumbered).

<sup>112</sup> *Opium v Various Complainants* (Ruling of the Advertising Standards Committee of the Advertising Standards Authority of SA) 2001, where complaints were lodged against a Yves Saint Laurent Opium campaign which featured a naked Sophie Dahl in a suggestive pose, published in specialised women's magazines.

<sup>113</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2004, where a complaint was lodged against an image of a woman dressed in a bikini top made of beads with one of her breasts partially showing.

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A further example of how the South African advertising regulator regards nudity as product relevant was illustrated in its decision relating to an *Ingram's* commercial, which featured scenes where, amongst others, tree roots were transformed into naked women, viewed from the back and side. The South African advertising regulator dismissed the complaints, commenting that as the product is a skin lotion that is applied over the entire body this justifies why the entire bodies of these models were depicted, and not just the hands or face.<sup>114</sup>

Accordingly, whilst product relevance may not constitute an absolute test, it can assist in objective decision-making. Should the product relevance test be adopted blindly, resulting in the depiction of breasts being justified purely because of the context of an advertisement for a bra and deemed unacceptable for the promotion of unrelated products, such test would not give a reasonable interpretation to an advertisement, guided by the requirements of the *Constitution, 1996*.

#### **4.5. Likely audience**

An advertisement must be considered not just in relation to the target market at which it is directed, but also in relation to all persons who are likely to be exposed to it. The audience likely to be exposed to an advertisement may be filtered by the medium in which it appears: Adults and children alike are likely to be exposed to billboard advertising, depending on the location of the billboard,<sup>115</sup> whereas more specific groups of readers are exposed to niche publications.<sup>116</sup> The Canadian advertising regulator also considered that the audience likely to be reached by the advertisement as well as the media used for publication, are relevant factors in assessing an advertisement's conformity with the advertising code.<sup>117</sup> Thus, Whyte, Lederman & Bur correctly suggest that, when dealing with children, the need to be

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<sup>114</sup> *Ingrams v Janse van Rensburg & Others* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2006.

<sup>115</sup> *The Lounge Billboard v Snyman* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2007.

<sup>116</sup> *Etv S'Camto* (ASA Final Appeal Committee ruling).

<sup>117</sup> [www.adstandards.com](http://www.adstandards.com).

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protected from commercial exploitation is far more important than the need for children to have adequate information in order to make informed choices.<sup>118</sup> For example, in *Irwin Toy*, the Canadian Supreme Court upheld a statutory prohibition on all advertising directed at children younger than 13 years of age, holding that the protection of this particularly vulnerable group was justified under the limitations clause.

The Yves Saint Laurent 'Sophie Dahl' Opium campaign in the United Kingdom illustrates that objections to sexually suggestive advertising, or depictions of nudity or apparent nudity, tend to be more prevalent when the media selected are perceived as inappropriate:<sup>119</sup> The campaign featured a naked Sophie Dahl in a suggestive pose. In its billboard format the advertisement resulted in over a thousand complaints, whereas the publication of the same execution in specialised women's magazines resulted in three complaints.<sup>120</sup>

Consumers generally have a certain level of expectation about the type of programme they will be watching, as they have an opportunity to learn about a show through reviews and rating systems before deciding whether to watch it. Whilst consumers can thus selectively choose the programming they watch, this is not true of the advertising they watch. Consumers cannot prepare for advertising that arrives unannounced.<sup>121</sup> One therefore needs to be mindful of the fact that the elective element is in most instances not present in advertising. It is for this reason that advertising is often described as the uninvited intruder in one's home.<sup>122</sup>

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<sup>118</sup> *Canadian constitutional law - cases, notes and materials* (1992) 22-50.

<sup>119</sup> *Etv S'Camto* (ASA Final Appeal Committee ruling); Advertising Standards Canada *Ad Complaints report* (2002) 7; Jardine "How far can you go before an ad is banned?" (1999) *Marketing* 14.

<sup>120</sup> Lord Borrie QC "Is self-regulation still the best way to protect advertising freedom?" *ISBA annual conference* [www.asa.org.uk](http://www.asa.org.uk) (accessed March 2001).

<sup>121</sup> Anonymous "I have a great commercial, so why won't the networks air it?" [www.library.lp.findlaw.com/articles](http://www.library.lp.findlaw.com/articles) (accessed February 2003).

<sup>122</sup> Refer, for example, Petty "Marketing without consent: consumer choice and costs, privacy, and public policy" *Journal of public policy and marketing* (2000) 42-53.

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Appropriate media selection results in consumers being able to predict the 'boundaries' of the advertising they are likely to see. This is a principle that can be applied to most media, whether, for example, billboards<sup>123</sup> or point-of-sale.<sup>124</sup> If a consumer buys a magazine, such as *FHM*, with a demographic profile of 72% male and titles such as "FHM Lingerie Special" and "FHM 100 Sexiest Women",<sup>125</sup> such consumer may reasonably and accurately guess at the type of advertising that may be published in such a magazine.<sup>126</sup> In the matter of *Dulux v Kapp*<sup>127</sup> the South African advertising regulator dealt with a print advertisement showing a "classical style painting of Adam and Eve without a fig leaf to cover the figures' genitals" with the pay-off line "Add some" and a block with the colour green. As the target market for the magazine in which the advertisement appeared was women falling within the 25 years plus age bracket; and that demographically only 23% of these readers have children above the baby age, the South African advertising regulator held that children were unlikely to be exposed to the advertisement.

Furthermore, the extent of a restriction as well as the form of the expression is further important factors to be considered: Where the extent of the restriction constitutes prior restraints on expression, the courts will scrutinise such restrictions more closely, because of their inherent dangers. As for the form of the expression, the European Court of Human Rights, for example, acknowledged that account must be taken of the fact that audio-visual media have a more immediate and powerful effect than the print media<sup>128</sup>. As such, measures that are more restrictive will be permissible in

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<sup>123</sup> Refer, for example, *Little Holland v Jaffee* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2006.

<sup>124</sup> Refer, for example, *Young Designers Emporium v Quinlan & Others* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2003.

<sup>125</sup> [www.ucm.co.za](http://www.ucm.co.za).

<sup>126</sup> Section 17 of the *Film and Publication Act* (Act 65 of 1996).

<sup>127</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2005.

<sup>128</sup> Ovey & White *Jacobs & White - the European Convention on Human Rights* (2006) 320.

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relation to the audio and visual media, because the potential for damage is greater.<sup>129</sup>

Age certificates at the cinema also allows for a similar filtering of advertising.<sup>130</sup> South Africa adopted a classification system through the *Film and Publication Board* (FPB) in terms of the *Film and Publication Act*. This body has determined that classification decisions should reflect the norms, values, virtues and standards of tolerance of the country within which a particular classification or rating authority functions.<sup>131</sup> A classification system is not, however, a uniquely South African practice. There are also film classification authorities in, for example, the United Kingdom (*British Board of Film Classification*), Canada (*Provincial Film Boards*) and the United States (*Motion Picture Association of America's Classification and Rating Association*). All are creatures of statute, whereas the United States' body is self-regulated without government status.

The *Film and Publication Board* established the following principles in implementing the objectives of the *Film and Publication Act*:<sup>132</sup>

- (i) While adults should enjoy freedom of choice, children must be protected from exposure to potentially disturbing and harmful materials;
  
- (ii) The policy of imposing age-restrictions to protect children in the relevant age groups from premature exposure to adult experiences or materials which may be inappropriate in the context of South African society;
  
- (iii) The need to alert members of the public, through consumer advice, to material which they may find offensive, both for themselves and for children in their care; and

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<sup>129</sup> Ovey & White *European Convention* 320; and *Murphy v Ireland* (2004) 38 EHRR 212 para 74.

<sup>130</sup> Section 18 of the *Films and Publications Act*.

<sup>131</sup> Chetty & Basson *Survey of public perception and use of FBP classification guidelines in making viewing choices for children* (2007) [www.fpb.gov.za/research](http://www.fpb.gov.za/research) 1-10, 4.

<sup>132</sup> Chetty & Basson *Public perception* 6.

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(iv) The requirement that guidelines be published annually and revised on the basis of public representations so that guidelines reflect, as far as possible, contemporary South African standards and values.

The aim of the *Film and Publication Act* is thus that people should be protected from exposure to unsolicited materials which may be offensive by way of “advisories” that are intended to alert viewers to materials which they might find offensive and would therefore wish to avoid.<sup>133</sup> This system of classification allows for limitations but not absolute prohibitions on the right to freedom of expression.<sup>134</sup>

In respect of television programming, the South African broadcast regulator’s code<sup>135</sup> is premised around the watershed period, meaning that television broadcasters are not allowed to broadcast programming “intended for adult audiences” outside the watershed period.<sup>136</sup> Broadcasting licensees are also required to provide audience advisories where necessary.<sup>137</sup> The South African broadcast programming code,<sup>138</sup> which deals with the content of broadcast programming on a self-regulatory basis,<sup>139</sup> explains this further, stating that “with the advance of the watershed period progressively less suitable (i.e. more adult) material may be shown and it may be that a programme will be acceptable for example at 23h00 that would not be suitable at 21h00”.<sup>140</sup> The United States broadcast regulator

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<sup>133</sup> Chetty & Basson *Public perception* 6.

<sup>134</sup> Chetty & Basson *Public perception* 9.

<sup>135</sup> Refer Schedule 1 to the *Independent Broadcasting Authority Act* (Act 153 of 1993).

<sup>136</sup> Para 19 of the ICASA code. The watershed period is the period between 21h00 and 05h00 with respect to free-to-air television services; and for subscription services, which offer a parental control mechanism restricting availability to children, the period, commences at 20h00.

<sup>137</sup> Para 32 of the ICASA code.

<sup>138</sup> Refer s 56(1) of the *IBA Act*; and Broadcast Complaints Commission of SA *Code of the Broadcast Complaints Commission of SA* (2003) [www.bccsa.co.za](http://www.bccsa.co.za).

<sup>139</sup> Section 56(2) of the *IBA Act*.

<sup>140</sup> Clause 23 of the BCCSA code.

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follows a similar approach.<sup>141</sup> Broadcasts that fall within the definition of “indecenty” and that are aired between 06h00 and 22h00 are subject to enforcement action by the FCC.<sup>142</sup>

In the matter of *Lacoste v Vegter*<sup>143</sup> the South African advertising regulator dealt with a television commercial which showed a naked man from the back, walking from his bed across a short corridor to a cupboard, where he picks up a Lacoste deodorant and applies it. He then walks back facing the camera with only his upper body showing and sits on a sofa. In view of the advertiser’s decision to flight the commercial after 21h00, the South African advertising regulator ruled that it was not necessary to examine whether the commercial is in fact indecent and/or offensive, as the possibility of children being exposed to the commercial was excluded. It would thus appear that the media schedule of commercials greatly assists the advertising regulator in determining whether advertising is likely to cause harm to children.

The same applies to radio stations.<sup>144</sup> For example, the British radio advertising code provides that:<sup>145</sup>

Standards of taste are subjective and individual reactions can differ considerably. Each station is expected to exercise responsible judgements and to take account of the sensitivities of all sections of its audience when deciding on the acceptability or scheduling of advertisements ... For example, advertisers may make a range of advertisements which are suitable for different listeners and moods. Where research on individual stations shows that a significant number of

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<sup>141</sup> Anonymous “Cable television fact sheet – program content regulations” <http://library.lp.findlaw.com/articles> (accessed August 2003).

<sup>142</sup> Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>143</sup> Ruling of the Advertising Standards Committee of the Advertising Standards Authority of SA 2003.

<sup>144</sup> For example, 94.7 Highveld Stereo broadcasts the often-controversial *Rude Awakening* breakfast show, hosted by Jeremy Mansfield ([http://en.wikipedia.org/wiki/94.7\\_Highveld\\_Stereo](http://en.wikipedia.org/wiki/94.7_Highveld_Stereo)).

<sup>145</sup> Clause 9 of the British radio advertising code.

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specific listeners, such as those aged below 16 years, are present at certain times, such as at breakfast or in daytime during school holidays, stations must schedule sensitive advertisements accordingly.

Davis points out that all democracies recognise the permissibility of placing reasonable time, place, or manner restrictions on freedom of expression.<sup>146</sup> Such filtering of potentially sensitive advertisements allows consumers to predict the kind of material that they are likely to see. Van Rooyen has suggested that place restrictions and age restrictions make it possible to differentiate between different types of material, and the difference in perception and understanding between adults and children.<sup>147</sup> On this premise and within reason, audiences may be given the choice of what they wish to see or hear and what material they wish to avoid.

As there is no South African case law, post 1994, that specifically deals with the principle of restrictions based on time, place or manner, foreign law in the United States, Canada and the European Community will be considered, as is provided for in the *Constitution, 1996*.<sup>148</sup> The provisions of s 39 of the *Constitution, 1996* require of the courts and other interpreters of the Bill of Rights to consider international law and explicitly allow them to consider foreign law. There is, however, an important caution against uncritical borrowings from comparative jurisprudence and, in particular, from *First Amendment*<sup>149</sup> jurisprudence emanating from the United States.<sup>150</sup> The Constitutional Court further noted in *S v Makwanyane and Another*<sup>151</sup> that comparative Bill of Rights jurisprudence and foreign case law “will no doubt be of importance, particularly in the early stages of the transition when there is no

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<sup>146</sup> Davis “Freedom of expression” in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 218.

<sup>147</sup> Van Rooyen *Absolute rules* 87.

<sup>148</sup> Woker *Advertising law in South Africa* (1999) 204 with reference to s 39 of the *Constitution, 1996*.

<sup>149</sup> *First Amendment to the United States Constitution of 1787*.

<sup>150</sup> Davis *Freedom of expression* 222.

<sup>151</sup> 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 para 37.

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developed indigenous jurisprudence in this branch of the law", but "will not necessarily offer a safe guide to the interpretation" of the Bill of Rights.

The European Community view is that the more extensive the potential dissemination of material (for example, by television or radio), the easier it is to justify a restriction imposed on grounds of offence to others, since the material is more likely to reach an audience which is not prepared for it.<sup>152</sup> The likely audience is thus a relevant consideration in limiting freedom of expression.

The European Court of Human Rights most clearly expressed the flexibility of the concept of the 'time and space criteria of morals' in *Handyside v The United Kingdom*,<sup>153</sup> which held that the restrictions imposed on the distribution of offensive material, where it is contained in a children's book, as was the case in *Handyside*, should be more readily justifiable than where the material is broadcast as part of a serious news program, intended for a well-informed audience.<sup>154</sup> In *Wingrove v The United Kingdom*<sup>155</sup> the European Court of Human Rights considered the medium of the intended expression (on video cassette) and noted how difficult it was to control the distribution of, and so the audience for, video films once they are put into circulation.

Accordingly, it would seem that as a result of restrictions on freedom of expression whether as to time, place or manner, even the availability of very explicit material is supported by jurisprudence in the European Community as long as (1) the risk of children viewing such material is limited due to the use of, for example, age restrictions; (2) the material is otherwise filtered to avoid the exposure of unwilling

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<sup>152</sup> Coppel *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (1998) 344.

<sup>153</sup> (1976) 1 EHRR 737. See also Koering-Joulin *Public morals* 84.

<sup>154</sup> Coppel *J The Human Rights Act 1998: enforcing the European Convention in the domestic courts* Chapter 12 – Freedom of expression 344

<sup>155</sup> (1997) 24 EHRR 1.

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adult audiences through, for example, appropriate warnings; and (3) the question of offending religious sensibilities does not arise.<sup>156</sup>

Canadian jurisprudence also suggests that courts should take account of the suitability of the placement of a particular advertisement for effective communication of the message; the symbolic significance of the property in question; the availability of other public arenas for dissemination of expression; the effect on the applicant of being denied the opportunity to disseminate the message in the form and in the time and place asserted.<sup>157</sup> The Canadian attitude is illustrated in the *dictum* by Dickson CJC in *R v Towne Cinema Theatres Ltd*:<sup>158</sup>

The cases all emphasize that it is a standard of tolerance not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it ... Since the standard is tolerance, I think the audience to which the allegedly obscene material is targeted must be relevant.

In the United States time, place, and manner regulations are also tolerated, but only if they are content neutral, meaning that the restriction must be “justified without reference to the content of the regulated speech”.<sup>159</sup> These restrictions must,

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<sup>156</sup> Fenwick *Civil liberties and human rights* (2007) 313 with reference to *Otto-Preminger Institut v Austria* (1994) 19 EHRLR 34 and *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321.

<sup>157</sup> Marcus & Spitz “Expression” in Chaskalson et al (eds) *Constitutional law of South Africa* (1999) 20-27-28 with reference to *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139. This is not expressly dealt with in Milo, Penfold & Stein *Freedom of expression*.

<sup>158</sup> (1985) 18 CCC (3rd) 193 at 205.

<sup>159</sup> *Ward v Rock Against Racism* 491 US 781 (1989); *Clark v Community for Creative Non-Violence* 468 US 288 (1984); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* 425 US 748 (1976); *Bates v State Bar of Arizona* 433 US 350 (1977). See also Ogletree, Miller & Jessamy “Utility affiliates: why restrict use of names and logos?” *Public utilities fortnightly Arlington* (1999) 34-9.

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however, leave open ample alternative channels for communication.<sup>160</sup> Content neutral regulations must be justified without reference to the content of the regulated speech.<sup>161</sup> For example, in *Hill v Colorado*<sup>162</sup> the Supreme Court upheld a statute which made it unlawful “knowingly to approach” a person within 100 feet of a health care facility to pass a “leaflet or handbill to, display a sign to, or engage in oral protest, education or counselling”: This restriction was regarded as content neutral because it regulated the places where speech may occur, and not the content of the demonstrator's speech; and the restriction was narrowly tailored to the state's interest and left open ample alternative communication channels, thus applying the rationale of *Ward v Rock Against Racism*.<sup>163</sup>

The United States Supreme Court, in the matter of *RAV v City of St. Paul*<sup>164</sup> pointed out that:

Even the prohibition against content discrimination ... is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. A valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is justified without reference to the content of the ... speech ... Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular “neutral” basis, so long as the

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<sup>160</sup> Refer, for example, *Metromedia, Inc v San Diego* 453 US 490 (1981), where a ban on all billboards containing non-commercial messages was struck down in part because it did not leave open adequate alternative channels.

<sup>161</sup> Refer, for example, *United States v Grace* 461 US 171 (1983), where it was held that, although content neutral, a statutory prohibition on the display of any flag or banner on the grounds of the Supreme Court was nevertheless unconstitutional because it prevented speech on public sidewalks in front of the court, which are traditionally places open for expressive activity.

<sup>162</sup> 530 US 703 (2000).

<sup>163</sup> At 711 – 713, 719 – 720 and 723 - 726.

<sup>164</sup> 505 US 377 (1992).

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nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.<sup>165</sup>

It is suggested that, in light of the above the content-neutral requirement of United States jurisprudence should not be adopted in South African law. For as cautioned in *S v Mamabolo*, *First Amendment* protection should not be blindly copied into South African freedom of expression protection, since they are inherently incompatible. Both protections have different common law origins and subsist in materially different constitutional regimes. In South African law, the limitations on offensive material based on time, place and manner restrictions should be acceptable if such restrictions are acceptable within the parameters of s 36(1) of the *Constitution, 1996*. The European Community and Canada also do not apply the United States content-neutral requirement, but rather determine the acceptability of restrictions on freedom of expression within the context of their relevant limitation clauses.

Accordingly, the consideration of the likely audience, given the context in which an advertisement is published, is a constitutionally justifiable approach in South African law. Moreover, the test of the fictional reasonable person endeavours to give a reasonable interpretation to an advertisement, taking into account all objectively relevant factors and judging the advertisement as a whole with the nature of the medium in which an advertisement is published at all times remaining an objectively relevant consideration.

## **5. Categories of offensive advertising**

Two different categories of offensive advertising can be identified, namely that which relates to offensive products such as condoms, feminine hygiene products and underwear; and offensive executions of advertisements.<sup>166</sup> It is ultimately the latter category, which includes racist, sexist, or violent executions, which could

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<sup>165</sup> At 393-396.

<sup>166</sup> Barnes & Dotson "An exploratory investigation into the nature of offensive television advertising" *Journal of advertising* (1990) 61-69, 61.

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objectively offend consumers.<sup>167</sup> This distinction is recognised in the British non-broadcast advertising code, which states that the fact that a product is offensive to some is “not sufficient grounds for objecting” to an advertisement.<sup>168</sup>

Offence caused by a product, rather than the advertising of such product, such as a condom, should not be enough to lodge a complaint on the grounds of offence. The nature of a product in itself should not result in its advertising automatically being considered offensive. The right to freedom of expression to advertise potentially offensive products would be severely and unduly curtailed should the advertising of such products be held to be offensive not because of the content of the advertising material but simply due to the nature of the product itself. Accordingly, potential offence caused by the nature of products will not be further discussed. The discussion will focus on potentially offensive executions of advertising as crystallised through various judgments.

In this regard, the Constitutional Court’s recognition that one would expect regulation to cover material that is (1) indecent, obscene or offensive to public morals, and (2) offensive to religious convictions or (3) offensive to feelings of sections of the population, will guide this discussion.<sup>169</sup> In addition, classifiable elements, which impact on the rating of films or publications, and which are common to most classification bodies, will also be taken into account. These classifiable elements include violence, sex, nudity, drug and substance abuse, language, blasphemy, and prejudice or negative stereotyping based on race, ethnicity, gender, religion, or other group-identifiable characteristics.<sup>170</sup>

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<sup>167</sup> Waller “What factors make controversial advertising offensive?” ANZC conference (July 2004) 7.

<sup>168</sup> Clause 5 of the General Rules of the British non-broadcast advertising code.

<sup>169</sup> *Islamic Unity* para 30.

<sup>170</sup> Chetty & Basson *Public perception* 10.

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#### **5.1. Advertising that is indecent, obscene or offensive to public morals<sup>171</sup>**

##### **5.1.1. Indecent**

The South African common law offence of public indecency has been defined as unlawfully, intentionally and publicly performing an act which tends to deprave or corrupt the morals of others or which outrages the public sense of decency.<sup>172</sup> But it has also been said that “indecency” is too subjective and emotional a concept to be workable as a legal test as it could denote a relative concept which is dependent on its context or on the nature of the audience or recipient.<sup>173</sup> In *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*<sup>174</sup> the Constitutional Court found that a subsection of the *Indecent or Obscene Photographic Matter Act*<sup>175</sup> was unconstitutional.<sup>176</sup> The Act prohibited the possession of “any indecent or obscene photographic matter”.<sup>177</sup> Section 1 of the Act defined “indecent or obscene photographic matter” as “photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature”. In finding the Act unconstitutional, Didcott J, for the majority, observed that:

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<sup>171</sup> *Islamic Unity* para 30.

<sup>172</sup> *Marcus & Spitz Expression* 20-44 footnote 7, with reference to, for example, *S v W* 1975 (3) SA 841 (T); *S v K* 1983 (1) SA 65 (C); and *Van der Westhuizen Freedom of expression* 282. This has not been specifically defined in *Milo, Penfold & Stein Freedom of expression*.

<sup>173</sup> *Fenwick Civil liberties* 288; *Jacobellis v Ohio* 378 US 184 (1964) 197.

<sup>174</sup> 1996 (3) SA 617 (CC); 1996(5) BCLR 609 (CC).

<sup>175</sup> Act 37 of 1967.

<sup>176</sup> The *Film and Publication Act* repealed this Act.

<sup>177</sup> Section 2(1) of Act 37 of 1967.

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So widely has [the definition of indecent or obscene photographic matter] been framed that it covers, for instance, reproductions of not a few works of art, ancient and modern, that are publicly displayed and can readily be viewed in major galleries of the world.<sup>178</sup>

The constitutional unacceptability of this statute was thus its overbreadth.<sup>179</sup> Similarly, in considering the constitutionality of the Namibian *Indecent and Obscene Photographic Matter Act*,<sup>180</sup> the High Court of Namibia commented in *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others*,<sup>181</sup> that:

Instead of addressing the legislative object with precision, caution and sensitivity to the fundamental rights of those who would be affected by the law, it was written with the bold and sweeping strokes of a legislative pen unconcerned with constitutional censure by the Courts.

In South Africa, and similarly in Namibia, the concern does not necessarily relate to the use of terms such as “indecent” or “obscene” itself, but to the broad definition given to these terms.

In a discussion of indecency, it must be taken into account that a child would not understand subtle sexuality. If a child were old enough to view an image in the context of an advertised service, and to perceive such subtle image as sexual in nature, that child would be old enough to be appropriately engaged on issues of

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<sup>178</sup> *Case v Minister of Safety and Security* para 91.

<sup>179</sup> Marcus & Spitz *Expression* 20-45 for a commentary on the Act; Marcus “Freedom of expression under the Constitution” *SA journal on human rights* (1994) 140, 144; Van der Westhuizen *Freedom of expression* 282.

<sup>180</sup> Act 37 of 1967.

<sup>181</sup> [1998] NAHC 1. In *Fantasy Enterprises*, the High Court of Namibia also ruled that section 2(1) of the Namibian *Indecent and Obscene Photographic Matter Act* (Namibia) is unconstitutional due to its wide and sweeping ambit.

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sexuality. Thus, for example, in the matter of *Zimbali Lodge v Kusel & Another*,<sup>182</sup> the advertisement featured a topless woman against an ocean background with a string of beads partially covering her breasts. The South African advertising regulator held that the reasonable child would not readily understand this type of subtle sexuality.

The European Court of Human Rights has repeatedly emphasised that article 10 of the *European Convention*, which protects the right to freedom of expression, protects not only information and ideas that are received favourably or with indifference, but also those that shock, offend or disturb,<sup>183</sup> although the value of their content may be justifiable under article 10(2).<sup>184</sup> Thus, the line of authority stemming from the *Handyside* case suggests that although explicit expression, including some pornographic expression, is protected within article 10(1), interference with freedom of expression can be justified quite readily in certain circumstances:

- In *Handyside*, a book called *The Little Red Schoolbook*, which contained chapters on masturbation, sexual intercourse and abortion was prosecuted under the *Obscene Publications Act 1959* on the basis that it appeared to encourage early sexual intercourse. The European Court of Human Rights placed particular weight on the fact that the book was aimed at children between the ages of 12 and 18.<sup>185</sup> The Court suggested that the “*protection of morals*” provision under article 10(2) refers to the corruption of individuals rather than to an effect on the moral fabric of society.<sup>186</sup> On the basis that the requirements of morals vary from time to time and from place to place, the Court found that the domestic authorities were therefore best placed to

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<sup>182</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2006. See also, for example, *Little Holland* (Ruling of the ASA Directorate).

<sup>183</sup> *Handyside* at 754.

<sup>184</sup> *Coppel Human Rights Act* 328.

<sup>185</sup> *Handyside* para 52.

<sup>186</sup> *Handyside* para 52.

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judge what was needed,<sup>187</sup> and that the English judges were entitled to find that the book would have a “*pernicious effect on the morals*” of the children who would read it in the United Kingdom.<sup>188</sup>

- In *Müller v Switzerland*,<sup>189</sup> the European Court of Human Rights found that the exhibition of explicit paintings was likely to “grossly offend the sense of sexual propriety of persons of ordinary sensitivity”. A sufficient level of offensiveness was reached, the Court suggested, in speech that may at best be termed “very shocking”. The Court made it clear that speech which would merely be termed “shocking” or “disturbing” would not reach this level.<sup>190</sup> The Court took into account the fact that the paintings had been exhibited to the public at large, without a warning as to their content, and that a young girl had seen them.<sup>191</sup>
- In *Kopp v Switzerland*,<sup>192</sup> the European Court of Human Rights reiterated that the requirements of accessibility and foreseeability are essential in establishing a legal basis for domestic authorities dealing with “indecency”, stating that the protection of morals appears to require a wide margin owing to its subjective nature.<sup>193</sup>

In the United Kingdom, the term “indecency” appears in certain statutes and is also found in the common law, essentially aimed at preventing public displays of offensive material or the possibility that such material will impinge in some way on the

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<sup>187</sup> *Handyside* para 48.

<sup>188</sup> Fenwick *Civil liberties* 279.

<sup>189</sup> (1991) 13 EHRR 212.

<sup>190</sup> Fenwick *Civil liberties* 295.

<sup>191</sup> Fenwick *Civil liberties* 280.

<sup>192</sup> (1999) 27 EHRR 91 paras 70-71.

<sup>193</sup> Fenwick *Civil liberties* 278-9.

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general public, or a part of it.<sup>194</sup> Prosecutions for conspiracy to corrupt morals can be brought at common law, as can prosecutions for outraging public decency. Both these offences were preserved in s 5(3) of the *Criminal Law Act 1977*.<sup>195</sup> However, common law indecency creates a much wider area of liability than statute specific restrictions, in that the common law is not confined to specific situations, such as using the mail.<sup>196</sup>

Taking an “indecent photograph or film of a person under the age of 16” is prohibited under s 1 of the *Protection of Children Act 1978*. Offensive displays fall under the *Indecent Displays (Control) Act 1981*, which covers public displays of anything capable of being displayed, but is limited in its application. The ambit of the Act does not cover theatre, cinema, broadcasting, museums, art galleries, local authority, or Crown buildings,<sup>197</sup> and shops which display an adequate warning notice, are exempted as far as adults are concerned. In this regard, art galleries are, anomalously, more constrained in their displays than sex shops, as they cannot take advantage of the adequate warning exception.

Chapter 21, s 3(2)(e) of the *Communications Act 2003* covers broadcast material, and requires of the British broadcast regulator to “provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services”. Section 319(2)(h) of the Act furthermore provides that the British broadcast regulator must prevent “advertising which may be misleading, harmful or offensive”. Moreover, in terms of s 6(1)(a) of the Act, these obligations can be “furthered or secured, by effective self-regulation”. As previously mentioned,<sup>198</sup> these duties were delegated to the British advertising regulator.

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<sup>194</sup> Fenwick *Civil liberties* 287.

<sup>195</sup> Fenwick *Civil liberties* 293.

<sup>196</sup> Fenwick *Civil liberties* 292.

<sup>197</sup> Section 1(4) of the *Indecent Displays (Control) Act*.

<sup>198</sup> Refer Chapter II, para 2.2.1.1 above.

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Concerning the test for “indecenty”, the House of Lords determined in *Kneller v DPP*<sup>199</sup> that whether the material results in outrage or utter disgust in “ordinary decent-minded people”. This suggests that the level of shock would have to be fairly high.<sup>200</sup> Furthermore, in cases such as *Wiggins v Field*<sup>201</sup> and *AG ex re McWhirter v IBA*,<sup>202</sup> the British Courts have held further that the circumstances in which the alleged “indecenty” occurred should be taken into account, as well as judging the material as a whole. Nevertheless, Fenwick suggests that, as currently interpreted in the United Kingdom, the term “indecenty” is so uncertain that there is at least room for argument that these statutory provisions do not meet the “*prescribed by law*” requirement.<sup>203</sup>

In the United States, the *First Amendment* protects indecent speech and consequently such speech cannot *per se* be outlawed. The courts have, however, upheld limitations on this right: Prohibitions on the broadcast of indecent speech during those times of the day when there is a reasonable risk that children may be in the audience, have been upheld.<sup>204</sup> Thus the United States Supreme Court held in *FCC v Pacifica Foundation*<sup>205</sup> that it was permissible for the United States broadcast regulator to consider license renewal applications on the basis that broadcast material that is “indecent” would be regulated. And the Court upheld the United States broadcast regulator’s determination that “the repetitive, deliberate use (of) words that referred to excretory or sexual activities or organs ... in an afternoon broadcast when children are in the audience was patently offensive, and ... that the broadcast was indecent”.<sup>206</sup>

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<sup>199</sup> [1972] All ER 898.

<sup>200</sup> Fenwick *Civil liberties* 288.

<sup>201</sup> [1968] Crim LR 50.

<sup>202</sup> [1973] 1 All ER 689.

<sup>203</sup> Fenwick *Civil liberties* 292.

<sup>204</sup> Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>205</sup> 438 US 726 (1978).

<sup>206</sup> *Pacifica Foundation* 739.

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In *Reno, Attorney General of the United States v American Civil Liberties Union*<sup>207</sup> the United States Supreme Court struck down the definition of “indecent” in the *Telecommunications Act 1996*. The law defined “indecent” as any communication “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs”. The Supreme Court held that the definition of “indecent” could be applied too broadly, and that as such it would infringe on constitutionally protected speech.<sup>208</sup> In *US v Playboy Entertainment*<sup>209</sup> the Supreme Court reached a similar decision, requiring that subscription cable operators primarily dedicated to sexually oriented programming should block transmission or limit such transmission to hours when children were unlikely to be viewing.<sup>210</sup> In both the above cases, the Supreme Court recognised that indecent material is protected and that the effort to protect children cannot be pursued to the extent of infringing the *First Amendment* rights of adults. A similar rationale was also applied in *Ashcroft v Free Speech Coalition*<sup>211</sup> in which portions of the regulations preventing child pornography were found to be too broad.<sup>212</sup> And in *Sable Communications, Inc v FCC*<sup>213</sup> the United States broadcast regulator’s “dial-a-porn” rules, which imposed a total ban on “indecent” speech, were found to be unconstitutional, given less restrictive alternatives were available, such as limiting access to users of credit cards, or user IDs, to prevent access by children.<sup>214</sup>

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<sup>207</sup> 521 US 844 (1997).

<sup>208</sup> At 870-879.

<sup>209</sup> 529 US 803 (2000).

<sup>210</sup> At 811-827.

<sup>211</sup> 535 US 234 (2002) 244-258.

<sup>212</sup> At 244-258.

<sup>213</sup> 492 US 115 (1989).

<sup>214</sup> At 126-131.

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Fenwick<sup>215</sup> also suggests that there has been a greater concentration on the question whether restrictions aimed at children might impinge also on the freedom of expression of adults and on the extent to which this should be tolerated. Dealing with the argument that advertising will reach young children, the United States Supreme Court in *Dunagin v City of Oxford, Mississippi*<sup>216</sup> remarked, “[p]eanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade”.<sup>217</sup> Although the court in *Dunagin* furthermore voiced its approval of the Supreme Court’s comment in *Bolger v Youngs Drug Store Products Corp*<sup>218 219</sup> that “the government may not ‘reduce the adult population ... to reading only what is fit for children’”, this does not mean that the United States courts believe that the state has no interest in protecting children from sexual exploitation.<sup>220</sup> Rather, the courts consider that government has a legitimate interest in protecting minors from potentially harmful materials,<sup>221</sup> narrowly drawn proscriptions for distribution or exhibition to children of materials, which would not be obscene for adults, are permissible.<sup>222</sup> For “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the youth from ideas or images that a legislative body thinks unsuitable for them.”<sup>223</sup>

The United States government’s legitimate interests in protecting children from sexual exploitation may be furthered by appropriately narrow regulation, and the court’s view of how narrow regulation must be is apparently influenced not only by its view

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<sup>215</sup> At 280.

<sup>216</sup> 467 US 1259 (1984).

<sup>217</sup> At 43.

<sup>218</sup> 463 US 60 (1983).

<sup>219</sup> *Bolger v Youngs* 74, referring to *Butler v Michigan* 352 US 380 (1957) 383.

<sup>220</sup> *Osborne v Ohio* 495 US 103 (1990).

<sup>221</sup> See, for example, *Reno v ACLU* 846.

<sup>222</sup> See, for example, *Reno v ACLU* 862 and *Ginsberg v New York* 390 US 629 (1968).

<sup>223</sup> *Erznoznik v City of Jacksonville* 422 US 205 (1975) 212-4; and *Pacifica Foundation* 749-50.

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of the strength of the government's interest in regulation, but also by its view of the importance of the expression itself.<sup>224</sup>

Furthermore, total bans applicable to adults and children alike are constitutionally suspect.<sup>225</sup> Broadcasts that fall within the definition of "indecent" and that are aired between 06h00 and 22h00 are subject to indecency enforcement action by the United States broadcast regulator. Efforts by the United States broadcast regulator to extend the indecency ban to 24 hours a day had been rebuffed by an appeals court:<sup>226</sup> In the *Action for Children's Television* case, the court had invalidated a restriction imposed by the United States broadcast regulator on indecent broadcasts between 06h00 and 24h00, finding that the United States broadcast regulator had failed to adduce sufficient evidence to support the restraint.

The approach of the United States is similar to the approach adopted in South Africa, as the South African broadcast regulator's code, which covers the content of broadcast programming, is also premised around a watershed period, meaning that television broadcasters are not allowed to broadcast programming "intended for adult audiences" outside this period.<sup>227</sup> Broadcasting licensees are also required to provide audience advisories where necessary.<sup>228</sup> The South African broadcast programming code, which deals with the content of broadcast programming on a self-regulatory basis, explains this further, stating that "with the advance of the watershed period progressively less suitable (i.e. more adult) material may be shown

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<sup>224</sup> In *Sable Communications* 132, Scalia J suggested, "the more pornographic what is embraced within the residual category of 'indecent,' the more reasonable it becomes to insist upon greater assurance of insulation from minors".

<sup>225</sup> *Denver Area Educational Telecommunications Consortium v FCC* 518 US 727 (1996).

<sup>226</sup> *Action for Children's Television v FCC* 503 US 913 (1992).

<sup>227</sup> Para 19 of the ICASA code. The watershed period is the period between 21h00 and 05h00 with respect to free-to-air television services; and for subscription services that offer a parental control mechanism restricting availability to children, the period commences at 20h00.

<sup>228</sup> Para 32 of the ICASA code.

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and it may be that a programme will be acceptable for example at 23h00 that would not be suitable at 21h00".<sup>229</sup>

From the above, it is clear that the term "indecent" is itself not unacceptable, both in South African and in other jurisdictions, but that the challenge lies in defining "indecent" in a manner that sets an intelligible standard. Fenwick's submission that the "indecent" laws in the United Kingdom are essentially aimed at protecting persons from the shock or offence occasioned by encountering certain material, rather than at preventing moral deterioration,<sup>230</sup> may be helpful in this regard. In that a definition of "indecent" based on the content of the material can incorporate concepts that are too subjective and / or emotional to constitute a workable legal test, it is submitted that limitations based on "indecent" should rather be based on the protection of children and unwilling adult recipients.

Furthermore, whether a work could be deemed "patently offensive" would depend on review of the work as a whole, the effect of the material on an average person, context, degree, and time of broadcast.<sup>231</sup> Given that the consideration of the likely audience, in the context in which an advertisement is published, should be constitutionally justifiable in South African law, it is submitted that a South African definition of "indecent" should be defined in relation to the likely audience of a particular medium or programme. This would also be similar to the approach in the United States. It should thus be a question of whether the reasonable person is likely to be offended by the content of a particular advertisement given the medium in which it is published and / or the programme during which it is published. In this sense, the interpretation of the term "indecent" relates to appropriate media placement, and not the outright banning of material; and the audience likely to be exposed to an advertisement can be filtered based on the medium in which the advertisement appeared. This is a principle that can be applied to most media,

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<sup>229</sup> Clause 23 of the BCCSA code.

<sup>230</sup> Fenwick *Civil liberties* 287-288.

<sup>231</sup> *Pacifica Foundation* 748; Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

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whether billboards,<sup>232</sup> point-of-sale,<sup>233</sup> magazines, television and radio broadcasts,<sup>234</sup> and cinema.

#### **5.1.2. Obscene**

Attempts to define the term “obscenity” will always be subject to criticism because the definition is difficult to apply in practice, unstable, and has even been regarded as being unintelligible.<sup>235</sup> As mentioned before, the Constitutional Court found in *Case v Minister of Safety and Security* that the prohibition on the possession of “any indecent or obscene photographic matter” as defined in section 1 of the *Indecent or Obscene Photographic Matter Act* was unconstitutional because of the broad definitions of the terms “indecent” and “obscene”.<sup>236</sup>

In terms of article 10(2) of the *European Convention*, obscene publications, and publications that may corrupt people's morals, may be restricted. The meaning of “obscenity” is, however, not defined, but is regarded as dependent on the standards of morality prevailing in a particular society at a given time.<sup>237</sup>

In the context of the United Kingdom, it is clear that the courts regarded the *Obscene Publications Act* as having the potential to interfere with the right to freedom of expression.<sup>238</sup> In the interests of the protection of morals, the courts are therefore willing to grant the legislature and police a wide margin of discretion. For

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<sup>232</sup> Refer, for example, *Little Holland* (ASA Directorate ruling).

<sup>233</sup> Refer, for example, *Young Designers Emporium* (ASA Directorate ruling).

<sup>234</sup> For example, 94.7 Highveld Stereo broadcasts the often-controversial *Rude Awakening* breakfast show, hosted by Jeremy Mansfield ([http://en.wikipedia.org/wiki/94.7\\_Highveld\\_Stereo](http://en.wikipedia.org/wiki/94.7_Highveld_Stereo)).

<sup>235</sup> Van der Westhuizen *Freedom of expression* 284.

<sup>236</sup> See further Marcus & Spitz *Expression* 20-45 for a discussion of the Act; Marcus *Freedom of expression* 144; Van der Westhuizen *Freedom of expression* 282.

<sup>237</sup> Naidu “The right to freedom of thought and religion and to freedom of expression and opinion” *Obiter* (1987) 59-73, 70.

<sup>238</sup> Amos *Human rights law* (2006) 432.

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example, in *R v Perrin*<sup>239</sup> where the Court of Appeal dismissed an appeal against a conviction under the *Obscene Publications Act*, it commented that “there was no public interest to be served by permitting a business for profit to supply material which most people would regard as pornographic or obscene” and further, that there was “no reason why a responsible government should abandon that protection in favour of other limited remedies”.<sup>240</sup> Accordingly, it was held that the offence of publishing an obscene article, contrary to the *Obscene Publications Act* was compatible with article 10 of the *European Convention* as “parliament was entitled to conclude that the prescription was necessary in a democratic society” which was within the “discretionary area of judgment”.<sup>241</sup>

Furthermore, the Queen’s Bench suggested in *R v Anderson*<sup>242</sup> that the test for obscenity must connote the prospect of moral harm, not just shock. Moreover, determining whether material is obscene cannot merely depend on an analysis of the material, but, rather, will depend on the character of the consumer.<sup>243</sup> It was thus held in *DPP v Whyte*<sup>244</sup> that in order to make a determination as to the type of consumer in question, the court could receive information as to the nature of the relevant area, the type of shop and the class of people frequenting it. Furthermore, the jury must consider the likely reader in order to determine whether material would deprave and corrupt him or her rather than considering the most vulnerable conceivable reader.<sup>245</sup> Accordingly, in *R v Penguin Books Ltd*,<sup>246</sup> which concerned the prosecution of *Lady Chatterley’s Lover*, the selling price of the book was taken into account and the fact that being in paperback, it would reach a mass

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<sup>239</sup> [2002] All ER 359 para 49.

<sup>240</sup> Amos *Human rights law* 432-433.

<sup>241</sup> *Perrin* par 52.

<sup>242</sup> [1972] 1 QB 304.

<sup>243</sup> Fenwick *Civil liberties* 283.

<sup>244</sup> [1972] 3 All ER 12.

<sup>245</sup> Fenwick *Civil liberties* 283.

<sup>246</sup> [1961] Crim LR 176.

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audience.<sup>247</sup> Coppel suggests that in applying the law of obscenity English courts would examine considerations such as the intended audience, the extent to which the audience is warned about what it is to witness, and the steps taken to prevent dissemination of the expression to an unsuitable, or unprepared, audience.<sup>248</sup>

Canadian jurisprudence has also been concerned with the threat posed to freedom of expression by attempts to prohibit representations of explicit sexual activity on the grounds of obscenity.<sup>249</sup> The *Canadian Criminal Code* defines “obscene publication” as “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence”.<sup>250</sup> In *R v Butler*<sup>251</sup> the Supreme Court held, whilst the statutory prohibition on the sale and possession for sale of “obscene” material infringed s 2(b) of the *Canadian Charter*, the restrictions were justifiable. The restrictions do not prohibit sexually explicit material that is not accompanied by violence or degradation, do not affect the private possession of obscene materials, and do not impact upon sexually explicit expression that might be required by the “internal necessities” of a serious work of art.<sup>252</sup> The court had regard to judicial decisions, which interpret “obscenity” as referring not to prevailing morality, but to social harms, particularly to women. Only by including what Hogg refers to as the judicial “gloss of harmfulness”<sup>253</sup> was the definition of “obscenity”<sup>254</sup> precise enough

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<sup>247</sup> Fenwick *Civil liberties* 283-284.

<sup>248</sup> Coppel *Human Rights Act* 343.

<sup>249</sup> Marcus & Spitz *Expression* 20-47. This is not expressly stated in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

<sup>250</sup> Section 163(8) of the Criminal Code.

<sup>251</sup> [1992] 1 SCR 452.

<sup>252</sup> Marcus & Spitz *Expression* 20-47. This is not expressly dealt with in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

<sup>253</sup> *Constitutional law of Canada* (2000) 40.11.

<sup>254</sup> The *Canadian Criminal Code* defines “obscenity” as “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence ...”

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to contain an intelligible standard and consequently to qualify as a “law” for purposes of the limitation clause. The prohibition of obscenity was thus based on the avoidance of harm to society.<sup>255</sup>

Moreover, in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*,<sup>256</sup> the Canadian Supreme Court held that the “national community standard of tolerance” test for determining whether materials were obscene did not discriminate against the gay and lesbian community, as concern for minority expression was one of the principal factors which had led to the adoption of the “national community standard of tolerance” test in the first place. Thus, the court held that the standard of tolerance of a Canadian community which specifically recognised that equality (and with it, the protection of sexual minorities) is one of the fundamental values of its society, could not be reasonably interpreted as seeking to suppress sexual expression in the homosexual community in a discriminatory way.

In the United States, the Supreme Court concluded in *Roth v United States*<sup>257</sup> that “obscenity is [not] utterance within the area of protected speech”.<sup>258</sup> “Obscenity” is defined in a three-part test set out in *Miller v California*:<sup>259</sup> (1) whether “a reasonable person, applying contemporary community standards” would find that the work, taken as a whole, appeals to a prurient (lustful) interest;<sup>260</sup> (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined as obscene by the applicable state law;<sup>261</sup> and (3) whether the work, taken as a

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<sup>255</sup> Van der Westhuizen *Freedom of expression* 284 ftn 104.

<sup>256</sup> [2001] 2 LRC 436.

<sup>257</sup> 354 US 476 (1957).

<sup>258</sup> At 481. See also *Memoirs v Massachusetts* 383 US 413 (1966); Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>259</sup> 413 US 15 (1973) 24. See also Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>260</sup> At 23 – 25. This leg of the test was originally adopted in *Roth* 489.

<sup>261</sup> At 23 – 25.

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whole, lacks serious literary, artistic, political or scientific values.<sup>262</sup> The question as to whether material appeals to the “prurient interest” or is “patently offensive” is essentially a matter of fact, to be judged in light of the judge’s or a jury’s understanding of contemporary community standards.<sup>263</sup> This ‘value’ test of *Miller* is, however, not to be measured against community standards, the Court later held in *Pope v Illinois*,<sup>264</sup> but instead against the question “whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole.”<sup>265</sup>

This does not mean, however, that *First Amendment* jurisprudence entirely precludes the regulation of content that is not obscene but is considered “harmful to minors”. The Courts’ willingness to allow substantial regulation of non-obscene but sexually explicit or indecent expression reduces the importance (outside the criminal area) of whether material is classified as “obscene”.<sup>266</sup>

In a South African context, in view of the above and given that the *Films and Publications Act* deals with “obscene” publications in its classification system,<sup>267</sup> it is suggested that in the context of advertising it is unnecessary to draw a distinction between “indecent” and “obscene” material if the test of the likely audience is applied, should the context of when, where and how an advertisement is published, be taken into account. In this sense, the questions of “indecent” and “obscenity” relate to appropriate media placement, and not the outright banning of material. It is thus a question of whether the reasonable person is likely to be offended by the

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<sup>262</sup> At 23 – 25.

<sup>263</sup> *Smith v United States* 431 US 291 (1977) 293.

<sup>264</sup> 481 US 497 (1987).

<sup>265</sup> *Pope v Illinois* 500-1.

<sup>266</sup> Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>267</sup> Refer Schedule 6 and Schedule 7 of the Act. See also Woolman, Roux & Bishop *Constitutional law of South Africa – student edition* (2007) 380-381.

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content of a particular advertisement, taking into account the context of the medium in which the advertisement is published.

#### **5.1.3. Offensive to public morals**

It has been suggested that the concept of “offensive to public morals” is open-ended and could be used to harbour not only petty prejudices and preferences related to morality and taste, but also a wide variety of apparently laudable causes which could not be accommodated under more carefully formulated limitations.<sup>268</sup>

In *Handyside*,<sup>269</sup> the European Court of Human Rights stated:

Freedom of expression ... is applicable not only to information or ideas that are favourably received, or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population.

The European Court of Human Rights has recognised that there is no uniform conception of morality, and that accordingly the content of “public morals” will vary from state to state.<sup>270</sup> For example, in *Open Door Counselling and Dublin Well Woman v Ireland*,<sup>271</sup> it was pointed out that national authorities are permitted to determine which moral principles they wish to protect, and are granted much latitude in deciding how best to protect them. To this extent, Coppel argues, the task of the European Court of Human Rights is to scrutinise the legal basis for restrictions adopted to protect public morals.<sup>272</sup> But only in exceptional cases has the European Court of Human Rights found such measures to be unnecessary, and so outside the scope of article 10(2) of the *European Convention*.<sup>273</sup> In *Müller v Switzerland* the European Court of Human Rights made it clear that expression has to

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<sup>268</sup> Van der Westhuizen *Freedom of expression* 282-3.

<sup>269</sup> At para 49; and further Coppel *Human Rights Act* 328.

<sup>270</sup> Coppel *Human Rights Act* 345.

<sup>271</sup> (1993) 15 EHRR 244.

<sup>272</sup> Coppel *Human Rights Act* 345.

<sup>273</sup> Coppel *Human Rights Act* 345.

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be termed as “very shocking”, and not merely as “shocking” or “disturbing”, and therefore the likelihood of expression “grossly offend the sense of sexual propriety of persons of ordinary sensitivity” has to be present.<sup>274</sup>

Fenwick argues that the *Open Door* and *Muller v Switzerland* decisions give a strong indication of the stance adopted by the European Court of Human Rights in respect of the interpretation of article 10(2), but must be viewed as determined by their special facts, particularly the fact that children might have been affected. In the United Kingdom, limitations on free expression are predominantly based on justifications of avoidance of the corruption of persons (particularly children as the more vulnerable), and the shock or outrage caused by public displays of certain material.<sup>275</sup> In light of the *Handyside* and *Müller v Switzerland* judgements of the European Court of Human Rights, it seems that the position in the United Kingdom regarding limitations on freedom of expression in the name of the protection of morality does not appear to breach article 10 of the *European Convention*.<sup>276</sup>

Fenwick believes that the rationale for the *Handyside* decision may parallel that in the United States<sup>277</sup> and Canada.<sup>278</sup> In the United States, she suggests, there has been a greater concentration on the question whether restrictions aimed at children might impinge also on the freedom of expression of adults and on the extent to which this should be tolerated.<sup>279</sup> However, to merely attempt to shield individuals from material they are likely to find offensive, is an insufficient state

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<sup>274</sup> Fenwick *Civil liberties* 280 and 295.

<sup>275</sup> Fenwick *Civil liberties* 277.

<sup>276</sup> Fenwick *Civil liberties* 331.

<sup>277</sup> See, for example, *Ginsberg v New York*.

<sup>278</sup> *Irwin Toy*. Refer also Fenwick *Civil liberties* 280.

<sup>279</sup> See also *Reno v ACLU* 845 - 892.

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interest.<sup>280</sup> Moreover, in Canada, it is rather a question of “what Canadians would not abide other Canadians seeing”.<sup>281</sup>

Turning to South Africa, Sachs J pointed out in *Phillips and another v Director of Public Prosecutions and others*<sup>282</sup> that the Canadian cases which followed *Towne Cinema Theatres* have indicated that the furnishing of massive quantities of evidence on a case by case basis does little to simplify the judicial task of determining the exact borderline between what the Canadian community would abide and what it would not.<sup>283</sup> Sachs J accordingly questioned whether the standard of tolerance test is applicable in South African law, saying:

It is not obvious to me what degree of tailoring would establish the bare minimum that the South African community would tolerate in a bar which customers entered knowing full well what they were going to see, or even if this would be the test.<sup>284</sup>

In view of the above, and given that the test of “offensive to public morals” includes a reference to time and place,<sup>285</sup> it is suggested that in the context of advertising it is unnecessary to draw a distinction between the terms “indecent”, “obscene” and “offensive to public morals” if the test of the likely audience in the context in which an advertisement is published, is applied. If, for example, a commercial is flighted in line with the programming shown at that moment, it could be argued that such material conforms to the requirement of “generally acceptable public morals”.

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<sup>280</sup> Ogletree, Miller & Jessamy *Names and logos* 34-9.

<sup>281</sup> *Towne Cinema Theatres* at 508-9.

<sup>282</sup> 2003 (3) SA 345 (CC); 2003 (4) BCLR 357(CC).

<sup>283</sup> At para 66 with reference to *R v Tremblay* [1993] 2 SCR 932; *R v Hawkins* (1993) 15 OR (3d) 549; and *R v Mara* (1997) 148 DLR (4th).

<sup>284</sup> At para 66.

<sup>285</sup> [www.bcap.org.uk](http://www.bcap.org.uk).

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#### **5.1.4. Concluding comments**

It has been noted that governments have a “compelling” interest in protecting children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.<sup>286</sup>

In that the terms “indecent”, “obscenity,” and “offensive to public morals” are all open to subjective and emotional interpretation, the use of such terms will always be subject to criticism. Whilst it is accepted that absolute precision in the law exists rarely, if at all, and that certainty is not required, it is rather a question of whether a restriction has set an intelligible standard both for those governed by the prohibition and those who must enforce it.<sup>287</sup> In any event, given the willingness of courts in general to allow substantial regulation of expression that is “indecent” or “offensive to public morals”, the importance, in areas such as advertising, of precisely defining these terms is reduced.

The importance of appropriate media selection has been discussed earlier. In short, given the nature of advertising ‘arriving unannounced’, appropriate media selection results in consumers being able to predict the ‘boundaries’ of the advertising they are likely to see.

In the context of the regulation of offensive advertising, it is therefore submitted that restrictions should relate to the protection of children, and the protection of persons from the shock or offence occasioned by unexpectedly encountering certain material, rather than at preventing moral deterioration (‘unwilling adult recipients’).<sup>288</sup> Rather than the outright banning of advertising material, appropriate media placement should be centre to the consideration of offensive advertising material.

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<sup>286</sup> See, for example, *Islamic Unity* para 30; and *Denver* 2391.

<sup>287</sup> *Sunday Times* 245.

<sup>288</sup> Fenwick *Civil liberties* 287-288.

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Taking the legal landscape of “indecent, obscene or offensive to public morals”,<sup>289</sup> as discussed above, into account, the provisions of the South African advertising code on this category of offensive advertising will now be critically examined in order to determine whether these provisions are “clear and precise” and accordingly whether they constitute “law of general application” as required by s 36(1) of the *Constitution, 1996*.<sup>290</sup> In assessing the current provisions, it will furthermore be discussed whether alternative or additional provisions should be incorporated into the South African advertising code to meet the “clear and precise” requirement.

#### **5.1.5. The South African advertising code**

##### **5.1.5.1. Prohibition on sex or nudity**

The South African advertising code does not deal with offence taken because of sex or nudity specifically. It is only referred to in the general offence clause,<sup>291</sup> which, in accordance with the British advertising codes, provides that advertising should not contain anything that is “likely to cause serious or wide-spread offence”.<sup>292</sup>

The British advertising codes are, however, more specific in respect of offence resulting from sex or nudity: The British television advertising code furthermore qualifies the limitation “serious or wide-spread offence” as being “against generally accepted moral, social or cultural standards”,<sup>293</sup> and includes “sex and nudity” as part of these “shared standards”.<sup>294</sup> In addition, the British television advertising

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<sup>289</sup> *Islamic Unity* para 30.

<sup>290</sup> Section 36(1) of the *Constitution, 1996*.

<sup>291</sup> Refer, for example, *KFC v Naidoo* (Ruling of the Advertising Standards Committee of the Advertising Standards Authority of SA) 2005.

<sup>292</sup> Clause 1.2 of Section II of the South African advertising code; Clause 5 of the General Rules of the South African advertising code; and Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

<sup>293</sup> Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

<sup>294</sup> Section 6(1)(1) – Harm and offence of the British television advertising code.

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code also prohibits advertising that “offend[s] against public feeling”.<sup>295</sup> The British non-broadcast advertising code, however, prohibits offence relating to “sex”,<sup>296</sup> and the British radio advertising code provides that “sexual innuendo or stereotyping likely to cause serious or general offence should be avoided”.<sup>297</sup>

The Canadian advertising code also addresses sex and nudity specifically, by prohibiting these where the “display [thereof are] indifferent to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population”.<sup>298</sup>

In the absence of intelligible standards to assist in the determination of the scope of the intended prohibition of offensive advertising in which nudity or sex is featured,<sup>299</sup> it is submitted that the current offensive advertising clause in the South African advertising code does not provide standards sufficiently clear and precise to enable the South African advertising regulator to handle complaints in a consistent manner.

In this regard, the South African advertising regulator, in the matter of *Teazers v Huckle NO*,<sup>300</sup> commented that:

While music, television and daily newspapers are available to all persons at all times, there must be a conscious decision to either tune into a music or television station or to read the classified sections of newspapers with similar pictures of women scantily dressed. The advertisements under consideration in this matter are all on billboards at busy places on the roads of Johannesburg. In the nature of things, the viewing of billboards is involuntary. Consequently, a wide section of the general public, including children, would be exposed to the billboards without any

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<sup>295</sup> Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

<sup>296</sup> Clause 5 of the General Rules of the South African advertising code.

<sup>297</sup> Clause 9(b) of Section 2 of British radio advertising code.

<sup>298</sup> Clause 14(d) of the Canadian advertising code.

<sup>299</sup> *Islamic Unity* paras 18 and 22.

<sup>300</sup> Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA 2006.

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conscious effort on their part to view this kind of advertising. There is nothing in the Code which restricts or prohibits the advertising of certain kinds of businesses or issues on billboards.

In light of these comments, it is suggested that the South African advertising code should be amended to deal with sex and nudity more specifically.<sup>301</sup>

#### **5.1.5.2. Prohibition on violence**

The South African advertising code deals with violence by prohibiting advertising “which might lead or lend support to acts of violence, including gender-based violence, nor should such advertising appear to condone such acts”.<sup>302</sup> The British non-broadcast advertising code also deals with violence on a similar basis, stating: “Marketing communications should contain nothing that condones or is likely to provoke violence or anti-social behaviour”.<sup>303</sup> The British radio advertising code provides that to ensure that public feeling is not offended, “violent themes should be avoided”.<sup>304</sup> The British television advertising code provides more specifically: “Advertisements must not encourage or condone violence or cruelty”<sup>305</sup> and that “[g]ratuitous and realistic portrayals of cruel or irresponsible treatment of people or animals are not acceptable”.<sup>306</sup> The Canadian advertising code also provides that advertisements shall not “appear in a realistic manner to exploit, condone or incite violence”.<sup>307</sup>

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<sup>301</sup> Refer paragraph 6 of this chapter.

<sup>302</sup> Clause 2.3 of Section II of the South African advertising code.

<sup>303</sup> Clause 11.1 of the British non-broadcast advertising code.

<sup>304</sup> Clause 9(b) of the British radio advertising code.

<sup>305</sup> Clause 6.2(a) of the British television advertising code.

<sup>306</sup> Clause 6.2(b) of the British television advertising code.

<sup>307</sup> Clause 14(b) of the Canadian advertising code.

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Whilst all these codes deal with provoking, encouraging and condoning acts of violence, it is only the British television advertising code that in addition regulates offence based on violence, stating in its notes on Clause 6.2:

'Theatrical' violence (for example, the mayhem common in action/adventure films) is generally acceptable, as is violence which has a stylised 'cartoon' or slapstick quality. Problems are more likely to arise where the violence seems to take place in everyday life and to involve ordinary people ... Timing restrictions are necessary for advertising featuring violence.

Violence has clearly become a general matter of great concern especially where children are in the audience. There is, however, general acceptance that the real world contains violence. Cutri & Jarosch<sup>308</sup> suggest that there are three primary areas of concern in the depiction of violence: (1) repeated exposure results in desensitisation; (2) viewers of violence experience fear or psychological harm; and (3) viewers may imitate what they see or hear. Again, the appropriate placement of material containing violence is therefore an important factor in determining the acceptability of advertising depicting violence.

In the absence of a clause dealing specifically with offensive advertising relating to violence, and given that violence could be "offensive to public morals",<sup>309</sup> it is submitted that the South African advertising code should be amended.<sup>310</sup>

#### **5.1.5.3. Prohibition on offensive language**

The South African advertising code, the British non-broadcast code and the Canadian advertising code do not deal with offence that results from the use of offensive language more specifically than in terms of the general offence clause.<sup>311</sup>

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<sup>308</sup> *Super Bowl* (unpublished and unnumbered).

<sup>309</sup> Chetty & Basson *Public perception* 10; *Islamic Unity* para 30.

<sup>310</sup> Refer paragraph 6 of this chapter.

<sup>311</sup> Refer, for example, *KFC v Naidoo* (ASA Standards Committee ruling); Clause 14(d) of the Canadian advertising code.

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The British television advertising code, however, prohibits the use of offensive language,<sup>312</sup> and the British radio advertising code provides that “offensive and profane language must be avoided”.<sup>313</sup>

In the United States, the United States broadcast regulator has jurisdiction over “obscene, indecent, or profane language”,<sup>314</sup> defining broadcast indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities”.<sup>315</sup> The United States broadcast regulator also defines profane material, being that which includes “language that denotes certain of those personally reviling epithets naturally tending to provide violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance”.<sup>316</sup> In *Cohen v California*,<sup>317</sup> however, the United States Supreme Court found that the *First Amendment* protected a political view expressed in profane terms. It said:

Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well ... words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little regard for that emotive function which, practically speaking, may often be the most important element of the overall message sought to be communicated.

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<sup>312</sup>Section 6(1)(1) – Harm and offence of the British television advertising code.

<sup>313</sup>Clause 9(a) of Section 2 of British radio advertising code.

<sup>314</sup>Section 18 of the *Telecommunications Act*. See also Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>315</sup>Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>316</sup>Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

<sup>317</sup>403 US 15 (1971) 25-6.

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According to the United States broadcast regulator “the public interest is best served by permitting free expression of views”, recognising that indecent material is protected by the *First Amendment* and cannot be banned entirely. Nonetheless, the United States broadcast regulator has taken multiple actions to enforce its restrictions on the broadcast of indecent material.<sup>318</sup>

Accordingly, it is suggested that the South African advertising code should more specifically deal with offensive language in advertising, given that offensive language could be “indecent, obscene or offensive to public morals”.<sup>319 320</sup>

#### **5.2. Advertising that is offensive to religious convictions**

This is the second category of offence that the Constitutional Court in the *Islamic Unity* case recognised as a category that could reasonably be expected to be regulated.<sup>321</sup>

Due to the very nature of religion, discussions about, attacks on and the questioning of practices of religious groups are bound to be viewed as offensive by those who disagree with the particular views expressed. For example, in the United Kingdom complaints were dismissed against a charity poster which stated, “I wish the baby Jesus had never been born”, were dismissed, as the poster expressed the charity’s emotional support for people who felt particularly lonely or desperate at Christmas time.<sup>322</sup>

South Africa is generally regarded as a highly religious society. Accordingly, pressure to prohibit free expression, which hurts religious feelings, will always exist.<sup>323</sup> However,

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<sup>318</sup> Cutri & Jarosch *Super Bowl* (unpublished and unnumbered). Refer, for example, *Pacifica Foundation* 739.

<sup>319</sup> Chetty & Basson *Public perception* 10; *Islamic Unity* para 30.

<sup>320</sup> Refer paragraph 6 of this chapter.

<sup>321</sup> At para 30.

<sup>322</sup> CAP *Help note* [www.cap.org.uk](http://www.cap.org.uk) (accessed May 2008).

<sup>323</sup> Van der Westhuizen *Freedom of expression* 281.

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freedom of religion does not require an environment free of insult, ridicule, and intemperate critique of religion in general, or of a particular dogma to be exercised meaningfully.<sup>324</sup> The *Constitution, 1996* clearly acknowledges this fact, confirming that the “advocacy of hatred that is based on ... religion, and that constitutes incitement to cause harm” is not regarded as protected expression.<sup>325</sup> Section 16(2) of the *Constitution, 1996* therefore serves as an internal limitation to the general right to freedom of expression in s 16(1).

Not all religious offence can, however, be classified as hate speech and therefore other forms of expression of a religious nature should enjoy constitutional protection, albeit that the latter category of expression may be further limited in terms of s 36(1) of the *Constitution, 1996*.<sup>326</sup> Smith<sup>327</sup> and Van der Westhuizen<sup>328</sup> both suggest that restrictions on religious expression beyond the scope of hate speech should preferably be limited to time, place and manner restrictions, as opposed to an outright ban.

The European Court of Human Rights adopted a similar approach in terms of article 9 of the *European Convention*, which protects the right to thought, conscience and religion.<sup>329</sup> The cases of *Wingrove* and *Otto-Preminger Institut* demonstrate that material which is likely to offend the religious convictions of others may be justifiably

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<sup>324</sup> Smith “The crime of blasphemy and the protection of fundamental human rights” *South African law journal* (1999) 162-173, 168.

<sup>325</sup> *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC); 2005 (5) BCLR 743 (CC) para 47. Moseneke J referred with approval to *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) paras 14-15; and *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) para 51. See also Van der Westhuizen *Freedom of expression* 280.

<sup>326</sup> Smith *Blasphemy* 163.

<sup>327</sup> *Blasphemy* 171.

<sup>328</sup> *Freedom of expression* 282.

<sup>329</sup> Naidu *Freedom* 62.

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limited:<sup>330</sup> In the *Otto-Preminger Institut* case the European Court of Human Rights found that the responsibilities of those exercising the right under article 10 of the *European Convention* include “an obligation to avoid as far as possible expressions that are gratuitously offensive to others”,<sup>331</sup> and that therefore might be considered necessary to prevent such expression.<sup>332</sup> Although in this case a warning was issued to the public as to the nature of the film, and the film was shown in a “cinema of art” at a late hour, limiting the likelihood of the presence of young children, the European Court of Human Rights accepted that the offensive nature of the film was not outweighed by its artistic merits.<sup>333</sup> The European Court furthermore noted that the respect for the religious feelings of believers as guaranteed in article 9 could legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and that such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.<sup>334</sup>

The decision of the European Court of Human Rights in *Wingrove* concerned the decision of the British Board of Film Classification (BBFC) to refuse a certificate to the short, explicit film *Visions of Ecstasy*. The Court found that this decision was within the national authority's margin of appreciation. However, the European Court of Human Rights concluded that the film, which was to be promulgated as a short video, was viewed as offensive to religious sensibilities and likely to come to the attention of children, since it could be viewed in the home. The Court in *Wingrove* applied the

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<sup>330</sup> Fenwick *Civil liberties* 317; Van Rooyen “Onlangse regspraak: case of Otto-Preminger Institut v Austria (11/1193/406/485)” *De jure* (1995) 229-234, 230.

<sup>331</sup> *Otto-Preminger* para 49.

<sup>332</sup> Fenwick *Civil liberties* 318.

<sup>333</sup> *Otto-Preminger* para 77. For criticism of the judgement see, for example, Fenwick *Civil liberties* 317-318.

<sup>334</sup> Fick & Johannessen “Digest of foreign cases: Otto-Preminger-Institut v Austria judgment of 20 September 1994, Series A vol 295-A (European Court of Human Rights)” *SA journal on human rights* (1994) 637-640, 639.

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reasoning from *Otto-Preminger* and therefore argued along the same lines,<sup>335</sup> in deciding that there was no breach of article 10.<sup>336</sup>

For the very reason that religion is so fundamental to human nature and has such a profound influence on social policy, religion needs to be debated publicly. In the United States, the Supreme Court<sup>337</sup> took the view that government may not pass a law that burdens the free exercise of religion other than in the protection of a compelling interest: in the absence of such interest, an exemption for religiously motivated conduct is constitutionally required.<sup>338</sup> In practice, however, the powerful lobbying of religious groups may often result in self-censorship on the part of advertisers who wish to avoid controversy.<sup>339</sup>

Meyerson suggests that in South Africa there is perhaps even more scope for religious groups to insist on the public accommodation of their beliefs and practices via exemptions from otherwise valid and secular law:<sup>340</sup> Given that the *Constitution, 1996* intends to protect diversity and the rights of members of communities,<sup>341</sup> the rights specified in the Bill of Rights must not only be respected but also protected, promoted and fulfilled.<sup>342</sup>

In *S v Lawrence; S v Negal; S v Solberg*,<sup>343</sup> Chaskalson P, for the majority, approved of Dickson CJC's definition of freedom of religion in the Canadian case of *R v Big M*

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<sup>335</sup> Fenwick *Civil liberties* 319-320.

<sup>336</sup> *Wingrove* paras 61 and 63.

<sup>337</sup> *Wisconsin v Yoder* 406 US 205 (1972); *Sherbert v Verner* 374 US 398 (1963).

<sup>338</sup> Meyerson "Multiculturalism, religion and equality" in Jagwanth & Kalula (eds) *Equality law: reflections from South Africa and elsewhere* (2002) 106.

<sup>339</sup> Van der Westhuizen *Freedom of expression* 282.

<sup>340</sup> Meyerson *Multiculturalism* 107.

<sup>341</sup> Constitutional Principles XI and XII.

<sup>342</sup> Section 7(2) of the *Constitution, 1996*.

<sup>343</sup> 1997 4 SA 1176 (CC); 1997 (10) BCLR 1348 (CC) paras 92-93 and 97.

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*Drug Mart Ltd.*<sup>344</sup> In this Canadian case, the court emphasised both the right to hold and express religious views in worship and practice and the right not to be coerced in matters of religion, and found that it is an invasion of freedom of religion to force people to act or refrain from acting in a manner contrary to their religious beliefs and he added that such constraints could be imposed in "subtle ways", directly as well as indirectly. Chaskalson P approved both these aspects of the Canadian definition,<sup>345</sup> which correspond to what Smith<sup>346</sup> calls "positive" and "negative" freedom of religion.

The meaning of the concept of freedom of religion was furthermore explored and explained in the Canadian Supreme Court matter of *Syndicat Northcrest v Amselem*:<sup>347</sup>

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith ... Freedom of religion ... consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials ... Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non-trivial or non-insubstantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion ... However, even if the

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<sup>344</sup> (1985) 13 CRR 64 para 97.

<sup>345</sup> At para 92.

<sup>346</sup> Smith *Blasphemy* 168.

<sup>347</sup> [2004] 2 SCR 551.

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claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

The issue of the exemption of religious expression from generally applicable laws has been considered in two South African cases: *Prince v President of the Law Society of the Cape of Good Hope NO*<sup>348</sup> and *Christian Education South Africa v Minister of Education*.<sup>349</sup>

The question in *Prince* was whether the criminalisation of cannabis by s 4(b) of the *Drugs and Drug Trafficking Act*<sup>350</sup> is unconstitutional insofar as it fails to allow Rastafarians to possess and use the drug for purposes of religious worship. In the first phase of an appeal to the Constitutional Court,<sup>351</sup> the Constitutional Court commented: “While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law”.<sup>352</sup> In the second phase of the appeal,<sup>353</sup> Chaskalson CJ, Ackerman and Kriegler JJ, for the majority, held that the “disputed legislation ... seeks to prohibit the very possession of cannabis, for this is obviously the most effective way of policing the trade in and use of the drug”, and that “permission given to Rastafari to possess cannabis will undermine the general prohibition against such possession”.<sup>354</sup> The majority accordingly concluded that the failure of the state to make provisions for an exemption in respect of the possession

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<sup>348</sup> 2001 2 SA 388 (CC); 2001 (2) BCLR 133 (CC); and 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

<sup>349</sup> 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

<sup>350</sup> Act 140 of 1992.

<sup>351</sup> 2001 2 SA 388 (CC); 2001 (2) BCLR 133 (CC).

<sup>352</sup> At para 26.

<sup>353</sup> 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

<sup>354</sup> At para 141.

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and use of cannabis by Rastafarians is thus reasonable and justifiable under the *Constitution, 1996*. Ngcobo J, for the minority, stated that the “effect of the prohibition is to state that in the eyes of the legal system all Rastafari are criminals [and it] says that their religion is not worthy of protection”.<sup>355</sup> The minority accordingly concluded that the law is overbroad, is not carefully tailored to constitute a minimal intrusion upon the right to freedom of religion and is thus disproportionate to its purpose.<sup>356</sup>

In *Christian Education*, the question raised was whether s 10 of the *South African Schools Act*<sup>357</sup>, which prohibits corporal punishment in schools unconstitutionally, infringes the rights of parents of children in independent schools who, for religious reasons, consent to the corporal punishment of their children by teachers. Sachs J, on behalf of a unanimous Court, found that the failure to accommodate the appellant's religious convictions was justifiable under the limitations clause.<sup>358</sup>

In a self-regulatory environment, advertising regulators generally require that the beliefs of religious groups are not vilified or misrepresented. However, this does not extend to fair criticism of or comment on religious practices or actions by religious groups in the name of their religion.<sup>359</sup> Rather, it is recognised that it is a challenge to impose reasonable and justifiable restrictions on freedom of expression that allegedly wounds the feelings of any particular religious group, which may be inclusive of religious and spiritual beliefs, rites, and sacred images.<sup>360</sup>

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<sup>355</sup> At para 51.

<sup>356</sup> At para 83.

<sup>357</sup> Act 84 of 1996.

<sup>358</sup> *Christian Education* para 30.

<sup>359</sup> *Smith Blasphemy* 166-7.

<sup>360</sup> *Fenwick Civil liberties* 315.

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In the United Kingdom, the CAP highlights the following categories as potentially offensive to religious convictions:<sup>361</sup>

(1) *Dismissive or irreverent depiction of sacred figures, symbols, texts and places*

Some aspects of religion are so sacred to believers that it is rarely going to be acceptable to use them in marketing without causing offence. These aspects relate to the central tenets or most sacred symbols and icons of a particular faith. For example, when the shoemakers *Clarks* named two new designs of leather shoes after the deities Krishna and Vishnu, it angered Britain's Hindu community, given that Hindus regard the cow as sacred and footwear as unclean.<sup>362</sup> The use of other aspects that is less central to the core of a religion, for example the many familiar stories from the Bible, are part of the cultural and historical context of that particular religion.<sup>363</sup>

(2) *Links between religion and sex or nudity*

The use of men or women of the clergy in advertising are likely to be acceptable except when their depiction is considered unsuitable or denigratory.<sup>364</sup> For example, in the matter of *HTH v Maronite Church and Others*<sup>365</sup> the South African advertising regulator ruled that the fact that a woman, whose status as a nun was revealed later, was seen swimming, illustrated that nuns are also normal human beings who may be involved in real life, everyday activities. However, the British advertising regulator found that an advertisement for a photographic series called "Heavenly Bodies", which

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<sup>361</sup> Anonymous "Thank God for the CAP" [www.out-law.com](http://www.out-law.com) (accessed October 2003).

<sup>362</sup> [www.marketinglaw.co.uk/articles/blasphemy.htm](http://www.marketinglaw.co.uk/articles/blasphemy.htm) (1999).

<sup>363</sup> CAP *Help note* [www.cap.org.uk](http://www.cap.org.uk) (accessed May 2008).

<sup>364</sup> CAP *Help note* [www.cap.org.uk](http://www.cap.org.uk) (accessed May 2008).

<sup>365</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2001.

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featured a young Raquel Welch in a leather bikini tied to a wooden cross, was unacceptable.<sup>366</sup>

#### *(3) Using religion to advertise inappropriate products*

When the product itself conflicts with the beliefs of a particular faith, it is likely to cause offence. For example, it should be unacceptable to use Catholic references to advertise birth control products, Hindhu or Buddhist symbols to advertise meat products, or for Muslim imagery to advertise alcohol.<sup>367</sup>

Taking the above into account, the provisions of the South African advertising code in respect of offence to “religious convictions”,<sup>368</sup> will now be critically examined in order to determine whether these provisions are “clear and precise” and accordingly constitute “law of general application” as required by s 36(1) of the *Constitution, 1996*.<sup>369</sup> In assessing the current provisions of the South African advertising code, it will furthermore be discussed, should this prove to be necessary, whether alternative or additional provisions should be incorporated into the South African advertising code to meet the “clear and precise” requirement.

#### **5.2.1. The South African advertising code**

The South African advertising code does not deal with offence as a religious offence more specifically than in terms of the general offence clause.<sup>370</sup> On the other hand, the British television advertising code prohibits offensive advertising based on “(dis)respect for spiritual beliefs, rites, sacred images etc”.<sup>371</sup> The British radio advertising code also provides that “references to religious ... beliefs should not be offensive, deprecating, or hurtful, and the use of religious themes and treatments by

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<sup>366</sup> [www.marketinglaw.co.uk/articles/blasphemy.htm](http://www.marketinglaw.co.uk/articles/blasphemy.htm) (1999).

<sup>367</sup> CAP Help note [www.cap.org.uk](http://www.cap.org.uk) (accessed May 2008).

<sup>368</sup> *Islamic Unity* para 30.

<sup>369</sup> Section 36(1) of the *Constitution, 1996*.

<sup>370</sup> Refer, for example, *KFC v Naidoo* (ASA Standards Committee ruling).

<sup>371</sup> Section 6(1)(1) – Harm and offence of the British television advertising code.

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non-religious groups should be treated with extreme care".<sup>372</sup> The Canadian advertising code addresses religious offence on the basis that advertising shall not "condone any form of personal discrimination, including that based upon ... religion".<sup>373</sup> In addition, in more general terms, the British non-broadcast advertising code provides that the grounds of offence also relate to religion.<sup>374</sup>

Whilst some of these provisions, referred to above, attempt to provide an intelligible standard to assist in the determination of the scope of the limitations on offensive advertising, it is submitted that they do not provide standards sufficiently clear and precise to enable an advertising regulator to handle complaints in a consistent manner.<sup>375</sup>

In the context of South Africa, it is therefore suggested that guidance can be sought from the *Promotion of Equality and Prevention of Unfair Discrimination Act*<sup>376</sup> (the Unfair Discrimination Act), which was introduced to give effect to the constitutional injunction requiring that national legislation "must be enacted to prevent or prohibit unfair discrimination".<sup>377</sup> Liebenberg & O'Sullivan suggest that the *Unfair Discrimination Act* is widely regarded as a key piece of legislation for advancing the transformation of all spheres of South African society, and redressing the apartheid legacy.<sup>378</sup> In interpreting the *Unfair Discrimination Act*, it is, however, important to consider the equality jurisprudence developed by the Constitutional Court,<sup>379</sup> which

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<sup>372</sup> Clause 9(d) of Section 2 of British radio advertising code.

<sup>373</sup> Clause 14(a) of the Canadian advertising code.

<sup>374</sup> Clause 5 of the General Rules of the South African advertising code.

<sup>375</sup> *Islamic Unity* paras 18 and 22.

<sup>376</sup> Act 4 of 2000.

<sup>377</sup> Section 9(4) of the *Constitution, 1996*.

<sup>378</sup> Liebenberg & O'Sullivan "South Africa's new equality legislation – a tool for advancing women's social-economic equality?" in Jagwanth & Kalula (eds) *Equality law: reflections from South Africa and elsewhere* (2002) 70.

<sup>379</sup> Liebenberg & O'Sullivan *Equality* 78.

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has emphasised that the assessment of equality claims must take into account South Africa's particular history of apartheid as well as other systemic patterns of disadvantage, including sex and gender discrimination.<sup>380</sup> As expressed by O'Regan J in *Brink v Kitshoff NO*:<sup>381</sup>

Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed in our social fibre ... that all such discrimination needs to be eradicated from our society is a key message of the Constitution.<sup>382</sup>

The *Unfair Discrimination Act* defines "equality" as substantive equality, focussing on outcomes and the impact of discrimination rather than equal treatment.<sup>383</sup> The definition for "discrimination" makes it clear that the test for discrimination is the impact of an act or omission, whether that impact is direct or indirect.<sup>384</sup> According to Langa DP in *City Council of Pretoria v Walker*,<sup>385</sup> "[t]he inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evidences a concern for the consequences rather than the form of conduct". In this regard, the Constitutional Court warned that the "temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted".<sup>386</sup>

In respect of the "prohibition of hate speech",<sup>387</sup> read together with the definition of "prohibited grounds",<sup>388</sup> the *Unfair Discrimination Act* reads:

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<sup>380</sup> Liebenberg & O'Sullivan *Equality* 79-80.

<sup>381</sup> 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

<sup>382</sup> At para 8.

<sup>383</sup> Section 1 (ix) of the *Unfair Discrimination Act*.

<sup>384</sup> Liebenberg & O'Sullivan *Equality* 91.

<sup>385</sup> 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 31.

<sup>386</sup> *Harksen v Lane* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) para 49.

<sup>387</sup> Section 10 of the *Unfair Discrimination Act*.

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#### **"prohibited grounds"**

are-

- a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- b) any other ground where discrimination based on that other ground-
  - i) causes or perpetuates systemic disadvantage;
  - ii) undermines human dignity; or
  - iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

#### **10. Prohibition of hate speech**

- 1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
  - a) be hurtful;
  - b) be harmful or to incite harm;
  - c) promote or propagate hatred.
- 2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

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<sup>388</sup> Section 1(1)(xxii) of the *Unfair Discrimination Act*.

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Milo, Penfold & Stein<sup>389</sup> point out that there are essentially two constitutional concerns regarding the provisions of s10(1) of the *Unfair Discrimination Act*: Firstly, in that intention is not a requirement results in an overly broad and vague test. Secondly, the harms contemplated, namely “hatred”, “harmful”, “harm” and “hurtful”, are very wide.<sup>390</sup> To give these various forms of harm a constitutionally acceptable interpretation, Milo, Penfold & Stein suggest that the phrases “be harmful” or “incite harm” should be interpreted as referring to physical violence and other concrete forms of harm such as discrimination, and that the phrase “be hurtful” be limited to serious and significant psychological and emotional harm.<sup>391</sup>

In the *Hi-Fi Corporation* matter,<sup>392</sup> the Final Appeal Committee of the South African advertising regulator took cognisance of the *Unfair Discrimination Act* in addressing the question of racial offence: The matter related to a television commercial in which it was alleged that the Chinese community was portrayed as being stupid, stingy, petty or ‘foreign idiots’ as a result of requesting, for example, discounts for on items such as bananas. In the context of the advertisement, it was held that there was no attempt to record racial superiority or to incite or participate in any kind of racial violence.<sup>393</sup> Furthermore, in considering whether the advertisement could constitute hate speech within the meaning of the *Unfair Discrimination Act*, the committee held that the advertisement was clearly not intended to incite harm<sup>394</sup> or to promote or propagate hatred.<sup>395</sup> In addressing the question whether the advertisement could be hurtful,<sup>396</sup> the appeal committee pointed out that advertising by its nature contains innuendos and ambiguity and as such, one cannot

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<sup>389</sup> “Freedom of expression” in Woolman Roux & Bishop (eds) *Constitutional law of South Africa* (2008).

<sup>390</sup> At 42-87.

<sup>391</sup> Milo, Penfold & Stein *Freedom of expression* 42-87.

<sup>392</sup> ASA Final Appeal Committee ruling.

<sup>393</sup> Refer s 7(a) of the *Unfair Discrimination Act*.

<sup>394</sup> Refer s 10(a) of the *Unfair Discrimination Act*.

<sup>395</sup> Refer s 10(c) of the *Unfair Discrimination Act*.

<sup>396</sup> Refer s 10(b) of the *Unfair Discrimination Act*.

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apply a literal and realistic claims test absolutely without becoming open to ridicule. The committee believed that it is in this context that one should see whether the advertisement amounts to harmless parody. In this case, the asking for a discount on a banana, an ice cream or a sweet makes the asking of the discount ridiculous “especially by applying them to ludicrously inappropriate subjects”. In the appeal committee's view, the advertisement was clearly a parody and would be seen by the hypothetical reasonable man as such. To give the advertisement a literal meaning of being hurtful would open one to ridicule. In any event, the appeal committee concluded, that the mere act of bargaining cannot in itself be offensive, discriminatory, or hurtful.

It is furthermore interesting to note that the Australian advertising code<sup>397</sup> adopted a very similar approach in regulating, amongst others, religious offence:

Advertisements shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability, or political belief.<sup>398</sup>

Accordingly and in view of the above discussion, it is submitted that a similar approach can be followed in relation to religious offence, and a specific clause in the South African advertising code dealing with religious offence should be adopted.<sup>399</sup>

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<sup>397</sup> Australian jurisprudence is not critically evaluated in this study given its lack of a bill of human rights or human rights act.

<sup>398</sup> Clause 2.1 of Section 2 of the Australian advertising code.

<sup>399</sup> Refer paragraph 6 of this chapter.

### **5.3. Advertising that is offensive to feelings of sections of the population**

This is the third category of offence, which the Constitutional Court in the case of *Islamic Unity* recognised as a category that could reasonably be expected to be regulated.<sup>400</sup>

#### **5.3.1. Offence based on race**

After a history of apartheid and struggle, racial harmony and reconciliation are pivotal in a democratic South Africa. People do, however, also need to be able to vent their frustration, anger, and aspirations in order to achieve a mature democracy.<sup>401</sup> Advertising based on race, in the context of this democracy, even if done in a humorous manner or a harmless parody, might offend some viewers.<sup>402</sup> For example, in the matter of *Vodacom Dstv v Barkhuizen & Another*,<sup>403</sup> the South African advertising regulator considered complaints that a television advertisement created a racial stereotype of white men as incapable of dancing in using the pay-off line “dancing like a white guy”, thereby degrading or belittling white people. The advertising regulator commented that South Africans have a unique ability to laugh at themselves and their stereotypes, which the advertisement tapped into. The advertising regulator concluded that the humour in the phrase “Eish Joe ... dancing like a white guy”, in the context of the advertisement as a whole, did not put forward a racist stereotype, as all characters, white and black, male and female, enjoyed the joke, which is clearly based on something that they saw on television the night before.

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<sup>400</sup> At para 30.

<sup>401</sup> Van der Westhuizen *Freedom of expression* 274.

<sup>402</sup> *John Hoeben v African Harvest* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2000. Refer *Hi-Fi Corporation* (ASA Final Appeal Committee ruling) for a definition of parody.

<sup>403</sup> Ruling of the Directorate of the Advertising Standards Authority of SA 2007.

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It is, however, acceptable in a democratic society to prohibit racial offence that is intended to undermine or destroy the underlying values justifying the protection of freedom of expression, namely the democratic process, the free and equal co-existence of human beings, and the enhancement of knowledge and exchange of ideas.<sup>404</sup> Such limitations are foreseen in s 16(2)(c) of the *Constitution, 1996*, providing that racial hate speech does not enjoy constitutional protection; and also in s 36(1), which in essence provides that where such limitation is reasonable and justifiable, it is permissible.

The South African advertising code does not deal with racial offence more specifically than in terms of the general offence clause.<sup>405</sup> Although the British non-broadcast advertising code also does not specifically deal with racial offence, the code nevertheless cautions that “particular care should be taken to avoid causing offence on the grounds of [amongst others] race”.<sup>406</sup> The British Radio advertising code, however, points out that it “is illegal (with a few exceptions) for an advertisement to discriminate on grounds of race”,<sup>407</sup> and that “[a]dvertisements must not include any material which might reasonably be construed by ethnic minorities to be hurtful or tasteless”.<sup>408</sup> The Canadian advertising code provides that “[a]dvertisements shall not (a) condone any form of personal discrimination, including that based upon race ...”<sup>409</sup>

The code of the South African programme self-regulator, the South African broadcast programming code, provides that “[l]icensees shall not broadcast ... (c) [a]dvocacy of hatred that is based on race, ethnicity, gender, or religion, and that

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<sup>404</sup> Van der Westhuizen *Freedom of expression* 277.

<sup>405</sup> Refer, for example, *KFC v Naidoo* (ASA Standards Committee ruling).

<sup>406</sup> Refer Clause 5.1 of the General Rules of the British non-broadcast advertising code.

<sup>407</sup> *Race Relations Act 1976*. The offence of stirring up racial hatred was introduced under this Act in order to meet public order concerns and protect persons from the effects on others of provocative and inflammatory racist expression.

<sup>408</sup> Refer Clause 13 of the British Radio advertising code.

<sup>409</sup> Refer Clause 14 of the Canadian advertising code.

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constitutes incitement to cause harm".<sup>410</sup> This clause echoes the provisions of s 16(2)(c) of the *Constitution, 1996*, and therefore does not enter the s 36(1) consideration.<sup>411</sup> The exclusion of hate speech from the ambit of s 16(1) finds its source in a considerable body of comparative constitutional jurisprudence.<sup>412</sup> For example, the United States goes further than any other country in affording protection to hate speech:<sup>413</sup> The United States Supreme Court 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.<sup>414</sup> In Canada too the majority of the Supreme Court held in *R v Keegstra*<sup>415</sup> that hate propaganda was protected under s 2(b) of the Charter because the guarantee of freedom of expression covered all messages "however unpopular, distasteful or contrary to the mainstream".<sup>416</sup> The majority furthermore accepted that under s 1 of the Charter such infringement could be a limit demonstrably justifiable in a free and democratic society.<sup>417</sup>

Although all forms of expression, including racist and hate speech, fall within the right set out in article 10(1) of the *European Convention*, it is obviously easier for the state to justify interference when the expression is likely to incite disorder or crime or undermine the security of minority groups within society.<sup>418</sup> The European Court of Human Rights has frequently declared inadmissible applications from individuals and

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<sup>410</sup> Refer Clause 16 of the BCCSA code.

<sup>411</sup> Davis *Freedom of expression* 236.

<sup>412</sup> Davis *Freedom of expression* 235.

<sup>413</sup> Van der Westhuizen *Freedom of expression* 274.

<sup>414</sup> Refer, for example, *RAV v St. Paul; Brandenburg v Ohio* 395 US 444 (1969); and Van der Westhuizen *Freedom of expression* 275.

<sup>415</sup> [1990] 3 SCR 697. See, for example, Hogg *Constitutional law* 974-5.

<sup>416</sup> *Keegstra* 729.

<sup>417</sup> *Keegstra* 729. See also *R v Andrews* (1989) 39 CRR 36, 56.

<sup>418</sup> Ovey & White *European Convention* 280.

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groups complaining about restrictions placed on hate speech.<sup>419</sup> The position may be different, however, when the intention behind the publication of hate speech is to inform the public or illuminate debate.<sup>420</sup>

In line with the Canadian approach, it is submitted that a restriction on racial offence could extend beyond the parameters of the clause in the South African broadcast programming code, which merely echoes s 16(2)(c) of the *Constitution, 1996*, if such restriction can be justified in terms of s 36(1). In that the Final Appeal Committee of the South African advertising regulator heavily relied on the *Unfair Discrimination Act* in the *Hi-Fi Corporation* matter, as discussed above, and given that there is also a similar approach in the British Radio advertising code, it is submitted that a clause be included in the South African advertising code to specifically deal with racial offence. This will ensure that the provisions of such restriction are reasonably precise and clear.

In line with the provisions of the *Unfair Discrimination Act* and the approach in *Hi-Fi Corporation*, it is recommended that a clause similar to that proposed to cover religious violence be included in the South African advertising code.<sup>421</sup>

#### **5.3.2. Offence based on gender**

In addition to offence caused as a result of nudity, sexual innuendo or sexual activity, which was discussed earlier,<sup>422</sup> in which a male or female, or both, is “abused”, “commercially exploited” or “objectified”, such portrayals may well be considered unacceptable for reasons other than whether such advertising material was appropriately placed.

The South African advertising code provides:<sup>423</sup>

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<sup>419</sup> Ovey & White *European Convention* 278.

<sup>420</sup> *Jersild v Denmark* (1994) 19 EHRR 1.

<sup>421</sup> Refer paragraph 6 of this chapter.

<sup>422</sup> Refer Chapter IV, para 5.1 above.

<sup>423</sup> Clause 3.5 of Section II of the South African advertising code.

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Gender stereotyping or negative gender portrayal shall not be permitted in advertising, unless in the opinion of the ASA, such stereotyping or portrayal is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The South African advertising code proceeds to define “gender stereotyping” as “advertising that portrays a person or persons of a certain gender in a manner that exploits, objectifies or demeans”,<sup>424</sup> and furthermore defines “negative gender portrayal” as “advertising that portrays a person or persons of a certain gender in a manner that restricts and entrenches the role of persons of such gender in society or sections of society”.<sup>425</sup>

Precedents of the South African advertising regulator reflect that the regulator does not consider that nudity itself is unacceptable or demeaning.<sup>426</sup> “A woman has a conscious self and is entitled in a free and democratic society to portray her sexuality”.<sup>427</sup> Similarly, the view held is that a subtle sexual message itself cannot be demeaning.<sup>428</sup> Thus, it was held that a woman is not objectified where she appears to be comfortable in a situation, appreciating the attention given to her, and comfortable and confident in her surroundings.<sup>429</sup> For example, complaints that the *Yves Saint Laurent ‘Sophie Dahl’ Opium* campaign, which featured a naked Sophie Dahl in a suggestive pose, objectified the female form, were dismissed. The South African advertising regulator concluded that the context of the print advertisement as a whole, its placement in only specialised women’s magazines, and the fact that the nudity is product relevant, did not objectively result in the exploitation of the

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<sup>424</sup> Clause 4.19 of Section I of the South African advertising code.

<sup>425</sup> Clause 4.22 of Section I of the South African advertising code.

<sup>426</sup> *Good Hope FM* (ASA Final Appeal Committee ruling); *Opium* (ASA Standards Committee ruling).

<sup>427</sup> *Good Hope FM* (ASA Final Appeal Committee ruling).

<sup>428</sup> *Little Holland* (ASA Directorate ruling).

<sup>429</sup> *Lentheric v Jooste* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2004.

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female form.<sup>430</sup> It appears as if South African authors such as Bohler-Müller concurs with the rationale in the *Opium* matter in suggesting that there is a shift away from the idea that sexually explicit material should be banned or regulated, to the notion that pornography encourages disrespect for women and offends women's equal rights generally.<sup>431</sup>

Furthermore, in the matter of *Teazers v Huckle*,<sup>432</sup> the South African advertising regulator considered billboards for Teazers which depicted a picture of a guava, a picture of a kitten with the words "ours are playful", an oyster that several appellants contended resembled a vagina, a picture showing a pole dancer with the words "always in pole position", and a picture of a woman in scanty panties and/or bikini tops with the by-line "not your average lounge", "girls that stop traffic", or "at Teazers our girls don't lounge around". The regulator concluded:

Dignity connotes one's true worth. As a matter of probability, it cannot be said that objectively a reasonable viewer would have concluded that the dignity of each participant model in the advertisements, where parts of a woman's torso appear, were lowered by these advertisements ... In regard to the advertisements picturing an oyster, guava and a kitten, it is not the only reasonable inference to draw that every viewer would see the oyster as a woman's vagina, the guava as the buttocks of a woman and the kitten as a woman's "pussy" being the slang word for a woman's vagina.

Neither the British advertising codes nor the Canadian advertising code specifically deal with offence based on gender. The Canadian advertising regulator did, however, comment that advertising is demeaning to women in instances where women are objectified by exploitation of sexuality, especially where the product is

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<sup>430</sup> *Opium* (ASA Standards Committee ruling).

<sup>431</sup> Bohler-Müller *Pornography* 173.

<sup>432</sup> ASA Final Appeal Committee ruling.

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unrelated to sexuality.<sup>433</sup> The Australian advertising code<sup>434</sup> is also of no assistance in this regard.

The fact that the *Unfair Discrimination Act* also deals with the prohibition of unfair discrimination on the ground of gender,<sup>435</sup> should be taken into account. Whilst the prohibited grounds of discrimination that are listed include both gender and sex, and distinguish between “biological and social characteristics of maleness and femaleness”,<sup>436</sup> it is submitted that the provisions do not specifically address the issues of exploitation,<sup>437</sup> demeaning a maleness or femaleness,<sup>438</sup> or whether the role of persons of a particular gender in society or sections of society is entrenched.<sup>439</sup> Whilst the current provision in the South African advertising code does not ensure absolute precision, it is accepted that such precision exists rarely, if at all, in law and that certainty is only required to the extent that an intelligible standard has been set.<sup>440</sup>

It is accordingly submitted that the current South African advertising code, together with the rulings that follow from these provisions, provide an intelligible standard for dealing with offence relating to gender.<sup>441</sup> The provisions relating to this category of offensive advertising are thus “clear and precise” and accordingly constitute “law of general application” as required by s 36(1) of the *Constitution, 1996*.<sup>442</sup> It is

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<sup>433</sup> Advertising Standards Canada *Ad Complaints Report* 14.

<sup>434</sup> Australian jurisprudence is not critically evaluated in this study given its lack of a bill of human rights or human rights act.

<sup>435</sup> Refer section 8 of the *Unfair Discrimination Act*.

<sup>436</sup> Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 60.

<sup>437</sup> Clause 4.19 of Section I of the South African advertising code.

<sup>438</sup> Clause 4.19 of Section I of the South African advertising code.

<sup>439</sup> Clause 4.22 of Section I of the South African advertising code.

<sup>440</sup> *Sunday Times*.

<sup>441</sup> Clause 3.5 of Section II of the South African advertising code.

<sup>442</sup> Section 36(1) of the *Constitution, 1996*.

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accordingly not necessary to incorporate alternative or additional provisions into the South African advertising in respect of offence based on gender.

#### **5.3.3. Offence based on sexual orientation**

The inclusion of protection based on sexual orientation in the *Constitution, 1996*<sup>443</sup> and in the *Unfair Discrimination Act*<sup>444</sup> reflects the emphasis on equality and diversity within the democratic order in the current South Africa.<sup>445</sup> In a country where same sex unions are recognised,<sup>446</sup> offensive advertising based on sexual orientation may nevertheless occur as by casting gay and lesbian people as less worthy or less deserving of respect, such discrimination can violate the dignity, self-esteem, and identity of gay and lesbian people.<sup>447</sup>

The South African advertising code deals with discrimination based on, amongst others, sexual orientation.<sup>448</sup> It does not, however, specifically provide for offence based on sexual orientation. This is also the case in the British non-broadcast advertising code. The British radio advertising code, however, provides that “stereotyping likely to cause serious or general offence, should be avoided”<sup>449</sup> and that “references to minority groups should not be stereotypical, malicious, unkind, or hurtful”.<sup>450</sup> The British television advertising code provides similarly that, “Advertisements must not prejudice respect for human dignity or humiliate,

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<sup>443</sup> Refer s 9(3)(4).

<sup>444</sup> Refer s 1(1)(xxii).

<sup>445</sup> Albertyn, Goldblatt & Roederer *Promotion of equality* 72.

<sup>446</sup> Refer *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC); and *Gay and Lesbian Equality*.

<sup>447</sup> Albertyn, Goldblatt & Roederer *Promotion of equality* 72.

<sup>448</sup> Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

<sup>449</sup> Clause 9(b) of the British radio advertising code.

<sup>450</sup> Clause 9(c) of the British radio advertising code.

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stigmatise or undermine the standing of identifiable groups of people".<sup>451</sup> In its notes on this provision, the British television advertising code states:

The use of stereotypes is an inevitable part of establishing characters within the brief span of a TV commercial ... some stereotypes can be harmful or deeply insulting to the groups in question ... Anything which could encourage or condone the idea that some serious negative characteristic is associated with a particular group must be avoided ... Particular sensitivity is required where the group in question is generally recognised to encounter prejudice.

The Canadian advertising code also deals with offence based on sexual orientation, providing that advertising shall not "demean, denigrate, or disparage any identifiable person, group of persons, firm, organisation, industrial or commercial activity, profession, product or service or attempt to bring it or them into public contempt or ridicule".<sup>452</sup>

It is therefore clear that there is a shortcoming in the South African advertising code in not also specifically dealing with offensive advertising relating to sexual orientation, and that the South African code should be amended.

"Sexual orientation" is included as one of the prohibited grounds in the *Unfair Discrimination Act*,<sup>453</sup> but the term itself is not defined. However, the Constitutional Court in *Gay and Lesbian Equality* defined the term as follows:

[S]exual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to

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<sup>451</sup> Clause 6.6 of the British television advertising code.

<sup>452</sup> Clause 14(c) of the Canadian advertising code.

<sup>453</sup> Refer section 1(1)(xxii) of the *Unfair Discrimination Act*.

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members of the same sex. Potentially a homosexual, gay, or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.<sup>454</sup>

The provisions of s 10 of the *Unfair Discrimination Act*, read together with the above, can be usefully employed to provide a specific clause in the South African advertising code dealing with offence relating to sexual orientation. Such approach would also not be disharmonious with the approach followed by the South African advertising regulator in the matter of *Hi-Fi Corporation*<sup>455</sup>, where the provisions of the *Unfair Discrimination Act* were specifically read into the general offensive advertising clause of the South African advertising code in addressing the question of racial offence.

It is accordingly submitted that a clause similar to those clauses covering racial and religious offence be included in the South African advertising code.<sup>456</sup>

#### **5.3.4. Offence based on ethnic or social origin**

In a democratic South Africa, racial harmony and reconciliation based on ethnic or social origin should be achieved after a history of apartheid. Although dealt with in the *Constitution, 1996* as a single ground,<sup>457</sup> ethnic origin is distinct from social origin: Ethnic origin combines a biological group that shares a common descent, with a common cultural heritage and, sometimes, a territorial base. On the other hand, social origin refers to a particular social group or social status.<sup>458</sup> Furthermore, the meaning of the term "ethnic or social origin" has not yet been the subject of constitutional consideration or judicial interpretation.

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<sup>454</sup> Para 20.

<sup>455</sup> ASA Final Appeal Committee ruling.

<sup>456</sup> Refer paragraph 6 of this chapter.

<sup>457</sup> Section 9(3) of the *Constitution, 1996*.

<sup>458</sup> Albertyn, Goldblatt & Roederer *Promotion of equality* 79-80.

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Although these two terms are not defined in the *Unfair Discrimination Act*, the concept “ethnic or social origin” constitutes a “prohibited ground”<sup>459</sup> in respect of the “prohibition of hate speech”<sup>460</sup> in terms of the *Unfair Discrimination Act*.

Nor do the British advertising codes or the Canadian advertising code specifically deal with offence based on ethnic or social origin.

Whilst the South African advertising code does not specifically provide for *offence* based on ethnic or social origin, the code deals with *discrimination* based on, amongst others, ethnic or social origin.<sup>461</sup> Clause 3.4 of Section II of the South African advertising code provides:

No advertisements shall contain content of any description that is discriminatory, unless, in the opinion of the ASA, such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In addition, Clause 4.17 of Section I of the South African advertising code defines “discrimination” as:

[A]ny act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- imposes burdens, obligations or disadvantage on; or
- withholds benefits, opportunities or advantages from,
- any person on one or more of the following grounds:
- race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or
- any other analogous ground;

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<sup>459</sup> Section 1(1)(xxii) of the *Unfair Discrimination Act*.

<sup>460</sup> Section 10 of the *Unfair Discrimination Act*.

<sup>461</sup> Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

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It is clear that the above provisions of the South African advertising code very closely mirror the provisions of the *Unfair Discrimination Act*<sup>462</sup> read together with the limitations clause of the *Constitution, 1996*.<sup>463</sup>

To ensure that the South African advertising code not only deals with *discrimination* based on ethnic or social origin, but also with offensive advertising relating to ethnic or social origin, it is suggested that the South African advertising code should be amended in line to take the provisions of s 10 of the *Unfair Discrimination Act*, dealing with hate speech, into account. The South African advertising regulator adopted a similar approach in the matter of *Hi-Fi Corporation*,<sup>464</sup> where the provisions of the *Unfair Discrimination Act*, and particularly s 10 thereof, were specifically taken into account when it was tasked with addressing the question of racial offence. Accordingly, a specific clause dealing with offence relating to ethnic or social origin should be provided for in the South African advertising code, similar to those clauses covering religious and racial offence, and offence based on sexual orientation.<sup>465</sup>

#### **5.3.5. Offence based on age**

The rights of the elderly do not find specific protection in the *Constitution, 1996*. Nevertheless, abuse of the elderly, although often hidden, appears to be widespread.<sup>466</sup> The *Unfair Discrimination Act* accordingly includes “age” as a “prohibited ground” of discrimination,<sup>467</sup> and furthermore defines “age” as follows:<sup>468</sup>

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<sup>462</sup> Refer s 1(1)(viii), which defines “discrimination”; s 3(1)(a) which provides that in interpreting the *Unfair Discrimination Act* effect must be given to the *Constitution, 1996*; and s 6 which deals with the prevention and general prohibition of unfair discrimination.

<sup>463</sup> Section 36(1) of the *Constitution, 1996*.

<sup>464</sup> ASA Final Appeal Committee ruling.

<sup>465</sup> Refer paragraph 6 of this chapter.

<sup>466</sup> Albertyn, Goldblatt & Roederer *Promotion of equality* 73-74.

<sup>467</sup> Refer s 1(1)(xxii) of the *Unfair Discrimination Act*.

<sup>468</sup> Refer s 1(1)(i) of the *Unfair Discrimination Act*.

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[I]ncludes the conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age.

An advertisement could cause offence where a particular group, such as persons of an advanced age, appears to be mocked or demeaned. Put differently, an advertisement could be seen to exploit pain for commercial purposes.<sup>469</sup>

The South African advertising code deals with *discrimination* based on age, amongst other things.<sup>470</sup> The South African advertising code does not, however, deal specifically with *offence* based on age but refers to it impliedly in the general offence clause. However, the South African advertising regulator commented in *Fattis & Monis*<sup>471</sup> that it would be against public values and sensitivities to publish an advertisement, which depicted the abuse of the elderly. In this matter, the South African advertising regulator had to determine whether the television advertisement had shown an elderly Italian Mama being locked up after she assisted in the kitchen with the preparation of the meal. The regulator concluded that objectively this was not a correct interpretation of the television commercial.

The British non-broadcast advertising code also only provides for offence based on age in the general offence clause. The British radio advertising code more specifically provides that “stereotyping likely to cause serious or general offence, should be avoided”<sup>472</sup> and that “references to minority groups should not be stereotypical, malicious, unkind or hurtful”.<sup>473</sup> As a potential “minority group”, the aged is therefore impliedly catered for in the British radio advertising code. Similarly, the British television advertising code provides: “Advertisements must not prejudice

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<sup>469</sup> [www.bcap.org.uk](http://www.bcap.org.uk)

<sup>470</sup> Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

<sup>471</sup> ASA Final Appeal Committee ruling.

<sup>472</sup> Clause 9(b) of the British radio advertising code.

<sup>473</sup> Clause 9(c) of the British radio advertising code.

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respect for human dignity or humiliate, stigmatise or undermine the standing of identifiable groups of people".<sup>474</sup> In its notes on this provision, the British television advertising code states as follows:

The use of stereotypes is an inevitable part of establishing characters within the brief span of a TV commercial ... some stereotypes can be harmful or deeply insulting to the groups in question ... Anything which could encourage or condone the idea that some serious negative characteristic is associated with a particular group must be avoided ... Particular sensitivity is required where the group in question is generally recognised to encounter prejudice.

The wide provisions of the Canadian advertising code also deal with offence based on age only by implication or broad inclusion, providing that advertising shall not "demean, denigrate or disparage any identifiable person, group of persons, firm, organisation, industrial or commercial activity, profession, product or service or attempt to bring it or them into public contempt or ridicule".<sup>475</sup>

Despite the broad interpretations that may be accorded to the above codes, it is suggested that the South African advertising code should be amended to ensure that it not only deals with *discrimination* based on the ground of age, but also with offensive advertising relating to age. It is suggested that these amendments be effected through adopting provisions similar to that of the *Unfair Discrimination Act*, and more particularly s 1(1)(i) thereof, which defines "age", together with s 10 thereof, dealing with hate speech. Such an approach would be in line with that of the South African advertising regulator in the matter of *Hi-Fi Corporation*<sup>476</sup>, which relied on the provisions of the *Unfair Discrimination Act*, and in particular s 10 thereof, in interpreting the South African advertising code in respect of the question of racial offence. Accordingly, a specific clause dealing with offence relating to racial offence should be incorporated into the South African advertising code, similar to

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<sup>474</sup> Clause 6.6 of the British television advertising code.

<sup>475</sup> Clause 14(c) of the Canadian advertising code.

<sup>476</sup> ASA Final Appeal Committee ruling.

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those clauses covering religious and racial offence, and offence based on sexual orientation and ethnic or social origin.<sup>477</sup>

#### **5.3.6. Offence based on disability**

Unfair discrimination based on disability is rooted in incorrect and prejudicial stereotypes of disability and people with disability. These stereotypes conjure up images of abnormal, asexual, dependent, helpless, and / or incapable persons, permitting disabilities to be seen as an illness or curse.<sup>478</sup>

The *Unfair Discrimination Act* does not define the concept of disability or a disabled person, but rather approaches the issue from the idea of equality as embracing the full and equal inclusion of all disabled people within society through the removal of barriers and the development of positive measures.<sup>479</sup> The South African advertising code also deals with *discrimination* based on, amongst others, disability,<sup>480</sup> but does not specifically provide for *offence* based on disability.

The Canadian advertising code as well as the British advertising codes, except for the British radio advertising code, also does not specifically deal with offensive advertising based on disability. The British radio advertising code provides that, “those who have physical, sensory, intellectual, or mental health disabilities should not be demeaned or ridiculed”.<sup>481</sup>

Accordingly, these codes only cover offence based on disability impliedly or in general terms, and provide no assistance in providing an intelligible standard by which to cover such offence.

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<sup>477</sup> Refer paragraph 6 of this chapter.

<sup>478</sup> Albertyn, Goldblatt & Roederer *Promotion of equality* 65.

<sup>479</sup> Albertyn, Goldblatt & Roederer *Promotion of equality* 65-66.

<sup>480</sup> Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

<sup>481</sup> Clause 9(e) of the British radio advertising code.

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In line with the approach of the South African advertising regulator in the matter of *Hi-Fi Corporation*<sup>482</sup>, in relying on the provisions of the *Unfair Discrimination Act*, and in particular s 10 thereof, in interpreting the South African advertising code in respect of the question of racial offence, it is suggested that provisions relating to offensive advertising based on disability should be incorporated into the South African advertising code.

Accordingly, the South African advertising code should be amended to also specifically deal with offence relating to disability, similar to offence relating to religious and racial offence, and offence based on sexual orientation, ethnic or social origin, and age.<sup>483</sup>

#### **5.3.7. Offence based on culture**

Culture is notoriously difficult to define, and Albertyn, Goldblatt & Roederer suggest that for this reason it is also not defined in the *Unfair Discrimination Act*.<sup>484</sup> The *South African Concise Oxford Dictionary* defines “culture” as meaning, “the customs, institutions, and achievements of a particular nation, people, or group”.<sup>485</sup> It is submitted that this meaning of the term “culture”, as the everyday literal meaning thereof, should guide this discussion.

For example, in the *Mexican Embassy* matter,<sup>486</sup> the South African advertising regulator noted that it is not in the public interest to publish advertising that objectively offends a nation or group of people, and concluded that to label the Mexican people as lax, uncaring, and non-achieving persons, is unacceptable. Similarly, in the matter of *Med-Lemon v Dumisa*,<sup>487</sup> a television commercial in which

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<sup>482</sup> ASA Final Appeal Committee ruling.

<sup>483</sup> Refer paragraph 6 of this chapter.

<sup>484</sup> *Promotion of equality* 77-78.

<sup>485</sup> The Dictionary Unit for South African English (eds) *South African Concise Oxford Dictionary* (2005) 282.

<sup>486</sup> ASA Final Appeal Committee ruling.

<sup>487</sup> Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA 2003.

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people were depicted queuing for a cold treatment from a traditional healer and were presumably handed the same mass-produced Med-Lemon product, the South African advertising regulator concluded that this constituted a ridiculous situation. To give the advertisement a literal meaning of being hurtful, the appeal committee commented, would open one to ridicule.

The South African advertising code does not specifically provide for *offence* based on culture, but *culture* constitutes one of the grounds of *discrimination* provided for in the code.<sup>488</sup> In that the provisions of the British advertising codes and the Canadian advertising code are not differently phrased, there is no direct assistance in providing an intelligible standard for advertising causing offence based on the grounds of culture.

It is suggested that there is a need to regulate offence based on cultural grounds in South Africa, and that the provisions of the South African advertising code should be rectified to specifically regulate offensive advertising based on culture. Once again, cognisance should be taken of the South African advertising regulator's approach in the *Hi-Fi Corporation* matter. It is therefore recommended that the provisions of the *Unfair Discrimination Act*, and in particular the provisions of s 10 thereof, be used as the basis of this new provision. It is also clear from the rulings in the *Mexican Embassy* and *Med-Lemon* matters that the South African advertising regulator impliedly introduced harm as part of the test in determining whether advertising caused objective offence based on culture.

Therefore, a specific clause providing for offence relating to culture should be inserted into the South African advertising code, in accordance with the provisions for offence relating to religion, race, sexual orientation, ethnic or social origin, age and disability.

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<sup>488</sup> Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

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Next, and in view of the above discussions, an amended clause in the South African advertising code dealing with offensive advertising will be proposed and critically evaluated, in order to determine whether these alternative or additional provisions meet the “clear and precise” requirement and accordingly constitute “law of general application” as required by s 36(1) of the *Constitution, 1996*.

## **6. New offensive advertising provisions**

The Constitutional Court in the case of *Islamic Unity* recognised that one would expect that material that is (1) indecent, obscene or offensive to public morals, and (2) offensive to religious convictions, or (3) offensive to feelings of sections of the population, should be regulated.<sup>489</sup> The Constitutional Court, however, warned that such regulation should “ensure fairness and a diversity of views broadly representing South African society”.<sup>490</sup> For whilst it is accepted that there is a “compelling” interest in the protection of children from seeing or hearing indecent material, there is an assumption that a total ban on such material is constitutionally suspect.<sup>491</sup>

Reinhard argues that, whilst the protection of free expression may make the regulation of offensive material difficult, it does not mean that, given that “constructive measures are not easily crafted and that universal agreement is not likely to emerge”, the leaders of communities are relieved “from the responsibility of tackling this difficult issue”.<sup>492</sup> It is generally accepted that absolute precision in law, and more specifically in the regulation of offensive material, rarely exists, if at all, and it is certainly not required. The relevant question is rather whether a restriction has set an intelligible standard for both those governed by the prohibition and those who enforce it.<sup>493</sup>

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<sup>489</sup> Para 30.

<sup>490</sup> *Islamic Unity* para 23.

<sup>491</sup> See, for example, *Islamic Unity* para 30; *Denver* 2391.

<sup>492</sup> *De gustibus* (unpublished and unnumbered).

<sup>493</sup> *Sunday Times*; and *Grayned v City of Rockford* 109.

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In amending and expanding on the current provisions of Clause 1 of Section II of the South African advertising code, which deals with offensive advertising, essentially three conclusions have been reached in this study, namely:

1. In dealing with offensive advertising based on nudity, sexual innuendo, sexual activity, violence, or language, restrictions should relate to the protection of children, and the protection of unwilling adult recipients from the shock or offence occasioned by encountering certain material, rather than at preventing moral deterioration.<sup>494</sup> The resultant effect is that this category of offensive advertising is controlled rather by appropriate media placement, and not by the outright banning of material.

Appropriate media placement negates the use of terms such as “indecency”, “obscenity” and “offensive to public morals”, which are all open to subjective and emotional interpretation, and hence always subject to criticism. It also enables consumers to predict the ‘boundaries’ of the advertising they are likely to see. The focus thus shifts away from the actual material to the manner and place of publication, which then requires only an objective assessment of the context in which a particular advertisement is published.

For example, the acceptability of a television advertisement would be determined by the degree of nudity used in such advertisement in the context of the programme being broadcast. Accordingly, the degree of nudity could differ significantly, depending on whether the advertisement is broadcast during children’s programming where no nudity is seen, or during a family show such as *Ugly Betty* (which contains sexual innuendo), or during a movie such as *Emmanuelle* (which contains nudity and sexual activity). A viewer that has voluntarily chosen to view *Emmanuelle* cannot therefore be heard to complain about the content of advertisements published during the duration of this movie

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<sup>494</sup> Fenwick *Civil liberties* 287-288.

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where the advertising content is consistent with that of the movie. The exposure of children as well as unwilling adult recipients, the portion of an audience who may objectively be offended by a particular advertisement, is thus effectively regulated.

2. In dealing with offensive advertising based on religious convictions, race, sexual orientation, ethnic or social origin, age, and disability, the question is not of appropriate media placement, but rather a matter of the banning of certain material. These types of offence are also dealt with as categories of discrimination in the *Unfair Discrimination Act*. To this extent, it has been submitted that the provisions of the *Unfair Discrimination Act* serve as guidance in dealing with this category of offence, as this Act is a direct result of the s 9 requirement in the *Constitution, 1996* that national legislation must be enacted to prevent or prohibit unfair discrimination. In particular, has been submitted that the provisions dealing with these types of offensive advertising should directly 'borrow' from s 10 of the *Unfair Discrimination Act*, which prohibits hate speech. In this regard, the approach suggested by Milo, Penfold & Stein to the meaning of the various forms of *harm* in s10(1), namely that the phrases "be harmful" or "incite harm" should be interpreted as referring to physical violence and other concrete forms of harm such as discrimination, and that the phrase "be hurtful" be limited to serious and significant psychological and emotional harm, should furthermore be adopted.<sup>495</sup> The rationale behind this proposal is that where banning of a category of offence is permitted, such offence may not be merely shocking, but must result in hate speech. This is also the approach adopted in the *Unfair Discrimination Act*, which in turn borrows this approach from s 16(2)(c) of the *Constitution, 1996*.

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<sup>495</sup> Milo, Penfold & Stein *Freedom of expression* 42-87.

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It is furthermore interesting to note that the Australian advertising regulator, the *Australian Association of National Advertisers*,<sup>496</sup> in the Australian advertising code,<sup>497</sup> adopted a very similar approach:

Advertisements shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programming time zone.<sup>498</sup>

Accordingly, it is submitted that, should the provisions that regulate offensive advertising based on religious convictions, race, sexual orientation, ethnic or social origin, age, and disability borrow directly from s 10 of the *Unfair Discrimination Act*, these provisions should be sufficiently objective to provide an intelligible standard by which to regulate these types of offensive advertising.<sup>499</sup>

3. In dealing with offensive advertising based on gender, it has furthermore been concluded that the current provisions of the South African advertising code provide an intelligible standard for dealing with this particular category of offence.

In view of the above submissions, it is submitted that the South African advertising code in its amended format should regulate offensive advertising as follows:

*New definition*

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<sup>496</sup> Australian jurisprudence is not critically evaluated in this study given its lack of a bill of human rights or human rights act.

<sup>497</sup> Australian Association of National Advertisers AANA *advertiser code of ethics* [www.aana.com.au](http://www.aana.com.au).

<sup>498</sup> Clause 2.3 of Section 2 of the Australian advertising code.

<sup>499</sup> *Islamic Unity* para 23 and 30; *Sunday Times*; and *Grayned v City of Rockford* 109.

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“be hurtful” means harm limited to serious and significant psychological and emotional harm.

#### *New Clause 1 of Section II - Offensive advertising*

- 1.1 Nudity, sexual innuendo or sexual activity; violence; or language used in advertising shall be medium appropriate so that children and unwilling adult recipients are not unreasonably exposed thereto.
- 1.2 In determining whether advertising is “medium appropriate”, (1) the context and nature of the product or service advertised; (2) the context and nature of the medium used; (3) the place of publication or the relevant time slot; (4) the likely audience that will be exposed to the advertising; and (5) the public interest, shall be taken into account.
- 1.3 An advertisement should not disseminate any propaganda or idea, which propounds the superiority or inferiority of any person, or group of persons, on the basis of age, culture, disability, ethnic or social origin, race, religion, or sexual orientation, including incitement to, or participation in, any form of such violence.
- 1.4 An advertisement should not propagate, advocate or communicate, on the basis of age, culture, disability, ethnic or social origin, gender, race, religion, or sexual orientation, any message that could reasonably be construed to –
  - 1.4.1. be hurtful;
  - 1.4.2. be harmful or to incite harm;
  - 1.4.3. promote or propagate hatred.

#### *Current Clause 3.5 of Section II - Gender*

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Gender stereotyping or negative gender portrayal shall not be permitted in advertising, unless in the opinion of the ASA, such stereotyping or portrayal is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

In that s 36(1) of the *Constitution, 1996* provides that only a law of general application may limit a right in the South African Bill of Rights,<sup>500</sup> it is submitted that the South African advertising code, if amended, will not only be readily accessible and its provisions generally applicable, but that its provisions relating to offensive advertising will also be sufficiently clear and precise to enable any person who intends to place an advertisement that may be regarded as offensive, to ascertain on a reasonable basis whether the advertisement is likely to be acceptable. Accordingly, it is submitted that the proposed clause would constitute law of general application.

The next question is whether this proposed clause constitutes a justifiable limitation of freedom of expression within the parameters of s 36 of the *Constitution, 1996*. This will be addressed in **Chapter V**.

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<sup>500</sup>Section 36(1) of the *Constitution, 1996*. Refer also Cheadle *Limitation of rights* 360.

## Chapter V – Offensive advertising: justification

### 1. Introduction

The value system of the *Constitution of the Republic of South Africa, 1996* is premised on the values of an open and democratic society based on human dignity, equality, and freedom.<sup>1</sup> These values have been elaborated on by the South African courts and extended to include values such as *ubuntu* and reconciliation.<sup>2</sup> As has been mentioned, the Constitutional Court furthermore recognised in *Islamic Unity Convention v Independent Broadcasting Authority NO*<sup>3</sup> that it is expected that material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population, should be regulated.<sup>4</sup> The Constitutional Court did, however, warn that such regulation should “ensure fairness and a diversity of views broadly representing South African society”,<sup>5</sup> as it is essential that interference is reviewed to determine whether the values that it represents are in accordance with a particular vision in society.<sup>6</sup>

Against this backdrop, the provisions that have been proposed for inclusion in the South African advertising code<sup>7</sup> will accordingly be critically evaluated on a comparative basis in terms of s 36 of the *Constitution, 1996*.

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<sup>1</sup> Section 36(1) and s 39(1) of the *Constitution, 1996*.

<sup>2</sup> Cheadle “Limitation of rights” in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 373-3 with reference to *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 par 185. See also *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) para 26.

<sup>3</sup> 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).

<sup>4</sup> Para 30.

<sup>5</sup> *Islamic Unity* para 23.

<sup>6</sup> Van der Schyff *Limitation of rights – a study of the European Convention and the South African bill of rights* (2005) 246.

<sup>7</sup> Advertising Standards Authority of South Africa *Code of Advertising Practice* (2008).

## **2. Section 36(1) evaluation**

In order to conduct such a critical evaluation, the following question has to be asked: Is the proposed limitation on offensive advertising reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom? In order to determine the answer to this question, the nature of the infringing right,<sup>8</sup> the importance of the purpose of the limitation,<sup>9</sup> the nature and extent of the limitation,<sup>10</sup> the relation between the limitation and its purpose,<sup>11</sup> and the less restrictive means to achieve the purpose,<sup>12</sup> need to be taken into account.

### **2.1. Nature of the right<sup>13</sup>**

The purpose of determining the nature of the right lies in assessing the weight of a particular right in the constitutional scheme of things in order to effect a proper balancing exercise.<sup>14</sup> The weight or application of a particular right, based on particular circumstances can only be measured on a case-by-case basis, taking into account the value that such right brings to the upholding and strengthening of a democracy based on constitutional values.<sup>15</sup>

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<sup>8</sup>Section 36(1)(a) of the *Constitution, 1996*.

<sup>9</sup>Section 36(1)(b) of the *Constitution, 1996*.

<sup>10</sup>Section 36(1)(c) of the *Constitution, 1996*.

<sup>11</sup>Section 36(1)(d) of the *Constitution, 1996*.

<sup>12</sup>Section 36(1)(e) of the *Constitution, 1996*.

<sup>13</sup>Section 36(1)(a) of the *Constitution, 1996*.

<sup>14</sup> Refer, for example, Currie & De Waal *The bill of rights handbook* (2005)180; and Van der Schyff *Limitation* 279.

<sup>15</sup> *Makwanyane* para 104; *National Coalition for Gay and Lesbian Equality NO v Minister of Justice NO* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 34; Currie & De Waal *Handbook* 178; Van der Schyff *Limitation* 280-281; and Iles "A fresh look at limitations: unpacking section 36" *SA journal on human rights* (2007) 68-93, 79.

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There is no hierarchy of rights in the *Constitution, 1996*,<sup>16</sup> and the s 36(1) analysis is not a comparison of the importance of constitutional rights. Each constitutional right is rooted in the four foundational values of democracy, dignity, equality and freedom.<sup>17</sup> Even though these foundational values may articulate differently within each right but this does not mean that some rights are more important than others are. The value of each constitutional right has to be assessed in its context and by its relevance and importance to South African society.<sup>18</sup>

Although each value has its own particular manifestation in the Bill of Rights, those values bring every right to life.<sup>19</sup> For example, in the case of *Islamic Unity* the Constitutional Court placed particular emphasis on the right to freedom of expression by arguing that the right goes to the heart of democracy.<sup>20</sup> Furthermore, in *Phillips and another v Director of Public Prosecutions and others*,<sup>21</sup> the Constitutional Court commented that the right to freedom of expression “was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans”.<sup>22</sup>

This does not mean that freedom of expression is the most important right in the South African Bill of Rights. Other rights are equally indispensable in a democracy. The Constitutional Court therefore correctly recognised in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and*

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<sup>16</sup> Cheadle *Limitation of rights* 371.

<sup>17</sup> *Islamic Unity* 308-9.

<sup>18</sup> *Islamic Unity* para 27; Davis “Freedom of expression” in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights (2002)* 222; Govender “Horses for courses: understanding the constitutional mandate” *Obiter* (2000) 144-160, 158.

<sup>19</sup> Cheadle *Limitation of rights* 371.

<sup>20</sup> Para 26.

<sup>21</sup> 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

<sup>22</sup> Para 23.

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*Others*<sup>23</sup> that freedom of expression is one of a “web of mutually supporting rights” closely related to, amongst others, freedom of religion, belief and opinion, the right to dignity, and the right to freedom of association.<sup>24</sup> Explaining the context of the hierarchical relationship between the rights to dignity and freedom of expression, the Constitutional Court stated in *S v Mamabolo (E TV and Others Intervening)*<sup>25</sup> as follows:

The right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression ... What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.<sup>26</sup>

These views of the Constitutional Court are echoed in Canadian constitutional jurisprudence. In *Andrews v Law Society of British Columbia*,<sup>27</sup> the Canadian Supreme Court commented that:

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes ... [T]he test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.<sup>28</sup>

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<sup>23</sup> 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC).

<sup>24</sup> Para 27. Refer also *Van der Westhuizen Freedom of expression* 264.

<sup>25</sup> 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC).

<sup>26</sup> At par 37, 41.

<sup>27</sup> [1989] 1 SCR 143.

<sup>28</sup> At 198.

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The Canadian Supreme Court<sup>29</sup> has also stated that it is important to adopt a sensitive case-orientated approach and to place conflicting values in their factual and social context.<sup>30</sup> Determining the parameters of expression in any given case is therefore important, particularly where its exercise might intersect with other interests.<sup>31</sup> For given the wide-ranging nature of the right to freedom of expression, overlapping and conflict with other rights and freedoms is inevitable.<sup>32</sup>

Ovey and White point out that there is also no formal hierarchy of rights set out in the *European Convention*, even if there are occasions when a balance has to be achieved between conflicting interests.<sup>33</sup>

Bearing the above in mind, it is submitted that the democratic value of the right to freedom of expression, as it manifests in advertising, must be balanced against the purpose of the proposed provisions of the South African advertising code dealing with offensive advertising, to determine its proper function in a democratic society in this particular instance.

#### **2.2. Importance of the purpose of the limitation<sup>34</sup>**

In discussing the importance of the purpose of the limitation, one needs to determine whether a limitation's purpose is sufficiently important to justify the limitation of a constitutional right.<sup>35</sup> Section 36(1) of the *Constitution, 1996* does not expressly state which purposes would fall within this proviso, but rather states that any such interference must be "reasonable and justifiable".<sup>36</sup> In such a determination, this

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<sup>29</sup> Refer, for example, *Oakes*; and *Rocket v Royal College of Dental Surgeons* (1990) 2 SCR 232.

<sup>30</sup> Whyte, Lederman & Bur *Canadian constitutional law - cases, notes and materials* (1992) 22-54.

<sup>31</sup> *Islamic Unity* para 30-38.

<sup>32</sup> *Islamic Unity* para 30-38; *Coppel Human Rights Act* 328.

<sup>33</sup> Ovey & White *Jacobs & White - the European Convention on human rights* (2006) 6-7.

<sup>34</sup> Section 36(1)(b) of the *Constitution, 1996*.

<sup>35</sup> Section 36(1) and s 39(1) of the *Constitution, 1996*. Refer also Cheadle *Limitation of rights* 373-3 with reference to *Makwanyane* par 185.

<sup>36</sup> Van der Schyff *Limitation* 248.

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purpose has been described by the Constitutional Court as that which all reasonable citizens would agree to be compellingly important.<sup>37</sup> Unlike the *Constitution, 1996* and the *Canadian Charter*, article 10(2) of the *European Convention* requires an assessment as to whether the limitation is “necessary in a democratic society”, and in interpreting this requirement the European Court of Human Rights held in, for example, *Sunday Times v United Kingdom*<sup>38</sup> that the term “necessary in a democratic society” requires a “pressing social need”.<sup>39</sup>

The determination of the importance of the limitation does not involve a balancing between the limitation and the right that is being limited, but an evaluation of the limitation in the context of the system of values adopted by the *Constitution, 1996*, namely the values of an open and democratic society based on human dignity, equality and freedom, *ubuntu* and reconciliation.<sup>40</sup>

Section 36(1) of the *Constitution, 1996* does not provide a list of legitimate aims unlike the *European Convention*, which contains an exhaustive list of legitimate aims, and objectives are contained in article 10(2), including the protection of morals.<sup>41</sup> Coppel suggests that it is the intention of the European Court of Human Rights to interpret this list narrowly, but that given the nature of the list this has not always been

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<sup>37</sup> See, for example, *Prince v President of the Law Society of the Cape of Good Hope* NO 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) paras 52-53; and *Jaffha v Schoeman* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 40. See also Cheadle *Limitation of rights* 374 with reference to *Gay and Lesbian Equality*; and Meyerson *Rights limited: freedom of expression, religion and the South African Constitution* (1997) 36-43.

<sup>38</sup> (1979) 2 EHRR 245.

<sup>39</sup> See also Schermers *Freedom of expression* 203; and Ovey & White *European Convention* 232.

<sup>40</sup> See, for example, *Shabalala* para 26; *Prince* paras 52-53; and *Jaffha v Schoeman* para 40. Also, refer Van der Schyff *Limitation* 248.

<sup>41</sup> Article 10(2) of the *European Convention* makes reference to “the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

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the case.<sup>42</sup> Ovey and White<sup>43</sup> suggest that the European Court generally tends to interpret the protection of morals very narrowly referring to it as sexual morality, rather than giving it its broader dictionary meaning of "standards of behaviour, or principles of right or wrong".<sup>44</sup>

The classic example of the interpretation of the term "protection of morals" is the seizure of *The Little Red Schoolbook* that gave rise to *Handyside v The United Kingdom*.<sup>45</sup> The European Court of Human Rights was called upon to consider whether the conviction of individuals who had published a reference book targeted at children of school age containing advice on sexual and other matters violated the guarantee of freedom of expression in article 10 of the *European Convention*. The European Court readily accepted that the issues raised here related to the protection of morals in the sense that the protection of morals entailed the safeguarding of the moral standards of society as a whole.<sup>46</sup> A similar view was taken in *Müller v Switzerland*,<sup>47</sup> involving the confiscation of a number of sexually explicit paintings depicting sexual acts, seized by the authorities because they were obscene.<sup>48</sup> The European Court found that it was reasonable for the Swiss courts to have found the paintings liable to offend the sense of sexual propriety of persons of ordinary sensitivity. As a result, it also held that the imposition of fines did not violate article 10.<sup>49</sup>

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<sup>42</sup> *Human Rights Act* 338.

<sup>43</sup> Ovey and Robin *European Convention* 228.

<sup>44</sup> The Dictionary Unit for South African English (eds) *South African Concise Oxford Dictionary* (2005) 755.

<sup>45</sup> (1976) 1 EHRR 737.

<sup>46</sup> Ovey & White *European Convention* 229.

<sup>47</sup> (1991) 13 EHRR 212.

<sup>48</sup> Ovey & White *European Convention* 229.

<sup>49</sup> See further *Otto-Preminger Institut v Austria* (1994) 19 EHRLR 34, in which a film that would be deeply offensive to devout Roman Catholics were screened in a cinema located in a predominantly Roman Catholic area. The European Court concluded that the interference with the rights in article 10 of the *European Convention* was accordingly justified.

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Morals are therefore a sometimes controversial, and yet undeniable legitimate, purpose justifying the interference with constitutional rights.<sup>50</sup> Reinhard argues that the leaders of communities cannot be relieved “from the responsibility of tackling [the] difficult issue” of regulating offensive material.<sup>51</sup> This need for regulation of such material was also echoed by the Constitutional Court in *Islamic Unity*, in stating that the regulation of material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population are areas where regulations are to be expected,<sup>52</sup> provided that such regulation “ensure[s] fairness and a diversity of views broadly representing South African society”.<sup>53</sup> The protection of morals is therefore arguably also regarded as a legitimate purpose in terms of the *Constitution, 1996*. It must, however, be emphasised that not every pursuit of morality, as is indeed the case with all legitimate purposes, will be justifiable as a limit.<sup>54</sup> In this regard, Currie & De Waal<sup>55</sup> correctly points out that personal morality will not qualify as a justification for the limitation of rights. This study therefore proposes that the protection of children, and unwilling adult recipients, as opposed to personal morality, should be a justification.

In a democratic South Africa, the exercise of restrictions on offensive advertising should be based on law that has a democratic mandate and within principles that recognise the role of freedom of expression in sustaining a democracy.<sup>56</sup> Nevertheless, the *Constitution, 1996* demands that while such regulation should “ensure fairness and a diversity of views broadly representing South African

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<sup>50</sup> Van der Schyff *Limitation* 254.

<sup>51</sup> “De gustibus non est disputandum” AAAA *management conference* (2001) (unpublished and unnumbered).

<sup>52</sup> *Islamic Unity* para 30.

<sup>53</sup> Para 23.

<sup>54</sup> Van der Schyff *Limitation* 254.

<sup>55</sup> *Handbook* 180.

<sup>56</sup> Boyle “Freedom of expression and democracy” in Heffernan (ed) *Human Rights: a European perspective* (1994) 211.

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society”,<sup>57</sup> it should not simply grant the protection of the morality of one sector of a society.<sup>58</sup>

The purpose of the proposed restrictions on offensive advertising are based on a “compelling” interest, namely the protection of children from seeing or hearing indecent material, without imposing total bans on advertising material unless such material effectively constitutes *hate speech* as defined within the *Promotion of Equality and Prevention of Unfair Discrimination Act*. It is submitted that the proposed provisions of the South African advertising code dealing with offensive advertising, especially insofar as the purpose of these provisions in the South African advertising code closely mirrors the purpose prescribed in the case of *Islamic Unity*, meet this requirement, being “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”, and are accordingly compatible with the demands of such a society.

### **2.3. Nature and extent of the limitation<sup>59</sup>**

It is clear that any enquiry into the nature and extent of the limitation investigates the method used in interfering with a right as well as the impact of such interference on the protected conduct and interests of the right concerned.<sup>60</sup> What is thus of concern in s 36(1)(c) of the *Constitution, 1996* is the effect of the limitation on the right itself.<sup>61</sup> Van der Schyff points out that although a legitimate and important purpose, namely punishment, was pursued in the case of *Makwanyane*, the means of such pursuit could be brought into doubt.<sup>62</sup>

Furthermore, the extent of interference should be considered in combination with other factors, as it is only when the context is taken into account that any one factor

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<sup>57</sup> At para 23.

<sup>58</sup> Cheadle *Limitation of rights* 374 with reference to *Gay and Lesbian Equality* par 37.

<sup>59</sup> Section 36(1)(c) of the *Constitution, 1996*.

<sup>60</sup> Van der Schyff *Limitation* 283.

<sup>61</sup> *Iles Unpacking section 36* 83 with reference to *Islamic Unity* para 49.

<sup>62</sup> *Limitation* 283.

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can come to its right.<sup>63</sup> For example, in *S v Lawrence*; *S v Negal*; *S v Solberg*,<sup>64</sup> Sachs J commented that the “intensity or severity” of a particular interference is a highly relevant factor in any proportionality exercise, as the “more grievous” an interference, the more compelling its justification has to be, whereas the “lighter” the interference is the easier the justification may be.<sup>65</sup>

The doctrine of the margin of appreciation holds that, in certain circumstances and at a domestic level, states are allowed a certain degree of discretion in the implementation and application of guaranteed human rights provisions, and it is precisely when a state employs the discretion that its conduct is challenged on the ground that it has violated a guaranteed right enshrined in a domestic and/or a regional human rights treaty.<sup>66</sup> The margin of appreciation would appear to be a sliding scale and its application will depend on its context.<sup>67</sup>

The jurisprudence of the European Court is rich with cases in which the doctrine has been applied: In the *Handyside* case, for example, the European Court of Human Rights noted that there was no uniform European concept of morality and made it clear that Contracting States would enjoy a wide margin of appreciation in assessing whether measures were required to protect moral standards.<sup>68</sup> It was furthermore suggested in *Handyside* that a restriction imposed based on morality must be proportionate to the legitimate aim pursued.<sup>69</sup> In achieving balance, the nature of

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<sup>63</sup> Van der Schyff *Limitation* 284.

<sup>64</sup> 1997 4 SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

<sup>65</sup> At para 168.

<sup>66</sup> Singh “The impact of clawback clauses on human and peoples’ rights in Africa” *African security review* (2009) 95, 98. For further reading, see for example, Yutaka *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (2002); Benvenisti “Margin of appreciation, consensus, and universal standards” *International law and politics* (1999) 843-854; Hutchinson “The margin of appreciation doctrine in the European Court of Human Rights” *International & comparative law quarterly* (1999) 638-650.

<sup>67</sup> Ovey & White *European Convention* 233.

<sup>68</sup> *Handyside* para 43. See also Ovey & White *European Convention* 233.

<sup>69</sup> At para 48.

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the expression restricted is to be weighed against the importance of the aim pursued by the restriction.<sup>70</sup>

The application of the margin of appreciation as applied in the *Handyside* case illustrates and explains how the publication of *The Little Red Schoolbook* could be accepted in some contracting states but not others.<sup>71</sup> The same is true of the *Otto-Preminger Institute* case. Here the fact that the cinema, where the film was shown that would be deeply offensive to devout Roman Catholics, was located in a predominantly Roman Catholic area, appears to have been an important factor in the European Court's decision that the interference with the rights in article 10 of *European Convention* was justified.<sup>72</sup> Similarly, in the *Müller* case, where an exhibition of contemporary art including three paintings depicting sexual acts, were seized by the authorities on the grounds that they were obscene, the European Court found that it was not unreasonable for the Swiss courts to have found the paintings liable to offend the sense of sexual propriety of persons of ordinary sensitivity. As a result, the imposition of fines was found not to violate article 10 of the *European Convention*.

In the context of advertising, one needs to be consistently mindful of the fact that consumers cannot selectively choose the advertising to which they are exposed, but that advertising arrives unannounced.<sup>73</sup> The audience of, for example, an outdoor billboard often does not have a choice as to whether it wishes to be exposed to a particular advertisement. However, appropriate media selection would result in consumers being able to predict the 'boundaries' of the advertising they are likely to see.

Accordingly, the nature of any limitation is that it should act as a filter to protect children; and to avoid unwilling adult recipients being exposed to material

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<sup>70</sup> Ovey & White *European Convention* 319.

<sup>71</sup> Ovey & White *European Convention* 234-235.

<sup>72</sup> Ovey & White *European Convention* 235.

<sup>73</sup> Anonymous "I have a great commercial, so why won't the networks air it?" [www.library.lp.findlaw.com/articles](http://www.library.lp.findlaw.com/articles) (accessed February 2003).

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reasonably likely to cause offence.<sup>74</sup> The extent of the proposed limitation relates to appropriate media placement, and not to the outright banning of material, as suggested earlier. Such an approach would also accord with jurisprudence in the European Community and with Canadian jurisprudence, where even very explicit material is acceptable if the risk of children viewing such material is limited and the material is otherwise filtered to avoid the exposure of unwilling adult audiences.<sup>75</sup>

Furthermore, the banning of material is only proposed where advertising material effectively constitutes *hate speech* as defined within the *Unfair Discrimination Act*. This approach is permissible within the parameters of s 16(2)(c) of the *Constitution, 1996* which deals with *hate speech*.

Accordingly, it is submitted that the approach suggested in the draft offensive advertising clause which interferes with freedom of expression is reasonable given the impact of such interference on freedom of expression: The proposed offensive advertising limitations mirrors the extent of limitation proposed in the case of *Islamic Unity*;<sup>76</sup> and the nature of the proposed limitation would still ensure “a diversity of views broadly representing South African society”<sup>77</sup> in a manner compatible with the demands of “an open and democratic society based on human dignity, equality and freedom”.

#### **2.4. Relation between the limitation and its purpose<sup>78</sup>**

Simply put, this factor questions whether the interference stretches too far or not far enough in realising its purpose.<sup>79</sup> Alternatively, as put differently by Ngcobo J in the

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<sup>74</sup> Fenwick *Civil liberties* 287-288.

<sup>75</sup> Fenwick *Civil liberties* 313 with reference to *Otto-Preminger Institut and Groppera Radio AG v Switzerland* (1990) 12 EHRR 321; See also *Committee for the Commonwealth of Canada v Canada* (1991) 1 SCR 143.

<sup>76</sup> At para 30.

<sup>77</sup> *Islamic Unity* para 23.

<sup>78</sup> Section 36(1)(d) of the *Constitution, 1996*.

<sup>79</sup> Van der Schyff *Limitation* 286.

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*Prince* case, this factor relates to the effect of the limitation,<sup>80</sup> as this is the terrain of proportionality concerning the manner in which a right is limited, and not the question as to whether it should be limited at all.<sup>81</sup> For example, in *Christian Education South Africa v Minister of Education*,<sup>82</sup> Sachs J found that the duty of the state to protect people from violence would be frustrated should an exemption be created for parochial independent schools to administer corporal punishment in accordance with the religious convictions of parents.<sup>83</sup>

In the context of the proposed limitations on offensive advertising, the effect is that advertiser's freedom of expression is curtailed insofar as it relates to the protection of children; the protection of unwilling adult recipients from the shock or offence occasioned by encountering certain material, rather than at preventing moral deterioration; and the outright banning of material that falls within the categories identified in the *Islamic Unity* case where such material constitutes *hate speech* within the meaning of s 10 of the *Unfair Discrimination Act*. Accordingly, the proposed limitations do not have the same effect as using a "sledgehammer to ... crack a nut".<sup>84</sup>

#### **2.5. Less restrictive means to achieve the purpose<sup>85</sup>**

In considering whether the proposed offensive advertising limitations imposed on freedom of expressing are less invasive of this protected right, it has to be asked whether the limitation is any less effective in achieving its purpose.<sup>86</sup> It is accordingly necessary to question whether a limitation impedes the preservation and realisation of the values of an open and democratic society as little as possible, while not

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<sup>80</sup> At para 45.

<sup>81</sup> Cheadle *Limitation of rights* 370.

<sup>82</sup> 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

<sup>83</sup> At para 50.

<sup>84</sup> *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para 34. See also Currie & De Waal *Handbook* 182.

<sup>85</sup> Section 36(1)(e) of the *Constitution, 1996*.

<sup>86</sup> *Islamic Unity* para 28.

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endangering the purpose for which a particular right was interfered with.<sup>87</sup> This factor thus serves as a reminder that other possibilities must be explored in the hope of preserving as much of the protected conduct and interests of rights as possible.<sup>88</sup>

In the *Prince* case the majority of the Constitutional Court did not consider alternative means of drug control to be as effective as a total ban on cannabis possession, for the sake of effective policing and ultimately societal coherence.<sup>89</sup> The minority, however, held that less restrictive means, such as a licensing scheme, could have been pursued in satisfying the purpose of drug control while also protecting diversity.<sup>90</sup>

In the context of the proposed limitations on offensive advertising, the comments of the Canadian Supreme Court in *Ramsden v Peterborough (City)*,<sup>91</sup> are also of relevance:

The complete ban on postering, however, did not restrict expression as little as is reasonably possible ... Many alternatives to a complete ban exist. Proportionality between the effects and the objective was not achieved because the benefits of the by-law were limited while the abrogation of the freedom was total.

The proposed limitations on offensive advertising only put forward the outright banning of material where such material constitutes *hate speech* within the provisions of s 10 of the *Unfair Discrimination Act*. This is permissible in terms of s 16(2)(c) of the *Constitution, 1996*, which removes the category of *hate speech* from the protected category of free expression provided for in s 16(1). Insofar as the proposed limitations impose any further restrictions on offensive advertising, these relate solely to time, place and manner, and not to the outright banning of

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<sup>87</sup> Van der Schyff *Limitation* 287-288.

<sup>88</sup> Currie & De Waal *Handbook* 183-184; and Van der Schyff *Limitation* 287-288.

<sup>89</sup> At paras 141, 169.

<sup>90</sup> At paras 51, 64-65, 83.

<sup>91</sup> [1993] 2 SCR 1084.

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advertising material. Freedom of expression is thus restricted “as little as is reasonably possible” in order to achieve the purpose of preventing the dissemination of the expression to an unsuitable child audience; or an audience that has not been forewarned.

### **3. Concluding comments**

None of the factors in s 36(1) of the *Constitution, 1996* is individually decisive,<sup>92</sup> and do not constitute an exhaustive list to be considered.<sup>93</sup> Rather, it is ultimately an assessment based on proportionality.<sup>94</sup>

In light of the value system of the *Constitution, 1996*,<sup>95</sup> <sup>96</sup> and the categories of offensive material, which a democratic society might expect to be regulated,<sup>97</sup> the restrictions imposed on offensive advertising should be exercised based on law that has a democratic mandate and within principles that recognise the role of freedom of expression in sustaining a democracy.<sup>98</sup>

The purpose of the proposed limitation is three-fold:

Firstly, it aims at protecting children from seeing or hearing harmful material. Secondly, it seeks to avoid unwilling adult recipients being exposed to material reasonably likely to cause offence. Both these purposes are achieved without

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<sup>92</sup> *Prince* para 45.

<sup>93</sup> *Prince* para 45 with reference to *Makwanyane* para 104; and *Manamela* paras 33 and 65.

<sup>94</sup> *Prince* para 45 with reference to *Gay and Lesbian Equality* para 35, where it was said that “in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose”.

<sup>95</sup> Section 36(1) and s 39(1) of the *Constitution, 1996*.

<sup>96</sup> *Cheadle Limitation of rights* 373-3 with reference to *Makwanyane* par 185. See also *Shabalala* para 26.

<sup>97</sup> *Islamic Unity* para 23.

<sup>98</sup> Boyle “Freedom of expression and democracy” in Heffernan (ed) *Human Rights: a European perspective* (1994) 211.

## **Chapter V**

### ***Offensive advertising: Justification***

imposing a total ban on material, but relate to appropriate media placement. Thirdly, the regulation proposes the banning of material only where advertising material effectively constitutes *hate speech*.

From the above discussion, it is therefore submitted that the proposed limitations on offensive advertising achieve its purpose without unnecessarily stifling freedom of expression, whereby fairness and a diversity of views broadly representing South African society, is achieved.

## Chapter VI – In conclusion

In this study, the determination of the proposed provisions of the South African advertising code dealing with offensive advertising commences with a consideration of and a conclusion that advertising constitutes freedom of expression, as a protected right in terms of s 16(1) of the *Constitution of the Republic of South Africa, 1996*, which is in line with international jurisprudence.

The study argues, however, that the South African advertising code does not constitute “law of general application” in order to legitimately limit advertising freedom, as provided for in s 36(1) of the *Constitution, 1996*: Whilst this study argues that the South African advertising code constitutes “law” within the meaning of s 36(1) of the *Constitution, 1996*, that the South African advertising code, as a public document based on international advertising principles, is accessible, and that the advertising code has general application, this study concludes that the current provisions of the advertising code dealing with offensive advertising are too general and too vague and are therefore not “clear and precise”.

As an alternative, the study proposes that the categories of offence, which the Constitutional Court identified in *Islamic Unity Convention v Independent Broadcasting Authority NO*,<sup>1</sup> should be used as the basis of constructing revised and more specific offensive advertising provisions, namely:

1. Advertising that is indecent, obscene or offensive to public morals;
2. Advertising that is offensive to religious convictions; and
3. Advertising that is offensive to feelings of sections of the populations.

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<sup>1</sup> 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 30.

The study critically evaluates various jurisdictions, from a constitutional, legal and self-regulatory perspective, with the resultant effect being the formulation of the following provisions dealing with offensive advertising:

### *New definition*

“be hurtful” means harm limited to serious and significant psychological and emotional harm.

### *New Clause 1 of Section II - Offensive advertising*

- 1.1 Nudity, sexual innuendo or sexual activity; violence; or language used in advertising shall be medium appropriate so that children and unwilling adult recipients are not unreasonably exposed thereto.
- 1.2 In determining whether advertising is “medium appropriate”, (1) the context and nature of the product or service advertised; (2) the context and nature of the medium used; (3) the place of publication or the relevant time slot; (4) the likely audience that will be exposed to the advertising; and (5) the public interest, shall be taken into account.
- 1.3 An advertisement should not disseminate any propaganda or idea which propounds the superiority or inferiority of any person, or group of persons, on the basis of age, culture, disability, ethnic or social origin, race, religion, or sexual orientation, including incitement to, or participation in, any form of such violence.
- 1.4 An advertisement should not propagate, advocate or communicate, on the basis of age, culture, disability, ethnic or social origin, gender, race, religion, or sexual orientation, any message that could reasonably be construed to –

1.4.1. be hurtful;

1.4.2. be harmful or to incite harm;

1.4.3. promote or propagate hatred.

#### *Current Clause 3.5 of Section II - Gender*

Gender stereotyping or negative gender portrayal shall not be permitted in advertising, unless in the opinion of the ASA, such stereotyping or portrayal is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The study establishes that the above provisions are sufficiently clear and precise to enable any person who intends to place an advertisement that may be regarded as offensive, to predict on a reasonable basis whether the advertisement is likely to be acceptable. These provisions therefore meet the “clear and precise” requirement, meaning that these revised provisions constitute “law of general application” within the meaning of s 36(1) of the *Constitution, 1996*.

Finally, the study concludes that, in collectively weighing up the factors in s 36(1) of the *Constitution, 1996*, together with all other relevant factors, the proposed limitations on offensive advertising accord with the value system of the *Constitution, 1996*: In accordance with s 16(2)(c) of the *Constitution, 1996* only advertising material which constitutes *hate speech* is banned. Insofar as the protection of children from being unreasonably exposed to harmful material is concerned, as well as avoiding unwilling adult recipients from being exposed to material reasonably likely to cause offence, an appropriate media placement requirement is suggested.

Whilst there will always be a different point of view on issues of taste and decency, influenced by personal views and choices, the study establishes that the proposed

## ***Chapter VI*** ***In conclusion***

limitations on offensive advertising do not unnecessarily stifle freedom of expression, and ensures that fairness and a diversity of views broadly representing South African society, is achieved.

It is accordingly submitted that this study proposes limitations on offensive advertising which are compatible with freedom of expression in a democratic South Africa.

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FHM

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