

# 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 Reinhard "De gustibus non est disputandum" (2001) *AAAA management conference* (unpublished and unnumbered).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 Reinhard *De gustibus* (unpublished and unnumbered).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 16 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 SAMSO 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.