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.[1]

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.[2] These legal restrictions generally related to sex, nudity, crude language, violence, and religion.[3] 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.[4] In that the *Constitution, 1996* demands that regulation should "ensure fairness and a diversity of views broadly representing South African society",[5] these restrictions

[1] Le Roux "Does the Constitution have any implications for ordinary contractual relationships?" *Juta's business law* (2002)132-134, 132.

[2] Bohler-Műller "The discourse of pornography: a feminist perspective" *Obiter* (2000) 167-176, 167.

[3] 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.

[4] *Islamic Unity Convention v Independent Broadcasting Authority NO 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC)* para 30.

[5] *Islamic Unity* para 23.

should be exercised based on a democratic mandate and within principles that recognise the role of freedom of expression in sustaining a democracy.[6]

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".[7] 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'".[8] The British radio advertising code similarly acknowledges that standards of "taste" are subjective and individual reactions can differ.[9] 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*.[10] 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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[6] Boyle "Freedom of expression and democracy" in Heffernan L (ed) *Human rights: a European perspective* (1994) 211.

[7] Clause 1.1 of Section II of the South African advertising code.

[8] Clause (1) of the Background to Section 6 – Harm and offence of the British television advertising code.

[9] Clause 9 of Section 2 of British radio advertising code.

[10] www.bcap.org.uk; Cutri & Jarosch "What did the Super Bowl reveal ... about decency?" (2004) *Advertising & trademark law seminar* (unpublished and unnumbered).

The South African advertising code also provides that advertising should not contain anything that is "likely to cause serious or wide-spread offence".[11] 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",[12] 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".[13] In addition, the British television advertising code also prohibits advertising that "offend[s] against public feeling".[14]

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.[15] The British radio advertising code also provides that (1) "offensive and profane language must be avoided";[16] (2) "salacious, violent or indecent themes, or sexual innuendo or stereotyping likely to cause serious or general offence, should be avoided";[17] (3) "references to minority groups should not be stereotypical, malicious, unkind or hurtful";[18] (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

[11] Clause 1.2 of Section II of the South African advertising code.

[12] 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.

[13] Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

[14] Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

[15] Section 6(1)(1) – Harm and offence of the British television advertising code.

[16] Clause 9(a) of Section 2 of British radio advertising code.

[17] Clause 9(b) of Section 2 of British radio advertising code.

[18] Clause 9(c) of Section 2 of British radio advertising code.

with extreme care",[19] and that (5) "those who have physical, sensory, intellectual or mental health disabilities should not be demeaned or ridiculed".[20] 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".[21] 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";[22] (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";[23] (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";[24] 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".[25]

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

[19] Clause 9(d) of Section 2 of British radio advertising code.

[20] Clause 9(e) of Section 2 of British radio advertising code.

[21] Clause 5 of the General Rules of the South African advertising code.

[22] Clause 14(a) of the Canadian advertising code.

[23] Clause 14(b) of the Canadian advertising code.

[24] Clause 14(c) of the Canadian advertising code.

[25] Clause 14(d) of the Canadian advertising code.

concern, and (7) public interest will be taken into account.[26] 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".[27] Furthermore, the factors mentioned in the British non-broadcast advertising code are a closed list.[28] The ICC code provides that advertising should not "offend standards of decency currently prevailing in the country and culture concerned",[29] 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.[30] The Canadian advertising code contains a similar acknowledgment.[31] 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,[32] 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.[33] 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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[26] Clause 1.2 of Section II of the South African advertising code.

[27] Clause 5 of the General Rules of the South African advertising code.

[28] Clause 5 of the General Rules of the South African advertising code.

[29] Article 2 of the General Provisions of the ICC code.

[30] Clause 1.2 of Section II of the South African advertising code.

[31] Clause 14 of the Canadian advertising code.

[32] Section 6(1)(2) – Harm and Offence of the British television advertising code.

[33] Clause 5 of the General Rules of the South African advertising code.

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*,[34] 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[35] 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 "indecency" should be avoided,[36] stating that "offensiveness", for example, could easily be used as a vehicle to deal with material which is regarded as unpopular, unpleasant, or disagreeable.[37] 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.[38]

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[34] Section 36(1) of the *Constitution, 1996*.

[35] "Freedom of expression" in Van Wyk et al (1994) *Rights and constitutionalism: the new South African legal order* (1994) 272-3.

[36] Van der Westhuizen *Freedom of expression* 272-3.

[37] Van der Westhuizen *Freedom of expression* 273.

[38] *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.

Chapter IV
Offensive advertising: Clear and Precise

The terms "indecent", "obscene", "offensive" and "harmful" do not have a fixed meaning as such. Van den Heever JA said in *Marruchi v Harris*[39] 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:[40] "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.[41] 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.[42] 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.[43] Certainty is not required.[44] 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

[39] 1943 OPD 15, 18-19.

[40] "Absolute rules of morality?" *Tydskrif vir regswetenskap* (1992) 85-91, 87.

[41] Van Rooyen *Absolute rules* 87.

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

[43] Ovey & White *European Convention* 233.

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

delineat[ing] an area".[45] Differently put, a law must set an intelligible standard both for those governed by the prohibition and for those who must enforce it.[46] The decision of the Ontario High Court of Justice in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*[47] 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.[48]

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*[49] 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.[50] 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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[45] *Nova Scotia* 645-646.

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

[47] (1983) 147 DLR (3d) 58.

[48] (1983) 147 DLR (3d) 58.

[49] 34 App DC 592 (1910).

[50] At 596, 598.

General of the United States v American Civil Liberties Union.[51] 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*.[52] 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.[53]

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][54] 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[55] 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".[56] This raises the question whether the offensive advertising clause is capable of being interpreted consistently with the *Constitution,*

[51] 521 US 844 (1997).

[52] At 870-879.

[53] *Islamic Unity* para 18 with reference to *Hyundai Motor Distributors* para 23-24.

[54] Refer Preface, Clauses 6 and 8 of the South African advertising code.

[55] Refer Preface, Clause 2 of the South African advertising code.

[56] *Islamic Unity* para 18 with reference to *Hyundai Motor Distributors* para 23-24.

1996 while at the same time remaining sufficiently clear and precise as to enable the adjudication committees of the South African advertising regulator[57] 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.[58] 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.[59]

As the regulators of advertising content aim to reflect rather than shape public opinion, rather than being "social engineers",[60] 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

[57] Refer Preface, Clauses 6 and 8 of the South African advertising code.

[58] *Islamic Unity* paras 18 and 22.

[59] Du Plessis "Between apology and utopia – the Constitutional Court and public opinion" *SA journal on human rights* (2002) 1-40, 4.

[60] *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 (accessed May 2008).

advertisement for that product or service"[61] and that "it is not the quantity of complaints that is determinative, but the validity of the complaints".[62] 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.[63] 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.[64] For example, the British television advertising code provides that cases should not be judged on the number of complaints received.[65]

Public opinion is of little relevance in the objective assessment of matters pertaining to the interpretation of the Bill of Rights.[66] The Constitutional Court has made it clear that it will not resort to head counting as a reliable means of substantive reasoning.[67] In this regard, the statement of Chaskalson CJ in the matter of *S v Makwanyane and Another*[68] 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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[61] 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.

[62] Clause 3.9 of Section I of the South African advertising code.

[63] *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.

[64] CAP "*AdviceOnline: taste and decency*" www.cap.org.uk (accessed May 2008).

[65] Section 6(1)(2) – Harm and offence of the British television advertising code.

[66] Cockrell "Rainbow jurisprudence" *SA journal on human rights* (1996) 1-44, 19.

[67] Du Plessis *Public opinion* 2.

[68] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

> 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. [69]

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.[70] 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.[71]

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,*[72] 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

[69] At para 88.

[70] Van der Schyff *Limitation of rights – a study of the European Convention and the South African bill of rights* (2005) 239.

[71] Du Plessis *Public opinion* 2.

[72] Ruling of the Directorate of the Advertising Standards Authority of SA 2006.

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*[73] 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,[74] but it is not regarded as a substitute for the duty vested in the South African advertising regulator.[75] 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.[76] 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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[73] Ruling of the Directorate of the Advertising Standards Authority of SA 2007.

[74] *Makwanyane* para 88.

[75] *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.

[76] *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:[77]

> 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.[78] The impact of the advertisement on a reasonable person must be objectively assessed.[79] The law does not take into account those on the extremities of the spectrum, but rather the "reasonable person".[80] The remarks of Harms AJA in *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd*[81] are apposite:

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[77] Devlin *The enforcement of morals* (1965) I5.

[78] *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.

[79] *Anton Venter v SASOL (Pty) Ltd* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1997.

[80] *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).

[81] 1993 (2) SA 307 (A).

> 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.[82]

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.[83] 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,[84] since the hypothetical reasonable person is neither hypercritical nor over-sensitive.[85] 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.[86]

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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[82] At 315J.

[83] 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).

[84] *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).

[85] *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).

[86] Pinto "Putting advertising claims to the test" *Managing intellectual property* 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 1-117.

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*.[87] 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".[88] 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*.[89]

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*[90] 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"[91] and "religious views and influences"[92] of members of the community.

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[87] *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).

[88] Section 39(2) of the *Constitution, 1996*.

[89] *Good Hope FM v Venables & Others* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2005.

[90] 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

[91] At para 37.

Therefore, Meyerson insists that rights may be limited only by "public reasons" that resonate for all people as reasonable.[93] 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.[94] 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.[95]

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.[96] 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.[97] 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.[98] Critical morality thus acts as a screen for public offence. Only that public offence

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[92] At para 38.

[93] Meyerson *Rights limited: freedom of expression, religion and the South African Constitution* (1997) 17.

[94] Du Plessis *Public opinion* 28.

[95] Koering-Joulin "Public morals" in Delmas-Marty (ed) *The European Convention for the protection of human rights. International protection versus national restrictions* (1992) 84.

[96] Du Plessis *Public opinion* 12.

[97] 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.*"

[98] Du Plessis *Public opinion* 13.

which survives the scrutiny of critical offence has any role to play in constitutional adjudication.[99]

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.[100] 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.[101]

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.[102] 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.[103] 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

[99] Du Plessis *Public opinion* 13.

[100] See Clause 3.2 of Section 1 of the South African advertising code.

[101] www.adstandards.com.

[102] *Etv S'Camto* (ASA Final Appeal Committee ruling); www.adstandards.com.

[103] *National Brands Limited v Mexican Embassy* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1996; www.adstandards.com.

appeared.[104] This example clearly highlights that one cannot divorce an advertisement from surrounding circumstances.[105] 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,[106] 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.[107] In the matter of *Etv S'Camto,*[108] 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,[109] and each case would have to be decided separately and objectively on its own facts.[110]

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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[104] Anonymous "Tasteless animal ads spark ASA complaints" *Marketing Week* (1999) 13.

[105] www.adstandards.com.

[106] *The South African Sugar Association v Monsanto* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1998.

[107] *Rape Crisis* (ASA Final Appeal Committee ruling).

[108] ASA Final Appeal Committee ruling.

[109] *Rape Crisis* (ASA Final Appeal Committee ruling); *Etv S'Camto* (ASA Final Appeal Committee ruling).

[110] *Mexican Embassy* (ASA Final Appeal Committee ruling); Advertising Standards Canada *Ad complaints report – year-end summary* www.adstandards.com (accessed December 2007).

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;[111] and it is generally accepted that "unclad" males and females may be used in perfume and underwear advertisements.[112] The South African advertising regulator has explained the concept of product relevance in *Sun International v Falkson*[113] 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.

[111] Reinhard "De gustibus non est disputandum" *AAAA management conference* (2001) (unpublished and unnumbered).

[112] *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.

[113] 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.

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.[114]

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,[115] whereas more specific groups of readers are exposed to niche publications.[116] 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.[117] Thus, Whyte, Lederman & Bur correctly suggest that, when dealing with children, the need to be

[114] *Ingrams v Janse van Rensburg & Others (*Ruling of the Directorate of the Advertising Standards Authority of SA) 2006.

[115] *The Lounge Billboard v Snyman (*Ruling of the Directorate of the Advertising Standards Authority of SA) 2007.

[116] *Etv S'Camto* (ASA Final Appeal Committee ruling).

[117] www.adstandards.com.

protected from commercial exploitation is far more important than the need for children to have adequate information in order to make informed choices.[118] 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:[119] 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.[120]

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.[121] 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.[122]

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[118] *Canadian constitutional law - cases, notes and materials* (1992) 22-50.

[119] *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.

[120] Lord Borrie QC "Is self-regulation still the best way to protect advertising freedom?" *ISBA annual conference* www.asa.org.uk (accessed March 2001).

[121] Anonymous *"I have a great commercial, so why won't the networks air it?"* www.library.lp.findlaw.com/articles (accessed February 2003).

[122] Refer, for example, Petty "Marketing without consent: consumer choice and costs, privacy, and public policy" *Journal of public policy and marketing* (2000) 42-53.

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[123] or point-of-sale.[124] 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",[125] such consumer may reasonably and accurately guess at the type of advertising that may be published in such a magazine.[126] In the matter of *Dulux v Kapp*[127] 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[128]. As such, measures that are more restrictive will be permissible in

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[123] Refer, for example, *Little Holland v Jaffee* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2006.

[124] Refer, for example, *Young Designers Emporium v Quinlan & Others* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2003.

[125] www.ucm.co.za.

[126] Section 17 of the *Film and Publication Act* (Act 65 of 1996).

[127] Ruling of the Directorate of the Advertising Standards Authority of SA 2005.

[128] Ovey & White *Jacobs & White - the European Convention on Human Rights* (2006) 320.

relation to the audio and visual media, because the potential for damage is greater.[129]

Age certificates at the cinema also allows for a similar filtering of advertising.[130] 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.[131] 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*:[132]

> (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

[129] Ovey & White *European Convention* 320; and *Murphy v Ireland* (2004) 38 EHRR 212 para 74.

[130] Section 18 of the *Films and Publications Act*.

[131] Chetty & Basson *Survey of public perception and use of FBP classification guidelines in making viewing choices for children* (2007) www.fpb.gov.za/research 1-10, 4.

[132] Chetty & Basson *Public perception* 6.

(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.[133] This system of classification allows for limitations but not absolute prohibitions on the right to freedom of expression.[134]

In respect of television programming, the South African broadcast regulator's code[135] is premised around the watershed period, meaning that television broadcasters are not allowed to broadcast programming "intended for adult audiences" outside the watershed period.[136] Broadcasting licensees are also required to provide audience advisories where necessary.[137] The South African broadcast programming code,[138] which deals with the content of broadcast programming on a self-regulatory basis,[139] 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".[140] The United States broadcast regulator

[133] Chetty & Basson *Public perception* 6.

[134] Chetty & Basson *Public perception* 9.

[135] Refer Schedule 1 to the *Independent Broadcasting Authority Act* (Act 153 of 1993).

[136] 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.

[137] Para 32 of the ICASA code.

[138] 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.

[139] Section 56(2) of the *IBA Act*.

[140] Clause 23 of the BCCSA code.

follows a similar approach.[141] Broadcasts that fall within the definition of "indecency" and that are aired between 06h00 and 22h00 are subject to enforcement action by the FCC.[142]

In the matter of *Lacoste v Vegter*[143] 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.[144] For example, the British radio advertising code provides that:[145]

> 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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[141] Anonymous "*Cable television fact sheet – program content regulations*" http://library.lp.findlaw.com.articles *(accessed August 2003)*.

[142] Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[143] Ruling of the Advertising Standards Committee of the Advertising Standards Authority of SA 2003.

[144] 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).

[145] Clause 9 of the British radio advertising code.

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.[146] 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.[147] 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*.[148] 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*[149] jurisprudence emanating from the United States.[150] The Constitutional Court further noted in *S v Makwanyane and Another*[151] 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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[146] Davis "Freedom of expression" in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 218.

[147] Van Rooyen *Absolute rules* 87.

[148] Woker *Advertising law in South Africa* (1999) 204 with reference to s 39 of the *Constitution, 1996*.

[149] *First Amendment to the United States Constitution of 1787*.

[150] Davis *Freedom of expression* 222.

[151] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 para 37.

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.[152] 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,*[153] 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.[154] In *Wingrove v The United Kingdom*[155] 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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[152] Coppel *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (1998) 344.

[153] (1976) 1 EHRR 737. See also Koering-Joulin *Public morals* 84.

[154] Coppel J *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* Chapter 12 – Freedom of expression 344

[155] (1997) 24 EHRR 1.

adult audiences through, for example, appropriate warnings; and (3) the question of offending religious sensibilities does not arise.[156]

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.[157] The Canadian attitude is illustrated in the *dictum* by Dickson CJC in *R v Towne Cinema Theatres Ltd*:[158]

> 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".[159] These restrictions must,

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[156] 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.

[157] 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*.

[158] (1985) 18 CCC (3rd) 193 at 205.

[159] *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.

however, leave open ample alternative channels for communication.[160] Content neutral regulations must be justified without reference to the content of the regulated speech.[161] For example, in *Hill v Colorado*[162] 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*.[163]

The United States Supreme Court, in the matter of *RAV v City of St. Paul*[164] 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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[160] 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.

[161] 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.

[162] 530 US 703 (2000).

[163] At 711 – 713, 719 – 720 and 723 - 726.

[164] 505 US 377 (1992).

> nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. [165]

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.[166] It is ultimately the latter category, which includes racist, sexist, or violent executions, which could

[165] At 393-396.

[166] Barnes & Dotson "An exploratory investigation into the nature of offensive television advertising" *Journal of advertising* (1990) 61-69, 61.

objectively offend consumers.[167] 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.[168]

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.[169] 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.[170]

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[167] Waller "What factors make controversial advertising offensive?" *ANZC conference* (July 2004) 7.

[168] Clause 5 of the General Rules of the British non-broadcast advertising code.

[169] *Islamic Unity* para 30.

[170] Chetty & Basson *Public perception* 10.

Chapter IV
Offensive advertising: Clear and Precise

5.1. Advertising that is indecent, obscene or offensive to public morals[171]

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.[172] 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.[173] In *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*[174] the Constitutional Court found that a subsection of the *Indecent or Obscene Photographic Matter Act*[175] was unconstitutional:[176] The Act prohibited the possession of "any indecent or obscene photographic matter".[177] 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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[171] *Islamic Unity* para 30.

[172] 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*.

[173] Fenwick *Civil liberties* 288; *Jacobellis v Ohio* 378 US 184 (1964) 197.

[174] 1996 (3) SA 617 (CC); 1996(5) BCLR 609 (CC).

[175] Act 37 of 1967.

[176] The *Film and Publication Act* repealed this *Act*.

[177] Section 2(1) of Act 37 of 1967.

> 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.[178]

The constitutional unacceptability of this statute was thus its overbreadth.[179] Similarly, in considering the constitutionality of the Namibian *Indecent and Obscene Photographic Matter Act,*[180] 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*,[181] 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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[178] *Case v Minister of Safety and Security* para 91.

[179] 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.

[180] Act 37 of 1967.

[181] [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.

sexuality. Thus, for example, in the matter of *Zimbali Lodge v Kusel & Another,*[182] 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,[183] although the value of their content may be justifiable under article 10(2).[184] 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.[185] 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.[186] 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

[182] Ruling of the Directorate of the Advertising Standards Authority of SA 2006. See also, for example, *Little Holland* (Ruling of the ASA Directorate).

[183] *Handyside* at 754.

[184] Coppel *Human Rights Act* 328.

[185] *Handyside* para 52.

[186] *Handyside* para 52.

judge what was needed,[187] 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.[188]

- In *Müller v Switzerland,*[189] 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.[190] 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.[191]

- In *Kopp v Switzerland,*[192] 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.[193]

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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[187] *Handyside* para 48.

[188] Fenwick *Civil liberties* 279.

[189] (1991) 13 EHRR 212.

[190] Fenwick *Civil liberties* 295.

[191] Fenwick *Civil liberties* 280.

[192] (1999) 27 EHRR 91 paras 70-71.

[193] Fenwick *Civil liberties* 278-9.

general public, or a part of it.[194] 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*.[195] 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.[196]

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,[197] 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,[198] these duties were delegated to the British advertising regulator.

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[194] Fenwick *Civil liberties* 287.

[195] Fenwick *Civil liberties* 293.

[196] Fenwick *Civil liberties* 292.

[197] Section 1(4) of the *Indecent Displays (Control) Act*.

[198] Refer Chapter II, para 2.2.1.1 above.

Concerning the test for "indecency", the House of Lords determined in *Knuller v DPP*[199] 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.[200] Furthermore, in cases such as *Wiggins v Field*[201] and *AG ex re McWhirter v IBA,*[202] the British Courts have held further that the circumstances in which the alleged "indecency" 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 "indecency" is so uncertain that there is at least room for argument that these statutory provisions do not meet the "*prescribed by law*" requirement.[203]

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.[204] Thus the United States Supreme Court held in *FCC v Pacifica Foundation*[205] 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".[206]

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[199] [1972] All ER 898.

[200] Fenwick *Civil liberties* 288.

[201] [1968] Crim LR 50.

[202] [1973] 1 All ER 689.

[203] Fenwick *Civil liberties* 292.

[204] Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[205] 438 US 726 (1978).

[206] *Pacifica Foundation* 739.

Chapter IV
Offensive advertising: Clear and Precise

In *Reno, Attorney General of the United States v American Civil Liberties Union*[207] the United States Supreme Court struck down the definition of "indecency" in the *Telecommunications Act 1996*. The law defined "indecency" 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 "indecency" could be applied too broadly, and that as such it would infringe on constitutionally protected speech.[208] In *US v Playboy Entertainment*[209] 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.[210] 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*[211] in which portions of the regulations preventing child pornography were found to be too broad.[212] And in *Sable Communications, Inc v FCC*[213] 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.[214]

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[207] 521 US 844 (1997).

[208] At 870-879.

[209] 529 US 803 (2000).

[210] At 811-827.

[211] 535 US 234 (2002) 244-258.

[212] At 244-258.

[213] 492 US 115 (1989).

[214] At 126-131.

Fenwick[215] 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*[216] remarked, "[p]eanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade".[217] Although the court in *Dunagin* furthermore voiced its approval of the Supreme Court's comment in *Bolger v Youngs Drug Store Products Corp*[218] [219] 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.[220] Rather, the courts consider that government has a legitimate interest in protecting minors from potentially harmful materials,[221] narrowly drawn proscriptions for distribution or exhibition to children of materials, which would not be obscene for adults, are permissible.[222] 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."[223]

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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[215] At 280.

[216] 467 US 1259 (1984).

[217] At 43.

[218] 463 US 60 (1983).

[219] *Bolger* v Youngs 74, referring to *Butler v Michigan* 352 US 380 (1957) 383.

[220] *Osborne v Ohio* 495 US 103 (1990).

[221] See, for example, *Reno v ACLU* 846.

[222] See, for example, *Reno v ACLU* 862 and *Ginsberg v New York 390 US 629 (1968)*.

[223] *Erznoznik v City of Jacksonville* 422 US 205 (1975) 212-4; and *Pacifica Foundation* 749-50.

of the strength of the government's interest in regulation, but also by its view of the importance of the expression itself.[224]

Furthermore, total bans applicable to adults and children alike are constitutionally suspect.[225] Broadcasts that fall within the definition of "indecency" 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:[226] 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.[227] Broadcasting licensees are also required to provide audience advisories where necessary.[228] 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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[224] In *Sable Communications* 132, Scalia J suggested, "the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors".

[225] *Denver Area Educational Telecommunications Consortium v FCC* 518 US 727 (1996).

[226] *Action for Children's Television v FCC* 503 US 913 (1992).

[227] 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.

[228] Para 32 of the ICASA code.

and it may be that a programme will be acceptable for example at 23h00 that would not be suitable at 21h00".[229]

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 "indecency" in a manner that sets an intelligible standard. Fenwick's submission that the "indecency" 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,[230] may be helpful in this regard. In that a definition of "indecency" 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 "indecency" 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.[231] 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 "indecency" 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 "indecency" 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,

[229] Clause 23 of the BCCSA code.

[230] Fenwick *Civil liberties* 287-288.

[231] *Pacifica Foundation* 748; Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

whether billboards,[232] point-of-sale,[233] magazines, television and radio broadcasts,[234] 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.[235] 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".[236]

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.[237]

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.[238] 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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[232] Refer, for example, *Little Holland* (ASA Directorate ruling).

[233] Refer, for example, *Young Designers Emporium* (ASA Directorate ruling).

[234] 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).

[235] Van der Westhuizen *Freedom of expression* 284.

[236] 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.

[237] Naidu "The right to freedom of thought and religion and to freedom of expression and opinion" *Obiter* (1987) 59-73, 70.

[238] Amos *Human rights law* (2006) 432.

example, in *R v Perrin*[239] 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".[240] 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".[241]

Furthermore, the Queen's Bench suggested in *R v Anderson*[242] 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.[243] It was thus held in *DPP v Whyte*[244] 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.[245] Accordingly, in *R v Penguin Books Ltd,*[246] 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

[239] [2002] All ER 359 para 49.

[240] Amos *Human rights law* 432-433.

[241] *Perrin* par 52.

[242] [1972] 1 QB 304.

[243] Fenwick *Civil liberties* 283.

[244] [1972] 3 All ER 12.

[245] Fenwick *Civil liberties* 283.

[246] [1961] Crim LR 176.

audience.[247] 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.[248]

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.[249] 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".[250] In *R v Butler*[251] 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.[252] 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"[253] was the definition of "obscenity"[254] precise enough

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[247] Fenwick *Civil liberties* 283-284.

[248] Coppel *Human Rights Act* 343.

[249] Marcus & Spitz *Expression* 20-47. This is not expressly stated in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

[250] Section 163(8) of the Criminal Code.

[251] [1992] 1 SCR 452.

[252] Marcus & Spitz *Expression* 20-47. This is not expressly dealt with in Woolman, Roux & Bishop (eds) *Constitutional law* (2008).

[253] *Constitutional law of Canada* (2000) 40.11.

[254] 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 …"

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. [255]

Moreover, in *Little Sisters Book and Art Emporium v Canada (Minister of Justice),*[256] 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*[257] that "obscenity is [not] utterance within the area of protected speech".[258] "Obscenity" is defined in a three-part test set out in *Miller v California:*[259] (1) whether "a reasonable person, applying contemporary community standards" would find that the work, taken as a whole, appeals to a prurient (lustful) interest;[260] (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined as obscene by the applicable state law; [261] and (3) whether the work, taken as a

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[255] Van der Westhuizen *Freedom of expression* 284 ftn 104.

[256] [2001] 2 LRC 436.

[257] 354 US 476 (1957).

[258] At 481. See also *Memoirs v Massachusetts* 383 US 413 (1966); Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[259] 413 US 15 (1973) 24. See also Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[260] At 23 – 25. This leg of the test was originally adopted in *Roth* 489.

[261] At 23 – 25.

whole, lacks serious literary, artistic, political or scientific values.[262] 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.[263] This 'value' test of *Miller* is, however, not to be measured against community standards, the Court later held in *Pope v Illinois*,[264] but instead against the question "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[265]

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*".[266]

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,[267] 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 "indecency" 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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[262] At 23 – 25.

[263] *Smith v United States* 431 US 291 (1977) 293.

[264] 481 US 497 (1987).

[265] *Pope v Illinois* 500-1.

[266] Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[267] Refer Schedule 6 and Schedule 7 of the Act. See also Woolman, Roux & Bishop *Constitutional law of South Africa – student edition* (2007) 380-381.

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.[268]

In *Handyside,*[269] 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.[270] For example, in *Open Door Counselling and Dublin Well Woman v Ireland,*[271] 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.[272] 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*.[273] In *Müller v Switzerland* the European Court of Human Rights made it clear that expression has to

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[268] Van der Westhuizen *Freedom of expression* 282-3.

[269] At para 49; and further Coppel *Human Rights Act* 328.

[270] Coppel *Human Rights Act* 345.

[271] (1993) 15 EHRR 244.

[272] Coppel *Human Rights Act* 345.

[273] Coppel *Human Rights Act* 345.

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.[274]

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.[275] 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*.[276]

Fenwick believes that the rationale for the *Handyside* decision may parallel that in the United States[277] and Canada.[278] 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.[279] However, to merely attempt to shield individuals from material they are likely to find offensive, is an insufficient state

[274] Fenwick *Civil liberties* 280 and 295.

[275] Fenwick *Civil liberties* 277.

[276] Fenwick *Civil liberties* 331.

[277] See, for example, *Ginsberg v New York*.

[278] *Irwin Toy*. Refer also Fenwick *Civil liberties* 280.

[279] See also *Reno v ACLU* 845 - 892.

interest.[280] Moreover, in Canada, it is rather a question of "what Canadians would not abide other Canadians seeing".[281]

Turning to South Africa, Sachs J pointed out in *Phillips and another v Director of Public Prosecutions and others*[282] 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.[283] 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. [284]

In view of the above, and given that the test of "offensive to public morals" includes a reference to time and place,[285] 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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[280] Ogletree, Miller & Jessamy *Names and logos* 34-9.

[281] *Towne Cinema Theatres* at 508-9.

[282] 2003 (3) SA 345 (CC); 2003 (4) BCLR 357(CC).

[283] 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).

[284] At para 66.

[285] www.bcap.org.uk.

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.[286]

In that the terms "indecency", "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.[287] 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').[288] 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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[286] See, for example, *Islamic Unity* para 30; and *Denver* 2391.

[287] *Sunday Times* 245.

[288] Fenwick *Civil liberties* 287-288.

Taking the legal landscape of "indecent, obscene or offensive to public morals",[289] 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*.[290] 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,[291] 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".[292]

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",[293] and includes "sex and nudity" as part of these "shared standards".[294] In addition, the British television advertising

[289] *Islamic Unity* para 30.

[290] Section 36(1) of the *Constitution, 1996*.

[291] Refer, for example, *KFC v Naidoo* (Ruling of the Advertising Standards Committee of the Advertising Standards Authority of SA) 2005.

[292] 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.

[293] Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

[294] Section 6(1)(1) – Harm and offence of the British television advertising code.

code also prohibits advertising that "offend[s] against public feeling".[295] The British non-broadcast advertising code, however, prohibits offence relating to "sex",[296] and the British radio advertising code provides that "sexual innuendo or stereotyping likely to cause serious or general offence should be avoided".[297]

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".[298]

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,[299] 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,*[300] 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

[295] Clause 6(1) of Section 6 – Harm and offence of the British television advertising code.

[296] Clause 5 of the General Rules of the South African advertising code.

[297] Clause 9(b) of Section 2 of British radio advertising code.

[298] Clause 14(d) of the Canadian advertising code.

[299] *Islamic Unity* paras 18 and 22.

[300] Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA 2006.

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.[301]

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".[302] 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".[303] The British radio advertising code provides that to ensure that public feeling is not offended, "violent themes should be avoided.[304] The British television advertising code provides more specifically: "Advertisements must not encourage or condone violence or cruelty"[305] and that "[g]ratuitous and realistic portrayals of cruel or irresponsible treatment of people or animals are not acceptable".[306] The Canadian advertising code also provides that advertisements shall not "appear in a realistic manner to exploit, condone or incite violence".[307]

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[301] Refer paragraph 6 of this chapter.

[302] Clause 2.3 of Section II of the South African advertising code.

[303] Clause 11.1 of the British non-broadcast advertising code.

[304] Clause 9(b) of the British radio advertising code.

[305] Clause 6.2(a) of the British television advertising code.

[306] Clause 6.2(b) of the British television advertising code.

[307] Clause 14(b) of the Canadian advertising code.

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[308] 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", [309] it is submitted that the South African advertising code should be amended.[310]

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.[311]

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[308] *Super Bowl* (unpublished and unnumbered).

[309] Chetty & Basson *Public perception* 10; Islamic *Unity* para 30.

[310] Refer paragraph 6 of this chapter.

[311] Refer, for example, *KFC v Naidoo* (ASA Standards Committee ruling); Clause 14(d) of the Canadian advertising code.

The British television advertising code, however, prohibits the use of offensive language,[312] and the British radio advertising code provides that "offensive and profane language must be avoided".[313]

In the United States, the United States broadcast regulator has jurisdiction over "obscene, indecent, or profane language",[314] 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".[315] 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".[316] In *Cohen v California,*[317] 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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[312] Section 6(1)(1) – Harm and offence of the British television advertising code.

[313] Clause 9(a) of Section 2 of British radio advertising code.

[314] Section 18 of the *Telecommunications Act*. See also Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[315] Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[316] Cutri & Jarosch *Super Bowl* (unpublished and unnumbered).

[317] 403 US 15 (1971) 25-6.

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.[318]

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".[319] [320]

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.[321]

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.[322]

South Africa is generally regarded as a highly religious society. Accordingly, pressure to prohibit free expression, which hurts religious feelings, will always exist.[323] However,

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[318] Cutri & Jarosch *Super Bowl* (unpublished and unnumbered). Refer, for example, *Pacifica Foundation* 739.

[319] Chetty & Basson *Public perception* 10; *Islamic Unity* para 30.

[320] Refer paragraph 6 of this chapter.

[321] At para 30.

[322] CAP *Help note* www.cap.org.uk (accessed May 2008).

[323] Van der Westhuizen *Freedom of expression* 281.

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.[324] 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.[325] 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*.[326] Smith[327] and Van der Westhuizen[328] 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.[329] 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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[324] Smith "The crime of blasphemy and the protection of fundamental human rights" *South African law journal* (1999) 162-173, 168.

[325] *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.

[326] Smith *Blasphemy* 163.

[327] *Blasphemy* 171.

[328] *Freedom of expression* 282.

[329] Naidu *Freedom* 62.

limited:[330] 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",[331] and that therefore might be considered necessary to prevent such expression.[332] 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.[333] 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.[334]

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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[330] 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.

[331] *Otto-Preminger* para 49.

[332] Fenwick *Civil liberties* 318.

[333] *Otto-Preminger* para 77. For criticism of the judgement see, for example, Fenwick *Civil liberties* 317-318.

[334] 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.

reasoning from *Otto-Preminger* and therefore argued along the same lines,[335] in deciding that there was no breach of article 10.[336]

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[337] 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.[338] 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.[339]

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:[340] Given that the *Constitution, 1996* intends to protect diversity and the rights of members of communities,[341] the rights specified in the Bill of Rights must not only be respected but also protected, promoted and fulfilled.[342]

In *S v Lawrence; S v Negal; S v Solberg,*[343] 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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[335] Fenwick *Civil liberties* 319-320.

[336] *Wingrove* paras 61 and 63.

[337] *Wisconsin v Yoder* 406 US 205 (1972); *Sherbert v Verner* 374 US 398 (1963).

[338] Meyerson "Multiculturalism, religion and equality" in Jagwanth & Kalula (eds) *Equality law: reflections from South Africa and elsewhere (*2002) 106.

[339] Van der Westhuizen *Freedom of expression* 282.

[340] Meyerson *Multiculturalism* 107.

[341] Constitutional Principles XI and XII.

[342] Section 7(2) of the *Constitution, 1996*.

[343] 1997 4 SA 1176 (CC); 1997 (10) BCLR 1348 (CC) paras 92-93 and 97.

Drug Mart Ltd.[344] 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,[345] which correspond to what Smith[346] 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*:[347]

> 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

[344] (1985) 13 CRR 64 para 97.

[345] At para 92.

[346] Smith *Blasphemy* 168.

[347] [2004] 2 SCR 551.

> 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*[348] and *Christian Education South Africa v Minister of Education*.[349]

The question in *Prince* was whether the criminalisation of cannabis by s 4(b) of the *Drugs and Drug Trafficking Act*[350] 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,[351] 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".[352] In the second phase of the appeal,[353] 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".[354] 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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[348] 2001 2 SA 388 (CC); 2001 (2) BCLR 133 (CC); and 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

[349] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

[350] Act 140 of 1992.

[351] 2001 2 SA 388 (CC); 2001 (2) BCLR 133 (CC).

[352] At para 26.

[353] 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

[354] At para 141.

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".[355] 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.[356]

In *Christian Education,* the question raised was whether s 10 of the *South African Schools Act*[357], 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.[358]

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.[359] 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.[360]

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[355] At para 51.

[356] At para 83.

[357] Act 84 of 1996.

[358] *Christian Education* para 30.

[359] Smith *Blasphemy* 166-7.

[360] Fenwick *Civil liberties* 315.

In the United Kingdom, the CAP highlights the following categories as potentially offensive to religious convictions:[361]

(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.[362] 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.[363]

(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.[364] For example, in the matter of *HTH v Maronite Church and Others*[365] 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

[361] Anonymous "Thank God for the CAP" www.out-law.com (accessed October 2003).

[362] www.marketinglaw.co.uk/articles/blasphemy.htm (1999).

[363] CAP *Help note* www.cap.org.uk (accessed May 2008).

[364] CAP *Help note* www.cap.org.uk (accessed May 2008).

[365] Ruling of the Directorate of the Advertising Standards Authority of SA 2001.

featured a young Raquel Welch in a leather bikini tied to a wooden cross, was unacceptable.[366]

(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.[367]

Taking the above into account, the provisions of the South African advertising code in respect of offence to "religious convictions",[368] 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*.[369] 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.[370] On the other hand, the British television advertising code prohibits offensive advertising based on "(dis)respect for spiritual beliefs, rites, sacred images etc".[371] 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

[366] www.marketinglaw.co.uk/articles/blasphemy.htm (1999).

[367] CAP *Help note* www.cap.org.uk (accessed May 2008).

[368] *Islamic Unity* para 30.

[369] Section 36(1) of the *Constitution, 1996*.

[370] Refer, for example, *KFC v Naidoo* (ASA Standards Committee ruling).

[371] Section 6(1)(1) – Harm and offence of the British television advertising code.

non-religious groups should be treated with extreme care".[372] 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".[373] In addition, in more general terms, the British non-broadcast advertising code provides that the grounds of offence also relate to religion.[374]

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.[375]

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*[376] (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".[377] 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.[378] In interpreting the *Unfair Discrimination Act*, it is, however, important to consider the equality jurisprudence developed by the Constitutional Court,[379] which

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[372] Clause 9(d) of Section 2 of British radio advertising code.

[373] Clause 14(a) of the Canadian advertising code.

[374] Clause 5 of the General Rules of the South African advertising code.

375 *Islamic Unity* paras 18 and 22.

[376] Act 4 of 2000.

[377] Section 9(4) of the *Constitution, 1996*.

[378] 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.

[379] Liebenberg & O'Sullivan *Equality* 78.

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.[380] As expressed by O'Regan J in *Brink v Kitshoff NO*:[381]

> 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.[382]

The *Unfair Discrimination Act* defines "equality" as substantive equality, focussing on outcomes and the impact of discrimination rather than equal treatment.[383] 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.[384] According to Langa DP in *City Council of Pretoria v Walker,*[385] "[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".[386]

In respect of the "prohibition of hate speech",[387] read together with the definition of "prohibited grounds",[388] the *Unfair Discrimination Act* reads:

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[380] Liebenberg & O'Sullivan *Equality* 79-80.

[381] 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

[382] At para 8.

[383] Section 1(ix) of the *Unfair Discrimination Act*.

[384] Liebenberg & O'Sullivan *Equality* 91.

[385] 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 31.

[386] *Harksen v Lane* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) para 49.

[387] Section 10 of the *Unfair Discrimination Act*.

"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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[388] Section 1(1)(xxii) of the *Unfair Discrimination Act*.

Milo, Penfold & Stein[389] 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.[390] 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.[391]

In the *Hi-Fi Corporation* matter,[392] 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.[393] 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[394] or to promote or propagate hatred.[395] In addressing the question whether the advertisement could be hurtful,[396] the appeal committee pointed out that advertising by its nature contains innuendos and ambiguity and as such, one cannot

[389] "Freedom of expression" in Woolman Roux & Bishop (eds) *Constitutional law of South Africa* (2008).

[390] At 42-87.

[391] Milo, Penfold & Stein *Freedom of expression* 42-87.

[392] ASA Final Appeal Committee ruling.

[393] Refer s 7(a) of the *Unfair Discrimination Act*.

[394] Refer s 10(a) of the *Unfair Discrimination Act*.

[395] Refer s 10(c) of the *Unfair Discrimination Act*.

[396] Refer s 10(b) of the *Unfair Discrimination Act*.

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[397] 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.[398]

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.[399]

[397] Australian jurisprudence is not critically evaluated in this study given its lack of a bill of human rights or human rights act.

[398] Clause 2.1 of Section 2 of the Australian advertising code.

[399] 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.[400]

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.[401] 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.[402] For example, in the matter of *Vodacom Dstv v Barkhuizen & Another,*[403] 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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[400] At para 30.

[401] Van der Westhuizen *Freedom of expression* 274.

[402] *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.

[403] Ruling of the Directorate of the Advertising Standards Authority of SA 2007.

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.[404] 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.[405] 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".[406] 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",[407] and that "[a]dvertisements must not include any material which might reasonably be construed by ethnic minorities to be hurtful or tasteless".[408] The Canadian advertising code provides that "[a]dvertisements shall not (a) condone any form of personal discrimination, including that based upon race …"[409]

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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[404] Van der Westhuizen *Freedom of expression* 277.

[405] Refer, for example, *KFC v Naidoo* (ASA Standards Committee ruling).

[406] Refer Clause 5.1 of the General Rules of the British non-broadcast advertising code.

[407] *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.

[408] Refer Clause 13 of the British Radio advertising code.

[409] Refer Clause 14 of the Canadian advertising code.

constitutes incitement to cause harm".[410] This clause echoes the provisions of s 16(2)(c) of the *Constitution, 1996*, and therefore does not enter the s 36(1) consideration.[411] The exclusion of hate speech from the ambit of s 16(1) finds its source in a considerable body of comparative constitutional jurisprudence.[412] For example, the United States goes further than any other country in affording protection to hate speech:[413] 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.[414] In Canada too the majority of the Supreme Court held in *R v Keegstra*[415] 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".[416] 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.[417]

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.[418] The European Court of Human Rights has frequently declared inadmissible applications from individuals and

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[410] Refer Clause 16 of the BCCSA code.

[411] Davis *Freedom of expression* 236.

[412] Davis *Freedom of expression* 235.

[413] Van der Westhuizen *Freedom of expression* 274.

[414] Refer, for example, *RAV v St. Paul*; *Brandenburg v Ohio* 395 US 444 (1969); and Van der Westhuizen *Freedom of expression* 275.

[415] [1990] 3 SCR 697. See, for example, Hogg *Constitutional law* 974-5.

[416] *Keegstra* 729.

[417] *Keegstra* 729. See also *R v Andrews* (1989) 39 CRR 36, 56.

[418] Ovey & White *European Convention* 280.

groups complaining about restrictions placed on hate speech.[419] The position may be different, however, when the intention behind the publication of hate speech is to inform the public or illuminate debate.[420]

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.[421]

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,[422] 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:[423]

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[419] Ovey & White *European Convention* 278.

[420] *Jersild v Denmark* (1994) 19 EHRR 1.

[421] Refer paragraph 6 of this chapter.

[422] Refer Chapter IV, para 5.1 above.

[423] Clause 3.5 of Section II of the South African advertising code.

> 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",[424] 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".[425]

Precedents of the South African advertising regulator reflect that the regulator does not consider that nudity itself is unacceptable or demeaning.[426] "A woman has a conscious self and is entitled in a free and democratic society to portray her sexuality".[427] Similarly, the view held is that a subtle sexual message itself cannot be demeaning.[428] 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.[429] 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

[424] Clause 4.19 of Section I of the South African advertising code.

[425] Clause 4.22 of Section I of the South African advertising code.

[426] *Good Hope FM* (ASA Final Appeal Committee ruling); *Opium* (ASA Standards Committee ruling).

[427] *Good Hope FM* (ASA Final Appeal Committee ruling).

[428] *Little Holland* (ASA Directorate ruling).

[429] *Lentheric v Jooste* (Ruling of the Directorate of the Advertising Standards Authority of SA) 2004.

female form.[430] It appears as if South African authors such as Bohler-Műller 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.[431]

Furthermore, in the matter of *Teazers v Huckle,*[432] 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 women 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

[430] *Opium* (ASA Standards Committee ruling).

[431] Bohler-Műller *Pornography* 173.

[432] ASA Final Appeal Committee ruling.

unrelated to sexuality.[433] The Australian advertising code[434] 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,[435] 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",[436] it is submitted that the provisions do not specifically address the issues of exploitation,[437] demeaning a maleness or femaleness,[438] or whether the role of persons of a particular gender in society or sections of society is entrenched.[439] 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.[440]

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.[441] 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*.[442] It is

[433] Advertising Standards Canada *Ad Complaints Report* 14.

[434] Australian jurisprudence is not critically evaluated in this study given its lack of a bill of human rights or human rights act.

[435] Refer section 8 of the *Unfair Discrimination Act*.

[436] Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 60.

[437] Clause 4.19 of Section I of the South African advertising code.

[438] Clause 4.19 of Section I of the South African advertising code.

[439] Clause 4.22 of Section I of the South African advertising code.

[440] *Sunday Times*.

[441] Clause 3.5 of Section II of the South African advertising code.

[442] Section 36(1) of the *Constitution, 1996*.

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*[443] and in the *Unfair Discrimination Act*[444] reflects the emphasis on equality and diversity within the democratic order in the current South Africa.[445] In a country where same sex unions are recognised,[446] 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.[447]

The South African advertising code deals with discrimination based on, amongst others, sexual orientation.[448] 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"[449] and that "references to minority groups should not be stereotypical, malicious, unkind, or hurtful".[450] The British television advertising code provides similarly that, "Advertisements must not prejudice respect for human dignity or humiliate,

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[443] Refer s 9(3)(4).

[444] Refer s 1(1)(xxii).

[445] Albertyn, Goldblatt & Roederer *Promotion of equality* 72.

[446] 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*.

[447] Albertyn, Goldblatt & Roederer *Promotion of equality* 72.

[448] Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

[449] Clause 9(b) of the British radio advertising code.

[450] Clause 9(c) of the British radio advertising code.

stigmatise or undermine the standing of identifiable groups of people".[451] 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".[452]

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,*[453] 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

[451] Clause 6.6 of the British television advertising code.

[452] Clause 14(c) of the Canadian advertising code.

[453] Refer section 1(1)(xxii) of the *Unfair Discrimination Act*.

> 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.[454]

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*[455], 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.[456]

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,[457] 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.[458] 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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[454] Para 20.

[455] ASA Final Appeal Committee ruling.

[456] Refer paragraph 6 of this chapter.

[457] Section 9(3) of the *Constitution, 1996*.

[458] Albertyn, Goldblatt & Roederer *Promotion of equality* 79-80.

Although these two terms are not defined in the *Unfair Discrimination Act,* the concept "ethnic or social origin" constitutes a "prohibited ground"[459] in respect of the "prohibition of hate speech"[460] 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.[461] 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;

[459] Section 1(1)(xxii) of the *Unfair Discrimination Act*.

[460] Section 10 of the *Unfair Discrimination Act*.

[461] Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

It is clear that the above provisions of the South African advertising code very closely mirror the provisions of the *Unfair Discrimination Act*[462] read together with the limitations clause of the *Constitution, 1996.*[463]

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,*[464] 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.[465]

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.[466] The *Unfair Discrimination Act* accordingly includes "age" as a "prohibited ground" of discrimination,[467] and furthermore defines "age" as follows:[468]

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[462] 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.

[463] Section 36(1) of the *Constitution, 1996*.

[464] ASA Final Appeal Committee ruling.

[465] Refer paragraph 6 of this chapter.

[466] Albertyn, Goldblatt & Roederer *Promotion of equality* 73-74.

[467] Refer s 1(1)(xxii) of the *Unfair Discrimination Act*.

[468] Refer s 1(1)(i) of the *Unfair Discrimination Act*.

> [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.[469]

The South African advertising code deals with *discrimination* based on age, amongst other things.[470] 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*[471] 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"[472] and that "references to minority groups should not be stereotypical, malicious, unkind or hurtful".[473] 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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[469] www.bcap.org.uk

[470] Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

[471] ASA Final Appeal Committee ruling.

[472] Clause 9(b) of the British radio advertising code.

[473] Clause 9(c) of the British radio advertising code.

respect for human dignity or humiliate, stigmatise or undermine the standing of identifiable groups of people".[474] 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".[475]

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*[476], 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

[474] Clause 6.6 of the British television advertising code.

[475] Clause 14(c) of the Canadian advertising code.

[476] ASA Final Appeal Committee ruling.

those clauses covering religious and racial offence, and offence based on sexual orientation and ethnic or social origin.[477]

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.[478]

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.[479] The South African advertising code also deals with *discrimination* based on, amongst others, disability,[480] 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".[481]

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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[477] Refer paragraph 6 of this chapter.

[478] Albertyn, Goldblatt & Roederer *Promotion of equality* 65.

[479] Albertyn, Goldblatt & Roederer *Promotion of equality* 65-66.

[480] Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

[481] Clause 9(e) of the British radio advertising code.

In line with the approach of the South African advertising regulator in the matter of *Hi-Fi Corporation*[482], 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.[483]

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.*[484] The *South African Concise Oxford Dictionary* defines "culture" as meaning, "the customs, institutions, and achievements of a particular nation, people, or group".[485] 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,[486] 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,*[487] a television commercial in which

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[482] ASA Final Appeal Committee ruling.

[483] Refer paragraph 6 of this chapter.

[484] *Promotion of equality 77-78*.

[485] The Dictionary Unit for South African English (eds) *South African Concise Oxford Dictionary* (2005) 282.

[486] ASA Final Appeal Committee ruling.

[487] Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA 2003.

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.[488] 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.

[488] Clause 3.4 of Section II, read together with Clause 4.17 of Section I of the South African advertising code.

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.[489] The Constitutional Court, however, warned that such regulation should "ensure fairness and a diversity of views broadly representing South African society".[490] 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.[491]

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".[492] 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.[493]

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[489] Para 30.

[490] *Islamic Unity* para 23.

[491] See, for example, *Islamic Unity* para 30; *Denver* 2391.

[492] *De gustibus* (unpublished and unnumbered).

[493] *Sunday Times*; and *Grayned v City of Rockford* 109.

Chapter IV
Offensive advertising: Clear and Precise

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.[494] 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

[494] Fenwick *Civil liberties* 287-288.

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. [495] 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*.

[495] Milo, Penfold & Stein *Freedom of expression* 42-87.

It is furthermore interesting to note that the Australian advertising regulator, the *Australian Association of National Advertisers*,[496] in the Australian advertising code,[497] 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.[498]

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.[499]

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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[496] Australian jurisprudence is not critically evaluated in this study given its lack of a bill of human rights or human rights act.

[497] Australian Association of National Advertisers *AANA advertiser code of ethics* www.aana.com.au.

[498] Clause 2.3 of Section 2 of the Australian advertising code.

[499] *Islamic Unity* para 23 and 30; *Sunday Times*; and *Grayned v City of Rockford* 109.

"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.

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,[500] 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***.

[500] Section 36(1) of the *Constitution, 1996*. Refer also Cheadle *Limitation of rights* 360.