

Chapter V – Offensive advertising: justification

1. Introduction

The value system of the *Constitution of the Republic of South Africa, 1996* is premised on the values of an open and democratic society based on human dignity, equality, and freedom.¹ These values have been elaborated on by the South African courts and extended to include values such as *ubuntu* and reconciliation.² As has been mentioned, the Constitutional Court furthermore recognised in *Islamic Unity Convention v Independent Broadcasting Authority NO*³ that it is expected that material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population, should be regulated.⁴ The Constitutional Court did, however, warn that such regulation should “ensure fairness and a diversity of views broadly representing South African society”,⁵ as it is essential that interference is reviewed to determine whether the values that it represents are in accordance with a particular vision in society.⁶

Against this backdrop, the provisions that have been proposed for inclusion in the South African advertising code⁷ will accordingly be critically evaluated on a comparative basis in terms of s 36 of the *Constitution, 1996*.

¹ Section 36(1) and s 39(1) of the *Constitution, 1996*.

² Cheadle “Limitation of rights” in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights* (2002) 373-3 with reference to *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 par 185. See also *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) para 26.

³ 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).

⁴ Para 30.

⁵ *Islamic Unity* para 23.

⁶ Van der Schyff *Limitation of rights – a study of the European Convention and the South African bill of rights* (2005) 246.

⁷ Advertising Standards Authority of South Africa *Code of Advertising Practice* (2008).

2. Section 36(1) evaluation

In order to conduct such a critical evaluation, the following question has to be asked: Is the proposed limitation on offensive advertising reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom? In order to determine the answer to this question, the nature of the infringing right,⁸ the importance of the purpose of the limitation,⁹ the nature and extent of the limitation,¹⁰ the relation between the limitation and its purpose,¹¹ and the less restrictive means to achieve the purpose,¹² need to be taken into account.

2.1. Nature of the right¹³

The purpose of determining the nature of the right lies in assessing the weight of a particular right in the constitutional scheme of things in order to effect a proper balancing exercise.¹⁴ The weight or application of a particular right, based on particular circumstances can only be measured on a case-by-case basis, taking into account the value that such right brings to the upholding and strengthening of a democracy based on constitutional values.¹⁵

⁸ Section 36(1)(a) of the *Constitution, 1996*.

⁹ Section 36(1)(b) of the *Constitution, 1996*.

¹⁰ Section 36(1)(c) of the *Constitution, 1996*.

¹¹ Section 36(1)(d) of the *Constitution, 1996*.

¹² Section 36(1)(e) of the *Constitution, 1996*.

¹³ Section 36(1)(a) of the *Constitution, 1996*.

¹⁴ Refer, for example, Currie & De Waal *The bill of rights handbook* (2005)180; and Van der Schyff *Limitation* 279.

¹⁵ Makwanyane para 104; *National Coalition for Gay and Lesbian Equality NO v Minister of Justice NO* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 34; Currie & De Waal *Handbook* 178; Van der Schyff *Limitation* 280-281; and Iles "A fresh look at limitations: unpacking section 36" *SA journal on human rights* (2007) 68-93, 79.

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There is no hierarchy of rights in the *Constitution, 1996*,¹⁶ and the s 36(1) analysis is not a comparison of the importance of constitutional rights. Each constitutional right is rooted in the four foundational values of democracy, dignity, equality and freedom.¹⁷ Even though these foundational values may articulate differently within each right but this does not mean that some rights are more important than others are. The value of each constitutional right has to be assessed in its context and by its relevance and importance to South African society.¹⁸

Although each value has its own particular manifestation in the Bill of Rights, those values bring every right to life.¹⁹ For example, in the case of *Islamic Unity* the Constitutional Court placed particular emphasis on the right to freedom of expression by arguing that the right goes to the heart of democracy.²⁰ Furthermore, in *Phillips and another v Director of Public Prosecutions and others*,²¹ the Constitutional Court commented that the right to freedom of expression “was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans”.²²

This does not mean that freedom of expression is the most important right in the South African Bill of Rights. Other rights are equally indispensable in a democracy. The Constitutional Court therefore correctly recognised in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and*

¹⁶ Cheadle *Limitation of rights* 371.

¹⁷ *Islamic Unity* 308-9.

¹⁸ *Islamic Unity* para 27; Davis “Freedom of expression” in Cheadle, Davis & Haysom *South African constitutional law: the bill of rights (2002)* 222; Govender “Horses for courses: understanding the constitutional mandate” *Obiter* (2000) 144-160, 158.

¹⁹ Cheadle *Limitation of rights* 371.

²⁰ Para 26.

²¹ 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

²² Para 23.

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*Others*²³ that freedom of expression is one of a “web of mutually supporting rights” closely related to, amongst others, freedom of religion, belief and opinion, the right to dignity, and the right to freedom of association.²⁴ Explaining the context of the hierarchical relationship between the rights to dignity and freedom of expression, the Constitutional Court stated in *S v Mamabolo (E TV and Others Intervening)*²⁵ as follows:

The right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression ... What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.²⁶

These views of the Constitutional Court are echoed in Canadian constitutional jurisprudence. In *Andrews v Law Society of British Columbia*,²⁷ the Canadian Supreme Court commented that:

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes ... [T]he test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.²⁸

²³ 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC).

²⁴ Para 27. Refer also *Van der Westhuizen Freedom of expression* 264.

²⁵ 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC).

²⁶ At par 37, 41.

²⁷ [1989] 1 SCR 143.

²⁸ At 198.

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The Canadian Supreme Court²⁹ has also stated that it is important to adopt a sensitive case-orientated approach and to place conflicting values in their factual and social context.³⁰ Determining the parameters of expression in any given case is therefore important, particularly where its exercise might intersect with other interests.³¹ For given the wide-ranging nature of the right to freedom of expression, overlapping and conflict with other rights and freedoms is inevitable.³²

Ovey and White point out that there is also no formal hierarchy of rights set out in the *European Convention*, even if there are occasions when a balance has to be achieved between conflicting interests.³³

Bearing the above in mind, it is submitted that the democratic value of the right to freedom of expression, as it manifests in advertising, must be balanced against the purpose of the proposed provisions of the South African advertising code dealing with offensive advertising, to determine its proper function in a democratic society in this particular instance.

2.2. Importance of the purpose of the limitation³⁴

In discussing the importance of the purpose of the limitation, one needs to determine whether a limitation's purpose is sufficiently important to justify the limitation of a constitutional right.³⁵ Section 36(1) of the *Constitution, 1996* does not expressly state which purposes would fall within this proviso, but rather states that any such interference must be "reasonable and justifiable".³⁶ In such a determination, this

²⁹ Refer, for example, *Oakes*; and *Rocket v Royal College of Dental Surgeons* (1990) 2 SCR 232.

³⁰ Whyte, Lederman & Bur *Canadian constitutional law - cases, notes and materials* (1992) 22-54.

³¹ *Islamic Unity* para 30-38.

³² *Islamic Unity* para 30-38; *Coppel Human Rights Act* 328.

³³ Ovey & White *Jacobs & White - the European Convention on human rights* (2006) 6-7.

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

³⁵ Section 36(1) and s 39(1) of the *Constitution, 1996*. Refer also Cheadle *Limitation of rights* 373-3 with reference to *Makwanyane* par 185.

³⁶ Van der Schyff *Limitation* 248.

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purpose has been described by the Constitutional Court as that which all reasonable citizens would agree to be compellingly important.³⁷ Unlike the *Constitution, 1996* and the *Canadian Charter*, article 10(2) of the *European Convention* requires an assessment as to whether the limitation is “necessary in a democratic society”, and in interpreting this requirement the European Court of Human Rights held in, for example, *Sunday Times v United Kingdom*³⁸ that the term “necessary in a democratic society” requires a “pressing social need”.³⁹

The determination of the importance of the limitation does not involve a balancing between the limitation and the right that is being limited, but an evaluation of the limitation in the context of the system of values adopted by the *Constitution, 1996*, namely the values of an open and democratic society based on human dignity, equality and freedom, *ubuntu* and reconciliation.⁴⁰

Section 36(1) of the *Constitution, 1996* does not provide a list of legitimate aims unlike the *European Convention*, which contains an exhaustive list of legitimate aims, and objectives are contained in article 10(2), including the protection of morals.⁴¹ Coppel suggests that it is the intention of the European Court of Human Rights to interpret this list narrowly, but that given the nature of the list this has not always been

³⁷ See, for example, *Prince v President of the Law Society of the Cape of Good Hope* NO 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) paras 52-53; and *Jaffha v Schoeman* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 40. See also Cheadle *Limitation of rights 374* with reference to *Gay and Lesbian Equality*; and Meyerson *Rights limited: freedom of expression, religion and the South African Constitution* (1997) 36-43.

³⁸ (1979) 2 EHRR 245.

³⁹ See also Schermers *Freedom of expression* 203; and Ovey & White *European Convention* 232.

⁴⁰ See, for example, *Shabalala* para 26; *Prince* paras 52-53; and *Jaffha v Schoeman* para 40. Also, refer Van der Schyff *Limitation* 248.

⁴¹ Article 10(2) of the *European Convention* makes reference to “the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

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the case.⁴² Ovey and White⁴³ suggest that the European Court generally tends to interpret the protection of morals very narrowly referring to it as sexual morality, rather than giving it its broader dictionary meaning of "standards of behaviour, or principles of right or wrong".⁴⁴

The classic example of the interpretation of the term "protection of morals" is the seizure of *The Little Red Schoolbook* that gave rise to *Handyside v The United Kingdom*.⁴⁵ The European Court of Human Rights was called upon to consider whether the conviction of individuals who had published a reference book targeted at children of school age containing advice on sexual and other matters violated the guarantee of freedom of expression in article 10 of the *European Convention*. The European Court readily accepted that the issues raised here related to the protection of morals in the sense that the protection of morals entailed the safeguarding of the moral standards of society as a whole.⁴⁶ A similar view was taken in *Müller v Switzerland*,⁴⁷ involving the confiscation of a number of sexually explicit paintings depicting sexual acts, seized by the authorities because they were obscene.⁴⁸ The European Court found that it was reasonable for the Swiss courts to have found the paintings liable to offend the sense of sexual propriety of persons of ordinary sensitivity. As a result, it also held that the imposition of fines did not violate article 10.⁴⁹

⁴² *Human Rights Act* 338.

⁴³ Ovey and Robin *European Convention* 228.

⁴⁴ The Dictionary Unit for South African English (eds) *South African Concise Oxford Dictionary* (2005) 755.

⁴⁵ (1976) 1 EHRR 737.

⁴⁶ Ovey & White *European Convention* 229.

⁴⁷ (1991) 13 EHRR 212.

⁴⁸ Ovey & White *European Convention* 229.

⁴⁹ See further *Otto-Preminger Institut v Austria* (1994) 19 EHRLR 34, in which a film that would be deeply offensive to devout Roman Catholics were screened in a cinema located in a predominantly Roman Catholic area. The European Court concluded that the interference with the rights in article 10 of the *European Convention* was accordingly justified.

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Morals are therefore a sometimes controversial, and yet undeniable legitimate, purpose justifying the interference with constitutional rights.⁵⁰ Reinhard argues that the leaders of communities cannot be relieved “from the responsibility of tackling [the] difficult issue” of regulating offensive material.⁵¹ This need for regulation of such material was also echoed by the Constitutional Court in *Islamic Unity*, in stating that the regulation of material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population are areas where regulations are to be expected,⁵² provided that such regulation “ensure[s] fairness and a diversity of views broadly representing South African society”.⁵³ The protection of morals is therefore arguably also regarded as a legitimate purpose in terms of the *Constitution, 1996*. It must, however, be emphasised that not every pursuit of morality, as is indeed the case with all legitimate purposes, will be justifiable as a limit.⁵⁴ In this regard, Currie & De Waal⁵⁵ correctly points out that personal morality will not qualify as a justification for the limitation of rights. This study therefore proposes that the protection of children, and unwilling adult recipients, as opposed to personal morality, should be a justification.

In a democratic South Africa, the exercise of restrictions on offensive advertising should be based on law that has a democratic mandate and within principles that recognise the role of freedom of expression in sustaining a democracy.⁵⁶ Nevertheless, the *Constitution, 1996* demands that while such regulation should “ensure fairness and a diversity of views broadly representing South African

⁵⁰ Van der Schyff *Limitation* 254.

⁵¹ “De gustibus non est disputandum” AAAA *management conference* (2001) (unpublished and unnumbered).

⁵² *Islamic Unity* para 30.

⁵³ Para 23.

⁵⁴ Van der Schyff *Limitation* 254.

⁵⁵ *Handbook* 180.

⁵⁶ Boyle “Freedom of expression and democracy” in Heffernan (ed) *Human Rights: a European perspective* (1994) 211.

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society”,⁵⁷ it should not simply grant the protection of the morality of one sector of a society.⁵⁸

The purpose of the proposed restrictions on offensive advertising are based on a “compelling” interest, namely the protection of children from seeing or hearing indecent material, without imposing total bans on advertising material unless such material effectively constitutes *hate speech* as defined within the *Promotion of Equality and Prevention of Unfair Discrimination Act*. It is submitted that the proposed provisions of the South African advertising code dealing with offensive advertising, especially insofar as the purpose of these provisions in the South African advertising code closely mirrors the purpose prescribed in the case of *Islamic Unity*, meet this requirement, being “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”, and are accordingly compatible with the demands of such a society.

2.3. Nature and extent of the limitation⁵⁹

It is clear that any enquiry into the nature and extent of the limitation investigates the method used in interfering with a right as well as the impact of such interference on the protected conduct and interests of the right concerned.⁶⁰ What is thus of concern in s 36(1)(c) of the *Constitution, 1996* is the effect of the limitation on the right itself.⁶¹ Van der Schyff points out that although a legitimate and important purpose, namely punishment, was pursued in the case of *Makwanyane*, the means of such pursuit could be brought into doubt.⁶²

Furthermore, the extent of interference should be considered in combination with other factors, as it is only when the context is taken into account that any one factor

⁵⁷ At para 23.

⁵⁸ Cheadle *Limitation of rights* 374 with reference to *Gay and Lesbian Equality* par 37.

⁵⁹ Section 36(1)(c) of the *Constitution, 1996*.

⁶⁰ Van der Schyff *Limitation* 283.

⁶¹ *Iles Unpacking section 36* 83 with reference to *Islamic Unity* para 49.

⁶² *Limitation* 283.

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can come to its right.⁶³ For example, in *S v Lawrence*; *S v Negal*; *S v Solberg*,⁶⁴ Sachs J commented that the “intensity or severity” of a particular interference is a highly relevant factor in any proportionality exercise, as the “more grievous” an interference, the more compelling its justification has to be, whereas the “lighter” the interference is the easier the justification may be.⁶⁵

The doctrine of the margin of appreciation holds that, in certain circumstances and at a domestic level, states are allowed a certain degree of discretion in the implementation and application of guaranteed human rights provisions, and it is precisely when a state employs the discretion that its conduct is challenged on the ground that it has violated a guaranteed right enshrined in a domestic and/or a regional human rights treaty.⁶⁶ The margin of appreciation would appear to be a sliding scale and its application will depend on its context.⁶⁷

The jurisprudence of the European Court is rich with cases in which the doctrine has been applied: In the *Handyside* case, for example, the European Court of Human Rights noted that there was no uniform European concept of morality and made it clear that Contracting States would enjoy a wide margin of appreciation in assessing whether measures were required to protect moral standards.⁶⁸ It was furthermore suggested in *Handyside* that a restriction imposed based on morality must be proportionate to the legitimate aim pursued.⁶⁹ In achieving balance, the nature of

⁶³ Van der Schyff *Limitation* 284.

⁶⁴ 1997 4 SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

⁶⁵ At para 168.

⁶⁶ Singh “The impact of clawback clauses on human and peoples’ rights in Africa” *African security review* (2009) 95, 98. For further reading, see for example, Yutaka *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (2002); Benvenisti “Margin of appreciation, consensus, and universal standards” *International law and politics* (1999) 843-854; Hutchinson “The margin of appreciation doctrine in the European Court of Human Rights” *International & comparative law quarterly* (1999) 638-650.

⁶⁷ Ovey & White *European Convention* 233.

⁶⁸ *Handyside* para 43. See also Ovey & White *European Convention* 233.

⁶⁹ At para 48.

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the expression restricted is to be weighed against the importance of the aim pursued by the restriction.⁷⁰

The application of the margin of appreciation as applied in the *Handyside* case illustrates and explains how the publication of *The Little Red Schoolbook* could be accepted in some contracting states but not others.⁷¹ The same is true of the *Otto-Preminger Institute* case. Here the fact that the cinema, where the film was shown that would be deeply offensive to devout Roman Catholics, was located in a predominantly Roman Catholic area, appears to have been an important factor in the European Court's decision that the interference with the rights in article 10 of *European Convention* was justified.⁷² Similarly, in the *Müller* case, where an exhibition of contemporary art including three paintings depicting sexual acts, were seized by the authorities on the grounds that they were obscene, the European Court found that it was not unreasonable for the Swiss courts to have found the paintings liable to offend the sense of sexual propriety of persons of ordinary sensitivity. As a result, the imposition of fines was found not to violate article 10 of the *European Convention*.

In the context of advertising, one needs to be consistently mindful of the fact that consumers cannot selectively choose the advertising to which they are exposed, but that advertising arrives unannounced.⁷³ The audience of, for example, an outdoor billboard often does not have a choice as to whether it wishes to be exposed to a particular advertisement. However, appropriate media selection would result in consumers being able to predict the 'boundaries' of the advertising they are likely to see.

Accordingly, the nature of any limitation is that it should act as a filter to protect children; and to avoid unwilling adult recipients being exposed to material

⁷⁰ Ovey & White *European Convention* 319.

⁷¹ Ovey & White *European Convention* 234-235.

⁷² Ovey & White *European Convention* 235.

⁷³ Anonymous "I have a great commercial, so why won't the networks air it?" www.library.lp.findlaw.com/articles (accessed February 2003).

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reasonably likely to cause offence.⁷⁴ The extent of the proposed limitation relates to appropriate media placement, and not to the outright banning of material, as suggested earlier. Such an approach would also accord with jurisprudence in the European Community and with Canadian jurisprudence, where even very explicit material is acceptable if the risk of children viewing such material is limited and the material is otherwise filtered to avoid the exposure of unwilling adult audiences.⁷⁵

Furthermore, the banning of material is only proposed where advertising material effectively constitutes *hate speech* as defined within the *Unfair Discrimination Act*. This approach is permissible within the parameters of s 16(2)(c) of the *Constitution, 1996* which deals with *hate speech*.

Accordingly, it is submitted that the approach suggested in the draft offensive advertising clause which interferes with freedom of expression is reasonable given the impact of such interference on freedom of expression: The proposed offensive advertising limitations mirrors the extent of limitation proposed in the case of *Islamic Unity*;⁷⁶ and the nature of the proposed limitation would still ensure “a diversity of views broadly representing South African society”⁷⁷ in a manner compatible with the demands of “an open and democratic society based on human dignity, equality and freedom”.

2.4. Relation between the limitation and its purpose⁷⁸

Simply put, this factor questions whether the interference stretches too far or not far enough in realising its purpose.⁷⁹ Alternatively, as put differently by Ngcobo J in the

⁷⁴ Fenwick *Civil liberties* 287-288.

⁷⁵ Fenwick *Civil liberties* 313 with reference to *Otto-Preminger Institut and Groppera Radio AG v Switzerland* (1990) 12 EHRR 321; See also *Committee for the Commonwealth of Canada v Canada* (1991) 1 SCR 143.

⁷⁶ At para 30.

⁷⁷ *Islamic Unity* para 23.

⁷⁸ Section 36(1)(d) of the *Constitution, 1996*.

⁷⁹ Van der Schyff *Limitation* 286.

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Prince case, this factor relates to the effect of the limitation,⁸⁰ as this is the terrain of proportionality concerning the manner in which a right is limited, and not the question as to whether it should be limited at all.⁸¹ For example, in *Christian Education South Africa v Minister of Education*,⁸² Sachs J found that the duty of the state to protect people from violence would be frustrated should an exemption be created for parochial independent schools to administer corporal punishment in accordance with the religious convictions of parents.⁸³

In the context of the proposed limitations on offensive advertising, the effect is that advertiser's freedom of expression is curtailed insofar as it relates to the protection of children; the protection of unwilling adult recipients from the shock or offence occasioned by encountering certain material, rather than at preventing moral deterioration; and the outright banning of material that falls within the categories identified in the *Islamic Unity* case where such material constitutes *hate speech* within the meaning of s 10 of the *Unfair Discrimination Act*. Accordingly, the proposed limitations do not have the same effect as using a "sledgehammer to ... crack a nut".⁸⁴

2.5. Less restrictive means to achieve the purpose⁸⁵

In considering whether the proposed offensive advertising limitations imposed on freedom of expressing are less invasive of this protected right, it has to be asked whether the limitation is any less effective in achieving its purpose.⁸⁶ It is accordingly necessary to question whether a limitation impedes the preservation and realisation of the values of an open and democratic society as little as possible, while not

⁸⁰ At para 45.

⁸¹ Cheadle *Limitation of rights* 370.

⁸² 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

⁸³ At para 50.

⁸⁴ *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para 34. See also Currie & De Waal *Handbook* 182.

⁸⁵ Section 36(1)(e) of the *Constitution, 1996*.

⁸⁶ *Islamic Unity* para 28.

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endangering the purpose for which a particular right was interfered with.⁸⁷ This factor thus serves as a reminder that other possibilities must be explored in the hope of preserving as much of the protected conduct and interests of rights as possible.⁸⁸

In the *Prince* case the majority of the Constitutional Court did not consider alternative means of drug control to be as effective as a total ban on cannabis possession, for the sake of effective policing and ultimately societal coherence.⁸⁹ The minority, however, held that less restrictive means, such as a licensing scheme, could have been pursued in satisfying the purpose of drug control while also protecting diversity.⁹⁰

In the context of the proposed limitations on offensive advertising, the comments of the Canadian Supreme Court in *Ramsden v Peterborough (City)*,⁹¹ are also of relevance:

The complete ban on postering, however, did not restrict expression as little as is reasonably possible ... Many alternatives to a complete ban exist. Proportionality between the effects and the objective was not achieved because the benefits of the by-law were limited while the abrogation of the freedom was total.

The proposed limitations on offensive advertising only put forward the outright banning of material where such material constitutes *hate speech* within the provisions of s 10 of the *Unfair Discrimination Act*. This is permissible in terms of s 16(2)(c) of the *Constitution, 1996*, which removes the category of *hate speech* from the protected category of free expression provided for in s 16(1). Insofar as the proposed limitations impose any further restrictions on offensive advertising, these relate solely to time, place and manner, and not to the outright banning of

⁸⁷ Van der Schyff *Limitation* 287-288.

⁸⁸ Currie & De Waal *Handbook* 183-184; and Van der Schyff *Limitation* 287-288.

⁸⁹ At paras 141, 169.

⁹⁰ At paras 51, 64-65, 83.

⁹¹ [1993] 2 SCR 1084.

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advertising material. Freedom of expression is thus restricted “as little as is reasonably possible” in order to achieve the purpose of preventing the dissemination of the expression to an unsuitable child audience; or an audience that has not been forewarned.

3. Concluding comments

None of the factors in s 36(1) of the *Constitution, 1996* is individually decisive,⁹² and do not constitute an exhaustive list to be considered.⁹³ Rather, it is ultimately an assessment based on proportionality.⁹⁴

In light of the value system of the *Constitution, 1996*,⁹⁵ ⁹⁶ and the categories of offensive material, which a democratic society might expect to be regulated,⁹⁷ the restrictions imposed on offensive advertising should be exercised based on law that has a democratic mandate and within principles that recognise the role of freedom of expression in sustaining a democracy.⁹⁸

The purpose of the proposed limitation is three-fold:

Firstly, it aims at protecting children from seeing or hearing harmful material. Secondly, it seeks to avoid unwilling adult recipients being exposed to material reasonably likely to cause offence. Both these purposes are achieved without

⁹² *Prince* para 45.

⁹³ *Prince* para 45 with reference to *Makwanyane* para 104; and *Manamela* paras 33 and 65.

⁹⁴ *Prince* para 45 with reference to *Gay and Lesbian Equality* para 35, where it was said that “in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose”.

⁹⁵ Section 36(1) and s 39(1) of the *Constitution, 1996*.

⁹⁶ *Cheadle Limitation of rights* 373-3 with reference to *Makwanyane* par 185. See also *Shabalala* para 26.

⁹⁷ *Islamic Unity* para 23.

⁹⁸ Boyle “Freedom of expression and democracy” in Heffernan (ed) *Human Rights: a European perspective* (1994) 211.

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imposing a total ban on material, but relate to appropriate media placement. Thirdly, the regulation proposes the banning of material only where advertising material effectively constitutes *hate speech*.

From the above discussion, it is therefore submitted that the proposed limitations on offensive advertising achieve its purpose without unnecessarily stifling freedom of expression, whereby fairness and a diversity of views broadly representing South African society, is achieved.

Chapter VI – In conclusion

In this study, the determination of the proposed provisions of the South African advertising code dealing with offensive advertising commences with a consideration of and a conclusion that advertising constitutes freedom of expression, as a protected right in terms of s 16(1) of the *Constitution of the Republic of South Africa, 1996*, which is in line with international jurisprudence.

The study argues, however, that the South African advertising code does not constitute “law of general application” in order to legitimately limit advertising freedom, as provided for in s 36(1) of the *Constitution, 1996*: Whilst this study argues that the South African advertising code constitutes “law” within the meaning of s 36(1) of the *Constitution, 1996*, that the South African advertising code, as a public document based on international advertising principles, is accessible, and that the advertising code has general application, this study concludes that the current provisions of the advertising code dealing with offensive advertising are too general and too vague and are therefore not “clear and precise”.

As an alternative, the study proposes that the categories of offence, which the Constitutional Court identified in *Islamic Unity Convention v Independent Broadcasting Authority NO*,¹ should be used as the basis of constructing revised and more specific offensive advertising provisions, namely:

1. Advertising that is indecent, obscene or offensive to public morals;
2. Advertising that is offensive to religious convictions; and
3. Advertising that is offensive to feelings of sections of the populations.

¹ 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 30.

The study critically evaluates various jurisdictions, from a constitutional, legal and self-regulatory perspective, with the resultant effect being the formulation of the following provisions dealing with offensive advertising:

New definition

“be hurtful” means harm limited to serious and significant psychological and emotional harm.

New Clause 1 of Section II - Offensive advertising

- 1.1 Nudity, sexual innuendo or sexual activity; violence; or language used in advertising shall be medium appropriate so that children and unwilling adult recipients are not unreasonably exposed thereto.
- 1.2 In determining whether advertising is “medium appropriate”, (1) the context and nature of the product or service advertised; (2) the context and nature of the medium used; (3) the place of publication or the relevant time slot; (4) the likely audience that will be exposed to the advertising; and (5) the public interest, shall be taken into account.
- 1.3 An advertisement should not disseminate any propaganda or idea which propounds the superiority or inferiority of any person, or group of persons, on the basis of age, culture, disability, ethnic or social origin, race, religion, or sexual orientation, including incitement to, or participation in, any form of such violence.
- 1.4 An advertisement should not propagate, advocate or communicate, on the basis of age, culture, disability, ethnic or social origin, gender, race, religion, or sexual orientation, any message that could reasonably be construed to –

- 1.4.1. be hurtful;
- 1.4.2. be harmful or to incite harm;
- 1.4.3. promote or propagate hatred.

Current Clause 3.5 of Section II - Gender

Gender stereotyping or negative gender portrayal shall not be permitted in advertising, unless in the opinion of the ASA, such stereotyping or portrayal is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The study establishes that the above provisions are sufficiently clear and precise to enable any person who intends to place an advertisement that may be regarded as offensive, to predict on a reasonable basis whether the advertisement is likely to be acceptable. These provisions therefore meet the “clear and precise” requirement, meaning that these revised provisions constitute “law of general application” within the meaning of s 36(1) of the *Constitution, 1996*.

Finally, the study concludes that, in collectively weighing up the factors in s 36(1) of the *Constitution, 1996*, together with all other relevant factors, the proposed limitations on offensive advertising accord with the value system of the *Constitution, 1996*: In accordance with s 16(2)(c) of the *Constitution, 1996* only advertising material which constitutes *hate speech* is banned. Insofar as the protection of children from being unreasonably exposed to harmful material is concerned, as well as avoiding unwilling adult recipients from being exposed to material reasonably likely to cause offence, an appropriate media placement requirement is suggested.

Whilst there will always be a different point of view on issues of taste and decency, influenced by personal views and choices, the study establishes that the proposed

Chapter VI ***In conclusion***

limitations on offensive advertising do not unnecessarily stifle freedom of expression, and ensures that fairness and a diversity of views broadly representing South African society, is achieved.

It is accordingly submitted that this study proposes limitations on offensive advertising which are compatible with freedom of expression in a democratic South Africa.