Media Law and Practice in Southern Africa

Obscenity Laws and Freedom of Expression

A Southern African Perspective

No. 12 January 2000

This paper is one of a series dealing with media law and practice in countries belonging to the Southern Africa Development Cooperation (SADC). A conference addressing this theme was held jointly by ARTICLE 19 and the Media Institute of Southern Africa (MISA) in Zanzibar in October 1995.

Each paper in the series will focus on a particular country describing current and recent developments in media law and practice, or a particular theme of wide relevance within the whole SADC region.

It is hoped that the series will contribute to greater awareness of issues affecting media freedom in this fast-changing region and will provide an invaluable resource for individuals and organizations working in this field.

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ACKNOWLEDGEMENTS

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ARTICLE 19 gratefully acknowledges the generous support received from the Swedish International Development Agency (SIDA). The views expressed do not necessarily reflect those of SIDA.

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ISBN 1-902598-05-9

INTRODUCTION

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Recent court decisions and other developments in southern Africa have given new impetus to the need to reform outdated laws relating to obscenity which remain in place in several countries in the region and which have been used, and abused, in order to restrict freedom of expression. Increasingly, it has become clear that such laws, mostly relics of the colonial period, are fundamentally at variance with constitutional guarantees of freedom of expression found in most of the region, and particularly with the new constitutions introduced in Namibia, South Africa and Malawi, after decades of repression. These laws should be removed from the statute books and replaced with provisions that fully accord with international human rights standards, specifically the right to freedom of expression.

Freedom of expression is a fundamental human right, both in itself and due to the role it plays in guaranteeing other rights. At the same time, international law allows for limited restrictions on it to protect other important social interests such as privacy, an individual reputation and public order. It is never easy to strike an appropriate balance between these other interests and freedom of expression, as the highly developed jurisprudence in this area illustrates. One of the most controversial issues is how to balance the need to protect society against the potential harm that may flow from pornography and obscene materials, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas. This issue, which continues to provoke controversy both in southern Africa and around the world, is the central theme of this report

In Namibia, the High Court held, in a landmark judgement on 4 April 1998(1) that Section 2(1) of the *Indecent and Obscene Photographic Matter Act, 1967*(2) was unconstitutional in that it had been formulated in an overly-broad manner which was not intended or carefully designed to prohibit possession only of such sexually explicit material as may be proscribed under the Namibian Constitution.(3)

The court observed that the Act not only criminalised possession of indecent or obscene photographic material, but also defined ‘photographic matter’ so broadly as "to classify a virtually limitless range of expression, from ubiquitous and mundane manifestations… to the most exulted forms of artistic expressions, as ‘indecent’ or ‘obscene’ simply because they contain oblique, isolated or arcane references to matters sexual, or deal frankly with a variety of social problems".

The court held that although expression may under certain circumstances be restricted under the Namibian Constitution, the ‘claw-back’ provisions should be interpreted restrictively "to ensure that the exceptions are not unnecessarily used to suppress the right to the freedom guaranteed in Article 21(1)(a)."

In South Africa, the laws relating to obscenity were completely revised in 1996, when the old apartheid era laws were replaced with the *Films and Publications Act*, No. 65 of 1996. The latter defines obscenity much more narrowly than in the past. A test of the new standard occurred recently when the government and a child welfare organisation tried to put pressure on the Films and Publications Board to ban an art exhibition which included drawings and paintings of naked children. Resisting this pressure, the Films and

Publications Review Board ruled that with due consideration to fundamental rights, the spirit of the 1996 *Films and Publications Act*, the interests of the different sectors of society, and the context and intention of the work, the works were not child pornography, as had been alleged, but works of art which were appropriate for all ages, subject only to parental guidance.(4)

The developments in Namibia and South Africa reflect a growing concern over laws relating to obscenity in southern Africa and their impact on the fundamental right to freedom of expression. Unfortunately, apart from Namibia and South Africa, which have radically revised their obscenity laws, other countries have retained restrictive laws on their statute books, largely unchanged since enactment by colonial powers, despite glaring inconsistencies between them and constitutional guarantees of freedom of expression.

This study is a critique of obscenity laws in southern Africa, based on the laws in place in Lesotho, Malawi and Zambia, as measured against constitutional guarantees of freedom of expression. While the study focuses on the specific provisions from these three countries, other jurisdictions have similar laws relating to obscenity. Many of these laws date from the colonial period while others were passed during periods of one-party rule. These laws, along with a number of others restricting freedom of expression, remain in place despite their dubious constitutionality. As has been observed with regard to censorship and control in Malawi which occurred during the more than 20 years of one-party rule under Dr. Banda:

> [T]he control exercised … over the flow of information was unparalleled in Africa. Primarily, this control took place through extensive networks of informers at the level of the village or the workplace, backed up by the repressive force of the state… This naked use of state power was, in turn, reinforced by an extensive legal framework of censorship. The Censorship and Control of Entertainments Act regulates the publication and import of newspapers, magazines, books, films and records. Thousands of publications have been banned under this law, as well as under parallel powers granted in Section 46 of the Penal Code. Neither provision has yet been repealed.(5)

This study exposes the gap between the standards laid down in national constitutions and international law on the one hand, and obscenity laws on the other, using jurisprudence from countries in the region and other common law countries around the world. This analysis is followed by a set of general recommendations concerning the appropriate balance to be struck between the fundamental right to freedom of expression and legitimate societal interests, such as the need to prevent crime and to protect vulnerable groups, such as children, from harm and exploitation.

INTERNATIONAL AND CONSTITUTIONAL STANDARDS

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The constitutions of most southern African countries guarantee everyone the right to freedom of expression(6) and freedom of assembly and association.(7) Some also provide specifically for press freedom,(8) and for freedom of information.(9) All of the countries in southern Africa except Botswana and Swaziland are also parties to the *International Covenant on Civil and Political Rights* and therefore bound to respect the right to freedom of expression guaranteed by Article 19 thereof, which states:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

All of the countries in southern Africa, including both Botswana and Swaziland, are parties to the *African Charter on Human and Peoples' Rights*, which guarantees freedom of expression, at Article 9 in the following terms:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Both national and international courts have recognised that freedom of expression is essential to respect for human rights and the maintenance and progress of a democratic society. For example, the European Court of Human Rights has stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.... [I]t is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.(10)

At the national level, courts in Namibia, Zambia and Zimbabwe, for example, have recognised free expression as "an essential foundation of a democratic society."(11) The Nigerian High Court has held:

> Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.(12)

The purpose of constitutional human rights provisions, including the rights to freedom of expression and opinion, as well as privacy, is to guarantee to each individual the enjoyment of these rights, regardless of the will of the majority of the population at any given time:

> In addressing this issue it is important to examine the relationship between the idea of democracy and that of individual liberty. The former… does not mean tyranny of the majority. Granted that in general there may be some practical sense in making the will of the majority the cornerstone of a democracy, we must at the same time, realize that not only may the majority be wrong but also that there are certain areas of individual human activity in which the view of the majority need not have a role. When the individual enters into the social contract, he or she does not place himself or herself entirely at the mercy of the State as a representative of the majority's interest.(13)

When electing representatives, the people do not grant an *unlimited* power to make laws on their behalf. Governmental representatives are elected for a limited time and with a limited mandate. That mandate is set out in the Constitution which defines the range of fundamental rights where legislators may not tread or may tread only very cautiously:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials.(14)

This is perhaps of particular significance in southern Africa given the colonial history and the non-democratic pedigree of many laws. A South African court has observed:

> When interpreting the Constitution and more particularly the Bill of Rights it has to be done against the backdrop of our chequered and repressive history in the human rights field. The State by legislative and administrative means curtailed the common law human rights of most of its citizens in many fields while the courts looked on powerlessly. Parliament and the executive reigned supreme. It is this malpractice which the Bill of Rights seeks to combat. It does so by laying down the ground rules for State action which may interfere with the lives of its citizens. There is now a threshold which the State may not cross. The courts guard the door.(15)

Crucial though freedom of expression is to an open and democratic society, the right is not absolute. Most constitutions and international law allow for some restrictions on freedom of expression, but only where these meet strict conditions. Three conditions are usually imposed. First, restrictions must be prescribed by or under the authority of law. State action restricting freedom of expression that is not specifically provided for by law

is not acceptable. Restrictions must be accessible and foreseeable so that citizens know in advance what is prohibited and may regulate their conduct accordingly.

Second, any restriction must either serve one of a limited list of legitimate objectives or promote a legislative objective of sufficient importance to warrant overriding a constitutionally protected right. Under international law, Article 19 of the *International Covenant on Civil and Political Rights* permits restrictions on freedom of expression only as necessary to protect the rights and reputations of others, national security, or public order, health or morals. This list of legitimate objectives is exclusive. Measures restricting freedom of expression which have been motivated by other interests, even if these measures are specifically provided for by law, breach these legal guarantees.

Third, any restrictions must be reasonable, and necessary or justifiable in a democratic society. Given the pivotal importance of freedom of expression in a democratic society, it is not enough for the government simply to claim that a restriction relates to a legitimate objective. The restriction must be proportionate to the importance of the legitimate objective. Where the harm to freedom of expression caused by a restriction outweighs the benefit in terms of advancing the legitimate objective, the restriction is unconstitutional. Under this part of the test, courts may require restrictions to be rationally connected to, and no more than necessary to further, a legitimate objective.

These conditions have their counterparts in all of the constitutions of the countries under specific consideration here. For example, Section 42 (2) of the Constitution of Malawi provides:

> Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

Article 20(3) of the Zambian Constitution provides:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
>
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
>
> (c) that imposes restrictions on public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

NATIONAL LAW OBSCENITY PROVISIONS

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Most countries in the region have obscenity laws or provisions which are broadly similar in nature. For example, the Malawi *Censorship and Control of Entertainments Act*, prohibits undesirable publications, defined as material which is indecent or obscene, is offensive or harmful to public morals, or is contrary to the interests of public safety or public order.(16) Material which is likely to give offence to the religious convictions of any section of the public, to bring any member or section of the public into contempt or to harm relations between sections of the public is also defined as undesirable. Section 177 of the Zambian Penal Code prohibits a variety of obscene publications, along with any other material tending to corrupt morals.(17) The Lesotho *Proclamation 9 of 1912*, simply prohibits indecent or obscene publications.(18)

Under the Malawi Act, it is an offence to import, publish, manufacture, make or produce, distribute, display, disclose with reference to any judicial proceedings, exhibit or sell, or offer for sale undesirable material. In Zambia, it is an offence to make, produce, import, convey, export, advertise, publicly exhibit, put in circulation in any manner or be engaged in any business concerned with prohibited material. Significantly, it is also an offence simply to possess such material. The Lesotho Proclamation prohibits the importation, manufacture, production, sale, distribution or public exposure of indecent or obscene material.

The Malawi Act exempts certain materials, including *bona fide* reporting of judicial proceedings, publications "of a technical, scientific or professional nature *bona fide* intended for the advancement of or for use in any particular profession or branch of the arts, literature or science and approved for such purpose by the Minister; and any publications of a *bona fide* religious character."(19) The provisions in Lesotho and Zambia contain no exemptions.

The various laws have different enforcement mechanisms. The Malawi Act establishes a Censorship Board with the power to declare whether or not any material is in its opinion undesirable within the meaning of the Act.(20) It may also exempt any person or institution from any provision of the Act.(21) In Lesotho, District Officers may, upon receiving a complaint which they believe to be well-founded, seize impugned material by force and destroy it, where warranted. Such power is subject to an appeal to the courts by the owner. In Zambia, the provision is applied in the regular way by the criminal courts.

CONSTITUTIONALITY OF OBSCENITY PROVISIONS

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In order to determine whether any law is contrary to the right to freedom of expression as guaranteed under national constitutions and international law, the following questions must be examined:

(1) Does the restriction interfere with the right to freedom of expression as guaranteed under the Constitution?

(2) Is the restriction "prescribed by law" or "under the authority of any law"?

(3) Does the restriction serve a legitimate objective of sufficient importance to warrant overriding a constitutionally protected right?

4. **Is the restriction reasonable, and necessary or justifiable in a democratic society?**

(1) Does the Restriction Interfere with the Right in Question?

The purpose of the threshold 'interference test' is to ensure that the strict requirements of constitutional law are applied only in the context of 'restrictions' which actually do limit freedom of expression. This test should, however, be a liberal one and both the effect and the objective of the legislation should be examined to determine whether there is an abridgement of freedom of expression. In this case, the various restrictions have both the purpose and the effect of banning and restrictively classifying publications, films and so on. As such, they clearly interfere with the right to freedom of expression.

(2) Is the Restriction Prescribed by Law?

Restrictions on fundamental rights must be prescribed by or under the authority of law. In *The Sunday Times* case, the European Court of Human Rights set the standard that should be followed in determining whether a restriction was prescribed by law:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.(22)

A restriction does not satisfy the 'prescribed by law' part of the test if it is so vague that citizens cannot reasonably predict what the requirements of the law are. Such a statute or such part thereof will be void on grounds of vagueness.

The laws outlined above prohibit publications which are obscene, indecent or tend to corrupt morals. The Malawi law goes further, prohibiting a range of other material, including where it is "offensive or harmful to public morals".(23) None of the various laws define any of these terms, leaving wide scope for interpretation.

The words 'indecent' and 'obscene' have been rejected in some jurisdictions as being excessively vague.(24) In the US case, *ACLU v. Reno*, the constitutionality of a statute employing the word 'indecent' without further definition was found to be so "unconstitutionally vague … as to violate the First Amendment":

> Indecent in this statute is an undefined word which, standing alone, offers no guidelines whatsoever as to its parameters. Interestingly, another federal crime gives a definition to indecent entirely different from that proposed in the present case [18 USC para. 1461 states, "The term 'indecent' as used in this section includes matter of a character tending to incite arson, murder or assassination"]. While not applicable here, this example shows the indeterminate nature of the word and the need for a clear definition, particularly in a statute which infringes upon protected speech.(25)

This decision was upheld by the US Supreme Court which also focused on the problem of vagueness.(26)

The terms "offensive or harmful to public morals", found in the Malawi legislation, are unacceptably vague. It is quite unclear what these words mean. This unacceptably large 'grey area', common in laws restricting sexual material, would appear to result not from a lack of capacity or effort on the part of drafters or legislators. Rather, it would seem to be the consequence of an explicit desire to include inherently nebulous concepts within these laws so as to enable application whenever public concern is raised in relation to certain material. One key function of human rights is precisely to protect against politically-motivated restrictions of this sort.

Instead of simply relying on vague terms, some legislators and courts have tried to provide more detailed definitions of precisely what is prohibited. For example, in *Miller v. California*, the US Supreme Court set down what it deemed to be the appropriate standard in relation to obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a

> whole, appeals to the prurient interest … ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.(27)

The Canadian Criminal Code defines obscene material as follows:

> For the purposes of this Act, 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, shall be deemed to be obscene.(28)

The Supreme Court of Canada has extensively interpreted the meaning of "undue exploitation" in this section, holding that the dominant test is a community standards one. However, "it is a standard of tolerance, not taste … not what Canadians think is right for themselves to see [but] what the community would [not] tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."(29) The Court distinguished between three types of sexually explicit material, classifying each in terms of the test for "undue exploitation":

> [T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.(30)

In South Africa, legislators have opted for a detailed list of prohibited material. Schedule 1 of the 1996 *Films and Publications Act*, as amended, defines the XX Classification of prohibited publications as material which contains a real or simulated visual presentation of:

a. child pornography;
b. explicit violent sexual conduct;
c. bestiality;
d. explicit sexual activity which degrades a person and which constituted incitement to cause harm; or
e. the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm.

In the cases of Malawi and Lesotho, an additional problem resulting from vagueness is the absence of adequate guidelines to implementing authorities such as the Censorship Board and District Officers. It is well-established that where bodies exercise discretion which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate guidelines and effective control. The effect of provisions granting broad discretionary regulatory powers is unforeseeable and they are open to arbitrary abuse. They cannot, therefore, be regarded as being "prescribed by law".

The Court of Appeal of Tanzania has held:

> [A] law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by Article 30(2) of the Constitution only if it satisfies two

> essential requirements. First such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decision, and provide effective control against abuse by those in authority when using the law.(31)

In Canada, the Ontario High Court held:

> [I]t is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". 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 an official; such limits must be articulated with some precision or they cannot be considered to be law.(32)

The South African Constitutional Court has clearly pointed to the dangers of granting excessive discretion to executive or administrative authorities:

> It is incumbent upon the legislature to devise precise guidelines if it wishes to regulate sexually explicit material. Especially in light of the painfully fresh memory of the executive branch of government ruthlessly wielding its ill-checked powers to suppress political, cultural, and, indeed, sexual expression, there is a need to jealously guard the values of free expression embodied in the Constitution of our fledgling democracy.(33)

By granting administrative bodies vague and inherently broad powers, the Malawi and Lesotho laws provide these bodies with an unacceptable degree of discretion in restricting a fundamental right. In the case of Malawi, for example, the Censorship Board has the power to refuse an application for a cinematograph exhibition certificate, entertainment permit, or film permit or to attach such terms and conditions to certificates or permits as it deems appropriate,(34) while in Lesotho the District Officer can forcibly seize and destroy material. These problems are exacerbated where the individuals or bodies exercising the relevant powers are close to government. In such cases, the temptation to abuse the power for political reasons further trenches on the right to freedom of expression. This is the case, for example in Malawi, where the Minister has the power to exempt material under the art, education and science provision.

(3) Does the Restriction Serve a Legitimate Objective?

Restrictions on freedom of expression must serve a legitimate legislative objective which is of sufficient importance to justify limiting a fundamental right. It is clear that the prevention of harm to children satisfies this standard. It is much less clear that the objective of preventing offence to public sensibilities warrants restricting freedom of expression.

Specifically, in order to determine whether restrictions in the context of obscenity laws are justified, it is necessary to examine a number of important factors: the history of the impugned legislation; whether simple possession of obscene material should be a

criminal offence; whether there has been an effort to distinguish ‘offensive’ material from material that is actually harmful; and how the protection of children has been addressed.

- **The History of the Impugned Legislation**

Nigerian courts have pointed out that in order to determine whether a law passes constitutional muster:

> [T]he history of that law and the surrounding circumstances in which that law came into our statute book, the underlying object of that law and the mischief or evil it was aimed at preventing must of necessity be considered.(35)

Almost all the laws relating to obscenity in southern Africa are directly inherited from European colonialism. It should be observed that during the late nineteenth century and early twentieth century, Britain and the United States experienced a period of what might be described as "moral fundamentalism".(36) The moral views of the ‘majority’ (i.e. the dominant culture) were not open to debate but deemed to be ‘true’. Those who communicated or received information which contravened these values were to be punished. The law articulated the underlying fear that if divergent views were permitted, ‘corruption’ of society would result.

These puritanical conceptions of morality were inevitably influenced by religious and cultural beliefs and prefaced by paternalistic cultural assumptions. They seem also to have been influenced by a backdrop of social-Darwinist theories which questioned the innate intelligence of different racial groups, at a time when European powers were ‘acquiring’ territories overseas. In South Africa, for example, even the so-called ‘liberal’ segregationists saw ‘race purity’ and the ‘evils of miscegenation’ as a matter of fact. Even to challenge this view would have been seen as immoral. In addition, African culture was considered to be ‘unsuitable’ for urban conditions, as Africans were bound to be influenced by "only the evil sides of white civilisation and none of the good". Immorality and drunkenness, segregationists believed, were too potent for ‘natives’ to resist.(37) The fear of ‘impurity’ or corruption justified purity for purity’s sake and, during this period, allowed for no sense of proportion, as the following quotation clearly indicates:

> The white slave traffic was first exposed by W.T. Stead in a magazine article, ‘The Maiden Tribute’. The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject.(38)

- **Simple Possession**

Simple possession of obscene material, for example for private use, has often been distinguished from other activities such as production, importation, public display or

possession for certain purposes, such as sale. Simple possession is an area where there are important overlaps between the rights to privacy, to freedom of thought and opinion, and freedom of expression. It is significant that the right to hold opinions without interference, guaranteed by Article 19 of the *International Covenant on Civil and Political Rights*, is an absolute right, to which no restrictions are permitted. In this respect it is, of course, quite different from the right to freedom of expression.

In a case before the Constitutional Court of South Africa, a law criminalising the possession of obscene material was unanimously held to be unconstitutional and struck down as contrary to the right to privacy. The Court placed considerable reliance on the fact that the law extended to simple possession:

> What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy. Here the invasion is aggravated by the preposterous definition of "indecent or obscene photographic matter" which section 1 of the statute contains. So widely has it been framed that it covers, for instance, reproductions of not a few famous works of art, ancient and modern, that are publicly displayed and can readily be viewed in major galleries of the world.(39)

One of the seven judges, in a concurring opinion, also found the law to be contrary to the right of freedom of expression. The other judges, however, decided that the law was so blatantly inconsistent with the right to privacy that it was unnecessary to engage in an analysis of whether it also breached the right to freedom of expression. The court wanted to set a strong precedent signalling that the Constitution would not countenance the continuation of laws which allowed for State interference with private emotions and thoughts:

> The emphasis… with regard to the individual's right to privacy has to be seen against the backdrop of our history and the fact that constitutional protection of this right is new in this country. It is a right which, in common with others, was violated often with impunity by the legislature and the executive (for example, s. 16 of the Sexual offences Act 23 of 1957 prohibited interracial intercourse and marriage; s. 71 of the Internal Security Act 74 of 1982 and s. 118 of the Post Office Act 444 of 1958 authorised or permitted interference with private communication). Such emphasis is therefore necessary particularly in this period when South African society is still grappling with the process of purging itself of those laws and practices from our past which do not fit in with the values which underpin the Constitution - if only to remind both authority and citizen that the rules of the game have changed.(40)

The US Supreme Court has also held that criminalisation of simple possession of obscene materials violates the right to privacy:

> [A] prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home… takes on an added dimension. For fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one’s privacy… Whatever the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house,

> what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.(41)

Courts in other countries have also viewed possession offences with extreme suspicion, even if they have not necessarily struck down laws exclusively on that basis. The Canadian Supreme Court, for example, in upholding the obscenity provisions in the Criminal Code, took special note of the fact that they did not extend to the private use or viewing of obscene materials:

> I would note that the impugned section … has been held by this Court not to extend its reach to the private use or viewing of obscene materials.(42)

One problem with possession offences is that it has not yet been established that criminalising possession is an effective way of preventing the harm that may flow from production (this is discussed in greater detail below, under Rational Connection).

- **Offensive v. Harmful**

Courts in many jurisdictions have distinguished 'offensive' material from material that is actually harmful, only allowing restrictions which have as their objective the prevention of harm. The European Court of Human Rights, for example, has stated that freedom of expression is applicable "to 'information' or 'ideas' that ... offend, shock or disturb the State or any other sector of the population."(43)

Historically, States have often been guilty of a form of paternalism in applying restrictions on sexually explicit material. Such paternalism is inconsistent with human rights guarantees, including freedom of expression, which presume that all adults are equal and responsible moral agents. It is not for a judge, or even elected officials, to decide what materials we should or should not be able to access, in the absence of a real risk of actual harm. The use of laws on sexuality to enforce apartheid conceptions of racial purity provide a stark illustration of the danger of allowing the State to play the role of moral custodian.

In *R. v. Butler*, the Canadian Supreme Court considered the legitimacy of a provision prohibiting the production or distribution of obscene material. The definition, quoted above, was very limited in scope. The Supreme Court specifically held that the State could not restrict expression simply because it was distasteful or did not accord with dominant conceptions of what was appropriate. It upheld the legislation, however, on the basis that it was designed to prevent harm to society, by rooting out material which undermined basic human rights, such as equality between men and women:

> [Earlier legislation on obscenity's] dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered to be inherently undesirable, independently of any harm to society. I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the

> Charter. … In my view, however, the overriding objective of S.163 is not moral disapprobation but the avoidance of harm to society.(44)

ARTICLE 19 is firmly of the opinion that any obscenity restrictions must be aimed at preventing real harm and not simply at preventing 'offence to public sensibilities', sometimes misleadingly described as '*harm* to public morals'. In general, this means that expressions - pictures, films and so on - of activities that are themselves legal, should also be legal. Obviously this applies only where the production of the expression is itself legal and any individuals involved are acting by consent.

- **Protection of Children**

There is almost universal agreement that obscenity provisions designed to protect children from harm pursue a legitimate objective. Children, unlike adults, are not fully responsible moral agents and lack the capacity to make choices with regard to sexual matters. While there is inevitably an arbitrary element to such distinctions - an individual is no more capable of making certain decisions on his or her sixteenth birthday than the day before and everyone matures at a different rate - for legal certainty, some cut-off is necessary. Logically, this should be the age of consent for sexual relations although some jurisdictions have argued for a higher limit.

Prohibitions designed to protect children from involvement in sexual activities may serve a number of specific legitimate objectives. Such prohibitions may seek to prevent the production of sexually explicit material involving the actual abuse of children, an *ipso facto* criminal offence, or to prevent the distribution of material which incites adults to commit sexual offences against children.

In addition, it is widely accepted that decisions about what children may see or watch should be subject to parental control. To render that control effective, a number of what are commonly termed 'time, manner, place' restrictions may be legitimate. One such mechanism is mandatory classification of films and videos, so that users have an idea of what sort of content they contain. Indeed, this requirement is legitimate not only to assist adults in protecting children but also to enable adults to screen out material they themselves do not wish to view. Restrictions on the manner of display of sexually explicit material and on the sale of such material to minors may also be legitimate. In addition, many countries restrict the broadcasting of material that may be harmful to children, for example by subjecting broadcasters to codes of conduct imposed by independent regulatory bodies or by prohibiting the broadcast of such material at certain times.

However, while there is little disagreement about the legitimacy of these objectives, there is a great deal of debate about whether specific measures are rationally connected to these objectives and whether they are the most appropriate measures to achieve them. It would clearly not, for example, be legitimate to ban all films which contained material which might be harmful to children given that there are less drastic ways of protecting children, as described above. As a general principle, it is not legitimate to totally restrict adult

access to material simply because it might be harmful to children should they obtain access to it. These issues are discussed further below.

(4) Is the Restriction Reasonable, and Necessary or Justifiable in a Democratic Society?

The underlying rationale here is to ensure that restrictions, even where they serve legitimate objectives, are finely-tuned and proportionate. It is incumbent upon governments, even when seeking to achieve a legitimate objective, to exercise due care in restricting rights.

Different courts have approached this matter differently but two central themes run through the jurisprudence. First, the measures must be carefully designed and expected to actually advance the legitimate objective in practice. Measures which purport to serve a legitimate goal but which in practice fail to achieve it cannot be justified. Second, the effect of any restriction must, so far as is possible, be limited to the harmful expression which it is designed to restrict. This condition means that restrictions which limit legitimate speech, as well as the harmful material, cannot be justified.

Under the European Convention of Human Rights, an interference with freedom of expression must not only be prescribed by law and have a legitimate objective; it must also be ‘necessary in a democratic society’. In order to determine whether a restriction was necessary in a democratic society, the court examines whether the interference:

> ... corresponded to a ‘pressing social need’, whether it was ‘proportionate to the legitimate aim pursued’, and whether the reasons given by the national authorities to justify it are ‘relevant and sufficient’ under Article 10 (2).(45)

Uniquely, the European Court has developed the doctrine of margin of appreciation, according to which States have some latitude in deciding whether, within their cultural frameworks, certain types of expression may be limited but the scope an application of this margin of appreciation remains subject to European supervision. As regards cases dealing with matters like obscenity and blasphemy, however, the Court has tended to allow States a wide measure of discretion in deciding what is appropriate for their societies.

The Inter-American Court has also held that in order to be justified, a restriction on freedom of expression must be "necessary to ensure" one of the legitimate aims. The Court adopted the test of necessity articulated by the European Court and specifically requires the State to show that "the legitimate objective invoked cannot reasonably be achieved through a means less restrictive of a right protected by the Convention."(46)

National courts have also elaborated standards in relation to this part of the test. The Constitutional Court of South Africa, for example, has stated:

> The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.(47)

The Tanzanian Court of Appeal, interpreting the general limitation clause under the Constitution, noted:

> [T]he limitation imposed by such a law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality ... If the law ... does not meet [this requirement], such a law is not saved by Article 30(2) of the Constitution, it is null and void.(48)

One of the clearest statements of the standard to be applied comes from the Supreme Court of Zimbabwe. In *Nyambirai v. National Security Authority*, the Supreme Court laid down a three-tier test for assessing the legitimacy of restrictions on freedom of expression, of which the latter two parts are particularly relevant here:

> In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
>
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
>
> (ii) the measures designed to meet the legislative objective are rationally connected to it; and
>
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish
>
> the objective.(49)

Part (iii) of the three-tier test is known in legal shorthand as overbreadth.

- **Rational Connection**

This part of the test looks at whether the measures taken to achieve a legitimate objective are rationally connected to it. This is done by enquiring as to the extent to which the specific restriction furthers the intended objective. It is incumbent on the authorities to

show that they have some evidence, or at least a rational basis for believing, that the restriction will advance the objective. Mere supposition or assumption is not enough.

In some cases, the rational connection will be obvious. Classification of films clearly furthers the objective of protecting children from harm to the extent that parents are able to supervise their children's viewing and does not prevent adults from viewing such material. The justification for prohibiting the production of child pornography is equally obvious. Criminalisation of the dissemination of child pornography has been justified on the basis that it is probably the only effective way of limiting the production of child pornography. Given the clandestine nature of the production business, the US Supreme Court held:

> [T]he need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.(50)

In that case, the law in question prohibited promotion of any performance involving sexual conduct by a child under 16, sexual conduct being defined to include the "lewd exhibition of the genitals".

The rationale for banning simple possession of child pornography, however, has been questioned, quite apart from the question of whether or not it is a legitimate objective. The evidence would appear to show that a ban on possession would have little impact on the production of such material, and hence do little to prevent the abuse of children in that way. Indeed, by using the Internet, it is possible to transmit such material easily around the world and the detection and control of simple possession becomes random, if not almost impossible.

In a controversial Canadian case, a judge in British Columbia held, on the evidence presented, that possession of at least mildly erotic child pornography was as likely to satisfy the urges of paedophiles as to incite them to sexually abuse children. This, in part, led to the striking down of part of a law prohibiting the simple possession of a very broad range of material.(51) The decision was upheld on appeal to the British Columbia Court of Appeal and may be appealed further to the Supreme Court of Canada.(52) The point is that authorities must at least have a reasonable basis for believing that the measures they have taken will actually further the legitimate objective.

- **Overbreadth**

Even if a restriction is rationally connected to a legitimate objective, it may fail to pass constitutional muster if it is not proportionate or interferes with the right more than is necessary. Where the restriction interferes with legitimate speech or goes beyond what is necessary to promote the legitimate objective - in short, where it is overbroad - it cannot be justified.

For example, it may be quite acceptable for adults to view certain sexually explicit material even though that same material may be harmful to children. To satisfy this part of the test, restrictions designed to prevent this harm to children must try to accommodate adults. While society may take steps to protect the weaker and more vulnerable, it should not impose those restrictions on those for whom the material is not harmful. A blanket ban on such material would not be legitimate, particularly given that there are a number of more appropriate, less intrusive means of achieving the same objective. Classification and time, manner, place restrictions have proved amply adequate for the protection of children and should be used in preference to crude instruments such as blanket bans.

Similarly, banning films, for example, on the basis that they may trigger an anti-social reaction in a very small number of perhaps morally deficient individuals should be subjected to the closest scrutiny under this part of the test. In particular, one must consider whether the drastic measure of denying the whole population access to certain material on this basis can be justified. Relevant questions are the extent of the causal link between the material and the anti-social or criminal behaviour, the extent and degree of the harmful behaviour and whether other means of preventing the harm are available.

The utmost caution should be used whenever a system of prior restraint is envisaged. In most, if not all, circumstances, the application of subsequent penalties is sufficient to achieve any legitimate objective. On the other hand, the risk of a system of prior restraint being abused to prevent legitimate material from reaching the public is significant. A key problem with prior restraint is that it places decision-making in the hands of an administrative or executive body. In general, restrictions on freedom of expression should be imposed only by bodies with sufficient guarantees of independence, such as the courts.

The American Convention on Human Rights deems the potential danger of any system of prior restraint so significant that it bans them outright.(53) The European Court, while not taking such a categorical approach, has demonstrated a grave suspicion of systems of prior restraint:

> Article 10 of the (European) Convention does not in terms prohibit the imposition of prior restraints on publication, as such….On the other hand the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court.(54)

It may be noted that film and video classification systems, as such, are not a form of prior restraint. Where, however, classification bodies have the power to refuse to classify a film or to prevent it from being commercially released, this constitutes a system of prior restraint.

RECOMMENDATIONS

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ARTICLE 19 makes the following recommendations with a view to ensuring that obscenity laws in southern Africa respect constitutional and international human rights guarantees, particularly relating to freedom of expression:

1. Reform of Existing Obscenity Laws

Existing provisions dealing with obscenity and sexually explicit material in most countries in southern Africa are outdated, and inconsistent with constitutional and international guarantees of freedom of expression. A comprehensive review of all such provisions, should be undertaken to ensure that they respect human rights guarantees, as elaborated in these recommendations. Those which do not, including archaic common law offences such as "conspiracy to corrupt public morals" and "outraging public decency", should be repealed. Any restrictions or bans previously imposed on the basis of provisions which are to be repealed should themselves be lifted.

Any provisions relating to sexually explicit material which are to be retained should be brought together into a single statute.(55) Any reformed statute dealing with obscenity should take precedence over all other laws in all cases involving the censorship or control of sexually explicit material.

2. Vague Words and Concepts

Obscenity laws should avoid using vague and subjective terms, such as ‘indecent’, ‘obscene’ and ‘harmful to public morals’, without providing further clarification. Definitions should provide as much clarity as possible by elaborating in detail exactly what is prohibited.

3. The Harm Test

Obscenity laws may only restrict material which can be shown to be harmful. Merely offensive material should not be prohibited. In particular, expressive depiction of legal acts should normally not be prohibited. In addition, restrictions on simple possession may be imposed only where this can be shown to make a practical contribution to a legitimate goal.

4. Child Pornography

Effective measures to control the production, dissemination and use of child pornography may be imposed. Such measures should, however, include a clear and narrow definition of child pornography which does not extend to legal sexual or social activity or to material with a serious literary, scientific or educational value which does not threaten to cause physical or psychological harm to children. They should also be shown to have a practical impact on the production, dissemination and use of child pornography.

5. Publications

Publications should not be subject to prior restraint or classification. Control of any illegal material can adequately be achieved through the imposition of subsequent penalties. Reasonable time, manner, place restrictions may be imposed to ensure that unsuitable publications are not accessible to children.

6. Broadcasting

Broadcasters should not be subject to special bans on what may be broadcast. Suitable time, manner, place restrictions may be imposed to protect children. Regulatory bodies may also require broadcasters to inform viewers, in a manner which accords with the principles underlying film and video classification (see below), of the nature of potentially upsetting programmes. Broadcasting of sexually explicit material should essentially be governed by the principle of diversity, which should be guaranteed by the overall licensing system. This implies that within the broadcasting system as a whole, a range of sexually explicit material can be available but that non-specialised broadcasters, and particularly terrestrial broadcasters, should not provide an undue concentration of sexually explicit material.

7. Film and Video Classification

Films and videos may be subject to mandatory classification in order to enable viewers to decide what to view and to assist parents in supervising children. Classification categories should be based on current, progressive views about sexually explicit material which are supported by a significant segment of the population. Parliament should ensure that classification categories conform to these standards. General standards relating to classification categories should, so far as is reasonable, be set out in the law while more specific standards should be published from time-to-time by the body responsible for classification. Classification should take into account matters which fall within the art, education and science exemption clause.

Existing classifications and any refusals to classify should be reviewed to bring them into line with amended standards. Any film or video should be eligible for re-classification once a certain period of time – for example five years – has expired since it was last classified.

The classification system should not allow for censorship but may allow for consultations with the applicant in order to achieve a lower classification (that is, recommended for a younger audience) for a particular film or video. No film or video should be refused a classification but the body responsible for classification may be given the power to refer difficult cases, for example where child pornography is suspected, to the courts for appropriate legal action.

Minimum procedural guarantees of fair treatment should be respected. Applicants and other interested parties must be given an opportunity to be heard or to present written

submissions. Decisions should be made in a timely fashion and be accompanied by written reasons for all but the lowest classification. Provision should be made for an administrative appeal to a review body and for an appeal from that body to the courts.

8. Theatre

There should be no mandatory classification of live public entertainment. The theatre industry may, as a matter of self-regulation, provide viewers with information relating to sexually explicit material in plays and other live performances.

9. Regulatory Bodies

Any body responsible for regulation in this area, including film and video classification or imposing broadcast standards, should meet minimum standards of independence and accountability. The appointments process should be open, transparent and participatory, and designed to ensure that the collective membership is representative of the society as a whole. Individuals should be appointed on the basis of relevant expertise and anyone who holds party political or public office, or who has a vested interest in the relevant area, should be ineligible for appointment. Members should hold office for a fixed term and should be subject to removal only in limited, specified circumstances. Decisions of regulatory bodies should be subject to appeal to the courts and ideally also to a quasi-judicial review body. Regulatory bodies should be required to publish and widely disseminate an annual report detailing their activities and providing a public financial accounting.

10. Art, Education and Science exemption

It is recommended that obscenity laws, including those relating to films, videos and broadcasting, provide an exemption for *bona fide* technical, scientific, professional, educational, documentary, literary or artistic material, or any other material which it is in the public interest to make available.

CONCLUSION

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The issue of obscenity and the legitimacy of legal controls on sexually explicit material, both print and audio-visual, has provoked an increasingly wide ranging and fierce debate across southern Africa in recent years. Striking the balance between the fundamental

right to freedom of expression and the public interest in protecting children and safeguarding others from harm is indeed far from easy. But as problematic as it is, this is a task which the authorities and other interested parties in the sub-region need urgently to address. In the past, the balance has been tilted too far in favour of perceived moral and social requirements while too little importance has been given to the imperatives of freedom of thought and expression. ARTICLE 19 hopes that this report will help the countries of southern Africa to establish a better balance between these competing interests -- one which respects their own constitutional guarantees, as well as their obligations under international law, while providing adequate protection to vulnerable groups.

ENDNOTES

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1. *Fantasy Enterprises CC t/a Hustler The Shop v. Minister of Home Affairs & Ors*., unreported, Case No. A 159/96 and *Louis Nasilowski & Ors. v Minister of Justice & Ors*., unreported, Case No. 158/96. See also Mue, N., "Indecency Laws Declared Unconstitutional", *Southern Africa Media Law Briefing*, Vol. 3, No. 2, 1998.
2. Act 37 of 1967.
3. Under Article 21, which guarantees, *inter alia*, the right to freedom of expression.
4. See Pollecutt, L., "SA Board passes vital test" *Southern African Media Law Briefing*, Vol. 3, No. 3, 1998.
5. Carver, R., "Malawi" in *Who Rules the Airwaves?: Broadcasting in Africa* (ARTICLE 19 and Index on Censorship: London, 1995), 44.
6. Section 14 of the Constitution of Lesotho, Section 35 of the Constitution of Malawi and Article 20 of the Constitution of Zambia.
7. Section 38 of the Constitution of Malawi and Article 21 of the Constitution of Zambia.
8. Section 36 of the Constitution of Malawi and Article 20(2) of the Constitution of Zambia.
9. Section 37 of the Constitution of Malawi.
10. *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49; see also *Compatibility of "Desacato" Laws with the American Convention on Human Rights*, Annual Report of the Inter-American Commission on Human Rights 1994, 202 and 205.
11. See *Fantasy*, note , pp. 5-9; *Mulundika & Ors v. The People*, unreported, Case No. 95 of 1995, 13-14 (Supreme Court of Zambia); *Re Munhumeso & Ors*, 1995 (2) BCLR 125, 130B (Supreme Court of Zimbabwe).
12. *State v. The Ivory Trumpet Publishing Co.* [1984] 5 NCLR 736, 747 (Nigerian High Court).
13. Kanyongolo, F., "The Law and Practice of Censorship in Malawi: a Critical Review", *Law & Theology Conference on Social Change in Malawi: Legal and Theological Perspectives*, Chancellor College, 29-30 October 1993.
14. *West Virginia State Board v. Barnette*, 319 US 624 (1942), 638 (US Supreme Court).
15. *De Klerk & Anor v. Du Plessis & Others*, 1994 (6) BCLR 124 (T), 128-9 (Supreme Court of South Africa, Transvaal Provincial Division).
16. Cap. 21:01.
17. Penal Code Act, Chapter 57, Laws of Zambia.

18. Cap. 22.
19. Section 23(1)(4).
20. Section 24(1).
21. Section 23(5).
22. *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 49.
23. Section 23(2)(a).
24. For example, in South Africa and the United States.
25. *ACLU v. Reno*, 929 F. Supp. 824 (1996), 861.
26. *Reno v. ACLU*, 26 June 1997, No. 96-511.
27. *Miller v. California*, 413 US 15, 24.
28. S. 163(8) of the Criminal Code, RSC 1985, c. C-46.
29. *R. v. Butler* [1992] 1 SCR 452, 477, 485.
30. *Ibid.*, 485.
31. *Pumbun v. Attorney General* [1993] 2 LRC 317, 323.
32. *Re Ontario Film & Video Appreciation Society v. Board of Censors*, (1983) 41 OR (2d) 583, 592. See also the decisions of the European Court of Human Rights in *Silver & Ors v. The United Kingdom*, 25 March 1983, 5 EHRR 347, 33 and *Malone v. United Kingdom*, 2 August 1984, 7 EHRR 14, 27.
33. *Case & Anor, v. Minister of Safety and Security & Ors*, 1996 (5) BCLR 609 (Constitutional Court of South Africa), para. 63 (*per* Mokgoro).
34. Sections 12(1), 16(1) and 21(1*), Censorship and Control of Entertainments Act.*
35. *State v. The Ivory Trumpet Publishing Co.*, note , 750.
36. See, for example, the Comstock Act of 1873.
37. Legassick, M., "Race, Industrialisation and Social Change in South Africa: The Case of RFA Hoernle", *African Affairs*, Vol. 75, No. 299, 1976.
38. *Miller v. California*, Note , 26.
39. *Case & Anor*, note , para. 63.
40. *Ibid.*, para. 100 (*per* Langa).
41. *Stanley v. Georgia*, 394 US 557 (1969), 564-5.
42. *R. v. Butler*, note , 506.
43. *Handyside*, note , para. 49.
44. Note , 492-3.
45. *The Sunday Times Case*, note , para. 62.
46. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion, OC-5/85 of 13 November 1985, Series A, No. 5, 7 HRLJ 74 (1986), 186.
47. *State v. Makwanyane & Anor*, 1995 (6) BCLR 665, para. 104, *per* Chaskalson.
48. *Pumbun v. Attorney General*, note , 323.
49. *Nyambirai v. National Social Security Authority & Anor*, 1995 (9) BCLR 1221, 1231.
50. *New York v. Ferber*, 458 US 747 (1982), 760.
51. The law would, for example, have prohibited possession of an artistic depiction of two 17-year-olds engaged in perfectly consensual, legal sex, which had never been shown to anyone.
52. *R. v. Sharpe*, 30 June 1999, Docket CA025488 (BCCA).
53. Article 13(2).
54. *The Observer and Guardian v. United Kingdom*, 26 November 1991, 14 EHRR 153, para. 60.
55. The Williams Committee, appointed to examine and report on obscenity and film censorship in the United Kingdom, noted: "The law is scattered among so many statutes, and these so often overlap with each other and with the various common law offences and powers which still exist in this field, that it is a complicated task even to piece together a statement of what the law is, let alone attempt to wrestle with or resolve the inconsistencies and anomalies to which it gives rise." Cmnd. 7772, para. 2.29.