CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 20/95

Case, Patrick
Case, Inga

and

The Minister of Safety and Security
The Minister of Justice
The Attorney-General

CASE NO CCT 21/95

Curtis, Stephen Roy

and

The Minister of Safety and Security
The Minister of Justice
The Attorney-General

Heard on: 5 September 1995

Delivered on: 9 May 1996

JUDGMENT

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[1] **MOKGORO J**: This case concerns the simultaneous adjudication of the matters of *Patrick and Inga Case* (Case No. CCT 20/95), and *Stephen Roy Curtis* (Case No. CCT 21/95) (hereinafter, when referred to collectively, the "Applicants".) All three were charged with the contravention of section 2 of the Indecent or Obscene Photographic Matter Act, 37 of 1967, as amended (hereinafter, the "Act" or the "1967 Act"), in the Randburg Magistrates' Court.

[2] The charges were based on the possession by two of the Applicants (Patrick and Inga Case), (the "Case Applicants"), of some 150 video cassettes containing sexually explicit matter, and by another of the Applicants (Stephen Roy Curtis), of five similar cassettes. The cassettes in the possession of the Case Applicants were seized, along with various items of video-playback and recording equipment, by the South African police in the course of a raid on the Cases' Sandton residence on February 1, 1993. The cassettes in the possession of Applicant Curtis were taken from Mr. Curtis in a police operation conducted in a shopping centre parking lot in Northgate, Johannesburg.

[3] The Case Applicants made their first appearance in the Randburg Magistrates' Court on February 24, 1995. After a number of further appearances they applied in terms of section 103(3) of the Constitution of the Republic of South Africa, Act 200 of 1993 (hereinafter, the "Constitution"), for the proceedings to be postponed pending an application to the Supreme Court regarding the constitutional status of section 2(1) of the Act. The application was granted without hearing any evidence; proceedings in the Magistrates' Court were suspended in terms of section 103(4)(b) of the Constitution, and referred to the Witwatersrand Local Division of the Supreme Court. Appearing before Schabort, J., the Applicants applied to have the matter referred to this Court in terms of section 103(4) of the Constitution, alleging that section 2(1) of the Act was inconsistent with several sections of the Constitution. Applicants' motion was granted, and the matter duly referred. Proceedings against Applicant Curtis followed a parallel route to this Court, and the two cases were heard together on September 5, 1995.

The Question Referred

[4] The learned judge made an order referring the following question to this Court for consideration:

> [W]hether the provisions of section 2(1) of the Indecent or Obscene Photographic Matter Act, Act 37 of 1967, are inconsistent with the provisions of Chapter 3 of the Constitution, in particular the provisions of section 8 (equality), 13 (the right to privacy), 14(1) (the right to freedom of conscience), 15 (freedom of speech, expression and artistic creativity), 24 (administrative justice) and 33(1) (the permissible limitations of the fundamental rights entrenched).

[5] The President of this Court directed that the referred question be dealt with as an abstract question of law. The Minister of Home Affairs and the Government of the Republic of South Africa (respectively, the first and second intervening parties in this matter), and the Applicant submitted briefs, as also did several *amici curiae*.[1] The first and second intervening parties contended that it was necessary to lead evidence in order to determine the referred question. Such evidence, they argued, would facilitate this Court's consideration of the reasonableness or otherwise of any limitations placed upon any fundamental rights. For the reasons that appear below, I believe that this matter can be disposed of as an abstract question of law. I therefore do not believe that such evidence is necessary.

The 1967 Act and Obscenity Law in South Africa

[6] A brief historical survey of obscenity law in South Africa furnishes a useful background to a consideration of the Act and its purpose. Pre-Union cases established that the common law crime of public indecency, defined as "conduct in public [which] of its very nature must tend to

[1]People Opposing Women Abuse; NICRO Women's Support Centre; Advice Desk for Abused Women; Rape Crisis, Cape Town; NISAA Institute for Women's Development; Women Against Women Abuse (all of these organisations joined in a single set of papers); The Christian Lawyers Association; Centre for Applied Legal Studies; and The Freedom of Expression Institute (the latter two organisations joined in a single set of papers.)

the depravement of the morals of others",[2] may consist in the publication of an "indecent" sketch.[3] In 1905, a Natal court convicted an editor responsible for an "obscene" newspaper report of public indecency.[4] Statutory provisions in each of the colonies prohibited the importation of indecent or obscene publications.[5] Measures were also enacted to penalise the transmission of such matter through the mails.[6]

[7] After Union, the various colonial statutes relating to the importation and posting of indecent or obscene matter were replaced by the Customs Management Act, 9 of 1913. The consolidating and amending Customs Act of 1944 prohibited the importation of any goods "indecent or obscene or on any other ground whatsoever objectionable"; such goods were subject to forfeiture, and any person who knowingly possessed such goods was guilty of an offense.[7] Domestically produced "indecent" materials remained subject to various pre-Union statutes, including the Cape Obscene Publications Act,[8] provisions of the Transvaal Criminal Law Amendment Act,[9] and the Orange

[2] *Q v Marais* 1886 SC 367, 370 (*per* De Villiers, C.J.)

[3] *R v Bungaroo* 1904 NLR 28, 29-30 (*per* Finnemore, A.C.J.) (*dicta*).

[4] *R v Hardy* 1905 NLR 165. The newspaper published an article describing "immoral practices" between "native" men and "European" women. The court applied a test derived from *R v Hicklin* [1868] L.R. 3 Q.B. 360, 371 ("whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."). The court noted that "[i]t would be impossible to deny that in the works of many writers of ancient times, as well as in those of standard authors of a later period, passages of an extremely indecent and obscene character are to be found, the publication of which in the newspaper press of the present day would be an offense against good morals amounting to public indecency". *Id.* 171.

[5] *E.g.*, § 14 of the Customs Act 10 of 1872 (C); § 38 of the Customs Consolidation and Shipping Act, 13 of 1899 (N); § 3 of the Customs Management Ordinance, 23 of 1902 (T).

[6] *E.g.*, Obscene Publications Act, 31 of 1892 (C) § 7.

[7] Act 35 of 1944, §§ 21, 124.

[8] Act 31 of 1892 (C).

[9] Act 38 of 1909 (T).

Free State Police Offences Ordinance,[10] which were in force until repealed and replaced in 1963, when Parliament enacted the Publications and Entertainment Act (the "1963 Act").[11]

[8] The 1963 Act was the first of three pieces of legislation that form the legal foundation for the modern regulation of materials considered indecent, obscene or immoral. The second was the Publications Act, 42 of 1974 (the "1974 Act"), which repealed and replaced the 1963 Act.[12] The third was the 1967 Act, a section of which is the subject of the present referral. All three Acts trace their lineage to the *Report of the Commission of Enquiry in Regard to Undesirable Publications*, published on October 3, 1956, (the "Cronje Commission Report"), a lengthy and detailed investigation of "indecent, offensive or harmful literature."[13]

[9] Section 2(1) of the 1967 Act provides as follows:

> Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Section 1 defines *indecent or obscene* matter as follows:

> [It] includes photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, Lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.[14]

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[10]Ordinance No. 21 of 1902 (O).

[11]Act 26 of 1963,

[12]The 1974 Act has been the main vehicle for the prohibition of the *distribution* of publications deemed "indecent or obscene or harmful or offensive to public morals". § 47(2)(a) of Act 42 of 1974. *See* para 84, *infra*.

[13]Cronje Commission Report, para 1:4.

[14]*Photographic matter* is defined as: including "any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device."

[10] This 1967 Act definition derived from that in the 1963 Act, which defined matter "harmful to public morals" as material dealing improperly with, *inter alia:*

> "[S]exual intercourse, prostitution, promiscuity, white-slavery, licentiousness, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality, abortion, change of sex, night life, physical poses, nudity, scant or inadequate dress, divorce, marital infidelity, adultery, illegitimacy, human or social deviation or degeneracy, or any other similar related phenomenon."[15]

That definition in turn was based upon the recommendation of the Cronje Commission Report.[16]

[11] Aside from its overt moralism, a legacy of the common law, the statutory regulation of obscenity in South Africa has acquired a distinctive political dimension. As one authority puts it:

> [South Africans] have been subjected to a system of censorship which was intended to impose the Calvinist morality of a small ruling establishment on the entire population. [17]

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[15]Act 26 of 1963, § 6(1)(c).

[16]The Report recommended the proscription of material that

> Describe[s], depict[s], represent[s] or portray[s] one or more of the following in an indecent, offensive, or harmful manner: . . . sexual intercourse, prostitution, promiscuity, white-slavery, licentiousness, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sexual bestiality, abortion, change of sex, night life, physical poses, nudity, scantily or inadequately dressed persons, divorce, marital infidelity, adultery, illegitimacy, human or social deviation or degeneracy, or any other similar related phenomenon. Cronje Commission Report, para 5:93(2)(d).

[17]Van Wyk *Rights and Constitutionalism, The New South African Legal Order* (1994) 282. Some indication of the Cronje Commission's animating premises may be gleaned from the following extracts from its Report:

> As a silent and unobtrusive force, women have had a strong saving influence and significance in all cultures and civilizations. The question now arises whether the honour of women is still regarded as sacred and inviolate or whether it is not perhaps being injured . . . through . . . the various forms of undesirability as expressed in publications. *Cronje Commission Report*, para 3:194.
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> European women are portrayed . . . alluringly in calendars which have been distributed on a considerable scale among the Bantu in recent years . . . consideration must apparently be given at least to the possibility that illustrations of European women are more attractive to the Bantu than those of Bantu women. *Id.* para 3:298.
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> In Undesirable illustrations the female figure is presented . . . pre-eminently in scanty or inadequate attire . . . The position has, in fact, become so serious that any right-minded person will ask what the consequences for Western civilisation and culture in this country are likely to

[12] During the second reading of the Indecent or Obscene Photographic Matter Bill, the Minister of Justice made clear that the mischief at which the Bill was aimed was specifically the apprehended moral subversion of "a Christian, civilised country such as the one in which we are living."[18] The Minister also noted that:

> [I]t is not at all uncommon to find in the possession of one individual several hundreds of these photographs and up to half a dozen more of these films. There would hardly be any doubt that those people who have such photographs and films in their possession, do not only keep them for their own perverse amusement, but also to defile the morals of others, and that flourishing trade in those articles is probably one of the motives behind it.[19]

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be if action to combat [such illustrations] is not taken without delay. *Id.* para 3:188.

[18]19 *Hansard, House of Assembly Debates* (1967) 2659. I do not wish to be understood as holding that parliamentary statements are admissible for the purpose of interpreting the 1967 Act. I refer to such material at this point purely for the purpose of sketching the background to the legislation. The law in South Africa has traditionally been that legislative history is not admissible in the interpretation of a statute. *E.g.*, *Mathiba v Moschke* 1920 AD 354, 362. However, that rule is no longer as firmly entrenched as it once was. In *S v Makwanyane* 1995 (6) BCLR 665 (CC) 678, the Court noted that the exclusionary rule was being relaxed in other jurisdictions, but held that "whether our courts should follow these examples and extend the scope of what is admissible as background material for the purpose of interpreting statutes does not arise in the present case." (*Per* Chaskalson, P.) In *Westinghouse Brake & Equip. Pty Ltd. v Bilger Engineering* 1986 (2) SA 555 (A) 562-63, the Court held that, where the words of a statute are not clear and unambiguous, the court may have regard to the report of a Commission of Inquiry in order to ascertain the mischief aimed at and the state of the law as it was then understood to be. *See also S v Mpetha* 1985 (3) SA 702 (A) 713; *Ex Parte Slater, Walker Securities (SA) Ltd.* 1974 (4) SA 657 (W); Cockram, *Interpretation of Statutes* (1987) 55 ("The present trend would appear to permit limited use to be made of the history of legislation as an aid to its interpretation."). The case for relaxing the exclusionary rule in South Africa is strengthened by the fact that the rule has been considerably relaxed in England, *see, e.g., Pepper v Hart*, [1993] AC 593 (HL) (where legislation is obscure or ambiguous the parliamentary statements of a minister or promoter of the bill could be taken into account). According to Professor Hogg, "[l]egislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the classification of the statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose." *Constitutional Law of Canada* (3d ed.) (1992) 1285.

[19]19 *Hansard, House of Assembly Debates* (1967) 2659. Further, the Minister made clear that the government was not prepared to allow concerns of personal privacy to stand in the way of the effective enforcement of the law; it was time, he said, "for the cloak of non-interference in the personal and private affairs of people to be cast off, and for the problem we have to contend with to be tackled without gloves." *Id.* 2660.

Interpretations of the 1967 Act: The Ambit of the Definition of *Indecent and Obscene*

[13] The sweeping ambit of the definition of *indecent or obscene* material in the Act was acknowledged by courts at an early stage. In *S v R*, it was noted that,

> [T]he legislature could not have overlooked the fact that any person can with comparative ease purchase in most bookshops, cafes or at bookstalls illustrated magazines, books, reproductions or reprints of pictures of art, or pin-ups, which portray or depict licentiousness or lust. Even the pictorial covers, wrappers or containers of some commercial articles, which portray or depict licentiousness or lust are easily obtainable in the open trade.[20]

[14] The Court thus recognised that the legislature had intentionally given a wide ambit to the purported definition, casting the proscriptive net as wide as possible. In an attempt to narrow the scope of application of the concept, the Court in *S v H* imposed a test under which the question in each case was what the "probable effect" of the material would be upon the likely consumer thereof:

> [W]hat the Court has to decide is whether, as a matter of objective judgment, these photographs do or do not have a tendency to deprave or corrupt[21].

That test was, however, rejected in favour of an "objective"one in *S v Nunes.* It was concluded in that case that:

> Dit is duidelik . . . dat die toets is vir 'n hof om te besluit of uit te maak, in elke geval wat voor hom kom, of die betrokke onbetaamlike of onwelvoeglike fotografiese materiaal is in terme van Art. 1, en dit is 'n objektiewe toets.[22]

[15] That the crucial definition in the 1967 Act should have proven problematic in application is hardly surprising: the task of pinning down the scope of prohibitions of this kind has long vexed

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[20]1971 (2) SA 470 (T) 475 *(per* Joubert A.J.)

[21]1974 (3) SA 405 (T) 408.

[22]1975 (4) SA 929 (T) 931. *See also S v Film Fun Holdings (Pty) Ltd.* 1977 (2) SA 377 (E) 378-79 (rejecting the probable effect test in favour of the "objective" test).

South African courts, in a variety of contexts. In the case of *R v Hardy*, in which a newspaper was charged with common law public indecency for publishing a report tending to the "depravation of the morals of the people of Durban", the court acknowledged that the offence was "not capable of very accurate definition."[23] Courts experienced similar difficulties interpreting the words *indecent* or *obscene* in the 1974 Act, section 47(2)(a) of which provides that a publication "shall be deemed to be undesirable if it or any part of it . . . is indecent or obscene". In *Mame Enterprises v Publications Control Board*, the court remarked upon the difficulty in drawing the line between "that which is merely erotically stimulating" and that which is "subversive of morality", holding that "[a]ll that one can try to do is to decide on which side of the line a particular case falls".[24] Williamson, J.A., dissenting in *Publications Control Board v William Heinemann, Ltd*, noted that the kind of determinations the Publications Act called upon a judge to make might often be contingent upon "the background, the character, the surroundings, the experiences and the beliefs of the individual Judge or Judges dealing with the matter."[25] Also dissenting,, Rumpff, J.A., candidly noted that, in the process of vetting publications under the criteria of the 1974 Act, "the subconscious inclination to equate one's own sense of decency with that of the average modern reader is almost irresistible".[26]

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[23]1905 26 NLR 165, 170.

[24]1974 (4) SA 217 (W) 222F.

[25]1965 (4) SA 137 (A) 163F.

[26]*Id.* 161A. The phrase *indecent or obscene* has proven problematic in a variety of contexts. *See, e.g., R v Griezel* 1917 TPD 16; *R v Meinert* 1932 SWA 56, 60-61; *R v Mcunu* 1940 NPD 99, 100; *S v H* 1974 (3) SA 405 (T) 407-08. In *S v Gordonia Printing & Publishing Co. (Pty) Ltd and Another* 1962 (3) SA 51 (C) 53 , the Court did not attempt to determine the meaning of the words in section 2 of Act 31 of 1892 (C), which made the distribution of any "indecent or obscene" publication an offence, but simply accepted the interpretation articulated in *R v Meinert*, under which the phrase was interpreted to mean *subversive of morality*, or *grossly offensive to common propriety*." In *R v W* 1953 (3) SA 52 (SWA) 55D, the court found to be indecent a figurine alleged by the defence to be a reproduction of the famous street fountain in Brussels, depicting a naked boy in the act of urination; the court noted that "[i]t is very likely that our people would regard as indecent what the people of Brussels are said to have tolerated for more than three hundred years."

[16] With respect to the 1967 Act in particular, the root of the problem would appear to be that section 1 of the Act does not provide a true definition of *indecent or obscene*. Instead, following the recommendation of the Cronje Commission,[27] it offers a broad, inclusive and open-ended list of categories of photographic matter. Courts have thus been forced to resort to *ad hoc* enforcement of the Act.

Sexually Explicit Expression and Section 15 of the Constitution

[17] Under our new constitutional order, however, the legislature may enact and the executive may enforce law only subject to the norms set by the Constitution, section 15 of which protects the right of all persons to free expression. It is not for this Court to propose a definition that could live with that right. That would usurp the role of the legislature. Rather, it is our task here to consider, mindful of the Constitution's directive that, if it is possible to save legislation by restrictive interpretation we should do so,[28] whether the existing law comports with the right of free expression embodied in the Constitution.

[18] As already noted, Applicants submitted that the Act constitutes an unreasonable and unjustifiable violation of their freedom of expression. In addition, Applicants argued that the definition of "indecent or obscene" in section 1, on which the prohibitions in section 2(1) of the Act are based, is vague and overbroad, and as such constitutes an unreasonable and unjustifiable limitation upon their rights of freedom of expression. Before proceeding any further, it is necessary that we consider two important threshold questions. Firstly, is sexually explicit material as a category of speech and expression protected by the Constitution? If so, secondly, is the

[27] *Cf.* note 16, *supra*.

[28] *See* § 35(2).

possession thereof subject to the protection of the free expression clause of the Constitution?

Does Section 15 Protect Sexually Explicit Expression?

[19] Applicants' argument takes for granted that section 15 of the Constitution protects sexually explicit materials. But that is not self-evidently so. It might well be argued that, interpreting the Constitution purposively, the free expression clause should be read to protect speech conveying ideas bearing directly or indirectly upon matters of political importance. It would not be unreasonable to maintain that the particular expressive material with which we are here concerned -- graphic depictions of various forms of sexual activity -- falls outside of that protected category of expression.

[20] That, indeed, is an argument that has been well received in United States courts. In *Chaplinsky v New Hampshire*, the Court held that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libellous, and insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[29]

Although *Chaplinsky* has been significantly limited in other areas,[30] it remains settled law that, once material has been defined as obscene, it forfeits the protection of the First Amendment.[31]

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[29]315 U.S. 568, 571-72 (1942) (footnotes omitted).

[30]*E.g.*, *New York Times v Sullivan*, 376 U.S. 254, 269 (1964) ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the first amendment.")

[31]*Miller v California*, 413 U.S. 15, 23 (1973)*; see also New York v Ferber*, 458 U.S. 747, 763 (1982) (analysing "child pornography as a category of material outside the protection of the First Amendment.")

[21] The United States approach is, at least in part, a reflection of the fact that the American bill of rights does not contain a limitations clause. Where, as in the case of our Constitution, the listing of rights is accompanied by a clause that provided for the limitation, on a principled and considered basis, of all enumerated rights, the better approach would seem to be to define the right generously, and to interpose any constitutionally justifiable limitations only at the second stage of the analysis. That, in fact, is the approach that this Court has adopted.[32]

[22] There is significant textual support in section 33 of the Constitution for the adoption of such an interpretive methodology in relation to the question of "non-political" expression in particular. Section 33(1)(a) provides that Chapter Three rights may be limited by laws of general application, provided that such limitation is both "reasonable" and "justifiable in an open and democratic society based on freedom and equality." Part (bb) of the same subsection further provides that any limitation to, *inter alia*, section 15 rights, must, in addition, be "necessary" "*in so far as such right relates to free and fair political activity*." The clear inference is that section 15 must be read broadly enough to protect "non-political" expression. The fact that particular speech is not "political" in nature is factored only at the limitations stage of the analysis.

[23] That method would seem to be particularly appropriate in the course of interpreting and applying the guarantee of free speech and expression. There is an inherent artificiality in categorising expression in principle as "political" or not. Few forms of what we conventionally class as "artistic" expression can be said to be devoid of "political" implications. Conversely, history records many a rhetorically distinguished "political" speech that could fairly be

[32] *S v Zuma* 1995 (4) BCLR 401 (CC) 414; *S v Makwanyane* 1995 (6) BCLR 665 (CC) 707.

characterised as a form of dramatic "art".[33] Moreover, to strip entire categories of speech of constitutional protection by virtue of their *content* not only flies in the face of the common sense understanding of the meaning of the guarantee of freedom of expression, but would seem also to be antithetical to the fundamental purpose of that guarantee.[34]

Does Section 15 Protect the Right to *Possess* Sexually Explicit Material?

[24] It might be argued that the free expression guarantee may not be invoked by Applicants, simply because the conduct for which they are sought to be held criminally liable -- possession of indecent or obscene material -- is not *expressive* activity. That argument is not without force. Section 15 does not appear by its terms to protect the right to receive, hold and consume expressive materials generated by others.

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[33]I note also that section 15(1) protects "speech *and* expression", thus obviating any argument that the Constitution protects only traditional (verbal) political discourse. The pitfalls of categorising speech according to whether it appeals to the emotive, the cognitive, or the rational faculties have been acknowledged in United States jurisprudence. *See e.g., Cohen v California*, 403 U.S. 15, 26 (1971) (upholding constitutional right of petitioner to wear in public a jacket bearing vulgar epithet protesting Vietnam war draft: "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as for their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message.")

[34]*Cf. R v Keegstra*, [1990] 3 C.R.R. (2d) 193, 286 ("the contents of a statement cannot deprive it of the protection afforded by [the guarantee of free expression], no matter how offensive it may be"); *R v Butler*, [1992] 8 C.R.R. (2d) 1, 27 ("in my view, there is no doubt that [anti-obscenity legislation] seeks to prohibit certain types of expressive activity and thereby infringes [freedom of expression].") Ronald Dworkin identifies what he calls the "egalitarian" role of the guarantee of free expression, and it is on that basis that he insists that pornography falls under the umbrella of that guarantee, notwithstanding that it is not conventionally understood as "political" in nature. *Women and Pornography, New York Review of Books*, Oct. 21, 1993, 36: "The First Amendment's egalitarian role is not confined . . . to political speech. People's lives are affected not just by their political environment . . . but even more comprehensively by what we might call their moral environment. . . . Exactly because the moral environment in which we all live is in good part created by others . . . the question of who shall have the power to help shape that environment is of fundamental importance . . . Only one answer is consistent with the ideals of political equality: that no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and examples, just because these tastes and opinions disgust those who have the power to shut him up or lock him up. . . . In a genuinely egalitarian society, [such] views cannot be locked out, in advance, by criminal or civil laws: they must instead be discredited by the disgust, outrage, and ridicule of other people." *Id.* at 41. *See also* note 37, *infra*.

[25] But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients. [35]

[26] It is useful to relate that reasoning to the foundational purposes for the existence of the right to freedom of expression. The most commonly cited rationale is that the search for truth is best facilitated in a free "marketplace of ideas." That obviously presupposes that both the supply and the demand side of the market will be unfettered.[36] But of more relevance here than this "marketplace" conception of the role of free speech[37] is the consideration that freedom of speech

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[35]It is worth noting that a further dimension of the corollary relationship between the right to transmit and the right to receive information was recognised by the Technical Committee on Fundamental Rights During the Transition, which appended as an Explanatory Note to its draft of the free expression clause the comment that "the Committee understands that freedom of speech and expression includes the right to gather information preparatory to its expression." *Fourth Progress Report*, June 3, 1993, para 2.1. *See* Chaskalson, *et. al*, *Constitutional Law of South Africa* (1996) § 20.1(b) (Technical Committee's note "suggests that although access to information held by the state is separately enshrined in s 23, the right to receive information is also an integral part of the right of freedom of expression.")

[36]This rationale was eloquently articulated in Justice Holmes' famous dissent in *Abrams v U.S.*, 250 U.S. 616, 630 (1919): "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . [w]e should be eternally vigilant against attempts to check the expression of opinion that we loathe and believe to be fraught with death . . .".

[37]It is questionable whether the truth-seeking rationale for freedom of expression has application where the expression at issue is pornographic: "[M]ost pornography makes no contribution at all to political or intellectual debate: it is preposterous to think that we are more likely to reach truth about anything at all because pornographic videos are available." Ronald Dworkin, *Women and Pornography, New York Review of Books*, Oct. 21, 1993.

is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development.[38]

[27] We must understand the right embodied in section 15 not in isolation, but as part of a web of mutually supporting rights enumerated in the Constitution,[39] including the right to "freedom of conscience, religion, thought, belief and opinion", the right to privacy, and the right to dignity.[40] Ultimately, all of these rights together may be conceived as underpinning an entitlement to

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It is also worth noting that the truth-seeking rationale for freedom of expression has been sharply criticised as tending to project uncritically onto the jurisprudential debate an idealised conception of free economic market relations. *See* Chaskalson *et al*., *Constitutional Law of South Africa* (1996) § 20.2 (b) n. 8, and sources cited therein; Van Wyk *et al*., *Rights and Constitutionalism* (1994), 268-69.

[38]*See In re: Munhumeso* 1995 (2) BCLR 125 (ZS) 130 (noting that freedom of expression served the purpose, *inter alia*, of "help[ing] an individual to achieve self-fulfilment"); Van Wyk, *supra* note 17, 269 ("Every individual has the right (and duty) to seek his or her own 'truth', whether it objectively exists or not, in order to develop as a human being."); Emerson, *The System of Freedom of Expression*, 6 ("freedom of expression is essential as a means of assuring individual self-fulfilment. The proper end of man is the realisation of his character and potentialities as a human being. For the achievement of this self-realisation the mind must be free . . . [t]o cut off [a person's] search for truth, or his expression of it, is to elevate society and the State to a despotic command . . . and to place [her or him] under the arbitrary control of others.") Emerson's words resonate with those of Ackermann, J., in *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) 28 ("An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible.")

[39]*See S v Makwanyane* 1995 (6) BCLR 665 (CC) 675, para 10 (an individual provision of Chapter 3 must be construed "in its context, which includes . . . other provisions of the Constitution itself and, in particular, the provision of Chapter 3 of which it is part.") (*per* Chaskalson, P.) *Compare Mandela v Falati* 1994 (4) BCLR 1 (W) 8 ("In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech") (*per* Van Schalkwyk, J.) With respect to the learned judge, it may comport better with the both the spirit and the structure of our Constitution to understand each of the various enumerated rights contextually, as interrelated and mutually supporting articulations of the values that underlie the document, rather than to attempt to rank individual rights in any particular hierarchy.

[40]Respectively articulated in sections 14, 13 and 10 of the Constitution.

participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.

[28] Section 15 of the Interim Constitution provides that "the right to freedom of speech and expression" "shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research." One may well ask what effective utility *freedom of the press and other media* would have if that freedom did not include as a corollary the right of persons to actually obtain and read newspapers, and to be exposed to other media. By the same token, the *freedom of artistic creativity* would be seriously undermined if it did not encompass the right of individuals to unhampered access to sources of artistic and intellectual inspiration, including (or, one might say, *especially*), those expressions which convey sentiments that are threatened with suppression by the state or with marginalisation in civil society, because they are deemed dangerous, offensive, subversive, or irrelevant.

[29] Section 35 of the Constitution provides that this Court "shall, where applicable, have regard to public international law applicable to the protection of [Chapter 3 rights]". It is significant that at least four international human rights instruments provide specifically for the right to receive information under the general head of the right to free expression.[41]

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[41] Article 9 of the *African Charter on Human Rights and Peoples' Rights* provides for an unqualified right to *receive* information, which, significantly, is listed ahead of the right to transmit same:

> 9(1) Every individual shall have the right to receive information.
> 9(2) Every individual shall have the right to express and disseminate his opinions within the law.

The *European Convention on Human Rights*, Art. 10, provides that the right to receive information "[s]hall include freedom to . . . receive . . . information without interference." Article 19 of the *Universal Declaration of Human Rights* (1948), declares: "[e]very person has the right to freedom of opinion and expression; this right includes . . . [the right] to receive . . . information." Finally, Article 19 of the *International Covenant on Civil and*

[30] Section 35 of the Interim Constitution further permits this Court to "have regard to comparable foreign case law" in interpreting Chapter 3 of the Constitution. Various foreign courts have found the right to receive information to be embraced within the concept of freedom of expression. Thus, for example, in *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors*, the Ontario High Court of Justice wrote that the freedom of expression guaranteed under the Charter

> [A]lso extends to the listener and to the viewer, whose freedom to receive communication is included in the guaranteed right.[42]

In *R v Butler*, the Supreme Court characterised the right at stake as trammelled by a statute that "restrict[ed] the *communication* of certain types of materials based on their content."[43] Clearly, the concept of "communication" embraces both the transmission and the reception of information.

[31] The European Court of Justice has held that the right to receive information contained in the above-referenced Article 10 of the European Convention "prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him."[44] The Zimbabwe Supreme Court has held that what is truly at stake in freedom of expression jurisprudence is "the people's right to know."[45] And the Indian Supreme Court has observed that:

Political Rights (1966), provides that " [e]verybody shall have the right to freedom of expression; this right shall include freedom . . . [to] receive and impart information and ideas of all kinds."

[42][1983] 147 D.L.R. (3d) 58 (Ont.) 66.

[43][1992] 8 C.R.R. (2d) 1, 27 (emphasis supplied).

[44]*Leander v Sweden*, [1987] 9 E.H.R.R. 433, 456; *see also Sunday Times v United Kingdom*, [1979] 2 E.H.R.R. 245, 280 (noting necessary relationship between function of media in communicating information and right of public to receive same.)

[45]*In re: Munhumeso* 1995 (2) BCLR 125 (ZS) 130.

> The constitutional guarantee of the freedom of speech is not so much for the benefit of the press as it is for the benefit of the public.[46]

[32] Although the United States Constitution makes no explicit reference to a right to receive information, that right is well established as one of the bedrock principles of First Amendment jurisprudence.[47] Indeed, in some circumstances, the United States Court has, like the Indian Supreme Court in *Bennett Coleman*[48], deemed the right of the recipient to obtain information to be more fundamental than that of the speaker to transmit it. In *Red Lion Broadcasting Co. v FCC*, a case involving the regulation of television and radio broadcast licenses, the Court held that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[49]

[33] Perhaps the most striking illustration of this principle is to be found in the various cases decided by the United States Supreme Court in which it struck down government regulation of speech in instances where the *speaker*, for various reasons, could assert no first amendment rights at all, and the only first amendment right to be protected was that of the would-be *recipient*.[50]

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[46] *Bennett Coleman & Co. v Union of India* 1973 (2) S.C.R. 757, 818; *see also Indian Express v Union of India* 1985 (2) S.C.R. 287, 318-19.

[47] *Griswold v Connecticut*, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right to freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read"); *see also Bell v Wolfish*, 441 U.S. 520, 572-73 (1979) ("That individuals have a fundamental First Amendment right to receive information and ideas is beyond dispute.") (Marshall, J., dissenting).

[48] 1973 (2) S.C.R. 757.

[49] 395 U.S. 367, 390 (1969).

[50] *See, e.g., Procunier v Martinez*, 416 U.S. 396, 408-09 (1974) (sustaining challenge to censorship of prisoners' outgoing mail by focusing on first amendment rights of addressees to receive such mail); *Kleindienst v Mandel*, 408 U.S. 753, 762-65 (1972) (acknowledging in principle the right of an academic audience to hear presentation by communist alien seeking temporary visa to enter United States.); *cf. Lamont v Postmaster General*, 381 U.S. 301, 308 (1965) (striking statute permitting the government to intercept post coming into the United States from communist organisations abroad, because it interfered with *addressees'* first amendment rights to receive such mail) (Brennan, J. *concurring).*

[34] That principle has been applied to protect the rights of recipients to have access to sexually explicit messages as well. In *Board of Education v Pico,* the Court upheld the right of students to resist removal of books alleged by the board of education to be indecent and obscene from a school library, on the basis, *inter alia*, of students' right to be exposed to information contained in proscribed books.[51] And in *Stanley v Georgia,* the Court upheld individuals' right to consume obscene materials in their own homes. The Court noted that the "right to receive information and ideas, regardless of their social worth [is] fundamental to our free society."[52]

[35] I therefore hold that sexually expressive speech is subject to the protection of section 15 of the Constitution, and that such protection must necessarily extend to the right to possess such material. That, of course, does not end the inquiry: it remains to be seen whether those parties defending the 1967 Act can carry the burden of showing that the limitations the statute places upon

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[51]457 U.S. 853, 868 (1982).

[52]394 U.S. 557, 564 (1969). Without necessarily endorsing the analysis adopted by the United States Supreme Court, it is interesting to note the variety of other circumstances under which a right to receive information has been upheld. *See, e.g., Consolidated Edison Co. v Public Service Commission,* 447 U.S. 530 (1980) (ban on the inclusion of pro-nuclear power materials with power company's monthly bills held invalid, on basis of the First Amendment's role in affording the public access to discussion, debate, information, and ideas); *Central Hudson Gas & Electric Corp. v Public Service Commission,* 447 U.S. 557 (1980) (upholding public's right to access to advertising); *First National Bank v Bellotti,* 435 U.S. 765 (1978) (spending corporate funds to communicate to the public about voting on referenda issues); *Linmark Associates, Inc. v Township of Willingboro,* 431 U.S. 85 (1977) (right to receive information about property for sale through "For Sale" or "Sold" signs on residential property); *Carey v Population Services International,* 431 U.S. 678, 701-702 (1977) (right to receive advertising about contraceptives); *Bates v State Bar of Arizona,* 433 U.S. 350, 384 (1977) (right to receive information about availability and terms of legal services); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (right to receive advertising about prescription drug prices); *Griswold v Connecticut,* 381 U.S. 479, 482 (1965) (right to receive information about contraception); *Marsh v Alabama,* 326 U.S. 501 (1946) (right to receive religious literature on streets of a company-owned town); *Thomas v Collins,* 323 U.S. 516 (1945) (rights of workers to hear labour organiser); *Martin v City of Struthers,* 319 U.S. 141 (1943) (right to receive handbills).

free expression satisfy the requirements of section 33 of the Constitution.[53]

Application of the Limitations Clause

[36] Section 33 of the Constitution provides, *inter alia*:

> The rights entrenched [in Chapter 3] may be limited by law of general application, provided that such limitation --
>
> (a) shall be permissible only to the extent that it is --
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based upon freedom and equality . . .

[37] The right to receive, hold and consume expressive material, whether or not its content is sexually explicit, is not unqualified. Like all rights, it is subject to limitation under section 33 of the Constitution. Review of legislation restricting sexually explicit material may call upon a court to distinguish categories of such material that the state is justified in regulating from those categories that may not justifiably be regulated. Courts in the United States and Canada have developed an extensive jurisprudence in this area; it is useful to survey some of that law before turning to the implications of the limitations clause in our Constitution.[54]

Distinguishing Categories of Sexually Explicit Expression: The North American Experience

[38] In *Roth v United States*,[55] the United States Supreme Court for the first time confronted the question of obscenity and the First Amendment. The Court turned away from the common law

[53]*See S v Makwanyane* 1995 (6) BCLR 665 (CC) 708, para 102.

[54]I emphasise that my review of foreign authority should not be taken to mean that I necessarily approve of any of the authorities cited.

[55]354 U.S. 476 (1957).

definition of obscenity, based upon effect of passages upon most susceptible persons[56], holding that such test "might well encompass material legitimately treating with sex." However, the Court held that obscenity as a category of speech was not deserving of constitutional protection since it is "utterly without redeeming social importance".[57] The test for pornography was set down as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest".[58] However, the Court was careful to note that:

> [S]ex and obscenity are not synonymous . . . The portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. . . . [I]t is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." [59]

[39] The *Roth* test proved difficult to apply, and a period of considerable uncertainty followed, during which the Supreme Court adopted a practice of *per curiam* reversal of convictions for the sale or distribution of materials that at least five members of the court, applying various tests, judged not to be obscene.[60] In *Miller v California,* the Court laid down what has become the

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[56]The test laid down in *Regina v Hicklin* (1868) L.R. 3 Q.B. 360, 371 had been widely adopted by American courts. The *Hicklin* test was adopted also by the Indian High Court. In *Ranjit D. Udeshi v Maharashtra*, 1 S.C.R. 65, (1965) A.S.C. 881, the Court applied the *Hicklin* test to uphold the conviction of the accused for possession of a copy of D.H. Lawrence's *Lady Chatterley's Lover* for purpose of sale. The court held that application of the *Hicklin* test appropriately effectuated the limitation of freedom of speech contemplated by the words "decency or morality" in article 19(2) of the Indian Constitution. Hidayatullah J. noted that the protagonist gamekeeper's vocabulary was not "genteel": "[h]e knew no Latin which could be used to appease the censors." *Id.* 78. Moreover, the work's sociological message, he held, "does not interest the reader for whose protection . . . the [obscenity] law has been framed." *Id.* 80.

[57]*Roth*, 354 U.S. at 484.

[58]*Roth*, 354 U.S. at 489.

[59]*Roth*, 354 U.S. at 487-88.

[60]*See, e.g., Walker v Ohio*, 398 U.S. 434 (1970).

definitive test, setting three basic guidelines to determine when sexually explicit material may be subjected to state regulation:

> (a) the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest.
>
> (b) the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> (c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[61]

The Court noted that the First Amendment demanded that statutes "designed to regulate obscene materials must be carefully limited": the permissible scope of such regulation was restricted "to works which depict or describe sexual conduct", which conduct "must be specifically designated by the applicable state law."[62]

[40] Attempts to produce and apply a definitive, certain and satisfactory definition of obscenity have taxed the ingenuity of American judges. In *Jacobellis v Ohio,* Justice Potter Stewart famously declared: "I shall not today attempt further to define [obscenity] . . . and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."[63] The Court has attempted to clarify the *Miller* test by defining a "prurient" interest in sex as a "shameful or morbid" interest, as opposed to a "normal and healthy" interest.[64] In my opinion, that elaboration does not, in itself, furnish a great deal of guidance.

[41] The application of the third prong of the test, relating to "serious" artistic value, has proved

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[61]*Miller*, 413 U.S. at 24.

[62]*Miller*, 413 U.S. at 23-24.

[63]378 U.S. 184, 197 (1964) (concurring).

[64]*Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985).

especially troublesome. Thus, for example, the case of *Luke Records, Inc. v Navarro*,[65] cast a federal judge in the unfamiliar role of music critic, when he had to determine whether music containing sexually explicit lyrics performed by the popular "rap" group *2 Live Crew* was obscene. Having found that the first two prongs of the *Miller* test were satisfied, the trial judge decided that the group's music as a whole lacked artistic value, thus satisfying the third prong of the test. He accordingly declared the music obscene.[66] That judgment was overturned by the appeal court on the basis that there was insufficient evidence on the artistic value question.[67]

[42] The Canadian Supreme Court has adopted a markedly different approach to pornography from that adopted in the United States, discarding the public-morality basis that underpins the American approach in[68] favour of a standard based explicitly on the harm believed to be engendered by certain kinds of sexually explicit material. In the celebrated case of *R v Butler*,[69] the Canadian Court, reviewing the conviction of the owner of a sex shop for selling "obscene materials", an offence under the Criminal Code, was called upon to consider the following

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[65]960 F.2d 134 (11th Cir. 1992).

[66]960 F.2d 134, 136 (11th Cir. 1992).

[67]960 F.2d 134, 138-39 (11th Cir. 1992). While the conviction of the rap musicians in this matter was ultimately reversed, the singling out for prosecution of Afro-American performers whose work does not comport with decorous mainstream conceptions of what constitutes "art" would appear to be the ineluctable result of an obscenity jurisprudence that calls upon judges to make aesthetic determinations. As one commentator has noted, "the journey from *Ulysses* to *Hustler* involves more than a move from literature to smut, from words to images. It involves the transition from the preoccupations of an educated minority to the everyday fantasies of the blue-collar majority. . . . Once upon a time, obscenity was confined to expensive leather-bound editions available only to gentlemen. . . . One of the questions asked by the crown prosecutor [in the trial of the publisher of *Lady Chatterley's Lover*] was: 'Would you let your servant read this book?' . . . *Hustler* is the servant's revenge." Neville, *Has the First Amendment met its Match?, N.Y. Times*, March 6, 1977, p. 16 (quoted in Tribe, *American Constitutional Law* (1988) 918-19.)

[68]*See, e.g., Paris Adult Theatre v Slaton*, 413 U.S. 49, 59-69 (1973) (noting "'right of the Nation and of the States to maintain a decent society'.") (*quoting Jacobellis v Ohio*, 378 U.S. 184, 199 (1964).

[69][1992] 8 C.R.R. (2d) 1.

definition of obscenity in the Code:

> For the purpose of this Act, any publication a dominant characteristic of which is undue exploitation of sex, or sex and any one or more of the following subjects, namely crime, horror, cruelty and violence shall be deemed to be obscene.[70]

[43] The Court reviewed a number of cases which had attempted to give content to the phrase "undue exploitation of sex", and distilled those interpretations into three categories:

> [1] The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. [2] Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, [3] explicit sex that is 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.[71]

[44] Applying the *Oakes* two-stage test, the Court held that the challenged statute, inasmuch as it sought to prohibit "certain types of expressive activity", impacted the free expression rights guaranteed under the Charter.[72] However, that was justifiable under the limitations clause, because, *inter alia*, the Code did not prohibit serious work of scientific, artistic or literary merit,[73] nor did it affect the private possession or viewing of explicit materials.[74]

[45] Most significant in the *Butler* decision was its rejection of the traditional rationale for obscenity regulation -- what the court termed the imposition of a

> [C]ertain standard of public and sexual morality, solely because it reflects the conventions of a given community . . . The prevention of 'dirt for dirt sake' is not a legitimate objective which

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[70]Canadian Crim. Code, R.S.C. (1985), c. C-46, 163(8).

[71]*Butler*, *supra, note 69*, 25.

[72]*Butler*, *supra*, 27.

[73]*Butler*, *supra*, 39.

[74]*Butler*, *supra*, 40.

> would justify the violation of one of the most fundamental freedoms enshrined in the Charter.[75]

The Code challenged in *Butler*, on the other hand, could be upheld, because its "overriding objective" was not moral disapprobation as such, but the "avoidance of harm to society" in the form of, *inter alia*, the encouragement of violence, and the reinforcement of gender stereotypes.[76]

[46] Indeed, subsequent applications of *Butler* have emphasized the centrality of the "harm principle" in *Butler*, and the relatively narrow range of sexually explicit material that is subject to restriction under that principle. Thus, for example, in *R v Hawkins*, the Ontario Court of Appeal noted that:

> Under the *Butler* test, not all material depicting adults engaged in sexually explicit acts which are degrading or dehumanizing will be found to be obscene. The material must also create a substantial risk of harm to society. That risk is now an element of obscenity-based crimes. Like any element of a criminal allegation, it must be proved beyond a reasonable doubt . . . I cannot accept that *Butler* compels the conclusion that once the portrayal of sexually explicit acts is found to be degrading or dehumanizing, it necessarily follows that the films are harmful and, therefore, obscene.[77]

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[75] *Butler*, *supra*, 30.

[76] *Butler*, *supra*, 30-33. The Court's reasoning reflects the influence of American academic Catharine MacKinnon, who has developed a powerful critique of obscenity law as developed by the United States Supreme Court. Professor MacKinnon rejects both the morality-based approach, and the Millsean analysis of harm that she argues characterises First Amendment jurisprudence. *See Feminism Unmodified*, Harvard Univ. Press (1987), 156-57 ("The trouble with this individuated, atomistic, linear, isolated, tortlike -- in a word, positivistic -- conception of injury is that the way pornography targets and defines women for abuse and discrimination does not work like this. It does hurt individuals, not *as* individuals in a one-at-a-time sense, but as members of the group 'women.' . . . [The] causality is essentially collective and totalistic and contextual. To reassert atomistic linear causality as a *sine qua non* of injury -- you cannot be harmed unless you are harmed through this etiology - is to refuse to respond to the true nature of this specific kind of harm.") Responding to Professor MacKinnon, Ronald Dworkin agrees that the availability of pornography may crucially affect the social climate, but asserts that her argument that free expression may be limited in the interests of gender equality is misplaced, because free expression itself ultimately serves fundamental egalitarian interests: "[W]e may and must protect women . . . from specific and damaging consequences of sexism . . . We must protect them against unfairness and inequality in employment or education or housing or the criminal process, for example. But we must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness and inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them." Ronald Dworkin, *A New Map of Censorship, Index on Censorship*, May/June 1994, 9-15. *See* note 34, *supra*.

[77] [1993] 6 C.C.C. (3d) 246.

[47] The United States and the Canadian experiences illustrate how difficult it is for a Court to delimit the scope of constitutionally protected sexually explicit materials. The *Miller* test has been subjected to trenchant criticism both from within the United States Supreme Court,[78] and from academic commentators.[79] The Canadian experiment, based upon the "harm principle" rather than upon morality *per se*, may offer a more promising route, although we are not called upon for purposes of this matter to adopt any particular approach. I would note that the *Butler* decision's willingness to posit the harmful effect of certain classes of sexually explicit material, notwithstanding that this effect was not, as the Court conceded "susceptible to exact proof", but

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[78] *See, e.g.*, *Pope v Illinois*, 481 U.S. 497, 504-05 (1987) ("[I]t is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled 'reasonable man; . . . would have to be replaced with, perhaps, 'the man of tolerably good taste' -- a description that betrays the lack of an ascertainable standard . . . Just as there is no arguing about taste, there is no use litigating about it") (Scalia, J., concurring)); *Smith v United States*, 431 U.S. 291, 316 ("[I]n my judgement, the line between communications which 'offend' and those which do not is too blurred [t]o delimit the protections of the first amendment.") (Stevens. J., dissenting)); *Paris Adult Theatre v Slaton*, 413 U.S. 49, 87, 103 (1973) ("even the most painstaking efforts to determining in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing . . . I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice") (Brennan, J., dissenting)); *Interstate Circuit, Inc. v Dallas*, 390 U.S. 676, 704 n. 1 (1968) ("The subject of obscenity has produced a variety of views among the members of the court unmatched in any other course of constitutional adjudication"); *Ginzburg v United States*, 383 U.S. 463, 480-81 (1968) ("no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this court whether certain material come within the area of 'obscenity'") (Black, J., dissenting). *See also* Abraham & Perry *Freedom and the Court* (1994), at 200, n. 239 (*quoting* Stevens, J., as opining that the Court's "thinking on obscenity is intolerably vague and makes evenhanded enforcement virtually impossible") (landmark decisions "did not settle -- for they really could not -- the basic problem of just what "obscene" means.")

[79] *See, e.g., Using Racketeering Laws to Control Obscenity*, 36 *Boston College L. Rev.* 553, 581 (1995) ("The Supreme Court has encountered difficulty defining obscenity, and even the current *Miller* definition is vague"); Edward de Grazia, *Girls Lean Back Everywhere*, 11 *Cardozo Arts & Ent. L. J.* 777, 805 (1993) ("even the narrow definition of obscenity set forth in *Miller* is unconstitutionally vague and overbroad"); Jeff Rosen, *Miller Time*, 203 *The New Republic*, Oct. 1, 1990, 14 ("if art can't be cleanly distinguished from obscenity, as more than 30 years of failed Supreme Court tests make clear, then private consumption of obscenity must be endured so that art can be protected.") One influential study found that the *Miller* test had little effect on the regulation of obscene materials; this was attributed, *inter alia*, to the fact that the test "requires law enforcement officials to make "largely subjective evaluations of sexually explicit materials." Harold Leventhal, *An Empirical Study into the Effects of Miller v California on the Control of Obscenity*, 52 *N.Y.U.L. Rev.* 810 (1977). Judge Didcott (as he then was) , wrote in *Anchor Publishing Co. v P.A.B.* 1987 (4) SA 708 (N), that he doubted various attempts to define indecency and obscenity "have done much more in the end but replace some adjectives with others more or less synonymous but equally imprecise." *Id.* 713.

based instead upon a "substantial body of opinion",[80] has been criticised as a cover for *de facto* deference to morality-based evaluations.[81] Moreover, just as it is often culturally subordinated groups that in the United States bear the brunt of American obscenity regulation,[82] the manner in which *Butler* has been applied offers a cautionary tale regarding how well-intentioned legislation may be enforced in practice to suppress marginalised discourses that lack a powerful political constituency.[83]

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[80]*Butler*, 8 C.R.R (2d) at 21.

[81]*E.g.*, Jodi Kernick, *Suppressing Violent and Degrading Pornography*, 19 *Brooklyn Int'l L. J.* 627 (1993) (arguing that *Butler* is morality-based, and will tend to perpetuate women's inequality.)

[82]*See* note 67, *supra*.

[83]Various commentators have noted that, post-*Butler*, Canadian police and Customs officers seized quantities of lesbian, gay and feminist material. *See* Carlin Meyer, *Sex, Sin, and Women's Liberation*, 72 *Tex. L. Rev.* 1097, 1119 (1994); Margaret McIntyre, 6 *U.C.L.A. Women's L.J.* 189, 237 ff. (1995); *cf.* John Sopinka, *Should Speech that Causes Harm be Free?*, in Jane Duncan (ed.) *Between Speech and Silence* (1996), 140. Ironically, books by Andrea Dworkin, a prominent anti-pornography activist, have been amongst those seized. *See* Ursula Owen, *Hate Speech and Pornography*, in Duncan, *op. cit.*, 39; Sarah Lyall, *Canada's Morals Police: Serious Books at Risk?*, *N.Y. Times*, Dec. 13, 1993; Mary Williams Walsh, *Chill Hits Canada's Porn Law, L.A. Times*, Sept. 6, 1993, at A1; Carl Wilson, Vol. 257, No. 22, *The Nation* 788, Dec. 27, 1993. The two Andrea Dworkin books seized, *Pornography: Men Possessing Women* (1989) and *Women Hating* (1974), were confiscated because they "illegally eroticized pain and bondage." Walsh, *supra* at A17. *See also* Hasnas, *Back to the Future*, *45 Duke L.J.* 84, 120 (1995) ("the agents charged with the enforcement of [the statute upheld in *Butler*] apparently have a different interpretation of what is degrading, dehumanizing, and humiliating than either MacKinnon and Dworkin or the Justices of the Supreme Court"); Joanne Fedler, *A Feminist Critique of Pornography*, in Duncan, *op. cit.*, 58 (noting that the Feminist Anti-Censorship task force opposed a MacKinnon-drafted anti-pornography ordinance in Indianapolis, asserting that the ordinance would erode women's autonomy and privacy, because the ordinance would place powers "to censor and therefore to control culture . . . in the hands of the self-same gendered state officials.") McIntyre quotes Catharine MacKinnon and Dworkin as acknowledging the overbroad application of post *Butler* obscenity law in Canada, and as asserting that this was the result of the use of criminal sanctions against pornography rather than (as they had advocated) provision for civil damages for victims of pornography. 6 *U.C.L.A. Women's L.J.* 189, 239 & n. 188. *See* MacKinnon, *Pornography Left and Right*, 30 *Harv. Civil Rights-Civil Liberties L. Rev.* 143 (1995) (rejecting obscenity law as method of combatting pornography and calling for legislation making pornography civilly actionable. In *American Booksellers Ass'n v Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986), the court struck down the above-mentioned Indianapolis ordinance, drafted by Professor MacKinnon, creating a civil remedy against "graphically sexually explicit" portrayals of sexual violence against or sexual degradation of women.

Testing for Overbreadth as Part of the Limitations Analysis

[48] Applicants' overbreadth argument may present us with an opportunity to resolve the matter before us today without following United States and Canadian courts into the formidably difficult task of drawing lines between different kinds of sexually explicit speech, which is in any event primarily the task of the legislature. Applicants argue that the definition of proscribed material in the Act sweeps so widely that it unconstitutionally bans a great deal of incontestably constitutionally protected expression.[84] If that is so, there is no need for this Court to demarcate protected from unprotected sexually explicit speech, because whatever may be the legitimate scope of government regulation of sexually explicit material, the challenged legislation can be struck as being overbroad.

[49] Overbreadth analysis is properly conducted in the course of application of the limitations clause. To determine whether a law is overbroad, a court must consider the means used, (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad. The Canadian case of *Royal College of Dental Surgeons of Ontario v. Rocket*,[85] offers an example of this analysis in the free expression setting. The Canadian Supreme Court struck down as overbroad a ban on dentists' advertising, using an analysis conducted under the Canadian Charter's limitation clause. The Court held that while there was no doubt a legitimate government interest in preventing irresponsible and misleading advertising by dentists, the blanket ban challenged also struck at legitimate advertising, with the result that the test of

[84]Applicants also make the separate, but connected, argument, that the said definition is unconstitutionally vague. For reasons that will become clear, it is not necessary to consider that head of Applicants' argument.

[85][1990] 71 D.L.R. (4th) 68.

proportionality between the effect of the legislative measure and its purpose was not met:

> The aims of promoting professionalism and preventing irresponsible and misleading advertising . . . do not require the exclusion of much of the speech which is prohibited by [the statute]."[86]

[50] In *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer, Port Elizabeth Prison*, wherein this Court held a statutory provision providing for imprisonment in certain circumstances of nonpayment of civil debts to be unconstitutional on the ground, *inter alia*, that such provision was overbroad, the Court held that while providing a mechanism for the enforcement of judgment debts was a reasonable and legitimate governmental objective:

> [T]he question . . . is whether the means to achieve the goal are reasonable. In my view, the answer is clearly in the negative. . . The fundamental reason why the means are not reasonable is because the provisions are overbroad. The sanction of imprisonment is . . . aimed at the debtor who will not pay. But it is unreasonable in that it also strikes at those who cannot pay and simply fail to prove this at a hearing . . .[87].

[51] While striking down parliamentary statutes as void for overbreadth may be new in South Africa, because courts lacked the power to do so under a system of parliamentary sovereignty, a similar method of analysis was applied in the course of testing subordinate legislation for *ultra vires*. Subordinate legislation was invalidated on the basis that the means used exceeded the limits implied by the underlying objectives of the empowering statute. For example, in *United Democratic Front v State President*,[88] the court sustained in part a challenge to emergency regulations promulgated under the Internal Security Act. The regulations defined a "subversive

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[86]*Id.* 81. The Indian Supreme Court has adopted a broadly similar analysis: "There must be a direct and proximate nexus or reasonable connection between the restriction imposed and the object which is sought to be achieved." *Pathumma v State of Kerala*, [1978] (2) S.C.R. 537, 549.

[87]1995 (10) BCLR 1382 (CC) 1391 (*per* Kriegler, J.)

[88]1987 (3) SA 296 (N).

statement" to include "incitement or encouragement" of members of the public to attend certain gatherings. The Court agreed with the applicants' submission that this part of the definition was so widely constructed that it exceeded what Parliament could possibly have intended:

> There is no conceivable object related to the purposes set forth in . . . the Act which could be served by prohibiting the incitement or encouragement of people to attend or take part in gatherings which they may lawfully attend or in which they may lawfully take part . . . In the premises we are satisfied that [this part] of the definition of "subversive" statement is *ultra vires* and consequently void.[89]

[52] Mindful of the precedents available in our own law, as well as of the Canadian experience in testing for overbreadth under the aegis of the limitations clause, I now turn to an examination of the statutory provisions challenged in the present case. It is common cause in this matter that certain categories of pornographic material may constitutionally be subjected to state regulation. Most commonly singled out as legitimately subject to such regulation was pornography involving the exploitation of women and children, in contexts of violence, degradation and victimisation.

[53] But it was also agreed that the challenged provision includes within its reach material that is constitutionally protected: Ms. Fedler, appearing for *amici curiae* People Opposing Women Abuse, *et al*., conceded that the provision unjustifiably and unreasonably interferes with protected categories of expression. Counsel for the Christian Lawyers Association readily acknowledged that there is no place for a provision that outlaws all depictions of homosexuality and lesbianism. And counsel for the Attorney-General conceded that the Act amounted to a "loaded shot gun" with which the government that promoted the Act intended to "hit everything". Indeed, no one before

[89] *Id*. 325-26. Although the Appellate Division reversed the NPD's decision in *Staatspresident en Andere v United Democratic Front en 'n Ander*, 1988 (4) SA 830 (A), the fundamental principle for which the case is here cited was not contested.

the Court appeared to be willing to defend the statute in its present form.

[54] The consensus fostered by these concessions affords this Court the opportunity to adjudicate this matter on the basis of overbreadth analysis, without reaching the issues of (a) whether the Legislature may, consistent with the new Constitution, regulate sexually explicit material at all; and, (b) if so, what form of definition of proscribed sexually explicit material will pass constitutional muster. As to the first issue, I propose to simply assume, for purposes of this matter, an answer in the affirmative. As to the second, for purposes of overbreadth analysis I need not attempt to formulate a constitutionally permissible definition.

[55] Applicants did not dispute, for purposes of the application before us, that the contents of the various video cassettes found in their possession were in fact covered by the definition of "indecent or obscene" matter. If that be so, it does nothing to negate the Act's overbreadth, since it is not necessary for a successful overbreadth challenge that the conduct of the actual litigant in the case before the Court fall within the zone of overbreadth.[90] If the law itself is overbroad, it has to go, and no conviction may be founded upon it. That is so because of the chilling effect that overbroad legislation may have, discouraging others from engaging in constitutionally protected activities because legislation which on its face prohibits such activity remains on the statute books[91]. Under United States law, if a statute not only forbids expressive conduct that may constitutionally be restricted, but also forbids constitutionally protected expression, courts will look beyond the facts immediately before it to determine whether a putative class of future

[90] *See, e.g., R v Canadian Pacific Ltd.*, [1995] 99 C.C.C. (3d) 97.

[91] *Royal College of Dental Surgeons of Ontario v Rocket*, [1990] 71 D.L.R. (4th) 68.

speakers whose speech enjoys constitutional protection might refrain from speaking, for fear of having their speech deemed unlawful under an overbroad statute.[92] As Justice Marshall, dissenting in *Arnett v Kennedy*, put it,

> [An overbroad law] hangs over [people's] heads like a sword of Damocles [and] . . . the value of the sword of Damocles is that it hangs, not that it drops.[93]

[56] As discussed above, South African courts struggled for decades with the meaning of the phrase *indecent or obscene*, both as used in the 1967 Act and in various other contexts. The proscription in the 1967 Act takes the form of an open-ended nonexclusive listing, without clear outer parameters. I note also that, while section 2(2) of the Act provides for certain exemptions under the 1974 Act, the relevant provisions in that Act (section 5(4)(b)(iii) and (iv)), which made provision for exempting publications of a technical, scientific or professional nature or "of a *bona fide* religious character" were repealed by section 6(a) of the Publications Amendment Act 79 of 1977. The result is that as the two Acts now read, those exemptions are no longer available (although certain other exemptions, not here relevant, survive).

[57] Prior to determining whether the challenged language is overbroad, we must properly construe its meaning. In so doing, we must read the text as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant.[94] Thus, the

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[92] *Maryland v Joseph Munson*, 467 U.S. 947, 956-57 (1984).

[93] 416 U.S. 134, 231 (1973). *See also* para. 80 & note 117, *infra*.

[94] *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421, 436 (a statute "should be construed so that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant") (*quoting R v Bishop of Oxford*, [1879] 4 Q.B. 245 at 261); *cf. Secretary for Inland Revenue v Somers Vine* 1968 (2) SA 138 (AD) 156 (acknowledging non-redundancy as the "cardinal rule" of interpretation) (*dicta*); Du Plessis, *The Interpretation of Statutes* (1986) 129 ("If two different words are used in order to express apparently similar ideas or to refer to presumably similar phenomena, it may as a starting-point be

various forms of sexual conduct, appetite, and inclination (*sexual intercourse, licentiousness, lust, homosexuality . . .*), listed in the purported definition in section 1 of the Act must each be accounted for, and assigned distinct meanings. That exercise renders a *prima facie* already very inclusive list much broader still. The same procedure must be attempted in giving meaning to each of the various transitive verb forms preceding the list of forms of sexual conduct, appetite and inclination. Proscribed material is defined to include photographic matter "*depicting, displaying, exhibiting, manifesting, portraying or representing* sexual intercourse . . .". The terms *displaying, portraying* and *exhibiting* are not immediately problematic, but *manifesting* and *representing* are capable of yielding an almost unlimited set of potential references.

[58] Thus, for example, the verb *manifest* is defined in the *Oxford English Dictionary* as synonymous with "display".[95] Seeking an alternative meaning that will render both terms non-redundant in context forces us to assign the broader dictionary meanings of *display*, such as *evince, be evidence of* and *attest*. Similarly, the dictionary gives to the verb *represent* a primary meaning of *bring clearly and distinctively to mind, esp. by description or imagination*. But since that denotation appears already to be captured in the verbs *depict*, *display* and *portray*, we are thrown onto the broader, alternative meanings, such as *symbolise, be an equivalent of*, and *correspond to*. Examples could obviously be multiplied. Consider, to take just one, the scope of the prohibition if we apply the transitive verb form *symbolise* to the noun *lust*.

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assumed that the two different words -- each with is own meaning -- are primarily aimed at expressing different ideas or referring to different phenomena.")

[95]It is well established that resort to dictionaries is permissible in statutory interpretation. *See Minister of the Interior v Machadodorp Investments* 1957 (2) SA 395 (A) 402 (referring to *Shorter Oxford English Dictionary* and to *The Standard Dictionary of the English Language*) (*per* Steyn, JA); *see also S v Nunes* 1975 (4) SA 929 (T) 931.

[59] As the definition stands it could thus fairly be read to classify a virtually limitless range of expressions, from ubiquitous and mundane manifestations like commercial advertising to the most exalted 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. Thus, a television documentary treating safe-sex and the causes of Aids may be construed as a *manifestation* of *licentiousness*. Cinematic versions of the work of South Africa's most acclaimed playwrights and novelists may be labelled *exhibitions* or *portrayals* of *lust*, *masochism* or *sadism.* An illustrated public-service brochure dealing with incidents of sexual assault upon women could potentially be outlawed as a *depiction* of *rape*.[96] A photograph of persons of the same gender in tender embrace could fairly be construed as *manifesting homosexuality* or *lesbianism.*[97]

[60] As if the already sweeping implications of the purported definition are not enough, the

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[96]There is authority in South African law for the deployment of hypothetical cases against allegedly vague statutes. *See Amoils v Johannesburg City Council* 1943 TPD 386, 390 ("'the Court may always test the reasonableness of a by-law by its application in an extreme case.' For a by-law that would be grossly unreasonable if applied in some cases covered by its language is also grossly unreasonable as a whole and cannot be saved by the fact that it could be reasonably applied to many or even the great majority of cases.") In Canadian law, hypothetical cases are routinely used to test for overbreadth. *See, e.g., R v Canadian Pacific Ltd*., [1995] 99 C.C.C. (3d) 97, para 8 ("when conducting [an overbreadth] analysis, it will often prove necessary to consider hypotheticals.") In *R v Heywood*, [1995] 120 D.L.R. (4th) 348, the court struck down the challenged statute, which made it an offence for certain categories of sex offenders to be present in public parks. The court pointed out that a convicted sex offender could be found guilty under the statute if he was found in a "remote wilderness park", *Id.* 385. And it is no answer to assert that prosecutorial discretion would never be exercised so as to hit forms of expression which, it is common cause, deserve constitutional protection. This court held in *S. v Zuma*, 1995 (4) BCLR 401 (CC) 417, that even if there existed a judicial discretion to reject a confession because of doubts as to the voluntariness thereof, "that gives rise to no more than a possibility of an acquittal; the possibility of a conviction remains." *See also Attorney General v BBC*, [1980] A.C. 303 (HL) 346 ("in so far as the Attorney-General invites the courts to rely on his ipse dixit in the confidence that all holders of that office will always be both wise and just about instituting proceedings . . . acceptance of his invitation would involve a denial of justice to those who are bold enough to challenge that a particular holder has been either wise or just.")

[97]I need express no opinion as to whether the definition's singling out of *homosexuality* and *Lesbianism* constitutes a violation of § 8(2) of the Constitution, which prohibits unfair discrimination against persons on the grounds of, *inter alia*, sexual orientation.

phrase *or anything of the like* appended thereto seems calculated to invest prosecutors and courts with unlimited discretionary power over photographic and cinematic expression.

[61] One need proceed no further to appreciate that the means embodied in section 2(1), read with the definition of *obscene or indecent* material, which includes within its overbroad compass a vast array of incontestably constitutionally protected categories of expression, are entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute. Such a law is *ipso facto* not *reasonable* within the meaning of section 33(1)(a)(i).[98] Those parties who would have this Court uphold the challenged provision in the 1967 Act have manifestly not carried their burden of showing that the limitation on free expression that is imposed by that provision passes muster under section 33.

[62] Moreover, the hypothetical cases sketched above make it very clear that no "margin of appreciation" can rescue the statute as it stands. This is emphatically not an instance in which one could formulate a number of different means to achieve a legitimate objective, and persons of good faith might differ as to whether this or that statutory means is the optimal manner of attaining such objective while minimally impairing protected rights. In such a case, it may well be appropriate for a court to defer to the legislature's policy choices as to how to effectuate its goals.[99] Instead,

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[98]Given the scope for arbitrary enforcement afforded by a statute of such indeterminate reach, the statute arguably is also not, in the words of § 33(1) a *law of general application*, nor, in the language of § 33(1)(a)(ii), *justifiable in an open and democratic society based on freedom and equality*. *See S. v Makwanyane* 1995 (6) BCLR 665 (CC) 726, para 156 ("Arbitrariness, by its very nature, is dissonant with . . . core concepts of our new constitutional order.") (*per* Ackermann, J.) However, it is not necessary for purposes of this matter to pursue that line of argument. I assume for purposes of this matter that the speech restricted by the challenged provision does not "relate[ ] to free and fair political activity", § 33(1)(bb), and that there therefore is no burden upon the state to show that the limitation is *necessary*.

[99]*See Edwards Books and Art Ltd. v Q.*, [1987] 28 C.R.R. 1, 43 (noting need for a margin of appreciation for legislative choice). United States Courts will similarly show deference to legislative policy choices in testing for

what we are presented with here, if we assume in favour of the legislation a defensible core goal, is a statute whose sweep is undoubtedly immensely wider than what the reasonable attainment of any legitimate goal would require, even if we chose to define such a goal as broadly as imaginably possible.

[63] One need not go so far as to accept the notion of a preference for free expression over other rights,[100] to appreciate the danger of overbroad statutory proscriptions. 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.

Other Bases for Applicants' Constitutional Challenge

[64] Applicants' attack on the 1967 Act as a violation of their rights under the free expression clause of the Constitution was only one of several bases for their attack on that Statute. Applicants also invoked their constitutional right to privacy (section 13), their right to freedom of

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overbreadth: it is not sufficient that the litigant merely points to limited areas of overbreadth; "substantial" overbreadth must be demonstrated. Thus, for example, in *New York v Ferber*, 458 U.S. 747 (1982), the court rejected an overbreadth challenge of a statute forbidding distribution of explicit sexual materials to persons under the age of 16, where it doubted that "arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Id.* 773.

[100] *See Mandela v Falati* 1994 (4) BCLR 1 (W) 8. *Cf.* note 38, *supra*. *See also India Express Newspaper (Bombay) Pvt. Ltd v Union of India* [1985] 2 S.C.R. 287, 320 ("'Indeed, freedom of expression is the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succour and protection to other liberties.'") (quoting *Second Press Commission Report*, Vol. I pp 34-35); *Palko v Connecticut*, 302 U.S. 319, 327 (freedom of speech is "the matrix, the indispensable condition of nearly every other form of freedom."); *Retail, Wholesale & Department Store Union, Local 580 v Dolphin Delivery Limited*, [1987] 33 D.L.R. (4th) 174, 183 ("Representative democracy . . . is in great part the product of free expression . . .).

conscience and religion (section 14(1)), and their right to procedurally fair administrative action (section 24(b)).[101] Those other rights are essential components of the hermeneutic environment within which we go about applying section 15. But I do not propose to address the challenge mounted in terms of the other enumerated rights *per se*, simply because I believe that this matter can be quite satisfactorily disposed of under the head of section 15.

[65] I have had the privilege of reading the admirably concise opinion of Didcott, J, in which he arrives at conclusions similar to mine, but on the independent basis of Applicants' right to privacy, which is protected by section 13 of the Constitution. I must agree with his conclusion that the 1967 Act unreasonably and unjustifiably infringes the constitutional right to privacy. I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the state to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a "South African's home is his (or her) castle." But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials. I therefore associate myself with the caveat expressed by Justices Langa and Madala regarding Justice Didcott's opinion.

[66] Moreover, regardless of the conclusion we draw regarding the privacy issue, I believe that it is important to mark clearly that the challenged provision of the 1967 Act cannot be reconciled with the right to freedom of speech and expression embodied in section 15 of the Constitution. With due consideration for the virtues of judicial economy and restraint, I do not believe it would

[101] *See* the court *a quo's* referral order, para 4, *supra*.

be appropriate to dispose of a matter so prominently implicating crucial freedom of expression issues without attending to the arguments in that regard that were rehearsed at some length, both in the heads of argument submitted and in oral argument.

[67] I am mindful of the fact that Applicants were charged with *possession* under the 1967 Act. But it bears noting that Applicants were charged with possession, not of unlicensed arms and ammunition, illicit drugs, or contraband, but of sexually explicit video tapes. Attentive consideration of the privacy issues raised by this matter, and more particularly of what limitations upon the right to privacy may be reasonable and justifiable, leads us inexorably to closely intertwined free expression issues. I am very well aware that what forms of state control of sexually explicit expression are compatible with the values of free expression is a notoriously difficult and contentious question. But that should not deter us from addressing the issue, where, as here, the case referred to us so conspicuously interpellates fundamental free expression concerns.

Can the Provision be Saved by Severance or a Restrictive Reading?

[68] Having determined that the challenged provision is unconstitutionally overbroad, the question arises whether it can be saved either by restrictive interpretation or by severance. Counsel for the first and second intervening Parties submitted that "words like *licentiousness, lust,* etc. could be scrapped while possession in section 2 could possibly be restrictively interpreted." I interpret the suggestion that the words *licentiousness, lust* etc. be "scrapped' as a proposal that they be severed from the Act. The submission going to the interpretation of *possession* amounts to an appeal that we "read down" that word.

[69] Both "reading down" and severance are permissible remedies under the Constitution. The document provides that the Court's declaration of invalidity shall be limited to the extent of the inconsistency between the challenged statute and the Constitution.[102] In addition section 4(1) provides a clear textual basis for severance, and also, arguably, for "reading down":

> [A]ny law or act inconsistent with [the Constitution] shall . . . be of no force or effect *to the extent of the inconsistency*. (emphasis added).[103]

I will consider first the possibility of severance, before turning to the reading down option.

[102] §35(2)

[103] *Cf. Zimbabwe Township Developers (Pty) Ltd. v Lou's Shoes (Pty) Ltd.* 1984 (2) SA 778 (ZS) 783A-D. The constitutional principles embodied in sections 35(2) and 232(3) are a codification of an interpretative rule that derives from the Roman Law (*In ambigua voce legis ea potius accipienda est significatio, quae vitio caret*), and an established part of South African law. *E.g., R v Pickering* 1911 TPD 1054, 1058.

Severance

[70] The leading test for severance under South African law was set forth in *Johannesburg City Council v Chesterfield House (Pty) Ltd*:

> [W]here it is possible to separate the good from the bad in a statute and the good is not dependent upon the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute . . . however, where the task of separation is so complicated as to be impracticable, the whole statute must be declared *ultra vires*.[104]

The *Chesterfield* test was cited with approval in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*,[105] and in *Ferreira v Levin NO*; *Vryenhoek v Powell NO.*[106]

[71] I do not think that the severance of one or two isolated words (*lust, licentiousness*) within the challenged definition is a viable option.[107] That is because the offending overbreadth cannot be laid at the door of any one word, or group of words, but rather permeates the entire text. Even the noun *sexual intercourse*, which is in itself fairly well cabined, when modified by the transitive verb forms *depicting, displaying, exhibiting, manifesting, portraying* or *representing,* becomes an uncontrollably broad concept, yielding a veritable kaleidoscope of potential referents.

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[104]1952 (3) SA 809 (A) 822. *See also Government of the Republic of Namibia v Cultura 2000* 1994 (1) (SA) 407 (NmS) 424 (applying *Chesterfield* test.)

[105]1995 (10) BCLR 1382 (CC) 1392 (per Kriegler, J.)

[106]1996 (1) BCLR 1 (CC) 78 (*per* Ackermann, J.) In *MAWU v State President of the Republic Of South Africa* 1986 (4) SA 358 (D) 366, the Court noted that where a portion of subordinate legislation is void for uncertainty, it does not necessarily follow that everything surrounding it is also void: "The Court must try where it can and sever the good from the bad. It can sever the good from the bad when the bad is self-contained, stands on its own, can be cut out notionally as well as grammatically." *(Per* Didcott J.)

[107]The case of *Brockett v Spokane Arcades, Inc.*, 472 U.S. 491 (1985), in which the Court severed the word "lust" while upholding the remainder of an anti-obscenity statute, is clearly distinguishable. Lawrence Tribe points out that *Brockett* presented the Court with a particularly "persuasive array of factors in favor of only partial invalidation": "the law contained a plainly constitutional definition of obscenity in addition to the contested phrasing; it included a severability clause; and the state courts had not yet had the opportunity to construe the statute." *American Constitutional Law* (1988), 1028.

[72] On the other hand, if we apply a blue pencil to each and every noun form and transitive verb that presents overbreadth problems, we effectively write a new provision that bears only accidental resemblance to that enacted by Parliament. If, as appears to be the case, the scheme behind the statute was to impose a comprehensive scheme of censorship to give effect to a particular moral, cultural and political world-view,[108] it hardly does justice to the "main object" thereof for this Court to pare it down to prohibit only that discrete set of sexually-oriented expressions that this Court believes may constitutionally be restricted.[109]

[73] For this Court to attempt that textual surgery would entail it departing fundamentally from its assigned role under our Constitution. It is trite but true that our role is to review, rather than to re-draft, legislation. This Court has already had occasion to caution against judicial arrogation of an essentially legislative function in the guise of severance. In *Coetzee v Government of the Republic of South Africa; Matiso v. Commanding Officer, Port Elizabeth Prison,* Kriegler, J., noted that

> In order to [excise only offending provisions] . . . this Court would have to engage in the details of law-making, a constitutional activity given to the legislatures. [110]

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[108] *See* para 11-12 *supra*. Although, as noted *supra*, invoking the legislative history in interpreting a statute in the first instance is problematic, the weight of the objections to use of such history is significantly diminished when we come to consider severance, and are called upon to consider whether the main object of the statute would be served by proposed textual surgery.

[109] *See Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS) 1558 (declining to sever and read down overbroad regulation restricting freedom of speech, in light of fact that regulation was invalid in numerous respects, and that the proposed remedies would require the Court to "guess the intention of the lawgiver.") (*per* Dumbutshena, J.)*; R.M.D. Chamarbaugwalla v The Union of India,* [1957] S.C.R. 930, 951 ("Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole . . . the invalidity of a part will result in the failure of the whole.")

[110] 1995 (10) BCLR 1382 (CC) 1393, para 17. *See also MAWU v State President of the Republic of South Africa* 1986 (4) SA 358 (D) 367 ("If [a clean] amputation cannot be performed, it is not for the Court to redraft the legislation in an acceptable form. If severance is not possible, the bad then infects what might otherwise have been good, and it is all bad" *(per* Didcott J.); Schlaich, *Das Bundesverfassungsgericht* (1994) (3d) 353 (pointing out

[74] Canadian courts have similarly recognised that, unless carefully limited, severance will constitute an intrusion upon what is properly a legislative function.[111] In *Schachter v Canada*, the Court analysed severance and "reading in" as twin remedies, and cautioned that because both are drastic and intrusive devices, they should not be lightly indulged in by courts of law, but only in the "clearest of cases", when each of the following criteria is met:

> A. the legislative objective is obvious . . . and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
>
> B. the choice of means used by the Legislature to further that objective is not so unequivocal that severance/ reading in would constitute an unacceptable intrusion into the legislative domain; and,
>
> C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.[112]

[75] Doubtless it would be grammatically feasible to sever the entire definition of *indecent or obscene* from the Act: as a self-standing clause within section 1, the definition may be excised without doing grammatical violence to the balance of the statute. However, I doubt very much that the definition is *structurally* severable. The definition establishes the functional parameters of

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the danger that, by striking individual words within a provision, a Court may invade the province of the legislature by enforcing a rewritten statute not within the contemplation of the lawgiver).

[111] *See* Carol Rogerson, *The Judicial Search for Appropriate Remedies Under the Charter*, in Sharpe (ed.),*Charter Litigation* (1987) 288.

[112] [1992] 10 C.R.R. (2d) 1, 26. In *Edward Book & Art v The Queen*, [1987] 28 C.R.R. 1, 51 the court held that it was "not the role of this court of law to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable."; *see also R v Seaboyer*, [1992] 6 C.R.R. (2d) 35, 66.

the prohibition in section 2(1).[113] If the crucial definition incorporated by reference in section 2(1) falls, then so too must section 2(1) itself.

Reading Down

[76] Turning to the possibility of saving the provision by "reading down" pursuant to section 35(2) of the Constitution, the same considerations that persuade me that the provision cannot be saved by severance also militate against saving it by such restrictive interpretation. Reading down is a narrower remedy than severance: it is appropriate only where the language of the provision will fairly bear the restricted reading. Otherwise, it amounts to naked judicial law-making.[114]

[77] The overbreadth of the definition with which we are here concerned can scarcely be described as marginal. It is not as if we are confronted merely with a peripheral excess in scope, surrounding an identifiable proscriptive core that targets constitutionally unprotected material. Rather, the virtually unlimited range of unconstitutional potential application of the Act overwhelms whatever permissible proscription might be identified.

[78] Any form of "reading down" will thus require substantial reconstruction of the section, including the interposition ("reading *in*") of exemptions for undoubtedly constitutionally protected forms of expressions, such as artistic, scientific and medical works: the definition as written

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[113]*See R. v Le Page*, [1995] 28 C.R.R. (2d) 309 (Ont.) A provision in the Criminal Code permitting detention of mentally disturbed persons who posed a "significant threat to the safety of the public" was held to be unconstitutionally overbroad, in that it swept more broadly than potential violent or criminal conduct, failing to ensure that only those "who are shown to be risk to cause harm unacceptable to society" will be detained in a mental hospital. *Id.* 369-74. The court declined to sever the offending language because it was "central" to the review system. *Id.* 375.

[114]*See* Hogg, *Constitutional Law of Canada* (3d) (1992), 393-34, para 15.7.

proscribes material representing traditional, classical and popular cultural expressions that form an integral part of constitutionally protected South African art and culture.[115] Given what is clear about the objectives of the 1967 Act, that would not be a valid process of statutory interpretation, but an impermissible importation of content foreign to the enactment. The comments of Justice Sachs in *Coetzee v Government of the Republic of South Africa; Matiso v. Commanding Officer, Port Elizabeth Prison,* are directly apposite:

> It [is not] the function of the Court to fill in lacunae in statutes that might not have been visible or regarded as legally significant in the era when Parliamentary legislation could not be challenged, but which would become glaringly obvious in the age of constitutional rights; the requirement of reading down would not be authorisation for reading in. [116]

[79] Even merely "reading down" so as to tailor the scope of the provision to fall within constitutionally permissible limits would present serious problems. There is a real danger that, in dealing thus with an overbroad statute, we will simply substitute for the vice of overbreadth the equally fatal infirmity of vagueness.[117] The court's reasoning in *University of Cape Town v*

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[115]Without commenting upon whether or not the formulae applied in various foreign jurisdiction would pass constitutional muster in South Africa, it is instructive that courts in Canada, the United States, Germany and India have insisted on exemptions for works of a *bona fide* artistic nature in pornography legislation. *See R v Butler,*[1992] 8 C.R.R. (2d) 1, 23 ("Even material which by itself offends community standards [will not be proscribed] if it is required for the serious treatment of a theme"); *Miller v California*, 413 U.S. 15, 24 (1973) ("the work, taken as a whole, [must] lack[ ] serious artistic, literary, political, or scientific value"); BVerfGE 83, 130 at 147-48 (holding that the constitutional right to artistic freedom must be taken into account even in the circumstance where material in question is unquestionably pornographic); *K.A. Abbas v Union* (1971) 2 S.C.R. 446, 471 ("artistic appeal or presentation of an episode robs it of its vulgarity and harm.") It is interesting to note that the *Hicklin* test was modified in 1954, in *R v Martin Secker Warburg Ltd*., [1954] 1 W.L.R. 1138, Mr. Justice Stable held that a book representing an honest and serious attempt to portray the society or group about which it was written, rather than merely a vehicle for sexual episodes, could not be deemed obscene. *But see* note 67, *supra*, regarding the danger that judicial evaluations of artistic value will involve class-based and culturally discriminatory determinations.

[116]1995 (10) BCLR 1382 (CC) 1114, para 62. *See also Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS) 1558 (declining to "read in" limiting provision to overbroad regulation limiting freedom of expression, noting that this would entail the court performing "the constitutional function of the legislature.") (*per* Dumbutshena, J.)

[117]Lawrence Tribe points out the perilous dialectic between the Scylla of overbreadth and the Charybdis of vagueness when he cautions that "[b]y pruning a statute of its overbroad sections, courts run the risk of leaving the

Minister of Education and Culture is apposite:

> If it is clear that the widest possible meaning was not intended, but at the same time it is not possible to say where the intended narrower meaning begins or ends, then no ascertainable meaning exists.[118]

[80] Finally, the fact that the fundamental right impinged by the statute is that of free expression weighs against reading it down; we must be sensitive to the danger that free expression will be "chilled" by uncertainty as to the surviving scope of the law.[119] We must be especially solicitous of the rights of those in our grievously unequal society who lack the financial resources to risk testing the boundaries of their free expression rights through litigation.[120] I decline the invitation to leave undisturbed on our statute book a provision that is massively overbroad, in the hope that the fundamental right to free expression will be adequately protected by an assurance from this Court that, henceforth, the statute will be applied only to those forms of expression that lack constitutional protection.

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remainder impermissibly vague." *American Constitutional Law* (1988) 1030. Tribe adds: "the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct . . . a law whose reach into protected spheres is limited *only* by the background assurance that unconstitutional application will eventually be set aside is a law that will deter too much that is in fact protected." *Id.* 1031. *See also* Stone, *et. al*., *Constitutional Law* (1986) 1045 ("By declaring overbroad laws unconstitutional on their face, the overbreadth doctrine avoids the vagueness that ordinarily would result from permitting such laws to be enforced up to the limits of their constitutionality.")

[118]1988 (3) SA 203 (C) 213. *See also MAWU v State President of the Republic of South Africa* 1986 (4) SA 358 (D) 370 ("I consider that [the challenged provision] is hopelessly uncertain, that no ascertainable meaning can be derived from it if it is meant to have some limitation *and that if it is meant to have no limitation, if it is intended to apply literally . . . it has strayed way beyond the State President's powers*.") (emphasis added).

[119]*See Osborne v Canada,* [1991] 82 D.L.R. (4th) 321, 325 (noting danger of "cur[ing] over-inclusiveness on a case-by-case basis leaving the legislation in its pristine over-inclusive form outstanding on the books.") (*per* Wilson, J., concurring); Roach, *Constitutional Remedies in Canada* (1995), para 14.220 ("reading down is not an appropriate means to advance the purposes of freedom of expression. The effect of such a remedy is to preserve on the books vague or overbroad legislation that could chill expression.")

[120]The deterrent to protected speech posed by an overbroad statute would not be effectively dealt with if "the contours of regulation would have to be hammered out case by case -- and tested only by those hardly enough to risk criminal prosecution to determine the proper scope of regulation." *Dombrowski v Pfister*, 380 U.S. 479, 487 (1965) (*per* Brennan, J.)

Invalidity of the Provision; Argument Regarding Suspension of Invalidity

[81] Having concluded that section 2(1) of the Act, read subject to the definition of *indecent or obscene* material in section 1 of the Act, is overbroad such that it unreasonably and unjustifiably violates the right to freedom of expression embodied in section 15 of the Constitution, and having further concluded that the impugned section cannot be saved by restrictive interpretation, I hold that it is inconsistent with the Constitution. One might wonder what is the fate of the Act itself, once section 2(1) is struck from it. The prohibition contained in that section is plainly the operational heart of the statute, the balance of which consists only of various definitions (section 1), exemptions (section 2(2)), procedural and jurisdictional provisions (sections 3, 4 & 4A), and the short title (sections 5). Nevertheless, because the question referred seeks our judgment only as to the constitutionality of section 2(1), we need express no opinion regarding the fate of the rump of the Act.

[82] In the course of argument on behalf of the intervening parties, and on behalf of *amici* People Opposing Women Abuse, *et al*, and the Christian Lawyers Association, this Court was urged to exercise its power under the proviso to section 98(5) to keep the Act temporarily alive, in the event that it should make a finding of invalidity. The Court is empowered to declare a law invalid to the extent that it is inconsistent with the Constitution, provided that it may:

> [I]n the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

[83] Such a suspended declaration of invalidity is not lightly to be indulged, since it preserves fully operational a statute in the face of this Court's considered finding that the law violates the Constitution. Probably the predominant consideration in determining whether to suspend a

declaration of invalidity is whether undesirable social consequences will flow from the immediate striking of a statute, because a *lacuna* is created in the law.[121] That, indeed, was the contention of the parties who urged the Court to suspend invalidity. They argued forcefully that the immediate disappearance of the challenged provision would lead to an uncontrollable proliferation of harmful pornography.

[84] We are unpersuaded by that contention. As set forth in paragraph 8 of this opinion, the 1967 Act is only one part (the less important part at that), of the system of regulation of sexually explicit material in South Africa. The 1974 Act -- the practical enforceability of which is not in any manner affected by our decision today -- is considerably broader in application than the 1967 Act. The 1974 Act, which provides for the prohibition of the production, importation and distribution[122] of material deemed "indecent or obscene or harmful to public morals",[123] has been the mainstay of the system of regulation of sexually explicit material since its enactment. The Act allows the prohibition of the possession of "undesirable" publications or objects,[124] and also for

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[121]Although the Canadian Constitution does not contain a provision equivalent to the section 98(5) proviso, the Canadian Supreme Court fashioned such a remedy in *Reference re: Language Rights under the Manitoba Act*, [1985] 19 D.L.R. (4th) 1, 36, to deal with such a *lacuna*. The Canadian Supreme Court cited Lord Pierce's dissent in *Madzimbamuto v Lardner-Burke*, [1969] 1 A.C. (P.C.), in which Lord Pierce applied the doctrine of "state necessity" in his analysis of the legal regime in the aftermath of the unlawful Unilateral Declaration of Independence in Rhodesia, opining that to disregard all of the illegal provisions in the territory would create a "vacuum and chaos." 19 D.L.R. (4th) at 31. In *Schachter v Canada*, [1992] 10 C.R.R. (2d) 1, the Canadian Supreme Court identified three circumstances under which it would suspend invalidity: "(A) striking down the legislation without enacting something in its place would pose a danger to the public"; "(B) striking down the legislation without enacting something in its place would threaten the rule of law" ; or, "(C) the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated." *Id.* 27.

[122]§8(1)(a), (b) & (e).

[123]§47(2).

[124]§8(d) provides that "[n]o person shall -- . . . possess any publication or object, if the possession of that publication or object has been prohibited under section 9(3) and that prohibition has been made known by notice

prohibition of the possession of films.[125]

[85] To the extent that there are legitimate concerns that pornography will proliferate uncontrollably in the wake of our decision today, the relevant interests are quite adequately satisfied by these provisions of the 1974 Act. The apprehended deluge of pornography can be dealt with by the provisions governing importation and distribution. And if it is deemed necessary to punish possession, the 1974 Act allows for that too. I am quite satisfied that no *lacuna* will open up as a consequence of the immediate nullification of the operative provision of the 1967 Act.[126]

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in the *Gazette*."

[125]§21.

[126]The two instances in which this Court has temporarily suspended the invalidity of a statute are clearly distinguishable from the circumstances of this matter. In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa* 1995(10) BCLR 1289 (CC), Chaskalson P's decision emphasised the serious consequences for good government if invalidity of a provision delegating powers to the President to amend legislation relating to local government elections were not suspended: "An order which would in effect disrupt the functioning of transitional local government structures and prevent the elections from being held would not in my view be in the interests of good government. It could lead to increased tension in areas where the inhabitants are anxious to democratise their local structures and to considerable waste of expenditure bearing in mind the preparations that are already under way and the steps that have been taken to lay the groundwork for such elections." *Id.* para 110. The Court also took into account the limited prejudice that would be suffered by the applicants: "The prejudice to the applicants consequent upon such an order being made is, by comparison, not substantial. . . Weighing this limited potential prejudice as far as the applicants are concerned against the much greater prejudice to local government generally, and the holding of elections in particular, which will result if the proclamations are declared invalid with immediate effect, it seems clear that 'justice and good government' requires that Parliament be given the opportunity if it wishes to do so, to remedy the situation." *Id.* para 112.

In *S v Ntuli* 1996(1) BCLR 141 (CC) the Court suspended the declaration of invalidity of a provision requiring prisoners convicted in lower courts to obtain a judge' certificate if they wished to prosecute an appeal without the assistance of a lawyer. Writing for the Court, Didcott J. noted that allowing prisoners to lodge appeals without certificates would lead to a significant increase in the number of such appeals. That would require new statutory structures: "Legislation will have to be drafted and circulated. All that will take time, lots of time. . . The long perpetuation of an unconstitutional scheme is admittedly unfortunate. But the statute book cannot be purged suddenly of all its old elements that are now repugnant to the Constitution. And, if fresh problems are to be avoided, the removal of the objectionable parts and their replacement by ones that are sound and realistic has to be both thorough and thoughtful. That, I have no doubt, is 'in the interests of justice and good government'." *Id.* para 28.

[86] In both *S v Bhulwana; S v Gwadiso*[127] and in *Coetzee v Government of the Republic of South Africa; Matiso v. Commanding Officer, Port Elizabeth Prison*[128], this Court declined to suspend invalidity on the basis that there would be no resultant *lacuna* after the impugned legislation had been struck down.[129] In both instances, this Court held that the legislation that would remain undisturbed on the books after the offending provisions had been struck would suffice to protect the legitimate objectives of the law.[130]

[87] Of course, the 1974 Act may itself be unconstitutional, as urged by Applicants. However, for the reasons stated, I have declined to anticipate that question here. If the constitutionality of the 1974 Act is raised in proceedings before us, that will be the time to consider whether it is destined to meet the same fate as the provision struck down today, and if so, whether its immediate demise would open the floodgates to pornography. This Court will decide then whether or not circumstances warrant making an order pursuant to the proviso to section 98(5).

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[127]1995(12) BCLR 1579 (CC).

[128]1995(10) BCLR 1382 (CC).

[129]*See also Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) 94 (declining to grant order under proviso to § 98(5) where declaration of invalidity would have "insignificant, if any, impact" on relevant sections of Companies Act.

[130]In *Bhulwana* the Court found that the impugned presumption created by § 21(1)(a)(i) of the Drugs and Drug Trafficking Act of 1992 was "not necessary for the conviction of offenders, or for the furthering of the objects of the legislation." *Id*. para 30 (*per* O'Regan, J.) In *Coetzee*, striking down provisions allowing for the imprisonment, in certain circumstances, of civil debtors, the Court held that "it is by no means so that the system is dependent upon the imprisonment sanction for its viability. There are a number of other aids to judgment debt collection in the system, e.g., property attachment and garnishment of wages". *Id.* para 18 (*per* Kriegler, J.) In *Bhulwana*, the Court noted further that "[c]entral to a consideration of the interests of Justice in a particular case is that successful litigants should obtain the relief they seek. . . In principal too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants." *Id.* para 32 (*per* O'Regan, J.) In light of our conclusion that no significant considerations impel in favour of suspension of invalidity in the present case, it is unnecessary to analyse the interests of the Applicants and those similarly situated *in casu*.

Costs

[88] None of the Applicants made any submissions regarding costs, nor are any reasons apparent why an order for costs should be made. I will therefore issue no order in that regard.

Order

[89] In the result, the following order is made:

> Section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 is declared to be inconsistent with the Constitution of the Republic of South Africa, Act 200 of 1993 (as amended), and is, with effect from the date of this judgment, declared to be invalid, and of no force and effect.

[90] **DIDCOTT J:** These cases concern the possession of material that is hit by the Indecent or Obscene Photographic Matter Act (No 37 of 1967). I underline the word "possession", then underline it again. Neither case has anything to do with the production of such material, with its importation, publication, exhibition, distribution or dissemination. A single question has been referred to us for our ruling on it, the question whether section 2(1) of the statute is constitutionally valid or not. That issue and it alone had arisen down below, where a contravention of section 2(1) was the sole offence which the applicants for the referral were alleged to have committed. And what section 2(1) forbids, all that section 2(1) forbids, is the possession of material which it calls "indecent or obscene photographic matter". Indeed the entire statute, a singularly short one consisting of a mere six sections, deals in its penal provisions with nothing else. Separate legislation which is not challenged now, and cannot be within the limited terms of the referral, combats the other activities in the area of pornography, obscenity and indecency that I mentioned a moment ago.

[91] 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.[131] Here the invasion is aggravated by the preposterous definition of "indecent or obscene photographic matter" which section 1 of the statute contains.[132] 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. That section 2(1) clashes with section 13 seems to be indisputable.

[92] Section 2(1) is said in addition to be incompatible with the possessor's freedom of expression which section 15(1) of the Constitution likewise protects. That argument depends on the proposition, which we were urged to accept, that the protection thus provided is not confined to the conveyance of information and the expression of ideas by verbal, pictorial or other means, but encompasses also their reception by those to whom they are communicated or presented. Freedom of expression, in its literal and ordinary sense, lacks that extra dimension. The broader connotation which counsel ascribed to the concept has nevertheless, I am well aware, found favour elsewhere in constitutional lore. We may be persuaded to follow suit on some future occasion that calls for a decision on the point. In the meantime, I believe, the question should be left open since, once a violation of section 13 is established, we have no need to consider any alternative attack on section 2(1).

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[131] Ackermann J analysed and discussed the concept of personal privacy in paragraphs [65] to [79] of the judgment written by him in *Bernstein and Others v Bester NO and Others*, which was delivered in this Court on 27 March 1996 but has not yet been reported. In an apt metaphor used in paragraph [67] he alluded to "the inner sanctum of a person" that lay within "the truly personal realm".

[132] That goes thus : " 'indecent or obscene photographic matter' includes photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature".

[93] The issue that remains is whether section 33 (1) of the Constitution saves the prohibition pronounced by section 2(1) from nullification. It does not in my opinion. For the intrusion into personal privacy that flows from the prohibition fails, I am satisfied, the first and second tests set for its tolerability, the tests requiring it to be reasonable and justifiable. The viewing of obscene or indecent pictures by their possessors was blamed in argument for contributing, through its bad influence on some viewers, to the commission of sexual crimes and other socially repulsive behaviour. Such a causal connection is a controversial subject on which psychologists and penologists disagree, however, and the results of the research that was drawn to our attention neither prove nor disprove it empirically. So there we can come to no definite conclusion either way on this occasion. Much was also made of obscene or indecent pictures which exploited women and children, degrading the ones portrayed and insulting those who were not depicted but felt humiliated as a class. A ban on the possession of material so pernicious was said to serve a useful purpose in the campaign against its production. The market for it diminished once law abiding people departed from that, and the incentive to prepare it was then reduced. The production of pictures like those, and of further types equally depraved, is certainly an evil and may well deserve to be suppressed. Perhaps, as a means to that end, the same even goes for their possession, making it both reasonable and justifiable for society to mind the private business of its members. Such questions do not arise at present and are best left unanswered until some future case confronts us with them. But the trouble one now has with section 2(1) is that it hits the possession of other material too, material less obnoxious and sometimes quite innocuous which we cannot remove from its range while it lasts because the parts of section 1 giving it that effect are not satisfactorily severable from the rest. A better target at which to aim in the battle with unbearably vile pictures as matters stand for the time being, a target under fire already from

separate legislation as I mentioned earlier, is surely their production whenever that occurs here, the importation of ones produced elsewhere, and the dissemination of all.

[94] The debate which took place when we heard the present matters spread far and wide over the field of pornography and obscenity, exploring every visible pocket of it and stepping in the process on many prickly points. We should tread no such path in turn. To do so is not only unnecessary, and to be avoided on that conventional count, but also unwise. That I say for these expedient yet cogent reasons. The statute that concerns us has apparently entered its twilight, together with the other legislation dealing at present with pornography and obscenity. Fresh legislation which will replace the lot is currently in the course of preparation. Sooner or later we shall no doubt be required to pass judgment on the enacted replacement. But, while we can expect that, we ought not to anticipate it. We shall otherwise run the risk of fettering ourselves with premature decisions on important and contentious questions which have implications for future adjudication that are hard to foresee now. The less we say meanwhile, in short, the better that will be in the long run.

[95] I accordingly concur in the judgment which Langa J has prepared in these two cases. The construction placed by him on this one of mine, I confirm in particular, is indeed that which I intended it to bear, when read as a whole. The judgment written by Mokgoro J, on the other hand, differs markedly from my treatment of the cases in both its focus and its ambit. Within its framework it also contains some features and details which strike me at present as open to question but do not have to be considered on the view that I take of the matters. I shall therefore not concur in her judgment, as distinct from the order which she proposes. With that I quite agree. I do so,

however, solely and simply for the reasons which Langa J and I have given.

Chaskalson P, Mahomed DP, Ackermann J, Kriegler J, Ngoepe J and O'Regan J concur in the judgment of Didcott J.

[96] **LANGA J**: Applicants have been charged with possession of prohibited material.[133] Two questions immediately arise. The first concerns the constitutionality of the provision creating the offence and that is the issue which has been referred to this Court for decision. The second relates to the nature of the material prohibited by the relevant section, the question being whether possession of some or all of it should be constitutionally protected.

[97] With regard to the first question and having regard to the definition which is couched in very wide terms,[134] I am satisfied that the prohibition as framed is unconstitutional. I am in respectful agreement with the reasons so succinctly expressed by Didcott J, more particularly that a ban on possession of the material hit by section 2(1) of the Act infringes the right to personal privacy guaranteed by section 13 of the Constitution. The terms of the provision, read with the definition, are unquestionably overbroad and have the effect of sanctioning the unwarranted and unjustifiable invasion of the right to personal privacy regardless of the nature of the material possessed.

[133]In terms of s 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967. The relevant part of this provision is reproduced in paragraph [9] of the judgment of Mokgoro J.

[134]The definition of "indecent or obscene matter" is set out in s 1 which is quoted by Mokgoro J in paragraph [9] of the judgment.

[98] This finding with regard to the first question, makes it unnecessary in my view to canvass the second in fine detail. Nor is it necessary, in my view, to canvass the underlying free expression issues and to draw lines between different classes of sexually explicit material. Whether possession of the video cassettes which constitute the subject matter of these cases would be constitutionally protected is a question we need not consider in this instance.

[99] In paragraph [91] of the judgment, Didcott J makes the assertion that "[w]hat 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 the state." My understanding is that this statement is subject to the qualification that the right referred to, as is the case with other Chapter 3 rights, is not necessarily exempt from limitation. That the limitation may extend to possession even in the privacy of one's home in certain circumstances is a possibility acknowledged by Didcott J in paragraph [93]. The precise circumstances are not a matter we are called upon to delineate here and I agree that it is wise to refrain from attempting to do so in this matter. What is clear is that an intrusion into such privacy cannot, as was the case in the past, be permissible unless it can be adequately justified on the basis of section 33(1) of the Constitution.

[100] The emphasis with which Didcott J expresses himself with regard to the individual's right to privacy[135] 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.[136] Such emphasis is therefore

[135]I refer in particular to the first two sentences in paragraph [91] of the judgment.

[136]For example, s 16 of the Sexual Offences Act 23 of 1957 prohibited interracial sexual intercourse and marriage; s 71 of the Internal Security Act 74 of 1982 and s 118 of the Post Office Act 44 of 1958 authorised or permitted

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.

[101] For the reasons stated above, I concur in the judgment of Didcott J and agree with the reasoning leading to it. I also agree with the order as proposed in the judgment of Mokgoro J.

Chaskalson P, Mahomed DP, Ackermann J, Kriegler J and O'Regan J concur in the above judgment of Langa J.

[102] **MADALA J**: The question referred to us in these two cases is the constitutionality of Section 2(1) of the Indecent or Obscene Photographic Matter Act, 37 of 1967. My colleague, Mokgoro J, has prepared a very comprehensive judgment in the matter and comes to the conclusion that the impugned section is in conflict with Section 15 of Constitution - the right of freedom of expression. I do not believe that it is necessary nor indeed desirable for us to decide the issue raised in these cases on the basis of freedom of expression, even though counsel addressed argument at length on this score. However, I agree with the order Mokgoro J proposes. I adopt the route of privacy espoused by Didcott J, and supplemented by Langa J, rather than the route of freedom of speech in arriving at my conclusion that the clause under attack is unconstitutional. The freedom of expression leg is, in my view, both wider, and, I would suggest, more contentious than the privacy leg. That the impugned section is overbroad and vague admits of no doubt. It is, consequently, unconstitutional and cannot be saved by the provisions of Section 33 (1). Nor, in

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interference with private communication.

my view, can a neat surgical operation save it by severance of the offending portions.

[103] Consequently, I write not to disagree with the approach of Didcott J, which he articulates so well, briefly, and with power. The question of pornography is as contentious in its scope as it is in its definition. There is a loud voice that clamours for substantial censorship, if not outright prohibition of "sexually explicit" material. There is an equally loud voice that urges that pornographic matter should be made freely available. The arguments on both sides are hotly charged, the issues ranging, *inter alia*, from production, sale and distribution to possession of pornographic material and its effects on society. It is with the issue of possession only that the present cases grapple. I, therefore, write with a keen sense that these cases, like others that come before us from time to time, call upon one to add one's views to the debate. It is for fear that those who are less discerning, the mischievous, and those who may have ulterior motives, may want to believe that the flood-gates are open for the possession of any and all forms of pornographic material on the ticket that the right to privacy is inviolable, that I have decided to add these remarks on the matter in concurring with Didcott J and Langa J on the conclusion that Section 2 (1) is unconstitutional.

[104] In a dissenting judgment, Brandeis J, defining the right of privacy, stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognised the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. <u>They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men</u>.[137] (My underlining)

The right to privacy is recognised and guaranteed explicitly in several human rights instruments

[137] *Olmstead v US* 277 US 438 (1928) at 478.

such as the Universal Declaration of Human Rights,[138] the International Covenant on Civil and Political Rights[139] and the European Convention for the Protection of Human Rights and Fundamental Freedoms,[140] and implicitly guaranteed in others.

[105] While I agree that one's right to privacy should be respected, this, in my view, does not mean that all pornographic or similar material warrants protection under that right or even under the wing of free expression. There seems to be considerable consensus, both here and abroad, that some forms of pornography and obscene matter should not enjoy constitutional protection. In my view, children should not be exposed to or participate in the production of pornography, and that, therefore, possession by them and exposure to pornographic material should be prohibited. However, possession by adults, in the privacy of their homes for personal viewing of sexually explicit erotica, portraying nudity, sexual interaction between consenting adults, without aggression, force, violence or abuse, may not be prohibited, for the benefit of those who derive pleasure in viewing such material.

[106] The protection accorded to the right to privacy is broad but it can also be limited in appropriate circumstances. The different circumstances of different cases may require us to take decisions specifically suited to particular cases. If the American experience is anything to go by, it provides a clear example of the approach postulated above. Within the United States First Amendment, different approaches have been adopted by the Supreme Court in dealing with

[138]Article 12.

[139]Article 17.

[140]Article 8.

pornography cases to meet the particular circumstances. In Stanley v Georgia,[141] the Supreme Court struck down a Georgia law which outlawed the private possession of obscene material on the ground that the State's justifications for the law - primarily that obscenity would poison the minds of its viewers - were inadequate. The court recognised that the statute impinged upon the right to receive information in the privacy of one's home. Justice Marshall, delivering the opinion of the Court, stated:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own 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.[142]

However, in *New York v Ferber,*[143] the Supreme Court upheld a New York statute outlawing the distribution of child pornography for compelling state interests in protecting children. In Osborne v Ohio,[144] the Court upheld an Ohio statute proscribing the possession and viewing of child pornography on the basis of the state's compelling interests in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalising those who possess and view the offending materials. It is this elasticity that allowed the American courts to develop different principles in response to differing circumstances.

[107] Although the issue of child pornography may not be directly in issue in the present cases, and although it may even be the subject of litigation on another day, it is relevant to the question

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[141]394 US 557 (1969).

[142]*Stanley v Georgia* (supra) at 565.

[143]458 US 747 (1982).

[144]495 US 103 (1990).

of possession which is before us and I write to add my voice to the view that the right to privacy may be limited in certain circumstances.

[108] **SACHS J**: Mr Justice Potter Stewart might have known obscenity when he saw it, but with respect, I do not, nor would I lay claim to any intuitive and immediate recognition of what is indecent. I am sure that the great majority of South African judicial officers, not to speak of police and prosecuting authorities, or of the general public, are in the same position. Far from the definition in the Act helping us, it amplifies the confusion by: introducing such vague concepts as manifesting licentiousness and lust; discriminating against same-sex activities; and permitting the penalization of possession of perhaps half the videos on sale in the most respectable of shops, and possibly three quarters of coffee-table art books, let alone many tastefully illustrated copies of the Bible or Shakespeare.

[109] Yet, if the only defect in the Act was definitional overbreadth, it might have been possible to rescue something of it by appropriate definitional straitening. A well-trained judicial laser, coupled with a benevolent reading-down gaze, might have established a core residue of legitimately focussed state intervention in relation to the two protected interests well delineated by Mokgoro J and Didcott J in their respective judgments, namely, expression and privacy.

[110] In my view, however, even more serious and less remediable than the definitional overbreadth, is what I would regard as the strategic overbreadth. All obscene material is in effect treated in the same blunt and undifferentiated way: its possession in any circumstances, and within any context, is made a criminal offence. The limited exemptions provided for are based on bureaucratic rather than constitutional controls. There is no attempt to distinguish, as has been

done in some countries, between regulating what is offensive and prohibiting what is harmful. Possession in the privacy of the home is treated in the same way as possession for purposes of sale. There is nothing to show any serious legislative attempt to achieve the difficult balance between the principles of free expression and privacy, on the one hand, and respect for equality and the dignity of all persons, on the other. Even if we accept that the slippery slope argument, according to which any attack on any form of speech is an assault on all free speech, is itself a slippery slope, down which important speech rights could tumble because of their equation with trivial ones, there is no recognition at all in the legislation of the specific importance of freedom of expression and of artistic creation.

[111] As the historical and comparative materials assembled in Mokgoro J's valuable judgment show, these are all highly complex and controversial issues, on which honest and constitutionally-sensitive people may and do disagree. We are not called upon in the present case to say what our Constitution requires in respect of any of them, or with regard to their conjunctural invisibility; it is sufficient for the purposes of the present case to point out that the Act is irretrievably defective both by virtue of lack of legitimate definitional focus and because of absence of appropriate strategy to confront the broader problems of balancing different interests, in respect of which I have offered possible examples.

[112] I accordingly associate myself with the basic reasoning contained in the judgments of both Mokgoro J and Didcott J, as far as they go. Indeed, I see them as complementing each other. The invasion of privacy can be regarded as reducing any possible justification for the violation of the right to free expression. At the same time, the infringement of privacy becomes harder to

countenance when it targets communicative matter, which may vary from the artistic "laughter of genius" famously referred to by D.H. Lawrence, to the egregious degradation of the videos seized in the present case. Such material covers a range significantly different from, say, stolen goods, drugs or arms, the intrinsic harmfulness of which are universally recognised. Indeed, it seems strange that what one can do in one's bedroom one cannot look at in one's bedroom. The definitional overbreadth and operational heavy-handedness are common to invasions both of free expression and of privacy. I do not feel it necessary or even advantageous to confine my decision to the infringement either of expression or of privacy, since there is so much overlap between them. For these reasons, I concur in the order proposed by Mokgoro J.

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