



# “Proper contextualising of pornography as Expression”

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**2018 Youth Research Conference**

**20 September 2018**

**SESSION B: ONLINE SEXUAL EXPLOITATION**



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# Is pornography protected expression?

## **Section 16, Constitution of South Africa (1996):**

### 16. Freedom of expression: “*Protected expression*”

(1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the *press and other media*;
- (b) freedom to receive or impart *information or ideas*;
- (c) freedom of *artistic creativity*; and
- (d) *academic freedom* and freedom of *scientific research*.

# Is pornography protected expression?

## **Section 16, Constitution of South Africa (1996):**

16. Freedom of expression: ***“Unprotected expression”***

(2) The right in subsection (1) does not extend to -

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm (“hate speech”).

# Is pornography protected expression?

## Section 16, Constitution of South Africa (1996):

- Because pornography is not listed as “*unprotected expression*” in section 16(2), it is by default “*protected expression*” in terms of section 16(1).
  - ***De Reuck v Director of Public Prosecutions (WLD)*** 2004 (1) SA 406 (CC), para [48]
- How then *can* pornographic expression (words, images, film) be limited?

# Limitation of pornographic expression

## Section 36, Constitution of South Africa (1996):

### 36. Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of ***law of general application*** to the extent that the limitation is ***reasonable and justifiable*** in an ***open and democratic society*** based on ***human dignity, equality and freedom***, taking into account all relevant ***factors***, including -
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.

# Limitation of pornographic expression

## (a) The nature of the right

“... our Constitution ranks the right to freedom of expression differently [than the US Constitution]. With us it is ***not a pre-eminent freedom ranking above all others***. It is not even an unqualified right... Moreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims ***three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom***.

*(continued ...)*

# Limitation of pornographic expression

## (a) The nature of the right

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

- *S v Mamabolo* 2001 (3) SA 409 (CC), para [41].

*(continued ...)*

# Limitation of pornographic expression

## (a) The nature of the right

*“The Constitutional Court has distinguished between the ‘core values’ of freedom of expression and ‘expression of little value which is found on the periphery of the right’.*

*The latter type of expression receives less protection in that limitation of such forms of expression is relatively easily justified, compared to limitations on expression at the core.”*

- ***The Bill of Rights Handbook*** Iain Currie & Johan de Waal (Sixth Edition) 2013, p 340-341.

# Limitation of pornographic expression

## Section 1(a), Constitution of South Africa (1996):

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) ***Human dignity***, the achievement of ***equality*** and the advancement of human rights and ***freedoms***.

## Section 7(1), Constitution of South Africa (1996):

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of ***human dignity, equality and freedom***.

# Limitation of pornographic expression

## Section 10, Constitution of South Africa (1996):

Everyone has *inherent dignity* and the right to have their dignity respected and protected.

## Section 39(1)(a), Constitution of South Africa (1996):

(1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on *human dignity, equality and freedom*;

# Limitation of pornographic expression

- German approach: Human dignity (“Menschenwurde”)

*“Rather than deploying a subjective standard that attempts to determine the extent to which a particular work offends the viewer or reader (This was the approach of the U.S. Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).), the German court analyzed the presentation of sexuality in its human context. **Mathias Reimann summarized the characteristically Kantian German approach: The court essentially asks whether the material presents the characters truly as human beings with a value in and of themselves. If the material does, the court will find the sexual explicitness acceptable because sex forms a natural part of life.”***

# Limitation of pornographic expression

- German approach: Human dignity (“Menschenwurde”)

***“If, on the other hand, the material basically employs its characters only as objects for other purposes, notably sexual stimulation, the court will find the depiction of sex unacceptable because the work treats the characters not as humans, but only as objects. Such a work denies the characters their human individuality and personhood. The approach of the German court thus concerns itself not with the viewer's prurient interest but—ultimately— with human dignity”***

(Mathias Reimann, “Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the U.S.,” *University of Michigan Journal of Law Reform* 21 (1987– 88): 201– 53, at 229.).

# Limitation of pornographic expression

- Inherent worth / Human dignity:

“Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. ... The very nature of prostitution is the commodification of one’s body. ... ***The very character of the work [...] devalues the respect that the Constitution regards as inherent in the human body.***”

*S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)

# Limitation of pornographic expression

## **Example: De Reuck v Director of Public Prosecutions (WLD)**

### **Facts**

- Challenge to the constitutionality of the Films and Publications Act's prohibition on the creation, production, possession etc. of child pornography.

### **Conceptual analysis:**

- Prohibition of child pornography is a limitation on the right to freedom of expression.
- Question: Can the limitation be justified?

# Limitation of pornographic expression

## Example: De Reuck v Director of Public Prosecutions (WLD)

### Limitations analysis:

- Entails a weighing up of the *harm done* by limiting freedom of expression against the *benefits achieved* by doing so.
- The harm done by the prohibition depends on whether pornography is core to what is valuable about freedom of expression?
- Core values of freedom of expression:
  - Guarantor of democracy (political accountability)
  - Recognition/protection of moral agency of the individual
  - Facilitation of the search for truth
  - Hear, form and express opinions and views freely

# Limitation of pornographic expression

## **Example: De Reuck v Director of Public Prosecutions (WLD)**

### **Conclusion:**

- Pornography does not implicate the core values of freedom of expression. It is, for the most part, expression of little value which is found on the periphery of the right.
- Purpose of limiting child pornography: (1) Protecting the dignity of children, (2) Stopping production of child abuse material, (3) Preventing use of such materials for child sexual grooming.
- The relatively narrow infringement of expression is outweighed by the important purposes performed by the prohibition.

# Limitation of pornographic expression

## **Example: De Reuck v Director of Public Prosecutions (WLD)**

### **In other words:**

*The scope of legitimate exercise of constitutional freedoms does not extend to the use of such freedoms to violate human dignity and placing people at risk of harm and exploitation. That would constitute abuse of constitutional freedoms.*

### **Put differently:**

*Freedom of expression should not be used to trample on / violate people's inherent worth / human dignity.*

# Main Concerns.

Current Act (Films and Publications Act):	Amendment proposed in the Bill (legislative proposal):	Consequences:
“XX” definition:		
<ul style="list-style-type: none"> <li>•Explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person,<sup>1</sup></li> <li>•Conduct or an act which is degrading of human beings,<sup>2</sup> and</li> <li>•Conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour.<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>•Explicit sexual conduct <b><i>accompanied by explicit violence</i></b>, [Remove: “<i>which violates or shows disrespect for the right to human dignity of any person</i>”]</li> <li>•<b>Remove all</b></li> <li>•<b>Remove all</b></li> </ul>	<p>More vile, degrading and dehumanising materials will become legally distributable;</p> <p>The position proposed is that it will be fine to distribute such materials, as long as it does not contain explicit violence – <b><i>no matter how degrading and dehumanising it is.</i></b></p> <p>Material inciting harm will also become legally distributable.</p>

<sup>1</sup> Ss 16(4)(b)(i) and 18(3)(b)(i) of the Act.

<sup>2</sup> Ss 16(4)(b)(ii) and 18(3)(b)(ii) of the Act.

<sup>3</sup> Ss 16(4)(b)(iii) and 18(3)(b)(iii) of the Act.

# Main Concerns.

Current Act (Films and Publications Act):	Amendment proposed in the Bill (legislative proposal):	Consequences:
<p>“X18” definition: “Explicit sexual conduct” (section 1)</p>		
<ul style="list-style-type: none"> <li>• Only accessible by and distributable to adults inside an “adult premises” (section 24(1) and (2))</li> </ul>	<ul style="list-style-type: none"> <li>• Accessible by and distributable to adults online, subject to conditions incl. prevention of access by children (new subsection 24(3))</li> <li>• The elements proposed to be removed from the “XX” definition will either become “X18” classified or lower, in terms of the FPB Classification Guidelines.</li> <li>• The Bill proposes the inclusion of sexual intercourse with a human corpse in the definition of “explicit sexual conduct” in section 1. It then fails to amend the “XX” definition to include this extension in the “XX” definition.</li> </ul>	<p>Legalising material that research shows is a cause of adults perpetrating sexual violence on vulnerable individuals – mostly women and children – <b><i>without first conducting an investigation of the costs to society.</i></b></p> <p>If this is accepted, it will <b><i>become legally allowable to distribute material containing sexual acts with a human corpse.</i></b> This would constitute an unjustifiable violation of the human dignity inherent in the body of a deceased person and living person.</p>

# Main Concerns (continued).

- Watering down of “XX” definition:

It will result in:

- The violation of the inherent dignity of people and/or degrading people, in that materials containing such depictions will be legally distributed or sold

**[Note:** It is not always possible to deduce consent/wilful participation, including the nuances of coercion, dominance and power imbalances from image/video content – that is why a higher objective standard is necessary to protect people]; and

- A public health and safety risk in that people will be allowed to distribute material to incite recipients to harm others or themselves.

# Main Concerns (continued).

- Legalising of the ONLINE distribution of “X18” (hardcore adult pornography):

## 1. Harms of pornography – cause for investigation:

- The harms of adult pornography are grave. [See Annexure E to our Written Submissions for the Research.]
- Taking but one harm as example: **Pornography is a cause of sexual aggression and gender-based violence**
  - **Pornography use is rife in South Africa.** [We are in the top 20 of all countries in the world. We are number 1 in the world for accessing pornography via smart phones. [<https://carteblanche.dstv.com/stats-south-africas-porn-habits/>]]
  - **Gender-based, domestic and sexual violence is rife in South Africa.** Mostly adult males exploiting, abusing and violating women and children. [This is a matter of public record.]
  - **Scientific/research evidence shows that pornography use is a cause of gender-based / sexual violence.**

# Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:

Dr. Paul Wright and his research team ... analyzed recent data on pornography use and sexual violence from 22 studies and 7 different nations. They found that in correlational, cross-sectional, and longitudinal studies, **pornography use and acts of sexual aggression were directly connected**. This connection held true for both men and women, and for verbal and physical aggression. **Violent pornography was even more strongly linked to sexual violence**. Moreover, after viewing over 500 studies to determine whether consumption of pornography caused gender based violence, Dr. Max Waltman of Stockholm University concluded that the weight of the evidence shows the direction of the connection clearly. He noted that **the available research shows that pornography causes gender based violence through most every methodology imaginable, using experimental and nonexperimental studies, quantitative and qualitative studies, and samples of specific groups and samples of the general population**. Dr. Waltman describes the effects as not only statistically significant but robust.”

# Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:

## Let's take stock:

- Non-violent adult pornography is therefore poison, and violent adult pornography is even more toxic. ***Does that provide a rational justification for prohibiting the distribution of ONLY the one, and legalising the other? We think not.***
- The harms of adult pornography, or at least of this one harm, is **cause for serious concern and warrants proper investigation.**
- The **SEIAS on the Bill did not look at the social and economic impact** of legalising the mass distribution of adult pornography to adults via the internet.

# Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:
  2. If the legislative proposal is accepted, it will be done without having investigated to determine what the cost of that decision will be.
    - According to the research, more vulnerable people, mostly women and children, will fall prey to, in most instances, adult male sexual predators.
    - To take this decision to legalise, without having given proper consideration to the research and the impact it will have, is to declare: ***“Male sexual entertainment is more important than the safety and protection of women and children.”*** That would be a travesty of justice..
      - **S v Engelbrecht** 2005 (2) SACR 41 (W)
      - **“Porn seen as trigger for UCT rape spree”** 15 November 2016, Timeslive



Thank you.

