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A constitutionalised perspective on freedom of artistic expression

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In terms of section 16(1)(c) of the South African Constitution, Act 108 of 1996, artistic creativity is regarded as a manifestation of freedom of expression. However, unbridled artistic expression can sometimes go to the extremes of repulsiveness. For example, art, which takes on the form of pornography, can for instance be an insult to the dignity of women. In terms of the South African Constitution, a too liberal (and harmful) expression of artistic creativity can be limited in terms of section 36 of the Constitution by means of law of general application. The vital issue is to decide when and how to limit artistic creativity so that it does not unnecessarily hamper freedom of artistic creativity but at the same time to ensure the protection of societal norms against the unacceptable vulgarity of unbridled art. In an effort to find the correct recipe, this article takes a few pages from American litigious experiences and together with a few South African statutory directives, it tries to determine when, how and under what circumstances freedom of artistic creativity is to be limited.

Introduction

The urge to express oneself in various ways is a characteristic of the human being. The existence of freedom of expression is essential in order to create a democratic social and political society built on constitutionalism and human rights (Van der Westhuizen, 1994:264). The various ways in which a person expresses him/herself include verbal and non-verbal communication as well as various forms of artistic creativity. According to De Waal, Currie & Erasmus (1999:305) the need to protect the creation of art flows from the fact that artists are sometimes responsible for radical criticism.

The objective of this article is to determine the legal basis for freedom of speech (i.e. artistic creativity) and to try and explain the full meaning of the concept. Another objective is to analyse the South African Constitution as well as applicable American litigation regarding the various manifestations of freedom of expression in order to deduce the effect it may have on freedom of expression (i.e. artistic creativity) in South African schools.

Definition of concepts

In an effort to define the relevant concepts, an analysis of the concepts *freedom of expression* and *artistic creativity* amplifies the following:

freedom of expression

The word expression in the first instance refers to verbalisation of thoughts. The Oxford Dictionary explains it as a process "to put thought into words" (Sykes, 1976:366). This obviously includes speech. Van der Westhuizen (1994:264) says that it arguably includes "utterances with some intelligible content intended to inform, ask, or persuade". He contends that it also includes "appeals to the emotions

or the senses, through sound, colour etc." (Van der Westhuizen, 1994: 264). The latter opens the way for the inclusion of the concept of art.

artistic creativity

It is almost impossible to give a satisfying definition of the concept *art*. It is even more difficult to define the concepts artistic creativity and artistic expression. One of the reasons for this lies in the fact that "beauty lies in the eye of the beholder". In *Cohen v California* (1971) this age-old truth was phrased as follows:

one man's vulgarity may be another's lyric

A very liberal and broad approach to the description of the concept artistic expression is to be found in the literature of Heins (as quoted by Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman, 1999:20-23):

[Artistic expression] should include books, movies, paintings, posters, sexy dancing, street theatre, graffiti, comics, television, music videos — anything produced by creative imagination, from Shakespeare to sitcoms, from opera to rock. Freedom of expression may mean that we have to tolerate some art that is offensive, insulting, outrageous, or just plain bad. But it is a small price to pay for the liberty and diversity that form the foundation of a free society.

A local approach by De Waal *et al.* (1999:305) to the concept freedom of art should be regarded as more moderate and narrower. They define it as to include activities such as the making of films and music. Their further amplification of the concept shows that it includes all the activities associated with the creation of art — both art as a product as well as those activities or processes necessary for the creation of the art product (De Waal *et al.*, 1999: 305). Van der Westhuizen (1994:286) takes it one step further when he suggests that unsuccessful and experimental attempts at producing art will also enjoy constitutional protection.

The advantages and dangers of a broad definition

Some of the advantages of a broad (and liberal) definition (e.g. as portrayed by Heins) are:

- The interpretation of the broad definition reduces the problem for the court to decide whether a specific activity can indeed be classified as art for the purposes of constitutional protection, or not.
- A wide definition of the concept acts as a safeguard against censorship.
- Artistic creativity should be limited as little as possible because of its function in the promotion of self-fulfilment, autonomy and dignity in the life of an individual.
- The supporters of the liberal approach regard it as their right — as citizens of an open and democratic society based on human

dignity, freedom and equality — to enjoy unlimited freedom of artistic expression.

Some of the dangers of a broad (and almost unlimited) definition are:

- The wider the definition the more difficult it will become to determine the appropriate level of constitutional protection on a case by case basis.
- Artistic expression is known to quite often embody some of the most radical challenges to society, and also to have a severe impact on the values of a society. An unbridled and a too liberal approach might therefore have adverse effects on society's values. It must be accepted that law cannot be separated entirely from morality. Although it is "immoral" to force the religious and moral prejudices of one group upon others, legal mechanisms are often used to support and strengthen the moral values of a society (Van der Westhuizen, 1994:272).
- Although difficult to prove a causal link between pornography and sexual crime, some people regard the unbridled viewing of artistic expression in the form of pornography as a reason for sexual crimes. Van der Westhuizen (1994:283), for example, makes the statement that a "considerable body of material" of "some identifiable harm" done by pornography has been produced over the years.
- Unbridled art, which takes the form of pornography, is regarded by some as degradation of and an insult to women. Van der Westhuizen (1994:283) wrote:

Pornography is said to create or perpetuate a stereotypical view of women as not really meaning to say 'no', loving to be used and abused, and even raped. It creates a 'rape cul-ture' and tends to degrade women in their own eyes as well as in the eyes of men. Furthermore, harm to women may include sex discrimination and the perpetuation of sexual inequality of women. The fact that pornography — for whatever social or economic reason — often portrays men in a dominant position over women and depicts violence against women constitutes discrimination against women.

The legal basis for freedom of expression

Freedom of expression is generally acknowledged to be an important fundamental right and protected in national and international human rights instruments. In the following paragraphs first the national instruments and then the international instruments will be amplified:

National instruments

Section 1 of the South African Constitution (SA, 1996(a)) should be deemed as one of the key sections with regard to the founding provisions of the Constitution. It is phrased as follows:

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.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voter's role, regular elections and a multi party system of democratic government, to ensure accountability, responsiveness and openness.

South African freedom of expression is strongly rooted in these founding values of *democracy* and *human freedom*. Freedom of artistic creativity as a form of freedom of expression is specifically addressed in section 16 of the Constitution:

- (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.
- (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 .
(*author's italics*).

The limitation of freedom of expression

It is trite to mention that, like any other right, the right to freedom of expression is not absolute. Although this is the case in all legal systems it may vary and change with time and culture. It is also linked to the historical background as well as the political and social environment of a specific group.

In the South African context freedom of expression is limited in terms of:

- the *internal limitations* regarding freedom of speech (as quoted in paragraph 2 of this article) listed in section 16(2) of the Constitution, and
- by law of *general application* as taken up in the limitation clause of the Constitution, section 36:

The general limitations in section 36(1) of the Constitution read as follows (SA, 1996):

- (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 the extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

In terms of section 36 the first question to be asked is: what is "law of general application"; is the extent of the limitation of the artistic expression in question justifiable in an open and democratic society based on freedom and equality?

The second question to be asked is does the limitation in question meet the requirements set out in the 5 factors listed in section 36(1) (a)–(e)? In other words: one has to balance the conflicting rights in question (e.g. the application of right to freedom of expression against the morality and values of a specific society). For example: does a learner have the right to publish a report on his/her sexual experiences at the local club; or should his/her expressions be limited by the prevalent community morals and values reflected in the mission statement of the school.

The nature of the right to freedom of expression as contemplated in section 36(1)(a) recently came into contention in *The State v Russell Mamabolo*. Judge Krieger held that the right to freedom of expression is of such importance that it forms an integral part of the democratisation process of the present Constitutional dispensation in South Africa:

That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole ... [28]

It could actually be contended with much force that the public interest in the open-market place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed. [37]

However, important as it might be, no right is absolute. Judge Krieger's remark in this regard was as follows:

What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law [41]

In a particular instance it could for example be argued that the importance of the purpose to limit freedom of speech is to protect the specific society's concept of decency and human dignity. In *S v Williams* the court phrased the importance of this purpose as follows:

... the common thread running through the assessment of each phrase is the identification and acknowledgement of the society's concept of decency and human dignity.

The importance to limit freedom of expression could in a particular instance (for example of extreme vulgarity), be for the protection of public interest in general and in particular the protection of the interest of the young and tender of age and mind at school. It could very well be argued that the purpose to limit freedom of expression is important when it is balanced against other learner's rights to human dignity and privacy.

International instruments:

For the purposes of interpretation of the South African Bill of Rights it is mandatory to take into account the contents of applicable international law and foreign law. In this regard section 39(1) of the SA Constitution (SA, 1996(a)) specifies that:

- 39(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;
 - (b) must consider *international law*; and
 - (c) may consider *foreign law (author's italics)*.

As far as international law is concerned one need not go any further than article 19 of the Universal Declaration of Human Rights which determines as follows (UN, 1948):

- (19) Everyone has the right to freedom of opinion and expression, including freedom to hold opinions without interference, and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

Other international instruments such as The European Convention on Human Rights (1950), the American Declaration on the Rights and Duties of Man (1948) and the African Charter on Human and Peoples' Rights (1981) all confirm freedom of expression.

Freedom of expression in school context

Flowing from the basis of the South African Constitution spring various determinants which are useful in an effort to define the nature of freedom of expression (artistic creativity) within the school. Some of these determinants are as follows:

The advancement of fundamental rights

In terms of section 4 the National Education Policy Act (SA, 1996(b)) one of the directive principles for South African education is "the advancement and protection of fundamental rights of every person". Therefore, South African educators have a responsibility towards their learners to educate them in accordance with a culture of fundamental rights (i.e. freedom of expression — including artistic creativity). On the other hand the educator is under obligation to protect the learner against possible adverse effects of pornography. The right to freedom of expression should therefore not be regarded as an absolute right, but a right which is to be limited by general limitation as defined by section 36 of the South African Constitution (SA, 1996(a)).

Foreign law

Section 39(1)(c) of the South African Constitution determines that when the Bill of Rights is interpreted foreign law may be considered. Due to a lack of a long South African constitutional tradition, one should take counsel from foreign law as how to deal with the limitation of a right such as artistic expression.

As early as 1973 in *Miller v California*, a case that involved minors but not a school situation, the American judiciary held that individuals could not rightfully claim First Amendment rights for *obscene* or *vulgar* expression. In an attempt to distinguish obscene material from constitutionally protected material, the court used the following basic test:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work,

taken as whole, lacks serious literary, artistic, political or scientific value.

Referring to the case, Fischer, Schimmel & Kelly (1999:186) concluded that although many parents and teachers equate obscene expression with offensive four letter words, American lawyers and judges could not unconditionally equate the two. In an effort to find a satisfactory definition, the European Court of Human Rights in Müller and others referred to the following description:

Any item is obscene which offends, in a manner that is difficult to accept, the sense of sexual propriety; the effect of the obscenity may be to arouse a normal person sexually or to disgust or repel him. The test of obscenity to be applied by the court is whether the overall impression of the item or work causes moral offence to a person of ordinary sensitivity.

In light of the dearth of directly applicable precedent relating to student art work, the common thread in cases involving expressive activity is speech, regardless of whether it is spoken or written. The American Supreme Court was originally less willing to impose restrictions on student free speech, especially when it was political. The key case in the area of student free speech in a political context is *Tinker v Des Moines Indep. Community Sch. Dist.*, 393 US 503 (1969). In *Tinker* the court upheld the rights of students to wear armbands as a form of passive, non-disruptive protest. The Court added that learners do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". The Court also added that apart from a reasonable "forecast (of) substantial disruption of or material interference with school activities", school officials could not infringe upon students' constitutional right to freedom of expression. Even though *Tinker* dealt with political speech, it has since been applied in a variety of settings.

The American Supreme Court has modified its views in the two more recent cases. For example, in *Bethel School District No. 403 v Fraser* 478 US 675 (1986), the Court decided that school officials acted entirely within their permissible authority in imposing sanctions against a student who used lewd and indecent contents during a nomination speech.

Similarly, in *Hazelwood School District v Kuhlmeier*, 484 US 260 (1988) a case dealing with the rights of students who put together an upper-class, school sponsored newspaper, the Court addressed the authority of school officials to limit the content of such a publication. The students filed suit against the principal who deleted two articles from a school newspaper, *Spectrum*, one of which was based on the experiences of three pregnant students. The principal felt that the references to sex were not suitable for younger students to read. This case established a basic approach with regard to the censorship of a student's rights to freedom of expression. The court ruled that the principal acted reasonably in removing the article about pregnancy since his action would protect the younger students from "frank talk about sex".

This case confirmed that students do not enjoy an unlimited and unconditional right to freedom of speech at school and that the learner's first amendment rights were not violated by:

exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Moreover, it also contended that schools may refuse to sponsor student expression which:

advocates drug or alcohol use, irresponsible sex or a controversial political position.

Following the *Hazelwood* case, the few cases that have been litigated dealt primarily with print media such as movie reviews in a school newspaper, and expressive materials that students sought to distribute in school. For example, in *Desilets v Clearview Reg. Bd. of Educ.*, 647 A. 2d 150 (New Jersey 1994) it was held that school officials violated the American First Amendment rights of a junior high school student who sought to review R-rated movies in the school newspaper in the absence of a policy prohibiting such articles and also

because the existing policy was vaguely and loosely defined. Other disputes have concerned messages on a student's t-shirts. For example, in *Pyle v School Comm. of S Hadley*, 667 NE 2d 869 (Massachusetts 1996), it was held that high school students in public schools have freedom of expression, in the form of wearing t-shirts, to engage in non-school-sponsored expressive activity that may reasonably be considered vulgar, but that does not cause disruption or disorder. And in *Washegesic v Bloomingdale Pub. Schs.*, 33 F 3d 679(6th Cir. 1994), a school district was ordered to remove a portrait of Christ that was painted, and donated, by a former student more than thirty years earlier, from a school hallway on the ground that it violated the Establishment Clause.

In 1995 the limitation of learner rights to free speech was confirmed in *Lopez v Tulare Joint Unified High School District Board of Trustees*. The students in question contended that the use of profane words in the script of an art film would enhance the level of realism in the film. The court upheld the censorship in order "to maintain professional standards of English" required by Californian law.

Decentralisation and local definement:

In terms of section 7 of the South African Constitution the value of democracy is to be regarded as a fundamental right. Decentralisation of authority to the level of local schools could very well be regarded as a manifestation of democracy.

A strong trend to (decentralised) school based management is experienced in contemporary South African education. In terms of the purposes of the South African Schools Act (SA 1996(c)) as stipulated in the preamble of the Act — devolution of power to the community of a local school is to be one of the priorities in the governance of South African schools.

Likewise, the authority to decide on the desirability and/or acceptability of any given object of artistic expression should be devolved to the governing body of a school. In terms of section 20 of the SA Schools Act (1996(c)), the Governing body has to set the mission statement of a particular school. Religious and/or moral undertones are normally inherent to the mission statement of schools. It could very well be argued that Constitutional rights such as freedom of religion (section 15), freedom of association (section 18) and the right to enjoy and to practise religion (section 31) enhance a local school's right to a morally and/or religiously based mission statement. In arbitrary cases where there is a conflict of opinion as to the acceptability of a given work of art, it should first be evaluated against the norms and standards specified in the mission statement of the school. If this does not provide a satisfactory outcome, a special committee, appointed by the governing body, should analyse it against the background of the school's mission statement.

In America, two recent federal appellate cases dealt with the rights of teachers to have artistic freedom to select a school play and/or to permit students' greater freedom in expressing themselves in class. These constitute proof of the pendulum swing that of late has moved towards support of school board authority when dealing with speech-related activities of teachers. In *Boring v Buncombe County Board of Education*, 136 F. 3d 364 (4th Cir. 1998) the Fourth Circuit affirmed that a school board could transfer a high school drama teacher in North Carolina who selected a controversial play that administrators later decided was inappropriate for her students. Similarly, in *Lacks v Ferguson Reorganized School District R-2*, 147 F.718 (8th Cir.1998) the Eighth Circuit upheld a school board in Missouri's firing of a tenured high school English teacher who allowed students to use vulgar language in the context of creative, expressive assignments in her class.

Conclusion

Constitutional parameters for freedom of expression (i.c. artistic creativity) in South African schools should be drawn on the basis of the South African Constitution, South African educational statutes as well

as international and foreign law relevant to freedom of expression.

- Learners have constitutional rights and do not "shed their constitutional rights at the school gate" (the Tinker-case).
- Freedom of expression is more than mere verbal expression. In terms of section 16(1)(c) of the South African Constitution artistic creativity is a part of the freedom to express oneself.
- However, as far back as the Tinker-case it was held that "substantial disruption and material interference with school activities" is not acceptable.
- In terms of the general limitations of the South African Constitution (section 36) it is likely that substantial interference of privacy and infringement of human dignity could be considered as cause for a rightful limitation for freedom of expression (i.c. artistic creativity) at school. Likewise, lewd and indecent expression could be deemed unsuitable for a school environment (as was the situation in the Bethel case). Freedom of expression is likely to be rightfully limited in school publications by school management if such limitations are based on legitimate pedagogical concerns (as was held to be the case in the Hazelwood case). In other words, as it was held in the Williams case, a particular (school) community's concept of decency and human dignity is to be identified and acknowledged.
- The acknowledgement of a particular school community's concept of decency is rooted in democracy. In terms of section 16 of the South African Schools Act every school community has the democratic right to elect a governing body as representatives of parents, teachers, staff and learners. In terms of section 20 of the South African Schools Act a governing body has to adopt a mission statement for the particular school. Religious and moral considerations normally form the basis of mission statements and therefore a mission statement can be utilised as an effective instrument to determine the acceptability of a specimen of artistic expression.

If, in a particular instance, a school still has a problem with differentiating between acceptable art and unacceptable art, more clarification is to be found in the school's documents such as their school rules and mission statement.

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