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FROM MARGINALIZED DISCOURCES TO TENDER EMBRACES: BUILDING A NEW FREEDOM OF EXPRESSION JURISPRUDENCE IN SOUTH AFRICA

Carl F. Stychin

With the enactment of the Interim Constitution (pending the coming into force of the final version), South Africa has entered a new political and legal era. The Bill of Rights, for example, opens the door to the judicial review of legislation for its compatibility with guarantees of individual and group rights. A Constitutional Court has been appointed to carry out this task, and it has embarked upon this work with a recognition of the radically changed place of the judiciary in the Republic. Not surprisingly, the demands on Parliament's time have been extraordinary during the last two years, due in no small measure to the process of drafting the permanent constitution. As a consequence, South Africa currently has both a system of judicial review based upon a Bill of Rights as well as numerous statutes still on the books which were enacted during the apartheid era. The government clearly intends to repeal many of these laws for both political and legal reasons but, in the mean time, those statutes may well be subjected to searching judicial scrutiny. The decision of the Constitutional Court in *Case and Another* v. *Minister of Safety and Security*; *Curtis* v. *Minister of Safety and Security*[1] is a product of this current dynamic, in which one of the two statutes that served historically to regulate expression in South Africa was struck down.

FACTS

The applicants to the Constitutional Court, Patrick and Inga Case, and Stephen Roy Curtis, were charged with contravening section 2 of the *Indecent or Obscene Photographic Matter Act, 37 of 1967*.[2] Two of the applicants, the Cases, were charged based on possession of 150 video cassettes containing sexually explicit matter seized from their Johannesburg home in 1993. Cassettes in the possession of Curtis were seized by police in a shopping centre parking lot in Johannesburg. The applicants successfully applied for the two sets of proceedings to be postponed pending an application to the Constitutional Court regarding the constitutionality of section 2(1) of the *Act*.

At issue was whether the provisions of section 2(1) were inconsistent with Chapter 3 of the Interim Constitution (the Bill of Rights) and, in particular, with the rights to equality, privacy, freedom of conscience, freedom of speech, expression and artistic creativity, and administrative justice.

SIGNIFICANCE OF THE CASE

Although new legislation dealing comprehensively with the regulation of obscenity and hate speech currently is in the South African legislative process, the decision in *Case* remains important as it presented an early opportunity for the Court to examine the rights of freedom of expression and privacy (as they are articulated in the Interim Constitution). The analysis reveals a good deal about approaches both to constitutional interpretation, generally, and to the expression and privacy guarantees, specifically. The decision is also

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1 (1996) 5 BCLR 609 [hereinafter *Case*].

2 [hereinafter the *Act*]. Section 2(1) of the Act provided that: 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 defined "indecent or obscene" as including: 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.

important as an indication of how new legislation dealing with the regulation of film and publications likely will be scrutinized by the Court. Finally, for students of comparative rights jurisprudence, the decision presents an opportunity to expand their horizons in the South African direction, in a field which has been so dominated by the North American and European experiences.

FREEDOM OF EXPRESSION

The Bench rendered two principal judgments. The first, delivered by Mokgoro J., and concurred in by only one other member of the Court of eleven (Sachs J.), analyzes the constitutionality of section 2(1) in terms of the guarantee of freedom of expression in section 15(1) of the Bill of Rights.[3] By focusing squarely on the expression issue in considerable detail, Mokgoro J. may have succeeded in setting the framework of constitutional analysis for future freedom of expression cases.

In a sophisticated judgment, Mokgoro J. holds that it is appropriate for the judiciary to adopt a broad, inclusive approach to the expression right, given the presence of an explicit constitutional provision which allows for legal limitations on rights.[4] In this way, the state will carry the burden of justification for any limitation on the widely defined right. Thus, "sexual expression" is protected by section 15(1), a point on which all of the Justices appear to agree. Mokgoro J. then finds that section 15 protection extends, not only to the articulation of speech, but also to the right to receive and possess constitutionally protected expression.[5] She reaches this conclusion by looking to the purpose of the right, which she characterizes as an "entitlement to participate in an ongoing process of communicative interaction."[6] Importantly, Mokgoro J.'s analysis focuses on the importance of analyzing speech within a social context and she recognizes that rights may be "interrelated and mutually supporting articulations" of constitutional values.[7]

Having determined that section 2(1) of the Act limits the constitutional right to receive and possess sexually expressive material, Mokgoro J. turns her attention to whether such a limit can be justified pursuant to section 33 of the Interim Constitution.[8] She appears receptive to the argument accepted by the Canadian Supreme Court in *R.* v. *Butler*,[9] that obscenity justifiably can be prohibited under the criminal law based upon the rationale of avoiding harm to society in the form of encouraging of violence and reinforcing gender stereotypes.[10]

Indeed, all of the Justices seem to agree that some expressive material can be regulated and prohibited on the basis of content (for example, child pornography). But, in a nuanced analysis, Mokgoro J. also acknowledges the difficulties inherent in any future application of the *Butler* harm principle, specifically that it may provide "a cover for *de facto* deference to morality-based evaluations."[11] In this regard, she finds that often "culturally subordinated groups" bear the brunt of regulation through the suppression of "marginalised discourses that lack a powerful political constituency."[12] Moreover, Mokgoro J. recognizes that statutory exemptions for works of art may themselves create "the danger that judicial evaluations of artistic value will involve class-based and culturally discriminatory determinations."[13] This dicta suggests that the government may need to tailor very carefully any legislation to ensure that it withstands judicial scrutiny.

Mokgoro J. thoroughly interrogates the legislation and she sends a strong signal to Parliament that she will not be reluctant to strike down statutes tainted by

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3 Section 15(1) of the Interim Constitution reads: "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research."

4 *Case*, para. 22. The limitation provision in section 33 of the Interim Constitution reads in part:
(1) The rights entrenched in this Chapter 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 on freedom and equality; and (b) shall not negate the essential content of the right in question.

5 *Case*, para. 25.

6 *Case*, para. 27.

7 *Case*, endnote 39. For example, Mokgoro J. recognises, but leaves undecided, the question whether the singling out of representations of homosexuality and lesbianism for prohibition in the Act could withstand constitutional scrutiny in terms of the guarantee of equality on the basis of, *inter alia*, "sexual orientation" in s.8(2) of the Interim Bill of Rights (*Case*, endnote 97).

8 *Case*, para. 37.

9 [1992] 1 SCR 452.

10 *Case*, para. 47.

11 *Ibid.*

12 *Ibid.* Mokgoro J. cites the American decision in *Luke Records, Inc. v. Navarro* 960 F.2d 134 (11th Cir. 1992) [music performed by the African American rap group *2 Live Crew* as a whole lacked artistic value and was obscene] (*Case*, para. 41). She also refers to the targetting of feminist, lesbian and gay material by customs authorities and the police in Canada following the decision in *R.* v. *Butler* (*Case*, endnote 83).

13 *Case*, endnote 115.

apartheid. She examines the history of obscenity regulation in South Africa, using, for example, statements from both Hansard and the government-appointed Cronje Commission into Undesirable Publications (whose report was published in 1956).[14] These sources demonstrate that the motivations behind obscenity laws included unacceptable reasons grounded in racial and gender stereotypes.

In the end, Mokgoro J. has no hesitation in concluding that the scope of section 2(1) of the *Act* includes "a vast array of incontestably constitutionally protected categories of expression," and that the sweep of regulation is "entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute."[15] The terms of the *Act* are sufficiently broad on their face to include commercial advertising, artistic expression, safe-sex materials, a public service brochure dealing with sexual assault, or a "photograph of persons of the same gender in tender embrace."[16] Such a law is "*ipso facto* not *reasonable*,"[17] especially in a society with the history of censorship which has characterized South Africa.[18] Finding the law incapable of being severed or "read down" to avoid unconstitutionality, Mokgoro J. refuses to exercise her discretion to suspend a finding of invalidity pending correction of the defect by Parliament.[19] She holds that, unless constitutionally challenged, the field will be adequately regulated by the *Publications Act, 42 of 1974* (the principal legislation dealing with obscenity in South Africa).[20] Thus, no regulatory lacunae is created as a result of her order to strike down section 2(1) of the Act.

THE RIGHT TO PRIVACY

In a very different judgment, both in terms of the substantive right employed and the style of analysis, Didcott J. concurs in the order of Mokgoro J., but for completely different reasons. His focus is exclusively upon the privacy right found in section 13 of the Interim Constitution.[21] Didcott J. emphasizes the simple fact that the *Act* deals only with the *possession* of obscenity and, in that regard:

> [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 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 guarantees that I shall enjoy.[22]

Didcott J. consequently finds it unnecessary to consider the freedom of expression issues raised by the *Act*.

This sweeping characterization of the right to privacy is later qualified in the judgment by a recognition that possession might be a constitutionally permissible criminal act in some circumstances, because "the production of pictures like those, and of further types equally depraved, is certainly an evil and may well deserve to be suppressed."[23] In this passage, Didcott J. appears to employ a morality-based justification, as opposed to the harm approach favoured by Mokgoro J.

As for justifiable limitations on the right, Didcott J. does not wish to preempt Parliament in its consideration of new legislation. He simply finds that the *Act* criminalizes possession of material which is "sometimes quite innocuous" and therefore cannot be justified.[24]

Other members of the Court concurred in the judgment of Didcott J., although some did so only after explicitly disassociating themselves from his absolutist characterization of the right to privacy.[25]

ANALYSIS

The significance of the judgments in *Case* is, first, that they set the stage for future disputes dealing with freedom of expression and privacy. In particular,

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14 *Case*, paras. 6-12.
15 *Case*, para. 61.
16 *Case*, para. 59.
17 *Case*, para. 61.
18 *Case*, para. 63. On the egregious history of state censorship in South Africa, see generally Christopher Merrett, *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa* (Macon: Mercer University Press, 1994).
19 *Case*, para. 84. This power is granted to the Court by s.98(5) of the Interim Constitution.
20 *Case*, para. 85.
21 *Case*, para. 92. Section 13 of the Interim Constitution reads: "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."
22 *Case*, para. 91.
23 *Case*, para. 93.
24 *Ibid.*
25 Case, para. 99, per Langa J.; para. 102, per Madala J.

Mokgoro J., although not commanding a majority of the Court in this instance, may well have articulated the terms of the debate around both the scope of freedom of expression and the extent to which Parliament can limit that right. The Canadian approach seems the model that South African judges are likely to follow, although Mokgoro J. (rightly, in my view) expresses skepticism about the ability of judges and bureaucrats to apply the harm principle and to divorce it from considerations of "morality".[26]

Furthermore, Mokgoro J.'s emphasis on the interlocking character of rights suggests that she may be receptive to arguments that one justification for the regulation of expression is the impact that some speech — such as obscenity or hatred — may have on the equality rights of others. Here again, the Canadian approach, as articulated by the majority of the Supreme Court in *R.* v. *Keegstra*,[27] may be influential.

By contrast, the judgment of Didcott J. is confused on the scope of the right to privacy. He oscillates between an absolutist conception of the home as a domain of unfettered privacy, and a more balanced approach which recognizes the possibility of a justifiable state interest in invading that domestic sphere. Given the centrality of privacy doctrine in the legal histories of many jurisdictions, the Constitutional Court likely will have to take more seriously the determination of the scope and purpose of this right, and what might constitute a justifiable limit.

Also of interest to an international audience is the role played by comparative constitutional jurisprudence in the reasons of Mokgoro J. Not only does she canvass a wide array of jurisdictions, including North American, African, European, and Indian jurisprudence, she also *critically* appraises how other countries have developed their free speech doctrines. International law also is applied.

Finally, the differing styles of constitutional reasoning of Mokgoro J. and Didcott J. are significant. The latter adopts a very conservative approach, going no further in his analysis than necessary. Thus, Didcott J. leaves, for another day, the examination of an issue which was no doubt central to the arguments in Court. By contrast, Mokgoro J. deploys a more wide ranging and liberal approach and takes this opportunity to begin the process of developing a body of jurisprudence dealing with freedom of expression. The contrast between judicial restraint and activism is stark, and the majority of the Court concurs with the former. That conservatism may simply reflect an awareness that Parliament is comprehensively reshaping the law in this area. As a consequence, there may be no need to spill large quantities of judicial ink on a statute which can be disposed of more simply on privacy grounds.

CONCLUSION

As South Africa embarks upon a new era of constitutionalism, it does so without being indebted to a national tradition. That fact creates a space in which the Constitutional Court can creatively weave a new constitutional tapestry, pulling together an assortment of domestic and international strands, and generating a new discourse of rights. This unique opportunity deserves the attention of an international audience. In the area of obscenity law, the word "censorship" has a particular ignominious record in South Africa. Yet, despite this history, constitutional actors seem unpersuaded by a simple free marketplace-of-ideas analysis of speech. Rather, South Africans appear to be developing an approach which recognizes both the centrality of free expression for individual and collective self-realization, as well as the importance of contextualizing the right. How that dynamic ultimately will unfold remains to be seen.❑

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[26] I discuss this point as it arises in Canadian law in *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 76-90.

[27] [1990] 3 SCR 697 [upholding *Criminal Code* provisions which criminalise hate speech as a reasonable limit on the right of free expression].