

OPINION

The Bill seeks to limit the right to the Freedom of Expression, and possibly the Right to Privacy, in the Best Interests of the Children of South Africa (a right that the Constitution regards as paramount) and to uphold the right to dignity of women.

Summary of Argument: Internet pornography is such a readily accessible evil for children, that the Constitutional Court, if the Bill were challenged, would be bound to hold that the section 28 obligation to protect at all costs the best interests of children would trump the rights to freedom of expression and privacy.

In *Bannatyne v Bannatyne 2003 (2) SA 363 (CC)* para 24 the court held that:

“While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents,¹ there is an obligation on the state to create the necessary environment for parents to do so. This Court has held that the state

“ . . . must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s. 28.”²

In the case of *De Reuck v Director of Public Prosecutions Witwatersrand Local*

¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 77; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 77.

² *Grootboom* id at para 78.

Division)2004 (1) SA 406 (CC) the court were prepared to accept that s16³ encompassed pornography. It follows that a restriction of access to pornography on the internet and on cell phones will be a restriction of the right to freedom of expression and possibly also a restriction of the right to privacy. However it is arguably a very small restriction of very peripheral rights, especially when weighed against the Best Interests of the Child and the Right to Dignity. What follows is essentially a weighing up of harm against benefit; a test encompassed in s36 of the Constitution⁴ and known as the justification analyses.

S.36 Limitation of Rights reads as follows:

(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.*

*(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*⁵

We therefore proceed now to analyse this section of the Constitution in the light of the proposed Bill. To do so, the nature of the right and the extent of the limitation, on the one hand, and the purpose of the limitation on the other need to be weighed.^{6,7}

³ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁴ Ibid.

⁵ Ibid.

⁶ *Manamela* above n 64 paras 65-66.

⁷ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)2004 (1) SA 406 (CC)* para 58.

1. Law of General Application:

First the Bill, as a piece of legislation will inevitably qualify as law. The second component of the test, namely that it be a law of general application is also satisfied. The Bill is accessible, precise and of general application. While the Bill applies to specific 'individuals' with regards to enforcement, its influence applies generally and uniformly to all people across South Africa. The Bill is readily understood by the ordinary citizen as well as the Internet Service Providers at whom it is aimed.

2. Reasonable and Justifiable in an open and democratic society based on human dignity, equality and freedom:

In *S v Makwanyane*⁸ the court said that:

"[t]he limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, ultimately an assessment based on proportionality".

This criterion involves taking all relevant factors into account and is tackled below in the context of both Freedom of Expression and Right to Privacy.

Limitation analyses: Freedom of Expression

a. Section 36(1)(a): The nature of the right

In *Manual v Crawford-Browne*⁹ Le Grange J stated at paragraph 16 that:

"Freedom of expression is fundamental to our democratic society, however, it is not a paramount value. It must be construed in the

⁸ 1995 (3) SA 391 (CC) para 104.

⁹ [2008] 3 All SA 468 (C).

context of the other values enshrined in the Constitution, in particular the value of human dignity. Under our new constitutional order the recognition and protection of human dignity is a foundational constitutional value.”

Notably in the case of *De Reuck v Director of Public Prosecutions*¹⁰ the Constitutional Court, while dealing with what freedom of expression entails, held (with regards to pornography) that “[e]xpression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of the freedom of expression in many democratic societies.”¹¹ The right to view/possess pornography has been regarded (by the Constitutional Court) as peripheral in nature, and thus the Bill’s effect of only limiting a portion of the access to this right must be viewed as even more permissible. It is a fringe right and not at the core of the constitutional right to the freedom of expression. Adult persons retain the right to view pornography at controlled outlets such as sex shops.

b. Section 36(1)(b): The importance of the purpose of the limitation

The purpose of the limitation is of the utmost importance, namely “[t]o protect children from pornography, and to protect women from the indignity of being seen by children as objects of pornography”¹²

In *Hay v B*¹³ the Court held that:

“in terms of s 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 a child’s best interests were of paramount importance in every matter concerning the child and was the single most important

¹⁰ Ibid (note 7 above) para 59.

¹¹ *De Reuck* (note 7 above) para 59.

¹² The Internet and Cell Phone Pornography Bill.

¹³ 2003 (3) SA 492 (W) at 494I - 495A.

factor to be considered when balancing or weighing competing rights and interests concerning children. The duty to afford children protection fell on law enforcement agencies, all right-thinking people and ultimately the Court, which was the upper guardian of all children.”

*In Government of the Republic of South Africa and Others v Grootboom and Others*¹⁴ the Court held that:

“In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28.”

The purposes of the limitation are of utmost importance to our society. The limitation serves as a protection for children from the exposure of harmful pornographic images. Technological advancements have overtaken the law in many respects but arguably none as dangerous to the young ones of our nation as the internet. Pornography is now readily accessible to children of all ages and so the obligation falls on our legal and administrative infrastructure to pass and enforce the necessary laws (the Bill) to protect children from this form of abuse.

As regards the object of the Bill to protect women from the indignity of being seen by children as objects of pornography, the following from Canada is pertinent:

“The 1985 report of the Special Committee on Pornography and Prostitution (the Fraser Committee) made several significant findings on pornography in Canada...The Committee strongly suggested that

¹⁴ 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 78.

pornography represents and nourishes attitudes and activities inimical to the equality of men and women and that it presents demeaning images as normal and commendable, so that it perpetrates ‘lies about aspects of women’s humanity and denies the validity of their aspirations to be treated as full and equal citizens.’”¹⁵

c. Section 36(1)(c): The nature and extent of the limitation

Because pornography is available to adults elsewhere, the limitation is a relatively minor infringement of the right to freedom of expression. Firstly, the right to pornography is a peripheral right to the freedom of expression. Secondly, whilst the Bill seeks to prohibit internet and cell phone pornography for the sake of children, it refrains from infringing upon the arena of adult sex shops and access to pornography. Instead the Bill simply focuses on the protection of children.

In *V v V*¹⁶ it was stated that:

“The child’s rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents’ rights.”

d. Section 36(1)(d): The relation between the limitation and its purpose

The reason for the limitation is unique and very recent in society. For the first time children have ready access to any amount of violent and degrading pornography. There is a causal connection between the law

¹⁵ <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/CIR/843-e.htm#fpornographytxt> accessed on 17 May 2010.

¹⁶ 1998 (4) SA 169 (C) 189B.

and its purpose. The internet is a wild west whereby the laws of this country that seek to protect children are being circumvented due to technological advancement (coupled with globalisation). The purpose of the Bill is to restore the status quo pre-internet as regards access to pornographic media by minors. It is aimed solely at the protection of Children and compliments the aims of the Film and Publications Act¹⁷.

e. Section 36(1)(e): Less restrictive means to achieve it purpose

The ease of access to Internet and Cell Phone Pornography by an ever increasing technologically adept youth leaves no other means of achieving the Bill's purpose. Pornography is so rampant and so readily accessible, that children are inevitably going to be exposed at young ages unless the Bill is implemented as is. There exists no other means that would be able to achieve the same means.

Limitations Analyses: Right to Privacy

Right to Privacy (in the context of possession and consumption of Internet and Cell Phone Pornography)

The next question is whether the limitation of the right to privacy is justifiable. Although possession and consumption of internet and cell-phone pornography often takes place in the privacy of one's home, the legislative purposes identified above remain of great importance. Since pornography is frequently being imported via the Internet and then possessed on computers and cell phones, the ease with which children may access pornography (that would otherwise be restricted by the Film and Publication Act¹⁸) at the touch of a button, must be taken into account. It should not be overlooked that many of

¹⁷ Act 65 of 1996.

¹⁸ Ibid.

the resultant acts of children viewing pornography (especially on the internet and on cell phones) take place in private. In other words, where the reasonable risk of harm to children is likely to materialise in private, some intrusion by the law into the private domain is justified to minimise the risk of such harm.¹⁹

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¹⁹ *Argument paraphrased from De Reuck* (note 7 above) para's 89-90.