

PORNOGRAPHERS, PRUDES AND POLITICS: A HISTORY OF THE 1996 FILM AND PUBLICATION ACT AND THE DAWN OF LIBERTY

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1. INTRODUCTION

An excess of explicit pornographic videos, raunchy underwear, an assortment of sex toys and kinky leather accessories are just some of the merchandise one can buy at the porn shop in Cape Town's historic Plein Street. With its blackened windows and tacky nameplate to boot, it is a scene familiar to most South African urbanites. The only difference is that this particular porn shop is situated directly opposite Parliament.¹ In August 2004, the issue turned into a parliamentary debate during which all political parties were in agreement - the porn shop blemished the dignity of Parliament and had to go. The portfolio committee for Home Affairs promptly pledged to consult with the Mayor of Cape Town, the Western Cape provincial government and all departments of the local government in order to find technical loopholes in the municipal regulations that could be used to force the porn shop to move away from the seat of the country's legislature.² This is the most recent example of the resurgence of the issue of pornography and censorship, which has become a near permanent fixture of the contemporary history of South Africa.

Starting with the Obscene Publications Act, No. 31 of 1892 of the Cape Colony, followed by the Entertainment Censorship Act, No. 29 of 1931, the stringent Publications and Entertainment Act, No. 26 of 1963 and the notorious Publications Act, No. 42 of 1974, the debate about censorship and pornography would re-emerge time and again, amidst public protestations and emotional argumentation. Every time this happened, the successive minority governments clenched their hold on the freedom of speech and expression even tighter.³ The difference between previous legislation and the drafting of the Films and Publications Act, No. 65 of 1996, was that the new law would effect a dramatic liberating circumvolution regarding freedom of speech and expression in South Africa, going directly from one of the toughest censorship systems in the world to broad-minded

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¹ **Die Burger**, 14 August 2004, p. 6.

² **Ibid.**

³ Untitled archival material received from the Film and Publication Board, 2002.

classification.⁴ The Films and Publications Act, No. 65 of 1996, is of critical historical importance to the history of the New South Africa's conception, since it embodies a vital cornerstone of any true democracy - freedom. In this case, the freedom of speech and expression.

2. COITUS, CENSORSHIP AND CONFUSION: PROLOGUE TO CHANGE

"Geen Staat kan...deur wetgewing mense moreel maak nie," the chairperson of the Board of Appeals of Publications, Dr JCW van Rooyen, already wrote in 1988. "Die bron en belangrikste handhawer van sedes is op die ou end die ouer, die skool en die kerk."⁵ As South Africa critically reassessed its political and socio-economic status quo during the turbulent 1980s, so too the question of state-controlled censorship was reviewed. Although censorship remained very much in place, as the above quote illustrates, by the late 1980s a mind shift was steadily taking place as to what censorship ought to entail and whose responsibility moral schooling actually was. In 1991, Rev. Martin Blignaut wrote in *Die Kerkbode* that it was a fallacy to believe that it is the government's responsibility to impose morality through tough censorship laws: "Ouers en andere sal meer die verantwoordelikheid self moet aanvaar om hulle kinders...teen die dinge te beskerm en te bewapen."⁶

Despite the fact that a gradual mind shift was taking place, the debate regarding censorship and pornography in South Africa emerged once again during the country's dramatic transitional phase in the late 1980s and early 1990s - so much so that, in the annual report of the Department of Home Affairs for 1991, the Directorate of Publications stated that "the very principle of censorship was receiving fresh and pointed attention from the community".⁷ The Directorate noted that, although there were lobbies "advocating especially stricter controls", there were also a variety of new vehemently anti-censorship groups "that campaigned for publications, at least, not being subject to any form of control".⁸

During 1991, the censors examined only 13 publications they regarded as being pornographic, compared to the 2 434 political publications that were classified as being "prejudicial to the security of the State".⁹ The small number of pornographic publications was soon to multiply dramatically.

⁴ Untitled archival documents received from the Film and Publication Board, 2002.

⁵ JCW van Rooyen, "Die rol van die Wet op Publikasies in die handhawing van standarde", *SA Public Law* 3(2), November 1988, p. 141.

⁶ M Blignaut, "Wette keer nie pornografie", *Die Kerkbode* 147()1, 11 Januarie 1991, p. 5.

⁷ Annual Report for the Department of Home Affairs 1991, RP 63, 1992, p. 23.

⁸ **Ibid.**

⁹ **Ibid.**, p. 24.

To ensure that South Africa's first democratic elections were held within an atmosphere of openness, Parliament revoked the clauses of the Publications Act, No. 42 of 1974, which dealt with political speech and expression. "The political sting has for all purposes been removed from publications control," announced the Publications Appeal Board in the Annual Report of the Department of Home Affairs for 1993. "The Board concerned itself mainly with issues regarding sex..."¹⁰ and logically so, since it seemed that pornographers assumed that the new political openness implied a general relaxation of censorship.

While the censors examined only 13 pornographic magazines in 1991, this had mushroomed to 259 by 1993.¹¹ (It is important to note that the censors reviewed a total of 415 new publications in that year, which means that more than half of these were pornographic in nature.)¹² During 1993, South Africa saw the debut of local versions of the *big three*, internationally the most famous pornographic publications: *Penthouse*, *Playboy* and *Hustler*.¹³ Whereas *Penthouse SA* and *Playboy SA* were relatively soft and slick, *Hustler SA* was, just like its American counterpart, hard-core and audaciously explicit.¹⁴

The sudden explosion in the South African pornography trade by 1993 was not accidental. South Africa was soon to have a new and democratically liberal constitution; one in which the freedom of speech and expression was to be protected as a basic right. When the Interim Constitution came into effect shortly after the 1994 elections, the aforementioned freedom was indeed formulated as a so-called fundamental right. This right, the freedom of speech and expression, was in effect in direct conflict with the censorship system circumscribed in the - still existing - Publications Act, No. 42 of 1974.¹⁵ The implication was that, because of the contradictions between the 1974 Publications Act and the Interim Constitution, the rulings of the censors would most likely be easily overturned if challenged in court, since they were based on an unconstitutional law.¹⁶ In their 1993 report, the Directorate of Publications noted that these contradictions between the existing censorship law and the Interim Constitution motivated "a number of entrepreneurs" who "were poised to exploit the opportunities they envisaged opening up for them as a result of the rights guaranteed by the Constitution".¹⁷

¹⁰ Annual Report for the Department of Home Affairs 1993, RP 79, 1994, p. 26.

¹¹ **Ibid.**, p.24.

¹² **Ibid.**, p. 25.

¹³ Anon, "Porn wars", in Finance Week 59(7), 11 November 1993, p. 35.

¹⁴ **Ibid.**

¹⁵ Annual Report for the Department of Home Affairs 1994, RP 125, 1995, p. 24.

¹⁶ **Ibid.**

¹⁷ **Ibid.**

One such *entrepreneur* was South Africa's foremost pornographer, Joe Theron, whose company, JT Publishing, produced publications such as the hard-hitting pornographic magazine *Hustler SA*. After having successive editions of *Hustler SA* declared undesirable since its unveiling in August 1993, the wealthy and outspoken Theron was ready to take the censors and the 1974 Act to court.¹⁸ Calling the censors "moral criminals", Theron stated in 1994, "[W]e're sick and tired of playing their stupid censorship game. Their definition of what is wholesome and desirable is completely different from ours and the majority of South Africans." He goes on to state that the 1974 Act was clearly unconstitutional and a violation of constitutionally guaranteed rights, "because its structure and operation is based on the notion that certain forms of expression are 'undesirable' and can be proscribed as such".¹⁹

Not entirely satisfied with the Supreme Court verdict, Theron hired high-profile attorneys like the renowned Jeremy Gauntlett²⁰ and the equally famous Marcus Gilbert²¹ to challenge the essential constitutionality of the 1974 Act in the Constitutional Court.²² Gauntlett charged that the 1974 Act was in violation of the constitution regarding freedom of expression, freedom of conscience and the right to administrative justice.²³

He went on to demand that the 1974 Act be scrapped by the Constitutional Court - with immediate effect.²⁴ This would mean that South Africa, in effect, would now have no system of censorship whatsoever.

While court cases were under way due to the continuation of censorship, Mangosuthu Buthelezi, as Minister of Home Affairs, in 1994 stated over-enthusiastically that "never again in this country will anyone decide what other intelligent and rational beings may, or may not read, watch, or hear".²⁵ Having said that, his Department's Directorate of Publications promptly banned the August, September, October, November and December 1994 issues of *Hustler*, as well as more than 100 blue movies the South African Police had confiscated.²⁶ And yet, despite this censorship, the South African pornographic industry blossomed.

¹⁸ **Cape Argus**, 16 May 1995.

¹⁹ Archival documentation received from JT Publishing, 2003.

²⁰ **Cape Argus**, 25 July 1995.

²¹ **Weekly Mail and Guardian**, 5 January 1995.

²² **Natal on Saturday**, 13 May 1995.

²³ **Cape Argus**, 25 July 1995.

²⁴ **Ibid**.

²⁵ **Weekly Mail & Guardian**, 5 January 1995.

²⁶ Archival documentation received from JT Publications, 2003.

In the period January to June 1994, the now defunct pornographic magazine *Scope* sold 163 844 copies, *Playboy* 97 371, *Penthouse* 86 882 and *Hustler* 103 780.²⁷ Joe Theron, who publishes *Hustler SA*, also published a large variety of other pornographic magazines of which, by 1995, he was selling an average of 500 000 per month.²⁸ By 1994, South Africans could watch *blue movies* directly from Europe via TV satellite dishes. Internet pornography was also rapidly emerging and growing by leaps and bounds.²⁹ In the same year, South Africa's pay-per-view TV channel, M-Net, began broadcasting the soft pornographic series *Eden* on Friday nights (and only received 20 complaints from its 930 000 subscribers).³⁰ In 1995, Joe Theron made history by publishing the first Afrikaans porn magazine, *Loslyf*, which soon sold 100 000 copies.³¹ On the cover of the first edition was a woman in a suggestive pose standing in front of the Voortrekker monument, framed by the caption: "Vat aan my simbole en jy vat aan my."³² By 1995, South Africa's burgeoning pornographic video and magazine industry was worth about R25 000 000 per month.³³ Pornographic shops and porn mail services sprang up everywhere, with one porn company's mail order service selling some 15 000 units of porn videos and sex toys every month during 1995.³⁴ However, pornography in South Africa was still very much illegal.

"Pornografie bly pornografie," the commander of the Police's specialist units, Maj. Gen. Wouter Grové, stated in June 1994, "die publiek moet weet dat ons dit nog altyd as 'n misdryf sien."³⁵ During 1994, there was a sizeable number of police investigations into suspected pornography possessors: 62 in Pretoria, 55 in Johannesburg, 36 cases each in Port Elizabeth and Cape Town, 27 investigations in Bloemfontein, 8 in Welkom and 4 in East London and Pietermaritzburg respectively.³⁶ In the same year, the Publications Appeal Board recognised that the freedoms enshrined in the Interim Constitution seriously affected their approach to the material they reviewed. The Board stated that these rights could be impeded only "in exceptional cases". As such, "[t]otal bannings" could now only be applied "as an ultimate remedy".³⁷ Nonetheless, the censors went on to find 85,7% of all the

²⁷ **Beeld**, 26 August 1994.

²⁸ C Smith, "SA's huge sex industry", **Finance Week** 66(7), 17 August 1995, p. 25.

²⁹ **Beeld**, 1 July 1994.

³⁰ **Beeld**, 12 May 1995.

³¹ **Star**, 20 May 1995.

³² **Beeld**, 8 May 1995.

³³ Smith, p. 28.

³⁴ **Ibid**

³⁵ **Beeld**, 30 June 1994.

³⁶ **Ibid**

³⁷ Annual Report for the Department of Home Affairs 1994, RP 125, 1995, p. 26.

publications reviewed in 1994 to be "undesirable"³⁸, and the following year, 89,8% of all new publications examined.³⁹

In May 1995, *Beeld* tackled the issue head-on in its editorial. Referring to the situation as a "deurmekaarspul", the newspaper stated that it was high time for South Africans to realise that the Constitution was *the* supreme law of the land. If that implied allowing a proliferation of pornography, "sal almal dit moet aanvaar".⁴⁰ The *Mail & Guardian* pondered whether there was not a measure of spite in the censors' continued hard-line attitude: "Was this the last kick of a dying horse, a last-ditch bid by the censors to reassert their right to pronounce on what citizens should see and read?"⁴¹ The Police remained adamant that, although the Interim Constitution might conflict with the censorship laws, they had to enforce the existing law. Capt. Doep du Plessis, who was involved in investigating pornography cases in Pretoria, said in 1995 that, although the police were aware of the growing tolerance of pornography amongst the general public, "as ons pornografie in iemand se besit vind gaan hy slae kry".⁴²

As illustrated, utter confusion reigned during the early and mid-1990s, as publishers and censors were uncertain of how they should behave, with a liberal Interim Constitution that protected freedom of speech while at the same time, in practice, a tough remnant of the apartheid era was still dictating to South Africans what they could (not) see, read and listen to.

3. THE SCORN OF PORNOGRAPHY AND THE DEMANDS OF DEMOCRACY: THE TASK GROUP

Even before the chaos described above reached a climax, the Minister of Home Affairs, Mangosuthu Buthelezi, had realized that the discrepancies between the censorship laws and the Interim Constitution had to be addressed, and soon. On 8 August 1994, he therefore appointed an independent task group to research and draft new, constitutionally compatible legislation to replace the Publications Act, No. 42 of 1974.⁴³ As noted in the above section, cases in the Constitutional Court were challenging the constitutional validity of the existing 1974 Act. If the courts nullified this law before a new Act was in place, South Africa would have no censorship of any nature at all. Buthelezi was upset by these court cases, and said that it was 'opportunistic' to challenge laws that were in the process of being

³⁸ *Ibid.*, p. 25.

³⁹ Annual Report for the Department of Home Affairs 1995, RP 69, 1995, p. 28.

⁴⁰ *Beeld*, 1 May 1995.

⁴¹ *Mail & Guardian*, 23 August 1996.

⁴² *Beeld*, 20 April 1995.

⁴³ J Duncan, (ed.), *Between speech and silence* (Braamfontein, 1996) p. 173.

rewritten.⁴⁴ Nonetheless, time was of the essence, and the Minister wanted the Task Group's report and Draft Bill on his desk by December 1994.⁴⁵

In a move that seemed ironic - to say the least - to many anti-censorship activists, the person Buthelezi appointed to head the pioneering task group was a former chief censor, Prof. Kobus van Rooyen.⁴⁶ The task group consulted with film and publication classification bodies and censors in Australia, New Zealand, India, Egypt, Zimbabwe, Canada, Great Britain and the USA. They also studied the literature of censorship bodies from 30 different countries. Through the Department of Foreign Affairs the task group sent out questionnaires dealing with religious feelings and attitudes towards adult movie houses, to missions in 15 countries. Talks were held with a variety of stakeholders, including the Transvaal's Judge President, the Independent Broadcasting Authority, the Attorney-General and his Deputy, the Commissioner of Police, the SABC, M-Net, the National Association of Broadcasters, the Chief Director of the Arts Councils, academics and the heads of theatres, as well as leading film and video distributors.⁴⁷ In addition, apart from submissions from a large variety of women's groups, cultural organisations and almost 300 churches, the task group also received 1600 submissions from the general public.⁴⁸

About the defining question, the constitutionality of the 1974 Act, the task group had no doubt: "The [1974 Publications] Act intrudes upon the freedom of choice of adults in an unreasonable manner by making bannings widely possible; employs vague terminology; generally regulates the private domain of an adult too strenuously; gives preference to the Christian religion, which is in conflict with the equal protection clause [of the new constitution]; provides for political intervention by the Minister in certain instances; provides for ministerial intervention, which encroaches upon vested rights and administrative discretion, to refer a public entertainment to a committee; and does not place sufficient emphasis on the freedoms of artistic expression and of scientific research which are guaranteed by the Constitution."⁴⁹ One line in the report encapsulated the inherent difference between the old system of censorship and the new system envisioned by the task group: "[A]dults are free to decide for themselves..."⁵⁰

⁴⁴ **Pretoria News**, 17 August 1995.

⁴⁵ Duncan, p. 173.

⁴⁶ **Ibid**.

⁴⁷ Report of the Task Group: Film and Publication Control, December 1994, p.27.

⁴⁸ **Mail & Guardian**, 10 March 1995.

⁴⁹ Report of the Task Group: Film and Publication Control, December 1994, p. 11.

⁵⁰ **Ibid**, p. 42.

One point the task group had to consider with sober concentration was the type of terminology to be used in a proposed new law. The 1974 Act was based on ambiguous terms such as 'indecent', 'obscene', 'offensive', and 'harmful to public morals'.⁵¹ while the censors contemplated what would affront the 'average' and/or 'modern' South African.⁵² Commenting on this in 1993, *Finance Week* stated that the censors' interpretations of these terms were "subjectively applied with vast inconsistencies".⁵³ In its report, the task group elaborated on the legal potholes created by such terminology and the hazy, open-ended interpretations it solicited: "Reference to words such as 'indecent,' 'obscene' and 'offensive' was therefore avoided."⁵⁴ Instead, the 1996 Act gave an explicit definition of what was meant by sex.⁵⁵ Legally, sex would be: "[G]enitals in a state of stimulation or arousal; the lewd display of genitals, masturbation, sexual intercourse, which includes anal sexual intercourse, the fondling, or touching with any object, of genitals, the penetration of a vagina or anus with any object, oral genital contact, or oral anal contact."⁵⁶

It stated that a new act should "promote the optimum amount of freedom for adults",⁵⁷ and that the freedom of speech and expression ought to be impeded only in extreme cases, and never indiscriminately: "The prevention of harm...should be the basis of any regulation in this area."⁵⁸ This was a reference to child pornography.⁵⁹ Except for child pornography, "[n]o other possession ban is proposed", since that would imply a defamation of the Constitutional right to privacy.⁶⁰

In a long-awaited move that must have made many South African writers give a sigh of relief, the report stated that as far as sex, violence and language were concerned, in a new act, "the written word shall no longer be subject to total prohibition...".⁶¹ Furthermore, to protect the independent objectivity of a new system, the report also proposed that, in a new act, "ministerial intervention" would no longer be possible - in other words, politicians would no longer be able to dish out bannings.⁶²

⁵¹ The Publications Act, No. 42 of 1975, p. 61.

⁵² JCW van Rooyen, *Censorship in South Africa* (Kenwyn, 1987), p. 57.

⁵³ G Findlay, "Porn wars", *Finance Week* 59(7), 11-17 November 1993, p. 35.

⁵⁴ Report of the Task Group: Film and Publication Control, December 1994, p.14.

⁵⁵ Films and Publications Act, No. 65, 1996, p. 34.

⁵⁶ **Ibid**

⁵⁷ Report of the Task Group: Film and Publication Control, December 1994, p. 23.

⁵⁸ **Ibid.**, p. 15.

⁵⁹ **Ibid.**, p. 23.

⁶⁰ **Ibid.**, p. 34.

⁶¹ **Ibid**

⁶² **Ibid.**, p. 33.

Regarding the much cited argument that exposing the population to pornography automatically leads to criminal and/or deviant behaviour, the report was forthright: "[T]here is simply no scientific evidence that the criminal mentality is caused by, or dependant upon, the availability of pornography." As such, however, this line of thought did not enter into the equation when they drafted the new act.⁶³ All pornography would be allowed, except child pornography, bestiality, a mixture of graphic sex and extreme violence and - indirectly relevant - a glorification of violence.⁶⁴ "We therefore propose that only violent pornography be prohibited, while non-violent sexually explicit material will be available in adult bookshops where the entry of children will be prohibited."⁶⁵ Since, according to the task group, the constitution "guarantees the maximum amount of freedom for adults", sex shops and pornographic movie houses would be legalised.

The task group acknowledged that the legalisation of such places and of the pornography trade as such would place a great deal of responsibility on the community, but reminded South Africans that this was how a free and open democratic society functioned.⁶⁶ In essence, the report and the new act made an end to what is popularly known as censorship, which would now be replaced by 'consumer advice' through 'classification'.⁶⁷

4. CROSSING THE RUBICON ... IN THE NUDE: THE FILMS AND PUBLICATIONS ACT OF 1996

Only on 14 August 1996 did the National Assembly's Home Affairs Committee finally pass the new act, after a succession of closed meetings. The committee made a number of changes to the task group's original draft bill. These focused mainly on the protection of children: exposure of children to pornographic material of any nature would be illegal; the artistic exemption with regard to child pornography in writing proposed by the task group was rejected, and this type of child pornography would therefore also be unlawful; the maximum penalty for possessing, distributing or exhibiting prohibited material was increased from two years to five.⁶⁸

⁶³ **Ibid.**, p. 25.

⁶⁴ **Ibid.**, p. 47.

⁶⁵ **Ibid.**, p. 49.

⁶⁶ **Ibid.**, p. 41.

⁶⁷ **Ibid.**

⁶⁸ **The Mercury**, 15 August 1996.

According to the act, the harshest classification a film or publication could receive would be XX. It would be illegal to exhibit, distribute, advertise, import, produce or possess such a film or publication.⁶⁹ XX classifications were reserved for material containing depictions, real or simulated, of anyone under the age of 18 or "depicted as being under the age of 18" taking part in or assisting in sex or a "lewd" display of nudity; violent sex; bestiality; sex which "degrades" or "constitutes incitement to cause harm" and "the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm".⁷⁰ X18 would apply to (legal) hardcore pornographic material, which could be sold only in licensed sex shops.⁷¹ Bona fide art and scientific material would be exempted from XX or X18 classifications, except in the case of child pornography.⁷² Material with an R18 classification would be restricted to persons older than 18.⁷³ There is also an F18 classification, for periodicals of which "the following six issues" would contain material with an R18 classification.⁷⁴

Outside Parliament, the court cases - particularly Joe Theron's case - challenging the constitutional validity of the 1974 Act, were still continuing when the Films and Publications Act came into effect. The Constitutional Court did not find it necessary to rule on Theron's case, as the law being challenged had ceased to exist.⁷⁵ In fact, the promulgation of the Films and Publications Act in 1996 partly or completely invalidated and replaced 14 other laws and amendment acts, including two of apartheid's most controversial censorship laws: the Indecent or Obscene Photographic Matter Act, No. 37 of 1967, and the Publications Act, No. 42 of 1974.⁷⁶ Nonetheless, the Court did order the state to pay the costs of Theron's very expensive legal struggle.⁷⁷

As stated, the 1996 Act was based on the premise of classification rather than censorship. It made provision for a Film and Publication Board to enact this classification system. However, setting up such a structure took longer than expected, so that the 1996 Act really only came into effect in 1998. Up until that time, the structures that had existed under the 1974 Act continued to deal with publications control matters - but very much in the spirit of the new legislation. A new process of classification was thus initiated, and a system of accompanying consumer advice

⁶⁹ Films and Publications Act, No. 65 of 1996, pp. 20-4.

⁷⁰ **Ibid.**, pp. 30-1.

⁷¹ **Ibid.**, p. 20.

⁷² **Ibid.**, p. 30.

⁷³ **Ibid.**

⁷⁴ **Ibid.**

⁷⁵ **Cape Times**, 22 November 1996.

⁷⁶ Films and Publications Act, No. 65 of 1996, p. 34.

⁷⁷ **Cape Times**, 22 November 1996.

was introduced by using warning symbols to indicate whether a film contained nudity, violence, sex, etc.⁷⁸

- In its roughly two decades of existence, the Publications Act of 1974 banned 30 000 publications.⁷⁹ In 1997, no publications were banned in South Africa.⁸⁰

5. CONCLUSION

"Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

"Everyone has the right to freedom of expression, which includes - freedom to receive or impart information or ideas; freedom of artistic creativity ."⁸¹

- The Constitution of the Republic of South Africa

In the same way that *The Sunday Times* regularly selects some public figure who has blundered to be the "mamparra of the week" *Hustler SA* names someone to be their "asshole of the month". In February 1998, in reaction to a speech of his, *Hustler SA* designated Pres. Nelson Mandela to this position. The ANC was utterly appalled. The Deputy Minister of Home Affairs, Lindiwe Sisulu, was particularly outraged. The Deputy Minister said in public: "I was ready to ban the magazine." When Sisulu showed the *Hustler* article to Mandela, he promptly "gave me a lecture about freedom of speech". Despite Sisulu's outspoken disgust, her hands were tied - under the 1996 Act, neither a minister nor the President can ban publications.⁸² Nonetheless, only four short years into South Africa's revered true democracy, at least one high-ranking politician was ready to revert back to the ways of her apartheid predecessors. Speaking in terms that were even reminiscent of the apartheid years, Sisulu said that what had really upset her was *Hustler SA's* "blatant abuse of freedom of speech".⁸³ Therein lies the crux of the matter.

Freedom of speech and expression is exactly that - freedom to speak and to express views irrespective of topic or format. Freedom of speech and expression implies not only *tolerance* of those viewpoints, lifestyles and ethical systems that conflict with one's own (which is already quite an achievement in itself); it demands *acceptance* of the democratic right that allows those different viewpoints, ethical systems and lifestyles to be expressed. One may differ from and even oppose those beliefs, but in a true democracy you must acknowledge everyone's right to freely

⁷⁸ Annual Report for the Department of Home Affairs 1997, p. 33.

⁷⁹ Duncan, p. 28.

⁸⁰ Annual Report for the Department of Home Affairs 1997, p. 34.

⁸¹ The Constitution of the Republic of South Africa, Act No. 108 of 1996, pp. 8-9.

⁸² P Pereira, "Constraining a sensitive soul", in *Finance Week* 76(7), 19 February 1998, p. 43.

⁸³ Freedom of Expression Institute: Roundup, January to April 1998. <http://fxi.org/>.

express his or her beliefs and morality. This also applies to pornography. In correspondence with the author of this article, the prolific DA MP and former magazine editor, Dene Smuts, stated that pornography should be protected as part of the freedom of speech and expression. "I happen to detest pornography, but that is beside the point", wrote Smuts. "Freedom of speech by definition is not only for ideas or things that we approve of."⁸⁴ Nor is it meant only for those who politicians or society consider worthy of exercising these rights and freedoms, or responsible enough to do so.

Barry Ronge, the well-known film critic and social commentator, stated: "The leaders of a democracy must trust the people to make their own moral decisions and must accommodate and participate in debates about dissent and argument," and "(m)orality grows out of freedom in a properly integrated society. It cannot be imposed from the outside."⁸⁵ For some decades, censors worked with an abstract fantasy - the *normal, average* South African. However, this concept is contradictory to the very essence of these rights. Freedom of speech and expression is open to both the average, normal person as well as, (un)fortunately, the non-average, unusual person. After all, South Africa's fledgling democracy is based on *one person - one vote*, and not on *one normal average person - one vote*. St. John-Stevas stated that "the law cannot be invoked to protect prevailing moral standards...there is no common agreement on ultimate moral attitudes".⁸⁶

The debate on pornography and the censorship thereof concerns much more than mere pictures of sex. The issue of pornography tests the weight a society attaches to the freedom of speech and expression. As Harry Clor argued: "Freedom of expression may not be limited on the basis of a mere feeling that expression is undesirable, offensive or even dangerous."⁸⁷ Democracy begins to fray at the edges when freedom of speech and expression - irrespective of on which front - turns into qualified rights, since this implies that the true democracy that supposedly underpins it, is now turning into a conditional democracy.

"It is so easy to resort to more restrictions when the intolerant demand more restraints on free speech and expression, and yet, the quality and quantity of democracy and freedom which a state enjoys can, I believe, be judged by the amount of freedom of expression that State allows its subjects to enjoy," Kobus van Rooyen wrote in 1996.⁸⁸ If a country does not have freedom of speech and expression in all spheres, it simply does not have freedom of speech and

⁸⁴ JA Stemmet Private Collection: Correspondence with Dene Smuts, February 2003.

⁸⁵ JA Stemmet Private Collection: Correspondence with Barry Ronge, February 2003.

⁸⁶ JB van der Westhuizen, "Pornografie", *De Jure*, vol. 1, April 1976, p. 60.

⁸⁷ Van der Westhuizen, p. 61.

⁸⁸ Van Rooyen, "Freedom of speech ...", p. 69.

expression. It may sound absolutist, but if democracy does not protect and guarantee the individual's right to freedom of speech and expression on all points, then democracy has failed that individual. The greatest tribute to the New South Africa is that it allows South Africans to be free - inherently, freedom of speech and expression constitutes the pinnacle of this liberty.

In *Die Kerkblad* of June 1947, Prof. JD 'Totius' du Toit wrote: "Hier moet herhaal word enkele sinne uit 'n hoofartikel van...Prof. [Lion] Cachet..." 'Lees, lees!' word uitgeroep. Maar wat word geleses? Die kwaad wat slegte boeke doen, is nie te oorsien nie. Jongeling en jongedogter, as u in aanraking kom met iemand wie se taal openbaar wat in sy hart omgaan, vlug van hom af weg, want hy is 'n gesant van Satan. Dieselfde kan ons sê van 'n slegte boek: Vlug daarvan weg! Gooi dit weg! Vernietig dit!"⁸⁹ Many South Africans undoubtedly still agree with Totius. For the sake of the country's new and at times fragile democracy, they will hopefully also take to heart John Milton's words in *Areopagitica*. Although he had the media in mind, it is nonetheless apt: "Books are not absolutely dead things, but do contain a potencie of life in them to be active as the soule was whose progeny they are...A State which dwarfs its men, in order that they be more docile instruments in its hands...will find that with small men no great thing can really be accomplished."⁹⁰

A country can have the most impressive democratic constitution, but if the general populace do not have a culture with which to support that constitution, it really is not worth the paper it is written on. If South Africans, on all levels, do not develop a strong culture of regarding their freedom of speech and expression as sacrosanct, they will (in the light of the country's history) finally have to admit, in the words of George Orwell's tragic hero in *1984*: "I love Big Brother."

⁸⁹ Internet: <http://home.mweb.co.za/ke/kerkpad/>
⁹⁰ Van Rooyen, *Censorship...*, p. 20.