14. Making a case for freedom of expression

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Years ago, I was privileged to be invited as a Colenso Fellow to St. John's College Cambridge and had the benefit of meeting many interesting people, including an eminent scientist, Dr Viru Banakar from Goa, India. One day, he knocked on my door and evocatively and movingly shared his experience of seeing a painting at the local art gallery. His voice trembled with emotion as he described the sensation of seemingly being absorbed into the painting as if his physical being had been transported elsewhere momentarily.

Mandy Rossouw, a journalist at the Mail & Guardian, travelled to Nkandla to speak to the local residents about whether their lives were affected by living in the same area as the then president. She stumbled on the massive development taking place at former President Zuma's homestead in Nkandla and alerted the world to these events by publishing articles in the Mail & Guardian. Mendacious attempts at clarification, such as the project was paid for by Zuma and his supporters and latterly, including the infamous fire pool video, that all the upgrades were necessary for the security of the president and his family, were exposed as unconvincing attempts to deceive us. At the end, we were told that the upgrades to the homestead cost the country some R246 million. It was generally accepted that this was an obscene amount to pay for what was received. The coffers of the state had been plundered.

"constitutional democracy enshrines and protects freedom of expression"

The Constitutional Court (CC) felt it imperative to remind the then president, a supine Parliament and the country that we adopted the values of accountability, respect for the rule of law and the supremacy of the Constitution to make a decisive break "from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era." [1] One of the findings that the court made was that the National Treasury must determine the reasonable costs of the upgrades that did not relate to security and must further ascertain a reasonable percentage of those costs to be paid personally by Zuma. This mirrored the findings made by the then Public Protector, Advocate Thuli Madonsela.

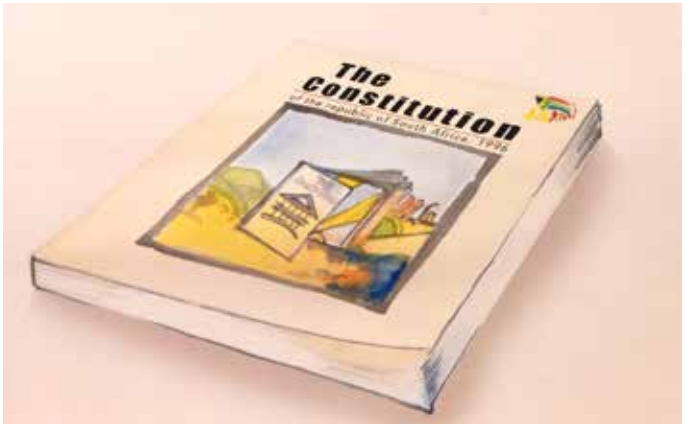
These incidents provide concrete illustrations of the adage that the freedom of expression is protected both as means to an end and also as an end in itself.[2] When Dr Banakar was enveloped into the painting, he was responding to the communication by the artist with him through the painting. Human beings communicate with each other for no reason other than we should be able to, as it enhances the experience of being human. We, therefore, protect the freedom of expression as an end in itself as it allows us to enjoy and participate in the human experience of interacting and communicating with each other. On the other hand, Rossouw's exposure was instrumental in nature as her articles shone a light on the abuse of power by those in positions of power when they authorised the payment of the upgrades at Zuma's homestead at Nkandla. Her reporting and subsequent actions by various role-players achieved the end of revealing abuses of power which resulted in Zuma being held partially accountable and placed the malfeasance that occurred before the South African people and the world. Our system of governance, based as it is on accountability, the rule of law and the supremacy of the Constitution, finally held firm, but it needed a jolt from an intrepid journalist and, thereafter, from various facets of our society to do so.

It is this important dual purpose, among others, that has resulted in virtually every constitutional democracy enshrining and protecting the freedom of expression. It is an indispensable feature of a democratic state, and, without it, a state ceases to be democratic. Section 16 of the South African Constitution protects the freedom of expression in the broadest possible terms. It is expression that conveys a message, and not just speech that is protected.[3] Colin Kaepernich, the quarterback of the San Francisco 49ers, an American football team, knelt during the playing of the national anthem, as a protest against racial injustice and police brutality in the United States. He did not say a word during the protest, but his conduct communicated a powerful message.

The First Amendment to the US Constitution prohibits Congress from making any law that abridges the freedom of expression or of the press and is regarded as the pre-eminent and predominant right in their bill of rights. In the landmark judgment of *New York Times v Sullivan,*[4] the US Supreme Court formulated the actual malice test that made it extremely difficult for public officials to sue in defamation. The court held that the First Amendment prevented an official from suing in defamation except if it can be established that the publication was made "with knowledge that it was false or with reckless

disregard of whether it was false or not." [5] Early on, the CC in South Africa took a much more nuanced attitude to the freedom of expression in our bill of rights. In *Mamabolo,* [6] the CC affirmed the importance of the freedom of expression in any constitutional democracy, but held that unlike the US, it is not the pre-eminent right ranking over all other rights in the bill of rights. Instead, the court emphasised that our Constitution proclaims three "conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom." [7] This meant that the right to human dignity is as least as significant and worthy of the same protection as the freedom of expression.

Since the advent of democracy, freedom of expression has been a catalyst of major changes in legal principles regulating both the relationship between the state and individuals, and between individuals themselves. Section 16(1) protects the right to freedom of expression which includes the freedom of the press and other media, the freedom to receive or impart information or ideas, the freedom of artistic creativity, academic freedom and freedom of scientific research. The list is simply illustrative of some aspects of the rights that are protected and is not meant to be exhaustive. Section 16(2) expressly withdraws constitutional protection from expression which amounts to propaganda for war, incitement of imminent violence and the advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. If the expression falls within section 16(2), the state is free to regulate and even prohibit it as it is not constitutionally protected.



Parliament enacted a convoluted and confused definition of hate speech in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. The Supreme Court of Appeal (SCA) in *Qwelane v SAHRC and others,*[8] held that the section 10 defined hate speech in much broader terms than section 16(2) of the Constitution, and thus restricted or limited some aspects of expression protected by section 16 of the Constitution. Section 10 prohibited hate speech on many more grounds than those specified in section 16. According to the court in *Qwelane,* section 16(2) envisaged an objective standard. The first part of the test was whether the advocacy of hatred was based on race, ethnicity, gender or religion and the second part of the test is whether the advocacy "constitutes incitement to cause harm." [9] Both the advocacy of hatred on the defined prohibited grounds and the incitement to cause harm must be objectively established for the expression to be deemed hate speech. By way of contrast, section 10 of the Equality Act adopted a vague and overbroad standard. It is now firmly established that the term "harm" is not restricted to physical harm and includes psychological harm. The court found that the restrictions on the freedom of expression were not justified in terms of the limitation clause and declared section 10 of the Equality Act inconsistent with the Constitution and invalid. The court decided that it would be appropriate to read-in the text of section 16(2) of the Constitution, but added the ground of "sexual orientation" in order to give effect to the right to equality and dignity. The reformulated section 10 now reads "No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm." At the time of writing, the declaration of invalidity and the reading-in has not as yet been confirmed by the CC as it needs to be in terms of section 172 (2) of the Constitution.

Thus, if the state seeks to limit or restrict expression falling within the purview of section 16(1), its law or conduct would be inconsistent with the Constitution and invalid except if it can justify the infraction in terms of the limitation clause.[10] Section 36 of the Constitution allows rights to be limited only in terms of a law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society. There are thus procedural and substantive requirements that must be met before the state can successfully rely on section 36 of the Constitution and justify the infringement of the rights. The substantive stage of the enquiry, according to the CC, in *S v Makwanyane,*[11] involves the balancing of different interests and the proportionality test. The nature of the right that is being limited must be balanced against the purpose or reason for the limitation. In addition, regard must be had to the extent that the right has been limited, the relationship between the limitation and the purpose sought to be achieved and whether there are less restrictive means to achieve the purpose.

The operation of the limitation clause in respect of an infringement of freedom of expression of the press and the media is best illustrated by the CC judgment in *Print Media SA and others v Minister of Home Affairs and others.*[12] Amendments to the Films and Publications Act compelled the publishers of material that contained sexual conduct to refer these publications for approval to the Films and Publication Board prior to publication. This requirement did not apply to newspapers that abided by a code of conduct administered by a press ombudsman. Sexual conduct was defined in extremely broad terms and included written descriptions. The court described the requirement of seeking pre-publication approval as administrative prior classification. This vested in an administrative official the decision as to when and whether the material should be published, and the court concluded that this form of prior restraint inhibited the freedom of expression.

Many courts throughout the world have found prior restraints

on publications to be constitutionally impermissible.[13] Some of the reasons for this judicial antipathy towards prior restraint is that the discretion as to when publication occurs and whether the material will be published is transferred from the publisher to a state official. The delay occasioned by seeking prior approval may mean that the public are denied timeous access to important material which may, in turn. become redundant when finally published.

The issue then in *Print Media* was whether this limitation on the right of the press and other media to publish was justified in terms of the limitation clause. The main purpose of the limitation, according to the state, was to limit the dissemination of indecent material. The purpose of the Films and Publications Act was to provide consumer advice to adults, prohibit child pornography and to protect children from exposure to harmful or age-inappropriate material. The court held that as the publication, distribution and possession of child pornography is a criminal offence in terms of other sections of the Films and Publications Act, the important state objective of prohibiting child pornography was already addressed. The court went on to find that there were less intrusive means open to the state to protect children from exposure to harmful or age-inappropriate material. The state could apply for an interdict stopping publications that are harmful and, unlike prior administrative restraint, would have to convince a court of the need for an interdict. Further, publishers could request advisory opinions. Given the serious intrusion on the freedom of the press and the existence of alternative less intrusive means to achieve the purpose of the limitation, the CC held that the state had failed to establish the requirements of the limitation clause and set aside section 16(2)(a) of the Film and Publications Act.

One of the most significant freedom of expression cases decided by the CC involved the interplay between section 16 of the Constitution and the truth and reconciliation process, one of the fundamental compromises that made the transition from the apartheid order possible in South Africa. Section 20 of the Promotion of National Unity and Reconciliation Act of 1995 (the Reconciliation Act) provided that once a person convicted of an offence with a political objective is granted amnesty, an entry into official records shall be deemed to be expunged and the conviction shall be deemed for all purposes not to have taken place. In *Citizen and others v McBride and others,*[14] the CC had to decide whether a person who had been convicted of murder and had obtained amnesty could be referred to as a murderer in the light of this provision. In 1986, Robert McBride carried out a car bomb attack outside Magoos' Bar in Durban killing three people and injuring 69 others. McBride was convicted of multiple murders and sentenced to death. He was, subsequently, reprieved and applied for and received amnesty for the murders. The Citizen opposed the proposed appointment of McBride as police chief of Ekurhuleni and in a series of articles described him as a "murderer" and a "criminal". McBride sued The Citizen for some R3.6 million in damages for defamation and impairment of his dignity. In order to sustain the defence of fair comment, pleaded by The Citizen, it had to be established that the defamatory statements were comments or expressions of opinion, that they were fair, that the facts being commented upon were true and that the comments related to matters of public interest.[15] Much of the debate in the case focused on whether it was legally and factually permissible to describe McBride as a "murderer" even though he had received amnesty and his convictions were expunged. McBride argued that once his convictions were expunged, he could not factually be described as a "murderer" and, therefore, the comments were not based on facts, and hence the defence of fair comment cannot be upheld. The CC adopted a purposive interpretation and avoided what it described as an acontextual and literal approach to interpreting the Act. The CC held that it was inconceivable that the Reconciliation Act, which was premised on truth-telling in the pursuit of national unity and reconciliation, would intend to render false, events which had in fact occurred historically. The court held that the Reconciliation Act simply expunged the previous conviction and reinstated McBride to the status of a person who had not been convicted of murder. It did not render untrue the fact that he was convicted of murder which remains true as a historical fact. The Reconciliation Act was never intended to obliterate or erase facts that had occurred and could never have intended to prevent the families of victims from talking about what happened to their loved ones and who was responsible for their torture and deaths. The Act did not intend to "mute the voices of those seeking to discuss the deeds"[16] of the perpetrators. To do so, according to the court, would have given the perpetrators a disproportionate share of the benefits of the process. The freedom of expression, which factored in the deliberation of the court, also supported the interpretation that historical facts remain historical facts and are not air brushed from the pages of history. Finally, the majority preferred the term "protected comment" as opposed to "fair comment." Judge Cameron held that the comment does not have to be fair or just as commonly understood, but held that comment and criticism is protected "even if extreme, unjust, unbalanced, exaggerated or prejudiced, so long as it expresses an honestly–held opinion, without malice, on a matter of public interest on facts that are true." [17] The defence of "fair" or "protected" comment, therefore, succeed in the case. The granting of amnesty to McBride meant that he was deemed not to have been convicted of murder, but it did not mean that as a historical fact he did not murder the victims of the bombing at Magoo's Bar.

Most constitutional democracies have had to formulate norms that protect the freedom of expression of the media

while also recognising and protecting the individual's right to dignity and reputation. As stated earlier, the US Supreme Court adopted the "actual malice" test which tilts the balance heavily in favour of the freedom of the media. South Africa like many other democracies, has adopted a more nuanced approach. Section 16 of the Constitution has had a major impact on our law of defamation as the courts have sought, in terms of section 8(3) of the Constitution to develop the common law in order to bring it into line with the Constitution. The common law norm prior to 1994 was that once the plaintiff established that the defendant had published a defamatory statement about him or her, the publication was presumed to be both unlawful and intentional thus justifying a finding that the plaintiff had been defamed. However, there were defences open to the defendant. The defendant could rebut unlawfulness by proving that the publication was true and in the public interest, that the requirements of fair comment were satisfied, and the publication was made on a privileged occasion. The defendant bore the onus of proving that the publication was true, and this had the effect of stifling and chilling expression, as the media would not publish if they could not prove the truth of the contents. The Vrye Weekblad bravely published allegations made by Dirk Coetzee that General Lothar Neethling had supplied him with toxin to be used on anti-apartheid activists. Neethling sued the Vrye Weekblad for defamation and Judge Kriegler held that the newspaper rebutted unlawfulness by proving truth and in the public interest. On appeal, the decision was reversed on the basis that the appeal court was not satisfied that the newspaper had discharged the onus of proof.[18] This finding bankrupted the newspaper, and it went out of existence. It was clear that these common law defences were far too constrained and not consistent with the freedom of the press and media as protected in section 16 of the Constitution. As pointed out by the US Supreme Court, the necessity to prove the truth of the publications serves to deter the publication of not just falsehoods. [19]

This was recognized by the SCA in *National Media v Bogoshi* and a further defence was added in an endeavour to attain a more appropriate balance between freedom of expression on the one hand, and the right to human dignity and privacy on the other. The court held that the publication of false defamatory allegations of fact will not be unlawful if it was found to have "been reasonable to publish the particular facts in the particular way and at the particular time." [20] The CC in *Khumalo and Others v Holomisa* [21] confirmed this approach. It had the beneficial effect of ameliorating the concern that the media would be deterred from publishing for fear of not being able to prove the truth of the facts while still requiring them to publish in a manner that was not negligent. This responsibility not to publish negligently would provide protection to the individuals affected by the publication. *Bogoshi* [22] suggested that in determining whether the publication was reasonable, regard must be had to the nature, extent and tone of the allegations, the manner in which the allegations are presented and whether they carry an unnecessary sting, the nature of the information on which the allegations were based and the reliability of their sources, and steps taken to verify the information which would include affording the affected parties a right of reply.

State-run media tribunals have a shoddy history and from a perspective of advancing the values of our Constitution, the proposals by the African National Congress for a media tribunal were alarming. An innovative system of self-regulation designed to ensure the media functions in accordance with its constitutional rights and obligations and that the rights of the public are protected has been adopted under the auspices of the Press Council of South Africa. The Council consists of retired judges, members of the public and members of the print and online media. All members of the Press Code subscribe to a code of ethics and conduct. At its essence, the code requires the media to take care to report news truthfully, accurately and fairly and "only what may reasonably be true, having regard to the sources of the news, may be presented as fact, and such facts shall be published fairly with reasonable regard to context and importance." [23] The Press Council commits to dealing with complaints against publications in a professional, cost-effective and expeditious manner. The detailed code is administered by a Public Advocate, a Press Ombud and an Appeals Panel. The Public Advocate seeks to achieve a speedy settlement of the complaint through conciliation while the Press Ombud adjudicates complaints that are not successfully mediated by the Public Advocate. Parties dissatisfied with the findings of the Press Ombud may appeal to the Appeal Panel which in terms of the Press Council Constitution is to be chaired by a senior legal practitioner, preferably a retired judge. The system is managed and administered by an executive director. An effective self-regulatory system such as this, is much more preferable to a system controlled by the state as it is inherently more capable of balancing conflicting rights in an impartial and non-partisan manner.

The rights in the bill of rights are, of necessity, protected at the level of principle. In functioning democracies, these rights are interpreted and applied over time resulting in a body of knowledge and jurisprudence being created that overlay the right. In a sense, it is similar to an inverted pyramid with the right at its base and the knowledge generated lying above it. This means that if we are to understand what the freedom of expression really means we need to be familiar with the jurisprudence and the way in which the right has been interpreted. Reciting the right in a mantra fashion, without this knowledge, is fruitless.

This chapter attempts to deal in a truncated way with some of the knowledge generated on the freedom of the press and other media. At one level, it is easy to be profoundly demoralised by the allegations and revelations of corruption, maladministration

and sheer sloth that are being revealed at the Commission into State Capture and other commissions. While oversight by the political bodies such as the portfolio committees during this period appeared to be illusionary, cynical and partisan, the other key components of a constitutional democracy held firm. A vibrant civil society, a free press, an effective public protector and independent courts allowed us to lift the veil of secrecy and reveal this very bleak picture. As a country, we now have the option of holding accountable those that plundered our country and safeguarding and reinforcing those institutions and organs of civil society that acted as a bulwark against the abuses of power. Had it not been for these institutions, we would not even have had this option. Our lived experience over the past decade is ample proof that the freedom of the media and the press is indispensable in a constitutional democracy.

Footnotes

1. Economic Freedom Fighters v Speaker of the National Assembly and Others [2016] ZACC 11 para 1.
2. See O'Regan J in South African National Defence Union v Minister of Defence 1999 (4) SA 469.
3. Phillips and Another v Director of Public Prosecutions and Others 2003 (3) SA 345
4. New York Times v Sullivan 376 U.S. 254 (1964)
5. It should be emphasised that the court reached this position in the latter part of the twentieth century after decades of permitting officials to stifle expression by using criminal and civil defamation laws.
6. S v Mamabolo (ETV and others Intervening) 2001 (3) SA 409 (CC)
7. S v Mamabolo para 41
8. Qwelane v SAHRC and Others 2020(3) BCLR 334 (SCA)
9. Qwelane at para 62.
10. These principles were confirmed by the CC in Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294.
11. S v Makwanyane 1995(3) SA 391(CC) para 104
12. Print Media SA and Others v Minster of Home Affairs and others [2012] ZACC 22
13. See Near v Minnesota 283 U.S. 697 (1931); Attorney-General v British Broadcasting Corp[1981] AC 303 CA at 362; Little Sisters Book and Art Emporium v Canada [2000] 2 SCA 1120.
14. Citizen 1978 (PTY) Ltd v McBride and others [2011] ZACC 11
15. Citizen v McBride para 80.
16. Citizen v McBride para 59
17. Citizens v McBride para 83
18. https://www.sahistory.org.za/dated-event/general-lothar-neethling-sues-vrye-weekblad-and-weekly-mail. Accessed on the 24th of June 2020.
19. New York Times v Sullivan (1964) 376 US 254 at 279
20. National Media Ltd & Others v Bogoshi 1998 (4) SA 1196 (SCA) 1212
21. Khumalo v Holomisa 2002 (5) SA 401 (CC)
22. National Media Ltd & Others v Bogoshi (note 17) 1212 to 1213.
23. Section 1 of the Code of ethics and conduct of the Press Council.

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