

# MEDIA FREEDOM IN SOUTH AFRICA: THE HIGH ROAD<sup>1 2</sup>

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## one

I am honoured by the request of the National Press Club to deliver the Percy Qoboza Memorial Lecture. When, in 1977, the apartheid government banned *The World* and *Weekend World*, and when Percy Qoboza was imprisoned for six months, without trial, I was the Deputy Chairperson of the Publications Appeal Board. The bannings and imprisonment were decisions of the Government, and from the wings, as Professor of Law, I stared in confusion at what was happening.

Yet, ten years later, during the Emergency declared by PW Botha, the Appeal Board had to decide whether it would lift the bans by a Publications Committee on two newspapers, *New Nation* and *South*, I was directly confronted, as Chairperson of the Appeal Board, with the core question: should these newspapers, despite their strong stand against apartheid, not rather be unbanned in the interest of the safety of the country, and in the interest of granting the oppressed majority the opportunity to raise its political voice against the National Party regime?

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<sup>1</sup> The *Percy Qoboza Memorial Lecture* delivered on 19 October 2011 as part of the commemoration by the National Press Club of *Black Wednesday*, the day in 1977 when the apartheid regime banned *The World* and *Weekend World* newspapers (editor : Percy Qoboza, who was detained without trial for 180 days thereafter and had to leave the country. In the eighties he came back as editor of the newspaper, *City Press*.

<sup>2</sup> See Galtung “High Road, Low Road” as published on the net, accessible via google. The author promotes the “high road” for journalists”. This means that a journalist must not only describe e.g. violence but also work towards a resolution thereof. An approach which I fully support.

<sup>3</sup> Chairperson of the Broadcasting Complaints Commission of South Africa; Chairperson of the Publications Appeal Board 1980-90; Chairperson of the Media Council 1991-1997; Chairperson of the Ministerial Task Group tasked to draft a new Films and Publications Act 1994-6; Deputy Dean Faculty of Law University of Pretoria 1984-1996; Professor and Head of the Department of Criminal Law, University of Pretoria 1971-1998; Fellow of the Alexander von Humboldt Stiftung since 1974; Commissioner of the Press Freedom Commission 2011-.

The same problem arose when, eight months later, the Appeal Board had to decide whether the film *Cry Freedom* could be screened in 35 cinemas, as from 29 July 1988. Four years earlier we had already unbanned the *Freedom Charter* and thereafter we also unbanned many issues of anti-apartheid publications such as *Staffrider*, *Grassroots*, *Saspu National* and the like. This was already an approach which was at loggerheads with the draconian apartheid policy of not permitting the voice of the majority to be heard.

I have decided to highlight these crucial political (so-called security) cases in this lecture, though I wish to state that, in so far as morality and religion are concerned, we had already, early in the eighties, unbanned all works of literary merit<sup>4</sup> that had come before us. In films we were also successfully on our way to permit adults to see what they wished to see, without moving into pornography. The Ministerial Task Group which I chaired in 1994-6 successfully advised Parliament to place pornography in licensed sex shops.

The question that we face in South Africa is one which should be approached constructively. To agitate for freedom is only constructive if a constitutional approach is followed. This is the “High Road” approach. To simply agitate for freedom is not enough. We must learn from the pain of the apartheid past and build constructively towards the ideal of democratic freedom. This is a never-ending task: the flames of freedom must constantly be kindled.<sup>5</sup> The crucial testing field is the political one. The claims of Calvinistic morality have already been overcome: art, drama and literature have won the day. The political road, however, remains the hazardous one. The apartheid government suppressed the right of the oppressed majority to agitate for a unitary state. The Publications Appeal Board, as a legally constituted independent structure, had to decide whether it would go along with this approach after 1980,

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<sup>4</sup> E.g. *Magersfontein, O Magersfontein!* (Leroux), *Looking on Darkness* (André Brink), *Donderdag of Woensdag* (John Miles), *Memoirs of a Woman of Pleasure* (John Cleland), *Lady Chatterley's Lover* (DH Lawrence).

<sup>5</sup> See Nelson Mandela *My Long Walk to Freedom* – last paragraph in book.

when I was appointed as Chairman. It was clear that the Government was intent on banning on a political basis. The safety of the state was in fact interpreted by government as creating conditions of “safety” in order to keep apartheid alive. We must, of course learn from this when we judge the Protection of Information Bill, which has been scheduled for further discussion by the ANC in hearings which will be held throughout the country.

## two

The history of the world is not simply the history of wars. It is the history of man’s struggle for freedom against despotism: freedom not only from tyranny and oppression, but also freedom of religion, and freedom of political and artistic expression and conscience. It is the perennial human struggle to breathe the fresh air of freedom – with which one tends to fall in love, even as an “unbanning” censor!

Thus freedom of expression as guaranteed in our Constitution, is the result of an arduous and century-old struggle against the tyranny of the State and, often, the Church. One only needs to page through *Censorship: 500 Years of Conflict*, which was published for the 1984 exhibition at the New York Public Library, to realise the gruesome deeds which were done by the Church and State against those who dared to disagree with them during the period described. One is struck by the imposition of prior restraint in the 16<sup>th</sup> Century by Henry VIII and Elizabeth I (abolished in 1695) ; the banning by the King of two books by John Milton in 1660; the banning of Hobbes’ *Leviathan* when the monarchy was restored, after Cromwell’s Protectorate in 1669; the burning at the stake of Giordano Bruno by the Inquisition for having put forward the concept of the worship of nature itself; the *Index Librorum* which e.g. in 1664 included works by Galileo and Pascal; Copernicus’ book which put forward the hypothesis that the earth revolved around the sun, was placed on the Index in 1616; Galileo’s *Dialogo* (1632) in which he supported Copernicus, was also placed on the *Index*; the Catholic Church had William Tyndale burnt at the stake for his translation of the Bible in the 16<sup>th</sup> Century; in Calvin’s time Servet<sup>6</sup> was also burnt at the stake

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<sup>6</sup> Even Calvin supported the death sentence for his friend Servet, who had propagated that the Trinity was not supported by the Bible. He did, however, ask that he should not be burnt at the stake but

for denying the Trinity; seditious libel in 18<sup>th</sup> Century England which did not allow an accused to plead truth; the tyranny of Louis XIV and his ministers up to the King's death in 1715 – the King and Church having monopolised the presses and having imposed prior restraint to all that was published; the pre-revolution censorship in 18<sup>th</sup> Century France against those who dared to differ from official doctrine and thinking. The 1735 trial of the John Peter Zenger, the printer of the *New-York Weekly Journal*, at least introduced a new era in America for publishers. The jury's finding that he had not committed seditious libel, effectively put an end to common law seditious libel in the colonies. Truth was, at last, a defence on charges of seditious libel.<sup>7</sup>

In apartheid South Africa the government, in its pernicious quest for white supremacy, also set its perceived Calvinistic morality as the norm, wrongly interpreting the Bible as supporting apartheid, and accordingly instituting censorship of publications, entertainment and films on that basis. The concerns of real life had been permitted no place in these media. Sin, one might say, did not exist in publications and films, for it was forbidden from being depicted. Democracy for all was anathema. In this climate, newspapers struggled to keep their own Media Council alive, and newspapers that were not members of the Media Council were subject to the heavy hand of the Minister of Justice and, of course, detention without trial for an editor (Percy Qoboza!) or a journalist who attacked apartheid – which, as we know, was in 1973 declared to be a crime against humanity by the United Nations.

### three

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“only” be beheaded. His request fell on deaf ears. Of course, I need not even refer to crucifixion for the expression of revolutionary new religious ideas.

<sup>7</sup> Which included criticising Parliament. See Lieberman *The Enduring Constitution* (1987) 217-9.

The vast majority of apartheid supporters had an immense sympathy and respect for the dignity of the police and of the apartheid establishment. Consequently, any book, play or film that criticised the police in their treatment of black people was under suspicion. Jack Cope's *The Dawn Comes Twice* was banned by the Appeal Board in 1977 because it included fictionalised unlawful acts by the police. To me this banning amounted to an unacceptable limitation on freedom of speech. It was clear that this book posed no risk to the public order or the security of the state, as required by the Publications Act.

I set it as an ideal when I was appointed chairman in 1980, to move towards realism, true democracy and freedom of expression for all. How could the police force be regarded as sacrosanct when reality contradicted this perception? One needs to only page through the reports of the Truth and Reconciliation Commission, to come to a different conclusion as to what the situation was at the time. Of course, it would be wrong to categorically blame each individual policeman. But the task the police were given under apartheid legislation – as is the case in all oppressive regimes – was open to abuse. Many books, newspapers and films addressed this situation critically, whether by way of documentary or fiction. They were, at a risk to be banned. Even the acclaimed poet Breyten Breytenbach's book of poems, *Skryt*, was banned in 1975 since, according to the Committee of Publications, it posed a risk to the security of the State by criticising the Security Police. Since the appeal was withdrawn as a result of Breytenbach's trial for treason, the Appeal Board did not reach a decision on this book.

When I took over in 1979 as acting chairman, the first signs of a new, freedom-oriented, dispensation within the area that we regulated were already in the air at the Appeal Board: we unbanned Nadine Gordimer's *Burger's Daughter*, which was said to have been a risk to the security of the state. How such an intricate novel could ever be regarded as a risk to security remains a riddle to me. Of course, it took a sympathetic stance with regard to the disenfranchised majority, but that could never be a reason to ban a book!

When *The Covenant* by James Michener was banned by a publications committee in 1981, I realised, as the newly appointed chairman, how utterly irrational traditional pro-apartheid beliefs were. It is true that the novel questioned the very roots of the Afrikaner in so far as the covenant of 1838 was concerned. This covenant constituted a promise to God that if He granted victory over the Zulus to a Voortrekker commando led by Andries Pretorius, they and their descendants undertook to regard 16 December as a day of worship, and to build a church to commemorate the day. A hundred years later, in 1938, a grand symbolical trek was organised from all corners of the country, to Pretoria. The foundation stone of the Voortrekker Monument in Pretoria was laid and nationalism among Afrikaners reached a climax. This rise of Afrikaner nationalism contributed to the National Party's victory at the general election in 1948, and to the foundations of apartheid being laid by that government by way of legislation. Michener's novel, *The Covenant*, questioned the integrity of Afrikanerdom in its 1838 covenant with God, and also sharply criticised its policy of apartheid. The novel had hardly been banned, when the local distributors filed an appeal. Within a week I suspended the ban, pending the outcome of the appeal. I was astonished that a Michener novel had been banned. A publications committee also soon afterwards banned an issue of *Reader's Digest* in which an abridged version of the book appeared. Once again, within a day after the appeal was lodged, I suspended the ban, pending the outcome of an appeal. How despotic could censorship get, I wondered. I was shocked by this demonstration of unreasonableness. Something had to be done to move South Africa out of the grip of fundamentalism. The Board set the bans aside.

#### four

John Dugard,<sup>8</sup> of the Centre for Applied Legal studies at Wits University, assisted me in 1983 in setting up a private meeting with author and critic, Professor Es'kia Mphahlele. I managed to convince Professor Nkabinde, rector of the University of Zululand, to attend. The advice was clear: such literature and newspapers posed no real risk to security, and the voice of the majority needed to be heard so as to ensure

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<sup>8</sup> Who is an ad hoc member of the International Court of Justice and has led, e.g. an inquiry into the Palestine question.

that suppressed voices would not be pushed into revolution and violence. My own view was much clearer after this meaningful meeting: only when material posed an actual danger of violence or amounted to a real contribution to violence, would we ban the distribution. And this was seldom the case. *Staffrider*, *Learn and Teach*—and many other publications giving voice to oppressed people – were unbanned by the Appeal Board. We also approved Sipho Sepamla's *A Ride on the Whirlwind*, a novel which included descriptions of appalling conduct by the police in Soweto.

## five

In so far as communist literature was concerned, all the books of Marx, Lenin, Trotsky, Stalin and the like had been banned – even for possession. Only by way of special exemption were they permitted to be kept under lock in certain research libraries. I regarded this as an unnecessary limitation on the necessity for research. In 1983 I appointed Professor Gerrit Olivier (who in 1995 was South Africa's first Ambassador in Russia) and Professor Marthinus Vorster, head of the Department of Public Law at the University of Pretoria, to advise the Board. The advice of the two experts was clear: the possession ban on the works was creating an unnecessary limitation on research regarding communism and related fields. Their report led to the unbanning of the possession of such works, and later the distribution bans were also lifted.

## six

Early in the eighties we lifted the ban on posters which promoted the *Release Mandela* campaign. The posters did not, in any manner, promote violence, but demanded what was reasonable. Later in the eighties we also unbanned a calendar of ANC days of remembrance. Our general approach was closely related to the approach of the American courts: there had to be a clear and real danger before a publication or a film was a security risk. Christof Heyns, in his 1991 doctoral thesis on *Civil Disobedience*, has argued that in effect we were applying the American doctrine: there had to be a clear and present danger. Looking back, I tend to agree with him.

The new policy of the Board led to a substantial reduction in publications sent in by the Security Police to the Directorate. I was told by Director Braam Coetzee that the Security Police had, as it were, given up on us.

### seven

By 1984 the *Freedom Charter*<sup>9</sup> was being distributed (unlawfully) on a much wider scale than before. The matter of the ban on its possession came before us. I decided to appoint Gilbert Marcus, who was associated with the Centre for Human Rights Studies at Wits, to address the Board as to any security risk that the *Charter* possibly posed. Quite correctly, he contended that, as it stood, the *Charter* was a mere Bill of Rights which demanded what a Bill of Rights would demand: equality, the rule of law, the vote for all citizens and equal opportunities for all. Of course, these rights conflicted directly with government policy. However, there was no sign of the propagation of violence in the *Charter* itself. We decided not to confirm the possession ban proposed by the Committee. The distribution ban was also lifted shortly thereafter.

A day or two later, two members of the Security Police (a colonel and a brigadier) came to see me, unannounced. They had in some way or another been informed that we had declined to confirm the possession ban. I explained that if anyone misused a publication, that was not the concern of the Board. The brigadier agreed with me. The colonel remained unconvinced. Of course, the unbanning remained intact. I merely refer to this example to demonstrate how we were seemingly being watched by the regime and its Security Police. The attempt at influencing us to withdraw our decision was, of course, not permissible. The Act was clear: we had to take our decisions independently and without any intervention by government.

### eight

After the unbanning of the *Freedom Charter* I received two important invitations: one from the State Department in the US and one from the British Foreign Office. I had

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<sup>9</sup> The Bill of Rights that the ANC drafted at Kliptown in 1955.



the privilege of meeting with prominent freedom-of-speech experts. What I found most informative were meetings with editors of the print and broadcast media. Their criticism of apartheid was vehement. After those two trips I knew for sure that the apartheid regime could not last for much longer and that the Appeal Board was on the right path in the freeing of anti-apartheid political thought and expression, which would lead to democracy for all. Of course, the problem was that there were still other laws prohibiting the voice of the majority from being fully heard: detention without trial and the emergency regulations of the late 1980s are examples. And, of course, the voice of the majority was excluded from Parliament, apart from one or two representative voices such as that of Helen Suzman.

## nine

The next problem we then encountered was attempts by the apartheid government, through its representatives in Namibia, to ban all future issues of the *Windhoek Observer*. The claim was that the *Observer* was supporting the external wing of SWAPO. A Publications Committee in Cape Town upheld the complaint and banned all future issues. When the *Windhoek Observer* appealed, I suspended the ban until such time as the Appeal Board had decided the matter.

I was taken aback by the many attempts there were to influence the Board to uphold the complaint. Yet we decided to continue with the case. The appeal was upheld. There was no sign in the issues of the *Observer* that the cause of any so-called enemy was being furthered by the newspaper. Had we confirmed the “all future issues” ban, I would have lost all hope that we were on the way to more freedom at the Appeal Board. The voice of the *Observer* was a political one; it was not a voice that endangered the safety of the State – though of course, it did attack apartheid, which was perceived by the government to be a cornerstone of its future existence.

The evening after we lifted the ban, an official phoned me. I informed him that we had lifted the ban. He was clearly distressed. He said that the State President would have to be approached to intervene. I told him that he was welcome to take the

matter further, but that we were independent from government and would not take orders to ban a publication – not even from the State President.

## ten

The government extended the state of emergency in 1987. I was asked by the Department of Home Affairs whether I could “tighten the rules” in regard to the so-called alternative media. I said that the Appeal Board could not do so, since it was bound by the Publications Act, and also that we did not believe in any such “tightening”. At the Board it was argued on behalf of the State that the Appeal Board was bound to accept that a state of emergency had been declared and that the Board should, accordingly, apply stricter rules. We held that we were not bound by the state of emergency and that we should ourselves decide what the state of security was in relation to films and publications, and whether the voice of the majority should or should not be heard. The media praised the Board for having taken this stand. This was a feather in the cap of the Board, and emphasised its independence. Government was not smiling.

And that is the path we took. In fact, we regarded it as a risk to the security of the state to go ahead and *ban* newspapers. Silencing the voice of an editor and his journalists amounted to creating conditions that could have contributed to anger, which could lead to more violence. We were convinced that there must be a newspaper outlet for suppressed political feelings and ideals. Furthermore, the government had a duty to hear and see how the suppressed majority felt. The suppression by the police state had to stop. It was in the interest of the security of the state to free Nelson Mandela and move into a new democratic dispensation.

## eleven

“F\*\*k the reasons in your judgment” the Minister of Home Affairs Stoffel Botha yelled at me on the phone in November 1987. “I am planning to ban *New Nation* and *South* for three months under the emergency regulations, and now you have *unbanned* them today under the Publications Act!” “Yes, but...” I tried to explain that the Minister’s decision and ours were under different legislative frameworks and that our

decision would not affect his decision. But after a few more loud curses, the phone was slammed down. I felt nauseous. I realised that it would of course have been a form of support for his decision the following week if he could say that the Board had also found the newspapers to be a risk for state security. But that was what the Board was not willing to do. We believed that a ban on the newspapers would be counterproductive.

On the following Monday, the Minister banned the newspapers for three months. At a meeting two weeks later, the Minister had clearly calmed down and gave a veiled apology. And then he asked me, "But am I permitted in law to order you to take a stricter approach or intervene?" I replied, "No, sir, the Publications Act expressly prohibits anyone from influencing or attempting to influence the Appeal Board." To this, he exclaimed, "Then we have painted ourselves into a corner!" He told me he would seek senior opinion to check whether I was correct. I did not hear from him again.

However, storm clouds were gathering over the Union Buildings, the seat of government and of the State Security Council. I can just imagine the heated debates about this Appeal Board that refused to toe the line, and the sense of utter despair and fury the government must have felt. For the apartheid government did not countenance any opposition from any board within the state structure – even if it were independent from the executive, as the Publications Appeal Board was, by Act of Parliament.

In the meantime, we were functioning with the full and justified conviction that we were independent, as the law guaranteed. And yet, that independence would be threatened, as I will describe hereunder.

twelve

In 1987 we heard that Sir Richard Attenborough was producing a film about Steve Biko, the Black Consciousness hero who had died as a result of wounds inflicted on him in prison whilst being detained without trial in 1976. Attenborough's huge, recent success with the film *Ghandi* was cause for concern for the government. The Biko film might be as big a success and further worsen the situation for South Africa. A Publications Committee had already found the film to be acceptable early in 1988. The Directorate did not appeal. However, when it emerged that the film would be screened by United International Pictures at more than 30 cinemas on 29 July 1988, the Minister of Home Affairs referred the film to the Appeal Board on 25 July for review. I knew that the State President had said that this film would never be screened in South Africa.

This was to be a turning point in my life. The passing of the film would open me to immense criticism from the apartheid government and would mean that I would not be reappointed as chair 18 months later.

Before the hearing started, the international media conducted a short interview with me: cameras, microphones and journalists' note pads surrounded me in my office. "But are you independent?" one young woman demanded. "We *are* independent" I answered. I kept my promise, and suffered personally for doing so. How this independence would be tested in the next few months I could not have foreseen.

The court room was packed. A well-known radio personality, Justus Tsungu, testified on behalf of the State that blood would flow on the streets if the film were to be screened. Professor Pieter Fourie, a communications expert, explained the function of the scenes of violence and convincingly testified that they were not incitatory, but rather functional in showing the plight of people who have been oppressed. The film would lead to a compassionate response rather than one of violence.

In the three-hour-long, very strained meeting that followed the hearing, a majority of six to four decided to make no cuts to the film and to pass it with an age restriction of 19.

The film included scenes where children were shot by the police during the, by then, internationally notorious incident when children, in their thousands, rose up against the apartheid education system in Soweto in 1976. The scenes referred to were extremely well filmed: the anger of thousands of protesting children, the policeman's gunshot that changed the protest into pandemonium, the ensuing shooting and sjambokking of children. The scene of Sam Nzima's famous photograph, showing the body of Hector Peterson being carried, was also realistically re-enacted in the film.

That night I wrote the judgment. I knew that the approval of the film would change my life and future within the apartheid dispensation. I worked on the judgment throughout the night, and it was released to the media at 09:00 on 29 July.

I sat down in my office after the national and international press had left, and enjoyed a hamburger which my staff had organised for me. The pressure seemed to be off and I knew that the right step had been taken.

However, unbeknown to me, all was not well on the streets. And it was not blood flowing as a result of an uprising by black people. "The police are seizing the 35 copies of *Cry Freedom* in the cinemas!" a *Beeld* journalist exclaimed on the phone. The Board was an independent judicial body, and the Commissioner of Police was ignoring our order that the film could be released without cuts. "This cannot be true!" I answered. What had become of the rule of law? And yet it turned out to be all too true.

The South African media gave me its full support in not having banned *Cry Freedom*.<sup>10</sup> There was also wide support from the Parliamentary Opposition and, of course, from anti-apartheid groups in South Africa and abroad.

Three months later, on 3 October 1988, I woke up to find that my family home was smouldering. The front door had been set alight during the night. The carpet was burnt in numerous spots and a whole burnt into a table. It was as if someone had shot a flame into the house from under the front door. The detectives could not establish what weapon had been used. Fortunately the fire had not spread. My wife was shocked, my children stunned and in tears, and the result was a police squad being set up to protect us. The intention had clearly not been to destroy the house, but to harass me.

A trained police dog, a German Shepherd called *Elsa*, was donated to us for protection. *Vrye Weekblad*, a year later, quoted an unnamed general who had allegedly said, "Give the fool a dog that will kill him!" At the time, it was suggested that white right-wing elements had probably played a role in the arson incident. Yes, *Cry Freedom* had shown the police to be brutal in their handling of Steve Biko. Yes, viewers were shouting "Amandla!" while watching the film after the state of emergency was lifted by FW de Klerk in 1990. Yes, a black witness for the State's case before us had exclaimed that there would be blood on the streets if the film were to be released. But no, there was never any blood on the streets or violence in theatres.

Amnesty was later granted by the Truth and Reconciliation Commission to persons who admitted that they had been involved in planting small bombs in theatres when *Cry Freedom* was released in 1988. These few slight explosions provided an excuse

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<sup>10</sup> See, for example, Rina Minervini "Dignified Van Rooyen just keeps on deciding for himself" *Saturday Star* 6 August 1988; Rina Minervini "At times it's hell being a censor in SA – just ask Kobus" *Sunday Star* 31 July 1988.

for the confiscation of the film, in some instances while the film was actually being screened.

We never learnt who wrote a letter in the *Sowetan* of 6 October 1988 under my name and on Appeal Board official paper, in which I hit out at the government for having seized the film. Cabinet considered firing me (which they were not authorised to do, in any case) as a result of the letter. Interestingly, an assistant working for the Cabinet phoned me to ask me whether they could fire me. I simply said “No,” and he unequivocally accepted my answer. This was, indeed, a lighter moment which led to a smile...It seemed as if I was part of a scene from the famous British comedy, *The Men from the Ministry*... Orders were orders even if they came from the person who was about to be fired.

The letter was an excellent piece of forgery. Some other strange things also happened. In retrospect, it is clear that the conduct amounted to harassment, and nothing more. At one stage we had seven police guards patrolling our premises after we received a call that our house would be destroyed that week. Our “suffering” was, of course, not even closely comparable to the real suffering in the townships under the hand of the Police.

The decision on *Cry Freedom* set a new freedom-oriented approach and, looking back, I am proud that we had the conviction and courage to pass it, given the state of emergency that was still in place. But by 1988 I had reached a stage where the cruel strictures of the apartheid regime simply had to be exposed for what they were. And *Cry Freedom* was the first effective medium to do so. It could not pose a risk to security. But it did pose a serious risk to the future of apartheid – thank God!

Freedom of expression is guaranteed in section 16 of the Constitution. This right has been said to lie at the heart of democracy. Although it has been said that it must be given a generous application, each case on Constitutionality starts with all the rights at an equal level, according to the Constitutional Court. Balancing of rights then takes place. Section 36 of the Constitution provides that the fundamental rights may only be limited by what would be regarded as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. One of the limits which have been accepted is in regard to child pornography. But even in that case the publication or film will be protected by the fundamental right of freedom of expression if it amounts to art. Limits are also to be found in the protection of reputation, dignity and privacy. A lot would depend on the value of the speech in comparison to the rights that may have been impaired.

National security would also place a limit on freedom of expression. Of course, the criteria according to which this is done, and the institutions who implement any classification, are crucial to the matter.

The Protection of Information Bill, even in its latest diluted form, has been subjected to severe criticism in the media and elsewhere. The ad hoc committee has limited its initial application quite considerably. A double check by a Review Panel has been included, and in the case of declassification applications, public interest is one of the criteria. In case of a denial of such an application, there is the possibility of a full appeal to a Court. Where there is a prosecution of e.g. a journalist and newspaper for having published without declassification public interest will not be a defence. The problem, to a certain extent, still lies with the over-broad nature of some of the criteria, and the decision not to allow for a public interest defence if a person publishes without declassification. Most of the offences may even be committed where the accused was negligent. In my view, the offences should, Constitutionally, be limited to intentional contraventions, given the severity of the possible sentences.



Let me examine the role of public interest in our law. Truth plus public interest is a defence in the case of a civil action based on defamation. In the case of privacy, the defence has been described as a *rara avis* by a previous Chief Justice.<sup>11</sup> This approach is still followed by our Courts. There would, accordingly, have to be cogent reasons before such disclosure is regarded as a legitimate defence of an action based on privacy.

The Protection of Disclosures Act does not permit a whistleblower to disclose material when the disclosure amounts to an offence. Public interest is, however, a ground for whistle-blowing in other cases. Since publication without declassification amounts to a criminal offence whistle blowing would be forbidden by the said Act.

The Films and Publications Act 1996 allows the Board to permit what would otherwise be hate speech if it is in the public interest. Of course, this a mere administrative action and does not, as such, affect a person. Indirectly, in so far as prosecutions could have followed for distribution, it would, however, be a defence to state that the publication had been passed by the Board.

I have compared the Council of Europe's Convention on Access to Official Documents and s15 of the Canadian Security of Information Act, 1985. The first allows for a public interest case to be made out for the *release* of a document. In other words, an application for disclosure must first be lodged. In Canada a person who works in the security establishment is permitted to publish within the stringent requisites of whistle blowing which the Official Secrets Act require.

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<sup>11</sup> "Assuming, in favour of the appellants, that in a case where the information sought to be published was obtained by means of an unlawful intrusion, there may nevertheless still be overriding considerations of public interest which would permit of its being published, it seems to me that such a case would be a *rara avis* and that the public interest in favour of publication would have to be very cogent indeed."

Although I fully understand the necessity for a public interest defence in the Protection of Information Act, and still regard it as first prize, I am in doubt whether scrutiny by the Constitutional Court will lead to its inclusion in the Act by the Court in cases where persons are charged under the Act. To my mind, the Constitutional Court will abide by the approach which it took in the *De Reuck*<sup>12</sup> matter, where it was argued that legitimate possession by, for example, a journalist who holds child pornography for purposes of publication thereof, should be provided for. The Court rejected this argument, stating that the Films and Publications Act provides that a person may obtain permission to hold child pornography from the Executive of the Films and Publications Board. From this it follows that the Court will probably find that, since the Protection of Information Act<sup>13</sup> provides for an application to declassify on public interest grounds, and a journalist (and others) would have the opportunity to apply and even take the matter on full appeal to a Court, the exclusion of the public interest defence in a prosecution is justified Constitutionally. Of course, this limits the opportunity for a scoop. But in this case also, the Bill places a duty on the organ of state to declassify within 14 days or, in some cases, within 30 days. Only a Court may allow it to lengthen the period.

Of course, an accused in terms of the Act would always be in a position to show that the classification which took place resulted from a fraud. Since the ad hoc committee has introduced a review panel which would have to confirm all classifications, I doubt whether this defence will, in practice, have a wide application.

Even the US Supreme Court,<sup>14</sup> in October 2009, took quite a strict approach to the question whether the right to freedom of association (which is on a par with the right to freedom of expression) would allow a US organisation to provide a terrorist organisation, listed as such by the Secretary of State, with advice as to how to

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<sup>12</sup> 2004(1) SA 404(CC)

<sup>13</sup> If it is ultimately passed without public interest defence.

<sup>14</sup> *Holder, Attorney General, et al, v Humanitarian Law Project et al* 561 US 2010.

negotiate peacefully. The majority of the Court held that the organisation might very well use this information to further its terrorist aims and that the limitation was justified, even in these circumstances. A minority of three judges (Beyers J, Ginsburg J and Sotomayor J) held that previous judgments of the Court in fact allowed this kind of activity as part of protected political discourse. The judgment of the minority makes for interesting reading. It does not base its dissent on public interest, but demonstrates that, in a democracy, there must be room to associate positively, even with an organisation that is generally regarded a terrorist. This minority judgment might have some value in making out a case for a defence under our Act, if Parliament decides to maintain its present exclusion of the public interest defence to a prosecution. However, the majority, in the US case, in effect rejected what could be regarded as a public interest defence, that is, that the prohibition would even apply where a good cause would be served.

Ultimately, the public interest defence to a charge in criminal law is a rather risky course to follow, except in the most glaring cases. Even then, one should bear in mind that the classification would only be valid if also confirmed by the Review Panel. My advice to a client would be to rather apply for declassification. If denied, the matter could be taken on appeal to the High Court. The Bill provides for special procedures so as to limit the public nature of the Court process.

In closing I should, however, refer to the 1994 European Court of Human Rights' judgment in *Jersild v Denmark*.<sup>15</sup> In this matter it was held that a Danish Court had convicted Jersild, a television journalist, in conflict with the European Convention of Human Rights for having broadcast a two minute section of a longer interview with racists. The racists, in the broadcast, used racially derogatory language in regard to immigrants from Africa and bragged about their criminal activities in this regard. The Court stated as follows:

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<sup>15</sup> Application 15890/89 (23 September 1994)

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (ibid.). Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (ibid.). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.

It would indeed be valuable for our Legislature in finalizing the Protection of Information Act to consider whether the public interest as referred to in the above passage, might not, in exceptional circumstances, be a defence to a prosecution. It might be argued that public interest could very well be a defence in hate speech matters, but that it will hardly have the same weight in cases of national security. Nevertheless, the judgment is a splendid example of how public interest could function to keep the public informed. The Jersild judgment has often been referred to by the Broadcasting Complaints Commission, notably in finding that e-tv interviews with criminals, who said that they planned to rob foreigners at the World Soccer 2010 in South Africa, were justified by the right of the public to be informed in the public interest.

#### **fourteen**

The apartheid government misused politics as a ground for banning newspapers and detaining people without trial. The Publications Appeal Board in the eighties rejected this abuse, i.e. political expediency, and instead the Board applied a security of the state test. That is why, in the vast majority of cases, the bans were lifted. This led to a serious rift between the Appeal Board and Government.

The Constitution will only, to my mind, permit Parliament to limit freedom of expression in cases where there is a clear danger that the national security will be placed at a real risk if material is not classified. Let us never return to a less strict criterion. I cannot foresee that the Constitutional Court, which has the final say, would permit any limitation which would unreasonably place freedom of expression at a risk. I, accordingly, remain optimistic.