Film censorship in South Africa. The analysis of classification and the interpretations of the 1996 Film and Publications Act, with reference to the banning of the film Of Good Report at the Durban International Film Festival 2013.

By Sipho Jabulani Ngwenya

Student Number 213571303

Ethical Clearance Number HSS/0503/014

11/28/2014

Submitted in fulfilment of the requirements for the Master of Social Science Degree in the Graduate Centre for Communication Media and Society, College of Humanities in the University of KwaZulu-Natal, Durban, South Africa.
Declaration

I, Sipho Jabulani Ngwenya, Student number 213571303, declare that:

1. The research reported in this thesis, except where otherwise indicated, is my original research.
2. This thesis has not been submitted for any degree or examination at any other university.
3. This thesis does not contain other persons’ data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
4. This thesis does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
5. Their words have been re-written but the general information attributed to them has been referenced.
6. Where their exact words have been used, then their writing has been placed inside quotation marks, and referenced.
7. This thesis does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the thesis and in the References sections.

Student Name:____________________

Signature: ______________________

Date: ______________________
Abstract

In 2013 the 34th Durban International Film Festival (DIFF) saw the banning of the first South African Film since the end of the apartheid. The banning of the film, *Of Good Report* (2013), aroused a new debate on censorship in South Africa. The film, about a high school teacher who preys on school girls, was alleged to contain child pornography. The ensuing debates were around the definition of child pornography and how the classification process, carried out by the Film and Publications Board, could so erroneously result in the banning of the film. The film was later unbanned by the Independent Appeals Tribunal which ruled that the classification committee had made a mistake.

Film Classification is an advisory note to assist parents in protecting children from premature exposure to adult experiences (Van Rooyen 1989), but this advisory service has sometimes resulted in censorship as in the case with *Of Good Report*. In 1994 the incumbent Minister of Home affairs, Dr Mongosuthu Buthelezi, said “never again in this country will anyone decide what other intelligent and rational beings may or may not read, watch or hear” (*Mail and Guardian* 1994). The banning raised a question of how in this constitutional dispensation we can have films being banned. The research examines the transition from apartheid censorship to the current dispensation of constitutional freedom of expression and regulation of through classification.

South Africa has a “colourful” history with regards to censorship particularly during the apartheid era. Censorship was justified by Kennedy (1986:393) as being necessary only when there is a “clear and present danger”.

The apartheid government had numerous censorship laws which censored the media, political institutions and people, with types of censorship consisting of banning, listing, travel bans, arrest, exile and assassinations (Venter 1989). The study compares pre-democratic censorship to current day trends and identifies how much progress, if any, has been made in creating an environment that is conducive for freedom of expression.
Acknowledgements

A number of people have been instrumental in making this dissertation possible and I would like to extend my sincerest gratitude to them.

I would like to thank my supervisor Prof K Tomaselli for all the guidance. His level of excellence was often very hard to meet but I am grateful for the standards he helped me set. I would also like to thank everyone else at CCMS for the help and guidance I often received.

I would like to thank all those who participated in my interviews and gave their time and knowledge to make this possible. I would like to thank the Film and Publications Board for opening up their doors to me and giving all the assistance I asked for. I would also like to acknowledge the Durban International Film Festival, Sharlene Versfeld and Peter Machen, who made this dissertation possible in a more profound way than they probably realise.
Dedications

I would like to dedicate this Masters Dissertation to my father, Colonel Thomas Ngwenya, my mother Fortune Mafu the rest of my family and to my unborn children.
<table>
<thead>
<tr>
<th>Acronyms</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CCA:</td>
<td>Centre for Creative Arts</td>
</tr>
<tr>
<td>CCMS:</td>
<td>Centre for Communication and Media Studies</td>
</tr>
<tr>
<td>Classifiers:</td>
<td>Film and Publications Classification Committee</td>
</tr>
<tr>
<td>DIFF:</td>
<td>Durban international Film Festival</td>
</tr>
<tr>
<td>FPA:</td>
<td>Film and Publications Act</td>
</tr>
<tr>
<td>FPB:</td>
<td>Film and publications Board</td>
</tr>
<tr>
<td>PCB:</td>
<td>Publications Control Board (1963-1974)</td>
</tr>
<tr>
<td>Porn:</td>
<td>Pornography</td>
</tr>
<tr>
<td>SABC:</td>
<td>South African Broadcasting Corporation</td>
</tr>
<tr>
<td>SADC:</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>Text:</td>
<td>A general term for a film, book or play.</td>
</tr>
<tr>
<td>Tribunal:</td>
<td>Independent Appeals Tribunal</td>
</tr>
<tr>
<td>UNISA:</td>
<td>University of South Africa</td>
</tr>
<tr>
<td>List of Figures</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Figure 1. Picture of DIFF opening night 2013</td>
<td>3</td>
</tr>
<tr>
<td>Figure 2. FPB Classification Chart</td>
<td>40</td>
</tr>
<tr>
<td>Figure 3. Zapiro FPB Cartoon</td>
<td>101</td>
</tr>
</tbody>
</table>
# Table of Contents

Declaration ........................................................................................................................................ ii  
Abstract ........................................................................................................................................... iii  
Acknowledgements .............................................................................................................................. iv  
Dedications ......................................................................................................................................... v  
Acronyms .......................................................................................................................................... vi  
List of Figures ..................................................................................................................................... vii  

## Chapter 1 Introduction .................................................................................................................. 1  

Introduction to Study ......................................................................................................................... 1  

The Drama in the Cinema .................................................................................................................. 2  

Background to study ........................................................................................................................... 4  

Summary of the film *Of Good Report* and its significance .............................................................. 6  

Description of the Study: ................................................................................................................... 7  

Objectives .......................................................................................................................................... 8  

Questions to be asked: ....................................................................................................................... 8  

Short Description on study approach ................................................................................................. 9  

Theoretical framework ....................................................................................................................... 9  

Research Methods and Approach to Study ..................................................................................... 9  

Conclusion ......................................................................................................................................... 11  

## Chapter 2 Literature Review: Censorship .................................................................................... 12  

Censorship ......................................................................................................................................... 12  

Pre-democracy Censorship in South Africa ...................................................................................... 14  

Diversity in Forms of Censorship in Pre-Democratic South Africa .................................................. 16  

Apartheid Censorship laws ............................................................................................................... 17  

Effects of censorship in Pre-Democratic South Africa ...................................................................... 19  

Impact of television on children ......................................................................................................... 22
Justifications for censorship.................................................................................................................. 23
Pre-democracy media-corporate relations.......................................................................................... 26
Press myths advanced by liberal apologists ...................................................................................... 27
Conclusion........................................................................................................................................ 28

Chapter 3 Classification and Legalities ............................................................................................ 29
Introduction........................................................................................................................................ 29
Legal Foundations of Classification.................................................................................................. 29
Classification Administrative Processes............................................................................................ 32
Classification Elements ..................................................................................................................... 34
Classification Categories (in Film) .................................................................................................... 36
Introduction and background to child pornography ........................................................................... 40
Historical Perspective of child Pornography..................................................................................... 42
Child Pornography and The Act ......................................................................................................... 43
The Case of XXY (2007) .................................................................................................................... 46
Observations from Professor Van Rooyen........................................................................................... 47
Conclusion........................................................................................................................................ 51

Chapter 4 Theoretical Framework ..................................................................................................... 53
Introduction........................................................................................................................................ 53
Theories in qualitative research.......................................................................................................... 54
Freedom of Expression: ..................................................................................................................... 56
Public good or individual liberty: ......................................................................................................... 56
The Right to know and the right to privacy: ....................................................................................... 57
Free Speech and hate speech: ............................................................................................................. 57
Morality.............................................................................................................................................. 58
Conclusion........................................................................................................................................ 59

Chapter 5 Research Methods and Data Collection .......................................................................... 60
Introduction........................................................................................................................................ 60
Chapter 6 Data Analysis and Findings ........................................... 76

Introduction .................................................................................. 76

Trends in apartheid (pre-democracy) South Africa .......................... 76

Post-apartheid South Africa ............................................................ 81

Context and aesthetics ................................................................... 85

Interpretation of the Film and Publications Act ............................... 87

Reception Analysis ........................................................................ 88

Trends in classification .................................................................... 92

Of Good Report (2013) banning ....................................................... 94

Erotic realism, pornography and Of Good Report .......................... 99

Media relations .............................................................................. 100
Chapter 1 Introduction

Introduction to Study

In a newly democratic South Africa Dr Mongosuthu Buthelezi said, “never again in this country... will anyone decide what other intelligent and rational beings may or may not read, watch or hear” (*Mail And Guardian* 1994). This was the vision that Buthelezi, who was then incumbent Minister of Home Affairs, had when overseeing the drafting of the 1996 Film and Publications Act (FPA). This statement was particularly relevant on the back of decades of censorship and repression of the fundamental freedom of expression by the apartheid government of South Africa. According to Venter (in Vorster 1989:11) “there has been a tradition ... that freedom of conscience, and therefore of speech and of expression, is a fundamental human right”.

The 34th Durban International Film Festival (DIFF) was witness to the banning of the first South African made feature film since democracy in 1994. On the 16th of July 2013 a Film and Publications Board Classification Committee (The Committee) assigned the film *Of Good Report 2013 (OGR)* a “refused classification” effectively banning it. The Committee was under the impression that the film had an element of child pornography in one of the scenes and as such, the Committee ceased the screening of the film 28 minutes and 16 seconds into it. The stopping of the film was based on Film and Publication Regulation 16(1) which states that if the Classification Committee discovers child pornography during any classification process the film, game or publication shall be stopped.

The film was scheduled to open the prestigious Durban International Film Festival (DIFF), but as a result of this banning it was not possible. This is because a film that receives a “refused classification”¹ cannot be possessed, shown, or distributed, especially in the case of child pornography - pending appeal.² The producers (Spier Films) and director (Mr JXT Qubeka) of the film immediately launched an appeal with the Appeals Tribunal. The appeal was heard as a matter of urgency on the 27th of July 2013 by the Chair of the Appeals

---

¹ Chapter 3 Section 4(a) of the Film and Publications Act 1996
² Chapter 6 Section 24A of the Film and Publications Act 1996
Tribunal together with all members of the Tribunal and an invited child rights expert, Professor Ann Skelton. After hearing the arguments of the appellants and respondents legal teams, and a full reflection on the issues raised, “the Tribunal was of the view that the [Classification] Committee had erred materially in refusing classification to this film” (Govender 2013:2). Upon establishing this error the Tribunal immediately set aside the “refused classification” and instead classified the film Of Good Report (2013) as a 16(V) (N) (S) film. This effectively unbanned it and made it open to viewing to those above the age of 15.

The Drama in the Cinema

As mentioned above OGR was set to be the premier film at the DIFF and was scheduled to open the festival. The only thing more dramatic than having a film of such aesthetic calibre opening the film festival was having it not show on the opening night.

As a public relations consultant3 at the DIFF for two years now, I had a front row seat and inside information to all the drama that at that point was yet to unfold. Only a handful of people were aware that a day before it was scheduled to be shown, OGR was refused classification by the FPB. However, instead of replacing the opening movie with a suitable alternative the organisers of the film Festival decided to try get exploit the situation to maximum PR (Public Relations) effect.

On the 18th of July 2013 at about 7pm, the red carpet was out at the Suncoast Casino lobby and all dignitaries and guests were seated in a theatre full of film lovers and invited guests. They were waiting for the opening preliminaries of the Film Festival followed by the opening film. When all speeches were done and it was time to play the film all that came onto the large movie screen was a notice written:

This film has been refused classification by the Film and Publications Board, in terms of the Film and Publications Act of 1996. Unfortunately we may not legally screen the film “Of Good Report” as to do so would constitute a criminal offence.

---

3 I and a number of CCMS students interned at the festival as reviewers and journalists, researchers, and front of house. My role was working directly as a PR consultant for Versveld and Associates, the Festival’s PR company.
At first the audience thought it was a joke, until the organisers came on stage to address the audience and explain what was happening. The organisers then announced that OGR had indeed been banned. This was followed by tirade after tirade by the director, producer, actors, activists and organisers, castigating the Film and Publications Board (FPB) for driving South Africa back into the apartheid era. The Director of the film, Mr J Qubeka, symbolically taped his mouth shut in protest and tore and set alight what seemed to be his identity book. This was a very dramatic affair. The DIFF had used this situation to get as much publicity as possible and numerous articles were featured in the print, online radio and television the following days to come. In an interview with me the DIFF Manager, Mr Peter Machen, said “it [the banning] raised the profile of the festival on a permanent basis ... before the audience even left the cinema that night the story was on the front page of the Hollywood Reporter and Variety Magazine⁴, that’s an amazing thing”. It is this whole incident that motivated me to pursue this research to find out what exactly had just happened. My interest was aroused into wanting to investigate the mechanisms of film classification and media policy.

⁴ Hollywood Reporter and Variety Magazine are some of the most prestigious leisure and fashion magazines in the world, and are based in the USA.
Background to study

The banning of OGR sparked national and global debate concerning the form and function of film classification, and more importantly how it may result in an inappropriate and/or misplaced case censorship. The aim of my study is to examine the status of film censorship in democratic (post-apartheid) South Africa. The study will use the banning of the film *Of Good Report* (2013) as a case study.

The research will review literature on the development of censorship and film classification in South Africa. It will compare censorship in pre and post-democracy periods; alternatively called apartheid and post-apartheid periods. I decided to pursue a comparative study because in studying the past we can understand “how continuities from the past shape the present” (Browne et al 2005:19). The historical analysis aspect of the research will be the identifying what censorship consisted of in the past (pre-democracy) and comparing it to the present.

Various authors such as Kobus Van Rooyen (1987), Keyan Tomaselli (1989) and Chris Merrett (1994), have written extensively on the history of censorship, but few, if any, authors have interrogated film classification. This is the gap identified- one of illuminating the field of film classification- asks what it is classification, how it is conducted, by whom, for what reason and most importantly how it results in censorship?

The research will briefly also examine other general release films that were restricted under the authority of the Film and Publications Act of 1996. Other films that were also banned for depicting children below the age of 18 being involved in sexual conduct are *Bog of the Beast* (2006) and *XXY* (2007) which was later unbanned. On the other hand *The Reader* (2008) which deals with a 15 year old male high school student’s relationship with an older woman was classified as 16 NS (nudity and sex). In another example, *Roepman* (Call Man, 2011) which features abuse of an 11 year old boy was given the classification of 16 LSV (language, sex and violence). The research sought to identify differences and contradictions in the application of the 1996 Act as well as inconsistencies in the classification process. The study will also interrogate the definition and, more so, the application of the definition of child pornography in classification.
Censorship is defined as a term “commonly used to designate the legal restrictions proclaimed by a state authority with regard to the right of publishing, and the contents of publication, in printed form and similar restrictions relating to material offered by the radio and television...[and] theatre and film industries” (Van der Vyver et al 1983:9). My research will, however, focus specifically on film censorship.

Understanding censorship in South Africa requires analysis of its history and its evolution (Merrett 1994:1). The roots of widespread, systematic state censorship can be found in the Suppression of Communism Act of 1950 (Merrett 1994; Van Rooyen 2011). The Bill of Rights Section 16 - Chapter 2 of the South African Constitution (1996) - states that “Everyone has the right to freedom of expression”. Censorship fundamentally infringes on the right to freedom of expression, in this case, artistic expression. Technically, censorship does not exist in South Africa but, in essence, may be found in the category of “Refused Classification” and partially in “XX” ratings, as stated in the Film and Publications Act (1996). The “Refused classification” status basically states that a film cannot be produced, watched, distributed and anyone found in position of the said film is liable to criminal prosecution (Film and Publications Act 1996:15). This amounts to censorship. On the other hand “XX” does not criminalise possession, or production but it does not allow distribution and public screening and consists of elements such as bestiality, extreme violence and advocating of war or harm (Film and Publications Act 1996:16). These films can be privately imported. The different classification categories will be discussed in Chapter 3.

This research aims to identify what currently film censorship consists of, as well as outline how it has changed over the decades. DIFF is considered to be an artistic, cultural, aesthetic and educational event, and previously enjoyed blanket exemption from the need for classification (Young 2013). Furthermore, DIFF has a long standing history of anti-apartheid and anti-censorship activity and has been strongly supported by its host institution in this stance (Botha 2014 :8). The Directorate of Publications- the predecessor of the FPB - also granted blanket exemptions to film festivals under certain conditions Tomaselli (1988: 28). This is not the case now as films which are to be screened at film festivals are also subject to classification. There is also a question of whether or not classifiers are capable of identifying artistic merit in a creative work of fiction (De Vos 2013).
Summary of the film Of Good Report and its significance

This is a serious and sombre film shot in black and white. The opening scene features the protagonist, Parker Sithole, pulling out teeth that are embedded in his head. This weird and bizarre scene is explained at the end of the movie. The movie is deeply embedded with intense themes centreing on a young school girl who is the victim of a sexual predator, who is also her teacher. In an interview with the Financial Mail the director of the film, J Qubeka, said he wanted to use the film “to scare the bejesus out of any teenager looking for sugar daddies”\textsuperscript{5}. The film is a thriller bordering on horror, albeit some brief and fleeting scenes of humour that are barely noticeable. The protagonist, Mr Sithole-who is an English teacher-quickly gains the trust of the school principal as he appears to be an established scholar of Shakespeare, a dance teacher and cricket coach.

Mr Sithole is portrayed as a tormented man, haunted by ghosts of his grandmother whom he euthanised, as well as by nightmares of his time in the military. Throughout the whole film Mr Sithole does not utter a single word but his character is fully expressed and represented. The film also makes subtle references to Vladimir Nabakov’s \textit{Lolita} (1955)\textsuperscript{6}. All these and other stylistic elements employed make \textit{OGR} an intellectually sophisticated and challenging film of aesthetic and artistic merit. The film employs a multi layered aesthetic film theories that are discussed in later chapters. Despite this, not much academic work has been written with regards to this film.

The banning of the film happened as follows: The Classification Committee noted a scene where the Mr Sithole meets a beautiful young girl in a local tavern. He is new in town. After a few drinks, he takes the girl, Nolita, home and the scene shows him going down onto his knees as the girl stands with one leg on his shoulder- fully clothed. Cunnilingus is heavily implied, but is not explicitly depicted. The scene switches to him standing up and removing his belt, once again coitus is implied not explicitly depicted. The real issue is the next scene, where Mr Parker is at his first day of work in the new school. As the grade 9 students enter the classroom the young lady he was with the previous night enters the classroom as well. He then realises, by deduction, that Nolita is under age. It is at this point that the Classifiers stopped the movie, that is, after 28 minutes and 16 seconds of a 109 minute film. Needless

\textsuperscript{5} McCracken P 2013. “FILM: SA’s outdated censorship legislation”, Financial Mail August 01 2013
\textsuperscript{6} This is a Novel also about a lecturer that becomes obsessed with his 12 year old step daughter.
to say there had not been any explicit sex scenes at that point in the movie, actually more explicit scenes were yet to follow. Also cutting the movie at that point in time completely removed the context. This is to say this is a film that brings awareness to the plight of girls who are preyed on by adults, rather than it being a product of child pornography. Mr Parker eventually becomes obsessed with the young girl, Nolita, and when she breaks up with him, he plots and kills her, hanging her up and dismembering her to dispose of the evidence. A similarly unstable, over-enthusiastic police officer who tortures the protagonist figures out the murder and arrests Parker. She stops to interrogate him along the way to the station, the ensuing fight results in Parker head butting her and her teeth getting lodged in his skull, as depicted in the opening scene. He escapes to Harare, Zimbabwe where he lands a position as a teacher in another girls school. The film closes with him lustfully ogling at a young girl, who is ironically holding a copy of the book *Lolita* (1955).

Stylistically *Of Good Report* (2013) can be described as an aesthetically pleasing and intellectually challenging film, as suggested by Peter Machen the DIFF manager (interview, 2014). The film is one of the few South African films that consciously draws on historical aesthetic movements. These are i) Italian Neorealism; slow pace, observational, re-enactments, monochromatic, daily life, ii) the French New Wave; elliptical time, parallel dimensions, iii) intertextuality; a la Kubrick, extreme violence depicting character disintegration, and iv) Third Cinema; socially critical analysis, all v) sandwiched into a psychological thriller genre (Tomaselli 2013:6).

**Description of the Study:**

According to Karthy Govender (2013) “the central objective of any society is to protect its children and allow them to enjoy their childhood without premature exposure to adult experiences and without their having to experience damaging, harmful and inappropriate behaviour, whether indirectly or directly”. The purpose of the study is to interrogate classification and its role in South African film, particularly where it results in censorship. The research investigates the fundamental human right of freedom of expression and the need to protect children, highlighting where overlap may occur. This will be done by reviewing literature on censorship in general in pre-democratic South Africa in Chapter 2. This is then followed by the analysis of classification laws and procedures currently being
used and linking them to the banning of the film *Of Good Report* (2013) in Chapter 3. Information on censorship was gathered by selectively sampling individuals who made a national contribution to the discussion as seen in Chapter 6.

**Objectives**

Broadly the study will investigate the development of film censorship and classification in pre and post democratic South Africa. This will be done by pursuing the following objectives:

1. **To identify and compare the trends and developments of film censorship between pre and post democracy South Africa.** This will involve interrogating the two eras and identifying how each is different.
2. **To ascertain the process and procedures of film classification in South Africa.** This will consist of identifying the protocols involved in classification and how they are carried out.

The first two objectives will enable the research to:

3. **To critically analyse the banning of the film *Of Good Report*.** I will analyse how the law was applied in the case of the banning (and unbanning) of OGR and how the law was interpreted. Also my aim is to learn whether or not the application of this law has been consistent through the years. The case study will create context for the first two objectives.

**Questions to be asked:**

1. What are the main differences in classification and censorship over the two periods outlined?
2. What developments in censorship and classification have been implemented over the years into the current legislation?
3. How has this resulted in the banning (and the unbanning) of the film *OGR* and the interpretation of the Film and Publications Act?
   - What were the residual discourses that came up as a result of this banning?
Short Description on study approach

Theoretical framework

According to Reeves et al (2008) “Theories give researchers different lenses through which to study complicated problems and social issues, focusing their attention on different aspects of the data and providing a framework within which to conduct their analysis”. A theory is a logical explanation for why something is as it is (Hofstee 2006). In this research the media censorship approach compiled from a variety of sources by Pieter Fourie (2001: 569) will be applied as a theoretical approach. In this approach censorship comprises five key aspects, that is: i) freedom of expression, ii) public good vs Individual liberty, iii) the right to know vs the right to privacy, iv) free speech vs. hate speech, and v) morality. This is the approach that will be used as the basis to view censorship in South Africa.

The research will attribute all censorship to one of these five categories and compare and contrast the differences. Censorship during the period of the Publications Control Board (1963-1973) was largely attributed to imposition of morality (in this case Christian Afrikaner Nationalism) through the use of criminal legislation (Merrett 1994). The primary function of the law, according to Harry Clor (1969), is to provide for peace and security, whilst the moral interests of man are exclusively in the core of agencies of society other than government. This is to say government should not resort to using the law to enforce morals.

Research Methods and Approach to Study

This research employed a qualitative approach. One of the most common qualitative data collection methods is in-depth interviews (Mack et al 2005:2). “The in-depth interview is a technique designed to elicit a vivid picture of the participant’s perspective on the research topic. During in-depth interviews, the person being interviewed is considered the expert and the interviewer is considered the student” (Mack et al 2005:29). As a result of this, in-depth interviews were used in the research to collect data. In this case information was sought from industry experts and key stakeholders- in the film, media, legal and policy fields- who will be able to shed light on issues surrounding censorship in South Africa. Information was sought from the above mentioned stakeholders through interviews to help attain the research objective already outlined. These in depth interviews were semi-structured. The
sets of questions set by the interviewer acted as a guideline to ensure that essential topics are covered but still remain open ended enough to allow the interviewee to add any insight they may feel may add value to the research.

Qualitative methods are flexible – that is, they allow greater spontaneity and adaptation of the interaction between the researcher and the study participant. The participants had the opportunity to respond more elaborately and in greater detail than is typically the case with quantitative methods. In turn, the researcher had the opportunity to respond immediately to what participants said by tailoring subsequent questions to information the participant has provided (Mack et al 2005). Through this I learnt in detail how the process of classification works- that is- the who, how and why of classification, how classifiers are selected, what experience and qualifications are required, and how they view films.

Purposive sampling is one of the most common sampling strategies and was used in this study. This is because it allowed the researcher to approach the persons who will give the most valuable information to the research (Mack et al 2005). Purposive sampling was used because participants are selected because they are likely to generate useful data for the project Brikci (2007). In this case the FPB is the sole classification authority in South Africa and is therefore the most relevant organisation to acquire information on classification. The researcher will also seek to interview other experts in the field of censorship such as Prof J Van Rooyen, who led the drafting of the 1996 Film and Publications Act and Dr M Buthelezi. Buthelezi is specifically relevant because as he was incumbent Minister of Home Affairs in a newly democratic South Africa under whose auspices and vision the Act was drafted. All other data was collected from various literature that is relevant to the laws of South Africa. The actual judgements of banned South African films, past official speeches and interviews were also used as primary data.

Data analysis is a continuous process, and occurs during and after data collection. The first step is to become familiar with the material as a whole (Patton 2002). It involves bringing order, interpretation and structure to the collected data (Marshall and Rossman 1990). Thematic analysis was used to interpret the research data. “Thematic analysis is performed through the process of coding in six phases to create established, meaningful patterns. These phases are: familiarization with data, generating initial codes, searching for themes
among codes [themes aligned to theoretical framework and research objectives], reviewing themes, defining and naming themes, and producing the final report” (Braun and Clarke 2006:93). The data collected was be coded and analysed primarily on the back of earlier mentioned themes of censorship.

The interpretation of these codes can include comparing theme frequencies, identifying theme co-occurrence, and graphically displaying relationships between different themes (Guest, MacQueen and Namey 2012). This research will look at the prominent themes. Most researchers consider thematic analysis to be a very useful method in capturing the intricacies of meaning within data set themes (Guest, MacQueen and Namey 2012). Thematic analysis has been determined as the most appropriate because the process consists of reading transcripts, identifying possible themes, comparing and contrasting themes, and building theoretical models (Guest, MacQueen and Namey 2012). This way the researcher will be able to see what interviewees consider to be the most pertinent themes when it comes to film censorship.

**Conclusion**

This is the basic outline of the purpose and direction of the research. The next chapter will examine censorship in South Africa primarily before democracy.
Chapter 2 Literature Review: Censorship

This chapter will interrogate the available sources that will help to set the scene and context for the research. In this regard sources include literature written, and commentaries and perspectives written about censorship. The literature will help in locating the research in terms of its temporary location. My aim in this chapter is to review the background and history of censorship, albeit briefly. This will be followed by an analysis of more recent censorship trends and occurrences, and finally draw up links, similarities and differences between the trends in censorship and classification. The chapter will also examine previously banned films and the circumstances surrounding these bannings. That will be used as a reference point in later chapters when analysing the banning of the film Of Good Report (OGR).

Censorship

State control of facets of freedom have been with mankind ever since authority was first vested in the state, though more during periods of tyranny than during times of peace (Censorship: 500 years of conflict 1984:7). Man has a primitive urge to prohibit that with which he does not agree (Rumpf 1965:160). Censorship is not unique and peculiar to South Africa but was very common during apartheid. One of the main objectives of this research is to try and establish: at what point can censorship be justified? According to Kevin Boyle (1992:1) a majority of scholars agree to the notion of “restrictions [on freedom of speech] on grounds of equality and dignity while conveying concern over the effects of any such restrictions on the values underlying free speech”. This is to say limitations on freedom of expression are widely recognised especially in instances where said free speech infringes on the right to equality and dignity. However, this must not be viewed in isolation but always be viewed in light of the effects of these limitations on freedom of expression.

The meaning of pre-democracy censorship in South Africa is captured well by the following statement:

The librarian thinks of books locked in inaccessible cupboards; the journalist, of limitations on the right to publish; and the political activist, of the ideas of detainees and political prisoners
Censorship is a phenomenon that is bound to be with us one way or another, however the debate “should not stop here: it should start here. As with the eldest profession, merely ignoring it or denouncing it from a high moral pulpit is not going to solve the problem...the question is how to deal with the flow of information” (Venter 1989:22).

In order to fully comprehend and fulfil the research objectives there is a need to review literature on the history of censorship and classification. Classification will be handled in the next literature review, Chapter 3, whilst censorship is handled in this Chapter. The research aims to delve into these two concepts from their generic dispositions and use the Funnel Method, that is starting with a very broad and general introduction and becoming more specific along the way, to locate them in their specific context and application. This is to say, the research will analyse censorship and classification in general, in South Africa and -in the following chapters- funnel down to the case of OGR.

The history of film censorship in South Africa will be divided into two periods, that is, pre- and post-democracy (1994). The pre-democracy period is characterised by three administrative eras: i) 1950 -1963 (pre-censorship era), ii) 1963-1974 (Publications Control Board era), and iii) 1974-1990 (Directorate of Publications era). The post democracy period consists of two eras i) 1990-1996 (The drafting era) and ii) 1996- present (The Film and Publications Board era).

Censorship, as mentioned earlier, is defined as a term “commonly used to designate the legal restrictions proclaimed by a state authority with regard to the right of publishing, and the contents of publication, in printed form and similar restrictions relating to material offered by the radio and television... [and] theatre and film industries” (Van der Vyver et al 1983:9). These definitions do not account for non-state or non-institutionalised forms of censorship such as self-censorship as well as other types peculiar to South Africa during apartheid; amongst these were the limiting of movement, inter racial relations (including miscegenation) and banning of people. This having been said, the focus of this research is on censorship of film in South Africa, and other media may only be mentioned briefly or as a point of reference.
The first fracturing of the previously opaque, morality and ideologically driven administration of censorship under the Publications Control Board (1963-1974) was when it was replaced by the Directorate of Publications (1974-1990). Initially, the Publications Control Board (1963-1974) operated as a de facto censorship body accountable only to itself (Tomaselli 1988; 1998). The Directorate of Publications introduced transparent legal procedures for classifying and censoring material as well as an appeals system and a more flexible and liberal philosophy (Van Rooyen 2011). This resulted in the unbanning of previously banned work such as *Cry Freedom* (1987), a decision that was over-ridden by the Security Police who cleared cinemas and allegedly bombed a few (Savage 1989). The more liberal approach to censorship even endangered the life of the head of the Directorate, who had his house set on fire by radical apartheid hardliners (Van Rooyen 2011:132; Van Rooyen 2014). This new legal discourse replaced the imaginary ‘average’ viewer with the ‘probable’ viewer. The Directorate in particular (1974-1990) was less driven by *a priori* notions of politics, morality and censorship than by pragmatism (Van Rooyen 1987). This was another positive step in the dismantling of political censorship. The Directorate was replaced by the FPB in 1996. The FPB substituted censorship for classification, and not very much had been written about the FPB until the banning of OGR.

**Pre-democracy Censorship in South Africa**

Understanding censorship in South Africa requires analysis of its history and its evolution (Merrett 1994:1). When the National Party (NP) gained control of Parliament in 1948 a paradigm shift from the previous United Party’s policy of segregation to Afrikaner Nationalism occurred. Apartheid resulted from a combination of Afrikaner National Socialism meshed with very conservative Calvinist-derived Christian National principles based on the concept of ethnos, an ‘own’ culture different from all others (Van Rooyen 2011; Louw and Tomaselli 1991). The government often justified these laws as being there to protect the public but Marcus (1992:208) describes this as being there to prohibit incitement of racial hatred. The roots of widespread and systematic state censorship can be found in the Suppression of Communism Act of 1950 (Merrett 1994; Van Rooyen 2011). The period 1950-1990 saw 40 years in which facts, ideas and aspirations were deliberately suppressed by the state, and this became an integral part of life (Merrett 1994). The government of the day often fell back on what it termed or considered Christian National
principles to pursue political and social plans, even though it was not a constitutional theocracy. Apartheid criminalised communism (Suppression of Communism Act, Act No 44 of 1950), miscegenation and interracial sex and marriage (Prohibition of Mixed Marriages Act No 55 of 1949; Immorality Amendment Act, Act No 21 of 1950 and the Sexual Offences Act 1957) as well as physically separated races and prohibited racially mixed living areas under numerous Acts such as the Group Areas Act (1950).

A commission\(^7\) was set up in the 1950s to propose a system according to which the indecency of publications and films would be regulated. This led to the establishing of the 1963 Publications Control Board (Van Rooyen 2011). Legislation was also passed to ensure that those “publications, films and public entertainment which were deemed to be offensive, indecent and obscene or harmful to public morals or blasphemous or offensive to religious convictions to a section of population” (Publications Act 42 of 1974, Section 47), would be subject to control by The Publications Control Board as per the Publications Entertainment Act No 26 of 1963. Films to be screened to the public were required to be certified by the Board. Appeals could be lodged with the minister himself for films and to the Supreme Court for publications (Van Rooyen 2011: 14).

Moralists described as utter disgusting any films or publications which departed from moral ideals that were often based on religious norms. Censorship in this era took the Isolated Passage Approach to Censorship, which means it excluded context (Van Rooyen 2011: 82).

One of the objectives of the National Party (NP) was to protect and further a politicised conservative Christian morality contested by sections of the Dutch Reformed Church (DRC) which initially questioned aspects of racial segregation (Van Rooyen 2011:14). These Christian moral values propelled the strict moral, religious and even political censorship that the government instituted after 1960s when it appealed beyond the DRC to the rank and file for support. This strict and culturally idiosyncratic moral Christian code was leverage to legitimise censorship. This perspective is described as, “the sweeping discretionary powers placed in the hands of the bureaucracy represent the ultimate power base which a repressive government might possibly desire to suppress information, manipulate opinions and silence opposition” (Van Der Vyver 1988:73). In apartheid South Africa films were

---

\(^7\) The Commission of Undesirable Publications was headed by Reverend DFB De Beer in 1957
subject to excisions, age and place restrictions and the complete banning in film was generally rare, but pornography was outright banned. The 1980’s, specifically after the introduction of the Publications Act of 1974, saw the moving away from the previous absolutist approach. This Act allowed for more liberal screenings only limited by location and age restrictions. There was more leniency with film as compared to television and video which were often ordered to make cuts (Van Rooyen in Vorster 1989:6).

Diversity in Forms of Censorship in Pre-Democratic South Africa

Censorship in South Africa before 1994 took various forms and shapes. A brief outline of the most common types of censorship is captured below.

*Detention without trial*: many writers and politicians were forced into silence because of the Criminal Procedure Act which allowed for detention without trial from 1961. These detentions were solely at the discretion of a panel of police officers rather than the courts (Merrett 1994). One of the more famous victims of this arbitrary detention was Retired Judge Albie Sachs, a lawyer and academic who worked for the African National Congress (ANC). This kind of detention is “... described chillingly as a form of censorship: under such conditions people start to doubt themselves and their ideas. Vulnerability and limitations become obvious in the loneliness of the solitary cell, and individuals were reduced to fatality and moral uncertainty” (Merrett quoting Sachs, 1994:47). Sachs was interviewed for this study as a legal and constitutional expert and his perspectives are discussed in the Data Analysis, in Chapter 6.

*House arrest*: consisted of individuals being confined to their respective residences for a specific number of hours a day over a definitive period of time. The incarcerated were also limited with regards to who could visit them whilst under house arrest and where they could go in the case of a limited house arrest. (This allowed persons to leave their houses for a specific number of hours per day). The incarcerated was not allowed to communicate with other listed or banned persons, to go to public gatherings or to be quoted. He or she was also not allowed to enter a building or associate with anyone with links to any form of publishing.
Banning and listing: Here people were banned from attending meetings and restricted to their districts. This mainly affected journalists and people involved in communications. The redefinition of “sabotage” in the General Law Amendment of 1962 proved to be a problem for journalists as it made it hard to differentiate between documentation and incitement. Merrett (1994). It was illegal to quote a banned or listed person except during court proceedings.

These are just a few of many examples of the veracity and diversity of censorship in pre-democratic South Africa. A lot has since changed and many of these laws are now obsolete. Many forms of censorship have been used over the centuries, and according to Venter (1989:12) “Socrates spoke his mind and questioned the wisdom of the Athenian politicians and leaders... he had to endure ultimate censorship: his mouth was shut by hemlock [this was the poison that killed him]”. This goes to show that censorship was not unique to South Africa and has existed for many years.

**Apartheid Censorship laws**

A state of emergency was imposed in the late 1980s and resulted in the use of various Acts to control information. These were Acts such as:

The Defence Act: which forebode anyone from publishing information relating to the defence forces, as well as publishing information relating to defence forces members that could prejudice the state or alarm the public and finally from publishing any secret relating to the state’s defence.

On the other hand The Police Act forbode anyone from publishing anything “untrue” about the police without first having “reasonable” evidence. In this case the onus was up to the person who made the statement to prove its truth. This was also similar to the Prisons Act which did not allow for the publishing of “false” information about the experiences and behaviour of prisoners without conclusive evidence.

The Internal Security Act of 1981 one prohibited the publication of speeches or statements of people who were prohibited, banned or listed, as well as material that could incite hatred between the races (Venter 1989:25). According to Keyan Tomaselli (2000:6) The Internal Security Act (1981) outlawed any "doctrine, ideology or scheme based on the works of
Lenin, Engels, Marx or Mao Tse-tung, or any other recognised theorist of exponent of these tenets”. Whilst previously the theorists were listed, they now went on to include “publications, academics, and activists working to overthrow apartheid, irrespective of whether collective ownership was an issue or not” (Tomaselli 2000:6).

On top of the various repressive acts that prevented freedom of expression during apartheid it was also prohibited to take or publish pictures or recordings of unrest situations or the conduct of security forces. This could result in sentences of up to 10 years in prison. After the imposition of further emergency regulations in 1986 the media needed express permission from the state to publish certain categories of information. This permission often could only be obtained in writing and therefore this delay sabotaged the element of immediacy of the news being reported. The government also put in place measures that prohibited the insertion of blank spaces like this XXXXX to show censorship had occurred. Journalist could also be forced to reveal their sources or face up to five years imprisonment if they refused. Journalists were also not allowed to take statements about the conduct of the police or security forces unless they had reasonable grounds. It was therefore, in essence, illegal to criticise police actions (Venter 1989:26).

One of the main effects of all these restrictions was a disadvantaged opposition. They, the liberation movements, could not make their view point know without being caught on the wrong side of the law. The government often only allowed negative information about their enemies to be published, thus creating a negative public perception of them, whilst the governments’ mistakes and shortfalls were generally hidden in order to create an image of a good government. The media, particularly television were manipulated to suit the interests of the ruling elite rather than the greater public (Venter 1989:29).

During the apartheid era there were some publications which were never actually banned such as Antonio Gramsci’s (1971) Prison Notebooks or Karl Marx’s Capital (1867). The government enacted very severe restrictions on the media between 1986 and 1990, “attempted to curtail information of the depth of the crisis facing the state and capital” (Tomaselli 2000:9) and while also managing depictions of so-called “unrest” during the states of emergency between 1996 and 1990.
Effects of censorship in Pre-Democratic South Africa

Censorship had a profound effect on academia as well as creative writing in pre-democratic South Africa. In the 1960s and 1970s censorship was responsible for the exiling of numerous South African researchers and their research (Merrett 1994:195). The cordonning off of some aspects of life and certain areas, crucial to study, by the apartheid government led to a phenomenon of “privatism”, that is the safe choice of conservative and non-controversial research by many scholars (Merrett 1994: 195). Another tactic used by scholars to protect their research was to cloak it in dense academic jargon that could only be understood by few fellow practitioners, and this trend amounted to severe self-censorship (Merrett 1994:195). Universities risked losing government funding by entertaining any research that went against the status quo (Van Der Vyver 1988).

A different aspect of the effect of censorship is raised, and this has to do with the free flow of information during the apartheid era. During the apartheid era “the public and professional right to be informed has been severely curtailed by censorship” (Levin 1988: 462). In research funded by the Human Sciences Research Council (HRSC) amongst 1352 academics, it was found that 27.7% of the respondents were in at least one way affected by censorship in their research. The disciplines being analysed were fine arts, history, law, politics, philosophy, psychology and sociology. It was determined that the main challenge was accessing literary and theoretical backgrounds, particularly to those pursuing Marxist or radical liberal perspectives in their research. This meant that censorship subverted research just as much as it prevented research. Merrett (1991: 28) described this as an attitude of “what we do not know, we end up not wanting to know”. School libraries adhered strictly to the law and in some way deliberately obstructed research (Merrett 1986). This all goes to show that the South African government required and used intellectual repression in order to survive and this provided a significant problem to academics (Merrett 1994). This resulted in a poor standard of academics in South Africa described by a former Vice Chancellor of Witwatersrand University when he said “through this lack of awareness [academics] are even ignorant of the extent of their ignorance” (Bozzoli 1977: 195). Academics were sometimes separated from literature that they needed and numerous aspects of South Africa life were never captured because of the control of information.
The public and academics were denied their rights to be informed as a result of censorship (Levin 1988:462).

A healthy society needs to be able to tolerate dissidence and learn from it and thus avoiding a paralysis of ideas. This was not the case in pre-democratic South Africa where the democratic society, unsure of its legitimacy, used censorship to suppress unwelcome ideas and harassing anyone who tried to circulate these ideas (Brink 1983). The state, in its pursuing of a rigid ideology and Afrikaner nationalism, collided with universities and their search for truth and knowledge in the service of all humanity and the universities’ rejection of the concept of “exclusive truth” (Edwards 1976). Pockets of resistance, however, always occurred especially on university campuses. This goes to show the all importance of context in everything, as “truths” were often placed out of context to justify and reinforce Apartheid. The debate on freedom of information and expression is one that could and would have been developed vigorously. It was a vicious unending circle suppression and lack of information. Suppression of information resulted in the lack of debate on freedom of expression and the lack of public debate on freedom of expression was a form and proponent of suppression of information. It is thought, however, that a liberalisation of the flow of academic information would not have been a fundamental societal change but rather one that would have been confined to the walls of universities. The fight for free flow of information was merely to enable academics to pursue their research rather than a genuine fundamental change in the status quo of the day (Merrett 1994). Nevertheless, the first intellectual cracks in the edifice of apartheid began as early as 1983 when the HSRC, the state’s research arm, produced in collaboration with hundreds of academics a series of reports that warned of the failure of apartheid. Some Afrikaans Film directors, argues Tomaselli (1989), had always taken on the state censorship apparatuses, though not always without consequences to their storylines. Further, many English-languages SABC staffers actively undermined the dominant ideology in challenging prevailing political attitudes, especially in the Drama and Magazine Departments (Tomaselli et al 1989).

The issue concerning the effect of censorship on creative writing is a very controversial one. There are as many opinions on it as there are authors (Merrett 2014). On one hand there are the likes of Gordimer (1976) who assert that creativity was only frozen not destroyed, whilst Andre Brink (1978) believes censorship was a stimulant for creative writing. In the
South African context it cannot be dispelled that the theory that a moderately repressive environment and a state of gross socio-economic inequality spurs and propels creative writing (Merrett 1994). It is also suggested by Brink (1981: 11) that writers in pre-democratic South Africa were aware and appreciated the power of written work and that censorship lent “greater resonance to the words of writers”.

Many writers dealt with the censorship by stopping writing completely whilst others went into exile. Those who did write however were deprived of any writers greatest need, that is, the need for the largest possible readership, and this caused a great amount of depression to black writers in particular (Sepamla 1976). There is no doubt whatsoever that the apartheid authorities partly accomplished their goal of causing self-censorship in writers (Sepamla 1982). The banning of Afrikaans writers such as Gert Garries in the 1970’s led to many of them switching to writing in English and as a result of this they reached wider readership both locally and overseas. There was a generation of readers who were deprived of creative ideas, attitudes and even role models (Steadman 1985). The generation also lacked mental stimulation and the intellectual life of the nation as a whole was affected because the society lacked worthwhile writing (Merrett 1994). Like the academics, some dissident black authors resorted to poetry to express themselves as it was harder for censors understand its ambivalent and cryptic nature (Grant 1977). Black writers were also expected to explicitly castigate the status quo of the day, failure of which would imply acquiescence (Ashcroft, Griffiths and Tiffin 1989). These artists daily ran the risk of crossing over from artistic expression to writing of propaganda because of the implicit “obligation to use words as if they were AK47s” (Watson 1990:472).

Censorship denied the public its right to see some of the most important films being produced at during apartheid, and inhibited film makers (dependant on local box office for their subsidy) from tackling any subject that may be too controversial to avoid the risk of being banned. This is what resulted in film festivals ultimately being the outlet for these unconventional films. The type of film the public wants to see depends on what is on offer, and therefore distributors have control of the audiences taste. Tomaselli (1989) attributes the mediocrity of the film industry in the 1970s to it being regarded as a money making device rather than a medium for communication for groups and individuals. Some academics such as Herman and Chomsky (2011) argue that this is untrue especially
considering that the society of the day uses the media to maintain the status quo (hegemony). This is also confirmed by Tomaselli when he defines censorship as “a fundamental device used by the state to induce consent among viewers for a prevailing social order” (Tomaselli 1989:28).

This impasse in the film industry bolstered the status quo by keeping the masses content with mediocrity. The impasse was also sustained by the system of subsidy, as this saw “committees of experts” appointed by the government only giving subsidies to film makers who showed interest in maintaining and entrenching attitudes and status quos of the day. Tomaselli (1979) alleged that the South African film industry rested on two observations, that it was not self-sustainable and that the films it produced were not artistic. He went on to suggest a personalist cinema on South Africa. This is a cinema that makes statements that authors (powers that be) want it to make despite financial and ideological restraints and implications. This was an idealistic approach but not pragmatic and sustainable Tomaselli (1979).

Impact of television on children

There has been a number of studies on the impact and influence of television in the lives of children and young adults. It was approximated that a primary school child could spent about 35 to 40 hours a week consuming media such as print, radio, film and television (Schramm et al 1961). Other studies in the late 1980’s also suggest that the viewing of television alone ranged from 35 to 40 hours per week (Roberts 2003). More recently figures suggest the average time that is spent watching television by a senior primary school child can ranges between 25 hours to 35 hours per week (Gentile and Walsh 2002; Marshall, Gorely and Biddle 2006).

In South Africa, the HSRC (Human Sciences Research Council) conducted a research in 1983 and found that children as young as nine months up to about four years old spend an estimated 40 minutes per day watching television. This figure increases to about two hours per day at the age of six. The is a slight dip in the amount of time spent on the TV as the children begin to attend primary school, but the number of hours steadily increases until the children get to the age of 12. When the children enter high school the time on the television begins to drop again as they engage in more social, sporting, academic and romantic affairs.
associated with adolescence. When the children reach the age of twenty the interest in television viewing increases again (De Beer 1983). This trend is a cycle that is similar to that of western countries (Wright et al 2001). All these statistics are intended to show that television is an integral part of the lives of children and influences them. The type of influence the television has on the children is determined by what they watch and this in turn is controlled by their guardians. It is, therefore, expected that there is legislation to help adults regulate what children may watch.

**Justifications for censorship**

Scholars such as Venter (1989:23) believe political power can only be checked by a powerful and countervailing institution such as the media. This is one of the main reasons for censorship, to prevent the media from keeping an eye on, and exposing the government. During apartheid South Africa had a publicly unresponsive and unrepresentative government, which exercised absolute monopoly of all instruments of influence and coercion. It was not accountable to the large majority of people it was supposed to serve but instead dominated them. In order to maintain this dominance the government kept a tight leash on the flow of information Venter (1989:24).

The controversy concerning the limits of a states’ right to intervene reached a climax when Lord Devlin and Professor Hart took part in a famous debate. Devlin (1965) defended the idea of extending the community’s right to prohibit publications which it finds to be offensive. Hart (1961) on the other hand believed this right should be limited to cases where tangible injury to others may ensue. Therefore in general the key element when it comes to justifying censorship is proving or showing that it will prevent damage or injury to others, potentially anti-social behaviour and/or criminal behaviour (Van Rooyen 1987). The only time power can be used in a free society against ones will is to prevent injury to others (Devlin 1965).

Academics such as Kobus Van Rooyen (1987) and Herbert Hart (1961) suggest that acts which offend against decency should be prohibited if committed publicly and if tangible harm to others ensues. This is in contradiction to Devlin (1959) who believes in the idea of extending a community the right to prohibit that which it finds offensive. In Devlin’s (1959) case the challenge is finding a collective definition for what a community may find offensive.
as people have different beliefs and opinions. In being objective censorship should not be based on prejudice, emotion, rationalisation or moral conviction, but should be based on factual potential tangible danger, in other words only when absolutely necessary (Van Rooyen 1987). It is not the task of the state to legislate for morality it, however, is responsible for providing social order. However, this is in contradiction to scholars like Smit (1989: 78) who do not subscribe to this idea but rather believe that “a state which only cares for the safety and order of its community and has no interest in its moral welfare may contribute to its own destruction”. This implies that the state does have a responsibility to regulate morality.

Often censorship of pornography is justified by the allegation that it results in harmful effects to one’s psyche. According to The Longford Report (1972), there is no conclusive evidence that shows that reading or watching pornography leads to anti-social or criminal behaviour. Those that believe so would fail to support their argument in a manner that would stand up before a judicial tribunal. This is different to depictions of violence which has been empirically proven to have deleterious effects on children.

According to Vuuren and P. Gouws (2007), there are three things that constant exposure to violence, does to children. Firstly children may be desensitized to the pain of others if exposed for long periods to television material where violence is an important component of the programming (Berkowitz and Rawlings 1963). Secondly they may become more fearful of the world in which they are living (Gerbner 1997). Or thirdly children might become more aggressive by imitating what they see on television (Bandura 1978).

Numerous studies have been done on the effects of media behavioural effects by academics such as Dvoskin et al (2012), and therefore the examples mentioned above are in no way exhaustive.

It is therefore important for those who have children under their care, such as parents, teachers and television producers, to make decisions as to what their children watch. They must be aware of what the children watch because “the question...is not whether media messages affect children but which messages, under which conditions, in which ways” (Roberts 2003:10).
The 1974 Film and Publications Act seems to concur with Hart (1959) when it states that material is deemed undesirable if it is indecent, obscene, offensive or harmful to public morals, blasphemous, offensive to religious convictions, or feelings of a certain population of the republic. “Interventions in this field may take place only if injury to others ensues and if this conclusion is not based on prejudice, emotions, rationalisation and... not relying on moral conviction of my own” (Dworkin 1977).

Morality can be viewed as the sum total of rules which society has developed to regulate man’s behaviour towards others. Some of these rules have been enacted into legislation whilst some have been left in the realm of social sanction. Morality often finds its source in religion, but often moral codes are based on prejudice such as racial discrimination. In as far as morality and religion are concerned, the basis for control (censorship) lies in the need for protection of children, respect for privacy of the sexual act and the nude human body, for the dignity and property of man, and for religious freedoms and feelings (Van Rooyen 1987:2-3).

Legislators and legislations are under pressure to remain relevant and close to common sense of a society or risk forfeiting popular goodwill. It is important that “the legislator must gauge the intensity with which a popular moral conviction is held, because it is only when the obverse is generally thought to be intolerable that criminal law can safely properly be used” (Devlin 1965:95). This is to say it is easier to legislate morality when similar morals are largely held in society. The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self protection.

The apartheid government justified their actions and means by claiming that there had been a “systematic publication of subversive statements and propaganda by radicals... which had the effect of promoting or encouraging things such as terrorism, the violent overthrowing of the government, the breaking down of public order and boycotts” (Tyson 1987:138). In other words the problem with the press during apartheid, according to Stoffel Botha, was not that the media reported the politics of the day but rather that it actively participated in it. There has to be a distinction between the public’s right to know from the right not to be indoctrinated, a distinction between “reportive” journalism and “promotive” journalism (Venter 1989:29). The apartheid government’s perspective on the role of the media follows
the Social Responsibility Model as established by the Steyn Commission on the public media (Tyson 1987:47-48). This model basically dictates that the status quo must be protected. Freedom of expression cannot be absolute, there must be boundaries... these boundaries ultimately have to be set by the government of the day” (Venter 1989:28).

Then minister of Home Affairs and Communications, Stoffel Botha said “when a government acts in the interests of the state in the context of ensuring the states existence for the common good, then the interest of the government and the public is indivisible” (Tyson 1987:144). In this statement Botha implies that under such conditions there is no conflict between the state and the public. According to Botha the press had a qualified role and the press must “watch how the government governs but in doing so it must accept governments role to govern in the first place” (Tyson 1987:135). This goes to imply that the press has a social responsibility towards the community, as well as a responsibility to respect the government and its decisions. Furthermore the freedom of this press and its responsibility should be understood in the “context of an attempted revolution by such violent organisations such as the S.A. Communist Party” (Tyson 1987:136). It was also alleged by Botha that the government did not have a problem with public criticism of government actions but rather has a problem with a press which sponsors subversion and unrest.

**Pre-democracy media-corporate relations**

The media in pre-democratic South Africa had an interesting relationship with big corporations. According to Venter (1989:29) “one only has to bear witness to the sweetheart treatment that the South African media generally offered to some of the larger business corporations”. This goes to say that the media was serving the interests of the large corporations. This is probably because the media depended on these corporations for advertising revenue. Venter (1989) goes further to claim that in the interviews he conducted with editors of large newspapers, some of the editors admitted that some large corporations do indeed use their power to have their will done and their image protected. It is actually possible that a lot more zeal was used in investigating the government than such corporations. According to Bagdikian (1983) large corporations in the private sector are just likely as politicians to manipulate the media, to conceal vital public information, to bribe and to be corrupt. This argument is taken a step further by Venter (1989:29) who says that
“there is no reason to believe that the sins of the corporate sector are smaller and less self-serving than those of the politicians”.

Press myths advanced by liberal apologists

Liberal apologists had different perspectives of the media during apartheid and some of these perspectives were considered myths. Eric Louw (1984) attempted to debunk the central myths associated with the press.

1. The first myth is that the private press is free and uncontrolled press. Louw propounds that the capitalist elite control and censor the press. It is therefore not surprising that the capitalist press tends to reflect the views of its class base, and often depicts this as unbiased, factual and objective (Louw 1984:34; Tomaselli et al 1987)). This questions whether any press is actually free.

2. The second myth is that private ownership is freer than government ownership. This implies that the market and market forces are neutral whilst government manipulates and controls free flow of information. This is not necessarily true, inasmuch as a free private capitalist press may not be under government influence it still remains prone to manipulation by capitalist interest groups and therefore cannot be completely free from their influence.

3. The third myth is of consumer sovereignty over the news. Louw (1984) argues that the tastes and preferences of the market heavily influence the type of news marketed. This is because the consumers buy the products the advertisers market on the media. The media house must therefore air news that will attract the audience that is sought by the advertisers.

4. The fourth myth is that of an unbiased journalist. Owners of liberal media tend to hire journalists who have similar views. Therefore if a journalist becomes a maverick he will be replaced or made redundant. The result of this is each media house reflecting a certain and specific political culture- usually pro or anti-government. Even without censorship, the selection of news and editorial content follows this culture. This is further emphasised by Venter (1989:31) who says “journalists do not reflect news as it is or as it happened, but as they perceive it to have happened...
media in South Africa in fact have their own agenda, and it is dangerous when this agenda is offered as unbiased reporting”.

5. The fifth myth is that of the media as the fourth estate. According to this theory the media is the fourth arm of the government and is there to balance the other three arms (the legislature, judiciary and executive). The media proposes to do this by providing free flow of information, exposing corruption, nepotism and incompetence. The media cannot be considered a forth arm of the government as it does not formally represent the people. The media has no public mandate and cannot be called to account, constitutionally speaking. The media is generally good at exposing government corruption but not nearly as proficient in exposing the private sector in its profiteering or exploitations. It is therefore for this reason that privately controlled press has other masters, and in such a capitalist society more often than not, these are large corporations (Louw 1984:37).

According to Venter (1989:49) during apartheid the media which was not for the government was considered to be against the government and therefore working with the enemy.

Conclusion

The chapter touched on a few issues that define and described pre-democracy censorship in South Africa. In the next chapter the transition from censorship to classification and freedom of expression is investigated. The conduct of the apartheid state resembled Henri Bergsons (1956) vision of a closed society. This closed society, according to Bergson (1956), is perpetually ready for war and because of this, rational communication is impossible and these tensions in society are more often than not resolved by violent means. This chapter interrogated the available primary and secondary sources that set the scene and context for the research. The literature will help in locating the research in terms of its temporary location. The aim in this chapter was to review the background and history of censorship.
Chapter 3 Classification and Legalities

Introduction

In South Africa many authors have written extensively about film censorship and its history. These authors include Van Rooyen (1987), Tomaselli (1989) and Merrett (1994), but none interrogates film classification in the South African context. The purpose of classification “...is to protect children and vulnerable adults from potentially harmful or otherwise unsuitable media content and to empower consumers, particularly parents and those with responsibility for children, to make informed viewing decisions” (British Board of Film Classification Guidelines 2014:3). The research gap to be investigated is the link between classification and censorship and how the former may result in the latter. This section will investigate the progressive elimination of repressive censorship laws and the introduction of classification practices and protocols. The chapter will go on to describe classification in as much detail as possible, so as to set a foundation for the case study. The chapter will also analyse how the law is being applied now and whether it is being interpreted in the way the drafters of the law intended it to be interpreted.

Legal Foundations of Classification

Classification aims to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences, as well as to provide such information as will allow adult South Africans to make informed viewing, gaming and reading choices, both for themselves and for children in their care. In making their decisions the classification committees, consistent with the principle that in all matters concerning children the best interests of children are paramount, must aim to strike a reasonable balance between competing interests and the protection of children from potentially disturbing, harmful and age-inappropriate material. The guidelines provide for the consideration of artistic, dramatic or scientific merit as but one of the considerations in making a classification decision (Classification Guidelines 1998)\(^8\). This is in agreement with

\(^8\) *Government Gazette, 8 October 2012, 12 No. 35765*
Van Rooyen (1989:5) who intimates that “on a whole these systems of film control have moved to a situation where their main task is to classify films so as to inform parents or protect children directly by way of classification and age restrictions”.

Censorship as mentioned already is often enforced by the enacting of laws to serve a specific purpose. There is legislation that may result in censorship, such as the Film and Publications Act’s (refused classification), but despite this the Constitution of South Africa and Universal Declaration of Human Rights enshrine freedom of expression and opinion as one of the fundamental and founding principles. The Universal Declaration states the following:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

(Boyle in Article 19 World Report 1988 :xii)

This is similar to the South African constitution which states that:

> Freedom of expression.-

(1) Everyone has the right to freedom of expression, which includes-

(a) Freedom of the press and other media;
(b) Freedom to receive or impart information or ideas;
(c) Freedom of artistic creativity; and
(d) Academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-

(a) Propaganda for war;
(b) Incitement of imminent violence; or
(c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Chapter 1 Section 16 of The Constitution of South Africa of 1996

These two principles emphasise the freedom that people have the right to express themselves freely, even when their opinion might offend others. Other laws which limit this freedom can be seen as being unconstitutional and violating this fundamental human right. There are, however, instances where some of these rights may be limited, these are found in Section 36 of the South African Constitution and will be discussed later. The limitation on freedom of expression is also explained in the statement that “freedom of expression as a
fundamental human right clearly recognize[s] that certain restrictions may legitimately be imposed upon free speech in order to promote social harmony and public order” (Ch’ang 1992:100). The instillation and proliferation of limitations on freedom of expression must however be handled cautiously because the retention and propagation of that freedom is also an important basic human right. And there is a need for a “balance to be struck between the restraint of free speech that such laws [such as the FPA] may impose and the social benefit that such laws may bestow[the protection of children] (Ch’ang 1992:100). This is to say there needs to be a balance between the effect of these laws (FPA) and their objectives: the ends should justify the means.

Whilst everyone has the right to freedom of expression, the constitution of South Africa also entrenches the rights of children. This has to be noted because children’s rights and the need to protect vulnerable people is one of the main reasons for censorship (particularly in the case of child pornography). The rights of children are noted below:

28. Children.- (1) Every child has the right-
   (a) To a name and a nationality from birth;
   (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
   (e) To basic nutrition, shelter, basic health care services and social services;
   (4) To be protected from maltreatment, neglect, abuse or degradation;
   (e) To be protected from exploitative labour practices;
   (f) Not to be required or permitted to perform work or provide services that-
      (i) Are inappropriate for a person of that child’s age; or
      (ii) Place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
   (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the, shortest appropriate period of time, and has the right to be -
      (i) Kept separately from detained persons over the age of 18 years; and
      (ii) Treated in a manner, and kept in conditions, that take account of the child’s age;
   (h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
   (1) Not to be used directly in armed conflict, and to be protected in times of armed conflict.
   (2) A child’s best interests are of paramount importance in every matter concerning the child.
   (3) In this section “child” means a person under the age of 18 years.
Chapter 2 Section 28 Of The Constitution of South Africa of 1996

Children’s rights must be closely examined to make sure that where their rights conflict with other rights, the interest of the children is put first.

**Classification Administrative Processes**

As mentioned already classification is a process made to help adults make informed viewing decisions for themselves and those in their care (British Board of Film Classification Guidelines 2014). The process is carried out by the Film and Publications Board (FPB) acting under the mandate of the Film and Publication Act of 1996. This organisation is overseen by the Minister of Home Affairs. Chapter 2 of the Film and Publications Act clearly defines the functions of the Act to be implemented by the Film and Publications Board.

The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to— (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care; (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and (c) make the use of children in and the exposure of children to pornography punishable. (Chapter 2 of Film and Publications Act of 1996: 6)

The FPA essentially creates three structures, that is the FPB, the FPB council and the Appeals Tribunal. The current FPA dispensations structure has the Appeals Tribunal there as an independent institution that assess appeals of decisions by the FPB classifiers because “no establishment in society, be it in the government, the state or the press, is beyond reproach or beyond the need for checks and balances” (Venter 1989:29).

In order to achieve these objectives, of protecting children from inappropriate materials, the Act requires that all persons or organisations who intend to distribute or exhibit any publication, game or film, register with the FPB as a distributor or exhibitor and submit for examination and classification any game, publication or film that has not previously been classified (FPA, Chapter 4: 17). This is to say, no publication or film can be exhibited or distributed without prior permission from the FPB.

The FPB functions primarily to use specific criteria to classify material so viewers may make an informed decision when viewing. Classification is carried out by what is called a classification committee (Chapter 2, Section 10 of FPA of 1996). The classification
committees are guided by the FPA (1996) and the official Gazetted classification guidelines of 1998.

There is a need to briefly touch on how classification occurs, how each classification element is graded. This grading is done by determining impact levels of the elements being classified. The impact levels of the elements are graded into these categories – None, Low, Mild, Moderate, Strong, Very strong and Extreme.

(3) The impact of a classifiable element determines the level at which it is categorised as follows: frequency of occurrence, realism, detail, techniques, theme, bona fide status, reference to sexual conduct or activity and violence:

(a) No: There are no classifiable elements present in the film

(b) Low: No noteworthy single or cumulative occurrences of classifiable elements, accordingly classifiable elements occur in passing or briefly; Occurrences of classifiable elements are not realistic; No details, close-ups or slow motion of violence and sexual activity or sexual conduct; limited accentuation techniques such as lighting, perspective and resolution; and the theme of the material is not threatening and causes no moral harm; no verbal reference or visual presentation of certain classifiable elements such as sexual activity or conduct and sexual violence; classifiable elements form part of a bona fide story line.

(c) Mild: only single occurrences of classifiable elements; occurrences of classifiable elements are not realistic; no details, close-ups or slow motion of violence and sexual activity or sexual conduct; limited accentuation techniques such as lighting, perspective and resolution; and the theme of the material is not threatening and causes no moral harm; no verbal reference or visual presentation of certain classifiable elements such as sexual activity or conduct and sexual violence; classifiable elements form part of a bona fide story line.

(d) Moderate: Single or cumulative occurrences of classifiable elements and incidental depiction of a classifiable element; occurrences of classifiable elements are not realistic; no details, close-ups or slow motion of violence and sexual activity or sexual conduct; may contain accentuation techniques such as lighting, perspective and resolution; the theme of the material may be threatening but causes no moral harm; verbal reference rather than visual presentation of certain classifiable elements such as sexual activity or conduct and sexual violence with no noticeable effect; classifiable elements form part of a bona fide story line.

(e) Strong: Single or cumulative occurrences of classifiable elements; occurrences of classifiable elements may be realistic; may contain details, close-ups or slow motion of sexual activity or extreme violence; may contain accentuation techniques such as lighting perspective and
resolution of sexual activity or extreme violence; theme of material may be threatening and may cause no moral harm; verbal reference rather than visual presentation of certain classifiable elements such as sexual activity or conduct and sexual violence which may have a noticeable effect; classifiable elements form part of a bona fide story line.

(f) Very strong: Single or cumulative occurrences of classifiable elements; occurrences of classifiable elements may be realistic; may contain details, close-ups or slow motion of classifiable elements; may use accentuation techniques such as lighting, perspective and resolution; and the theme of the material may be threatening and may cause moral harm; verbal reference and/or visual presentation of certain classifiable elements such as sexual activity or conduct or violence, but not sexual violence classifiable elements do not necessarily form part of a bona fide story line.

(g) Extreme: single or cumulative occurrences of classifiable elements; occurrences of classifiable elements may be realistic; may contain details, close-ups or slow motion; may use accentuation techniques such as lighting perspective and resolution; the theme of the material may be threatening and may cause moral harm; verbal reference and/or visual presentation of certain classifiable elements such as sexual activity or conduct, sexual violence and violence; classifiable elements do not necessarily form part of a bona fide story line.

(Part A, Section 3 of Classification Guidelines of 1998: 11-13)

These guidelines clearly detail the level of impact which each classifiable element has on the viewer. This is what determines the difference between a movie, for example, classified A and 18. The researcher does briefly also overview all the classification categories and classification elements.

**Classification Elements**

The paragraph above discusses the levels of impact on the viewer of a particular or numerous classification elements. This section deals not with the level of impact of a classification element, but defines the classification elements themselves.

A classification decision may consist of advice such as information about the content of a film. These classifiable elements are usually represented by Alphabetic symbols so as to alert the public of specific elements which maybe potentially disturbing, harmful or inappropriate to minors or sensitive viewers. This consumer advice in the form of the element is usually combined with an age restriction during classification, once the level of impact has been assessed.
"D": alerts to scenes of substance (drugs and alcohol) abuse. Any scenes of substance abuse are classifiable elements and must be considered in the allocation of an appropriate age restriction. Regardless of the level of age restriction, the public must be alerted to the occurrence of substance abuse of a moderate, strong or very strong impact, where applicable.

"H": alerts that there are scenes of horror. Any scenes of horror of a mild, moderate, strong and very strong nature are classifiable elements and must be considered in the allocation of an appropriate age restriction.

"L": alerts that there is use of bad language. The use of crude language is a classifiable element and must be considered in the allocation of an appropriate age restriction. Regardless of the level of age restriction, the public must be alerted to the occurrence of language of a mild, moderate, strong or very strong impact where applicable.

"N": warns that there are scenes of nudity. Regardless of the level of age-restriction, the public must be alerted to the occurrence of nudity of a mild, moderate, strong or very strong nature where applicable. Nudity in natural non sexual-contexts, such as breastfeeding and bona fide cultural traditions, is not considered in the allocation of age restrictions, but must be informed of if it has a mild, moderate, strong or very strong impact. The deliberate flaunting of human sexuality or the undue exposure of intimate parts is a classifiable element and must be considered in the allocation of an appropriate age restriction based on the context and impact.

"P": warns of scenes or language that is biased or prejudiced with regard to race, ethnicity, gender, religion, sexual orientation or other group-identifiable characteristics. Any scenes or language of prejudice are classifiable elements and must be considered in the allocation of an appropriate age restriction; Any advocacy of hatred that constitutes incitement to cause harm based on an identifiable group characteristic must be regarded as refused material.

"S": indicates scenes involving sexual conduct and sexual activity. Any mild, moderate, stronger or very strong scenes of sexual activity or consensual sexual activity are classifiable elements and must be considered in the allocation of an appropriate age restriction or be subjected to a distribution restriction; (ii) Any scenes of consensual explicit sexual activity
must be regarded as having a very strong impact and classified appropriately. Any scenes of non-consensual sexual conduct must be subject to restricted distribution (extreme impact) or regarded as refused material.

"SV": indicates scenes involving sexual violence; any scenes of sexual violence are classifiable elements and must be considered in the allocation of an appropriate age restriction. Any scenes involving implied sexual violence must be regarded as having a moderate, strong or very strong impact where applicable and must be classified appropriately. Any scenes involving actual sexual violence must be subject to restricted distribution (extreme impact) or be regarded as refused material.

"V": warns of violent scenes; Regardless of the level of age-restriction, the public must be alerted to the occurrence of violence of a mild, moderate, strong or very strong impact. Any scenes of extreme violence must be regarded as having a strong or very strong impact where applicable and must be classified appropriately.

"B": warns consumers that content may be religiously sensitive. Blasphemy is not treated as a classifiable element determining age restrictions, but as a matter of appropriate consumer information if it has a moderate, strong, or very strong impact. Within the context, the taking of God's name in vain may amount to blasphemy. The sensitivities of certain religions, especially with regard to precepts and practices which may be unique to certain of them, should be noted appropriately. An expression which does not amount to blasphemy but which may constitute religious prejudice is a classifiable element and must be considered in the allocation of an appropriate age restriction. Any advocacy of hatred based on religion that constitutes incitement to cause harm, outside of bona fide drama, art, science or documentary material will be regarded as refused material and, where the said exemptions justify it, be subject to an appropriate age restriction.

Classification Categories (in Film)

Having set the foundation of film classification by identifying the classification elements, there is context to define film classification categories as a whole. “Films and games are classified into categories on the basis of: (i) context, (ii) impact of the classifiable elements (the ones discussed in the previous chapter) and (iii) release format” (Classification
Guidelines 1998:20). All classification categories fall into one of three distribution categories. These are unrestricted distribution, restricted distribution and refused categories. Unrestricted distribution material may be distributed or exhibited by registered distributors and exhibitors in accordance with any age-restriction or condition which may be imposed by the FPB’s classification procedure. Restricted distribution material is indicated by the letter "X18" in the classification system and may only be distributed from or exhibited in licensed premises to persons older than eighteen and not be distributed or exhibited otherwise at all. Refused categories contain material that is prohibited by the Films and Publications Act and is classified as XX (Classification guidelines 1998:20). These are materials which may be possessed or imported but may not be distributed or exhibited. Possessing or distributing child pornography is prohibited by the FPA and amounts to a “refused category”. The distribution category of a material can only be determined after the classification has been done and the relevant classification category has been given to the film.

In the drafting of the 1996 FPA, there had to be a clear difference in the use of language from the last Act, language that was clear as possible. The words “judged within context” were to be dominant in all definitions. The Isolated- Passage Approach would amount to an irregular form of consideration of a publication or film. Child pornography was to be the only material automatically banned on importation, production and possession. The classification category “XX” meant/means a film could be possessed but not produced or distributes in South Africa - with the exception of child porn. The “XX” category mainly consists of films that contain visual images of child porn, explicit violence mixed with sex, bestiality, gender degrading sex and certain forms of extreme violence. Van Rooyen was castigated by moralists for allowing porn to be legalised and regulated, he was accused of abandoning “Afrikaner Christian” (Van Rooyen 2011:148).

There are numerous classification categories and these are defined in a little more detail below. According to the Film and Publications Guideline (1998) classification categories consist of the following:
A (All ages). This means the film is suitable for all ages and has no restrictions at all. The films should be set within a positive framework and should offer reassuring counterbalances to any violence, threat or horror.

PG (Parental Guidance). This is an all-ages category but cautions sensitive viewers and indicates that parents and caregivers are in the best position to decide whether or not a child in their care may view the film or DVD (Film and Publications Guideline 1998). A PG film should not unsettle a child aged around eight or older. Unaccompanied children of any age may watch, but parents are advised to consider whether the content may upset younger, or more sensitive, children (BBFC Guideline 2014).

7-9 PG. This category means the material is not suitable for children under the age of 7. A parent or caregiver may decide if it is appropriate for children in their care from ages of 7 to 9, if it is of particular entertainment or educational value for such children. Children from the ages of 7 to 9 years may not be allowed to watch a film classified 7 - 9PG unless accompanied by an adult.

10-12PG. Means the material is not suitable for children under the age of 10. A parent or caregiver may decide if the material is appropriate for children in their care from the ages of 10 to 12, if it is of particular entertainment or educational value for. Children from the ages of 10 to 12 years of age may not be allowed to watch a film classified 10-12PG unless accompanied by an adult. Adults planning to take a child under 12 to view a 10-12PG film should consider whether the film is suitable for that child.

16. This means that the material is not suitable for children under the age of 16 years.

18. This means that the material is not suitable for persons less than 18 years.

The following classification categories have restricted distribution conditions. This is to say they can only be distributed and exhibited under specific conditions.

X18. Means only a holder of a licence to conduct the business of adult premises, as set out in section 24 of the Act, may distribute the film to persons older than eighteen or exhibit such content to such persons within such premises (Film and Publications Guideline 1998). The X18 category is a special and legally restricted classification primarily for explicit works.
of consenting sex or strong fetish material involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops. X18 video works may not be supplied by mail order (BBFC Guideline 2014).

**XX.** Means the material may not be distributed or exhibited in public by anyone and also not in the premises referred to in the previous subparagraph. The material may be possessed and imported except in the case of child pornography which may not be possessed anywhere. Films that are classified XX consist of the following elements:

1. Explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
2. Bestiality, incest, rape (sexual violence);
3. Conduct or an act which is degrading of human beings;
4. Conduct or an act which constitutes incitement of, encourages or promotes, harmful behaviour;
5. Explicit infliction of sexual or domestic violence or
6. Explicit visual presentations of extreme violence;

Unless, judged within context, the film is a bona fide documentary or is of scientific, dramatic or artistic merit, in which case the material shall be classified "X18" or classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate material, except with respect to child pornography.

**Part A, Section 8 of Classification Guidelines of 1998**

There is some material which is considered by the FPA to be unconstitutional and illegal. This material falls under the refused category. This material may not be distributed, imported or possessed and doing so would constitute a criminal offence unless it exhibits artistic, literary or scientific merit. This exeption is not acceptable to child pornography which is illegal under all circumstances, and must be immediately reported to the South African Police Services.

1. Any material that contains propaganda for war or incitement of imminent violence or
advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm must be refused and reported to the chief executive officer for publication in the Gazette, unless judged within context the publication is a bonafide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest which must be restricted accordingly.

(2) Any material that constitutes child pornography must be reported to the South African Police Services via theChief Executive Officer immediately. There are no exceptions to the possession, distribution, sale or hire of child pornography, which is regarded as illegal under all circumstances.

Film and Publications Guideline 1998: 21

Introduction and background to child pornography

Pornography has a very long history and “the explicit portrayal of the sexual organs and sexual activities has existed since humans developed the ability to draw pictures” (Theron 1989:49).

It was during the Reformation that the church fathers started to oppose pornography believing it would corrupt Christian morals and lead them to sin. According to Theron (1988:168) during the reformation the church and government were one and so laws were
adopted to prohibit pornography. The second half of the twentieth century saw the laws that prohibit porn being abolished all over the world (Theron 1988:168). The argument for the legislation that allows porn consisted on one hand of those who opposed the move claiming that allowing of porn would increase sex crimes. On the other hand those who supported the legalisation of porn claimed it was their legal and democratic right to read and see whatever they want. In addition to this Theron (1989:50) claims that to others pornography “served as a release for suppressed sexual needs, which would in fact reduce sexual crime”.

Defining pornography has often proved to be very elusive, and defining child pornography is no easier. The original concept of pornography comes from the Greek words “porne” and “graphein” which loosely translated mean to write about prostitutes or female prisoners. This meaning has evolved over the years to the extent that now it refers to explicit sexual material presented in such a way that not much is left to the imagination and its sole objective is to stimulate sexual sentiments and feeling (Theron 1988:169).

Finding a universally accepted definition of pornography is difficult as sexual norms vary from culture to culture, and even in the same culture these norms change with time (Wafelbaker 1983:97). This situation is further complicated by that what is acceptable as a sexual norm to adults may not be applicable to children, for example if a child walked around the streets naked it could be regarded as cute but if an adult did the same thing it would be regarded as obscene (Theron 1989:50). Despite all these variations a few authors have tried to define child pornography.

According to Tyler and Stone (1985:314) “child pornography refers to pictorial descriptions of children in sexually explicit poses and acts”. This definition is slightly different from Burgess and Hartman (1987:248) who define child porn as “photographs, films, video tapes, magazines and books that depict children of either gender in sexually explicit acts which involve a psychological cost for the child”. Burgers and Hartman’s (1987) definitions is a little more comprehensive as it includes many different media and the element of non-physical consequence to victims of child porn. The closest definition to the current FPA is that offered by Campagna and Poffenberger (1988:166) who say the child victim is an underaged person who is used in the production of sexually suggestive, provocative or explicit
materials. In addition to this Lanning (1984:83) says the explicit materials capture a child that is being molested. It is therefore considered that child pornography is actually the documenting of child abuse.

**Historical Perspective of child Pornography**

The sexual abuse of children is not a new phenomenon, neither is it peculiar to South Africa. Ever since man realise that they could wield power over others, control them and (ab)use them for sexual gratification and recreational purposes, children have been victims of sexual abuse since the ability of humans to create images, write, paintings and statues there have been portrayals of children committing the most lewd acts (Theron in Vorster [ed] 1989: 52-53). The introduction of the camera further advanced child porn. As early as the mid 1800’s photographs of children involved in sexual activities with other children, adults and animals were being sold all over Europe (Tyler and Stone 1985:314).

Scholars such as Pierce (1984:483) are of the opinion that the perpetuation of child pornography could go on unabated for a very long time because society has always been of the thought that adults and parents would not exploit children for sexual or financial gratification. It was about in 1968 (when porn was legalised) that the sexual exploitation of children for commercial purposes really took off, prior to this adults who looked like children were used to portray children. With the legalisation of porn and the growth of the industry it was realised that the use of child participants was very profitable, and as soon as this was discovered to be true children as young as 3 years old were being used in porn (Theron 1989: 54). By the 1970s the issue of child porn had spiralled out of control and was of great concern to authorities and the public in the United States of America (Pierce 1984:484). This public outcry resulted in the public demanding that something be done about it. In 1977 the US congress and media officially acknowledged child porn to be a serious issue and a national problem (Brown 1982:1337). In 1977 the United States introduced legislation prohibiting the use of children in pornography, this was as a result of increased awareness of child exploitation and the realisation that this crime was organised (Beranbaum 1984:8). Similar action was taken in in Denmark and Sweden in 1980, and in Netherlands in 1984, this included prosecution of sellers of child porn (Tyler and Stone 1985:315).
Although the exploitation of children for the production of sexually explicit material has been happening for centuries, it is only in the past few decades that it has received a lot of attention. This is because the media now focuses on this scourge (Plummer 1986:307). As media coverage increased the more the public demanded more action be taken on this problem, as well as the establishment of legal and social agencies who focus on protecting children. In South Africa this resulted in the formation of Childline, a non-governmental organisation that advocates for child rights.

**Child Pornography and The Act**

In 1998 a painting, by the now late artist Mark Hipper, was condemned by the then Deputy Minister Lindiwe Sisulu for alleged child porn. Hipper had on display paintings of children in the nude and in what some considered as sexually suggestive poses. Despite this the FPB and Review board held that the work of art was an aesthetic piece of art and therefore did not amount to child porn. This resulted in the Deputy Minister setting up a task team to investigate the definition of child porn in the 1996 Act. This task team found that the original Section 27 of the FPA- which deals with the use of criminal sanction to prohibit child porn- was not comprehensive enough to counter the vice particularly because it took context into consideration. MacKinnon (1987) argues that the best way to invalidate a problem is to legitimise the setting (context). A picture of a naked woman can either be an aesthetic work of art and/or work of sexual stimulation, this is determined by the context or setting on which it is set. The Ministers’ task team rejected the contextual approach in the Act which had been argued for and accepted by Parliament.

"**child pornography**" includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted, made to appear, look like, represented or described as being under the age of 18 years-(i) engaged in sexual conduct;(ii) participating in, or assisting another person to participate in, sexual conduct; or(iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation. (Chapter 1 Film and Publications Act of 1996)

This legal definition of child pornography does not consider the intended message of the film or its context. It also is different to the Criminal Law (Sexual Offenses and Related matters) Amendment Act 32 of 2007, that says that the age of sexual consent is 16 not 18. If
this was acceptable in the case of film then Nolita would not have been considered a minor as grade 9 pupil may be above the age of consent. Also this discrepancy between the two laws implies that it is legal for an adult to sleep with a 16 year old but it is illegal to depict it in film, even with an actor who is actually an adult. In a nutshell one can do it, they just can’t talk about it. There is a call by Tomaselli (2013:6) to harmonise these two laws, either by increasing the age of consent or lowering the age of legal depiction of sex to 16.

Tacoe De Reuck, a Pretoria-based television presenter and film producer, began an investigation on the illegitimate availability of child porn on the internet in 1999. He managed to collect a number of pictures after falsely proving to underground managers that he was genuinely interested in this sexual interest. The police were tipped off of this by an informer and obtained a search warrant in terms of section 27 (3) of the FPA that states that

> An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.

He was arrested and charged with the possession of child pornography. He appealed to the constitutional court to test the constitutionality of Section 27 of the FPA (highlighted above) against section 14 of the Constitution of South Africa which states that:

> Privacy.-Everyone has the right to privacy, which includes the right not to have- (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.

He challenged the constitutionality of having his private communication infringed and disclosed to the police. The constitutionality of Section 27 of the FPA was also tested against Section 16 of the Constitution that states that:

> 16. Freedom of expression. (1) Everyone has the right to freedom of expression, which includes- (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.

Here De Reuck challenged the constitutionality of not being able to conduct scientific research freely, especially since it was never disputed that he was a reputable producer and researcher. The question was whether the FPA allowed him to possess child pornography, even for scientific research. The Constitutional Court argued that De Reucks prosecution
was not unconstitutional and as such he should have obtained permission from the FPB in terms of Section 22 of the FPA:

The Board may on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from sections 24A, 24B or 24C [sections that deal with the possession, production and distribution of unclassified material] if it has good reason to believe that bona fide purposes will be served by such an exemption.

The above quote basically says that according to Section 22 of the FPA, De Reuck should have first officially applied to the FPB for an exemption from not being allowed to access and possess child porn on the grounds of scientific research. This is particularly different to first world countries such as USA, Ireland, Britain, and Canada (the country on which the 1996 FPA was based) where scientific research would have been an acceptable defence on its own for the possession of child porn, and there would have been no need to seek permission from any authority (Van Rooyen 2011:153). As a result of all this, De Reuck’s case was dismissed from the Constitutional Court. He then changed his plea to guilty and his scientific research being a mitigating factor. This was taken into consideration in his sentencing. He was sentenced to one year in jail with the option to pay a R24 000 fine of which half was suspended, which he immediately paid.

In theory there should be a big difference between controls that police the media and the arts. In practice these are often painted with the same brush (in pre-1996) Cotzee (1996). Nudity in contemporary media such- as television and magazines- and nudity in the arts does not mean the same thing or serve the same purpose. According to Catharine MacKinon (1987) pornography should be attacked because along with rape and prostitution, it institutionalises the supremacy of male sexuality. This in turn fuses the eroticisation of dominance and submission with the social construction of male and female (Mackinon 1987). She argues that the best way to invalidate a problem, in this case pornography, is to legitimise the setting. “Taking the work [of art] as a whole ignores that which the victims of porn have long known; legitimate settings diminish the perception of injury done to those whose trivialisation and objectification they contextualise” (MacKinon 1987: 175).

She goes on to ask if a child or woman is subjected, should it matter whether the work has other value. Maybe it is the very thing that redeems a work’s value that enhances injury to
women (or children). She argues that existing standards of literature, art, science and politics- examined in a feminist perspective- are remarkably consonant with pornography’s mode, meaning and message, that is, a message of male domination MacKinnon (1987). This opinion is not necessarily true as some watch pornography for sexual arousal and not for ideological inculcation. Where does one draw the difference between a critical documentary on child porn and child porn itself? More and more violence has been necessary to keep the progressively desensitised consumer aroused to the illusion that sex is daring and dangerous. The anti-porn campaign is driven by the anti-violence stance, however, porn is also as much about power relations between men and women (or children) as much as it is about sexual stimulation (Rich 1983:61). Feminists argue that porn degrades and objectifies women and advocates sexual violence against them but this is not substantiated by any evidence (Rich 1983:62).

The sex industry relies upon, and trades in, all forms of inequalities and children’s powerlessness makes them, in particular, a target. It is also noticed that in feminists analysis and campaign against pornography it is noted that rarely is any attention paid to child pornography. This is probably because it is generally a consensus worldwide that child porn causes tangible harm. The many ways in which children are abused raises uncomfortable issues about adult power and responsibility. It is widely accepted that numerous children in Africa are caught up in the sex industry either as prostitutes or in pornography. It is also globally accepted that despite these being illegal all over the world they are both very prevalent. The most obvious point about child porn is pictures or films that depict adult sexual interactions with kids cannot be produced without an act taking place which is defined by the law as being illegal. Every piece of child porn is evidence of a crime committed (Itzin 1992).

**The Case of XXY (2007)**

There was unanimity on the part of the Board and the appellants that this is neither a film about child pornography, nor a devious attempt to offer child pornography masquerading as a serious and thoughtful film.

The film explores the confusion and relationship challenges between parents and their teenaged intersex child, Alex. Alex is born with both male and female genitalia, and her
parents attempt to protect and isolate her until she is able to make a decision about her gender identity. An eminent plastic surgeon is invited to stay with the family to assist them with their decision. The parents have been preparing Alex for a life as a female. However, a sexual attraction develops between Alex and Alvaro, the teenage son of the surgeon. The scene that has led to the present dispute over the film involves a sexual encounter between the two, during which Alex apparently penetrates Alvaro anally.

At a more profound level, the film is about respect, tolerance, and understanding. It carries the important message that premature decisions made at the birth of an intersex child can have seriously prejudicial and agonizingly tragic consequences for the child as s/he matures. Alex’s father is totally accepting of her, while her mother yearns for the normality of a child with a clear sexual identity.

Had the applicants been successful in securing the exemption, it would have been exempted from the provisions of Sections 25, 26, 27, and 28. These sections prohibit the distribution of publications contrary to classifications; prohibit the exhibition, distribution, or advertisement of certain films; prohibit the possession of certain films and publications; and prohibit the distribution of certain publications, respectively.

Observations from Professor Van Rooyen

As mentioned in the Introduction to the study, not much has been written with regards to South African classification. Professor Kobus Van Rooyen has almost 35 years of experience in the fields of media freedom in various portfolios and was instrumental in the drafting of the current FPA. He is considered an expert and that is why the researcher has dedicated a small section to observations made by him in various literature as well as conducting an interview with him, which will be discussed in chapter 6.

Leftist scholars, he observes, during apartheid had a tendency towards conspiratorial analysis, sometimes even in the face of evidence to the contrary. While admitting contradictions and fractures in otherwise one-size-fits-all censorship and media related legislation, such as the special concessions permitted by the Directorate of Publications for film festivals, these were often simply interpreted as a more sophisticated response to criticism and a continuation by other means of media and audience management.
Tomaselli now acknowledges that these fissures and relaxations were largely the result of struggles internal to Afrikanerdom where the “verligtes” (the enlightened) were gaining ascendancy over the “verkramptes” (reactionaries). These micro struggles within the classification and censorship apparatus were mirrored across Afrikanerdom as a whole. Whole sites, especially education and media management, were contested between the two factions, with the “verligtes” winning the day (see Muller 1987). It was this enlightened trajectory within the National Party that sowed the seeds for the transitional political negotiations that were to dominate the early 1990s. In hindsight, Tomaselli now argues that organic intellectuals like Van Rooyen, who were misinterpreted as technical intellectuals (Gramsci 1971) by the then Left, were amongst those who were in fact actively campaigning for a long period from the ‘inside’ to change apartheid, partly in response to calls from the outside (of Afrikanerdom). Similar ideological struggles as to the nature of the imagined Afrikaner nation were already being fought out in the Afrikaner film industry in the 1930s and 1940s. Van Rooyen’s own struggles from the inside of the verlig Afrikaner constituency could be thus interpreted as a continuation of the pragmatist trajectory that had a lengthy lifespan sourced to the early 20th Century. It was under Van Rooyen’s watch that Cry Freedom was unbanned and that film festivals were granted exemptions from both censorship and classification.

Prof K Van Rooyen believes that no material- whether film or book- can deprave of corrupt and adult audience. There may be an exception however to a mentally challenged person to whom violent or sexual material may well provide a link to anti-social conduct (Van Rooyen 2011:157). This is in contradiction to other legal scholars who wrote:

A majority of the courts have, apparently, maintained the idea that the justification for enforcement of obscenity statutes is the protection of the public from literature that would likely "deprave and corrupt" through its tendency to arouse in the reader sexually impure thoughts. These opinions can be supported only in the light of the unproved assumption that such thoughts will lead to conduct that will contravene commonly accepted moral standard. (Duke Law Journal 1958:121)

This statement in the Duke Law Journal (1958) suggests that it is justified to censor material that may corrupt and deprave, but it also admits that this is “likely” and not proven. There is

---

9 This analysis is based on a discussion with Tomaselli during the course of his supervision of this thesis.
yet to be conclusive evidence that may stand before a court of law that may prove that sexual material depraves adults.

Van Rooyen’s emphasis on the need to consider context when adjudicating materials in conjunction with applying due legal procedure to appeals separated the Directorate from the previous PCB apparatus of censorship by whim. All material must be judged in context, he argued, and judgements must apply due legal procedure. Therefore, any approach where parts of a novel, play or film are quoted out of context so as to demonstrate it is harmful, is rejected. The Isolated-Passage approach to censorship is an anathema to literary and legal scholars and experts (Van Rooyen 2011:157). Van Rooyen often displayed appreciation for context in judgements of materials during his days as the chairman of the Publications appeal board (1980-1990) and resultantly numerous previously banned works of art were unbanned. In the original 1996 FPA the words “judged in context” were very prevalent. The fact that during apartheid it was often the case that films and publications were often quoted out of context in order to justify their condemnation, just goes to show that context is of paramount importance. The first attempt to remove/ exclude the word “context” from the definition of child porn in the 1999 Amendment of the 1996 FPA was rejected in 2003. The constitutional court rejected any approach where context would not be relevant.

In a democratic constitution such as the one in South Africa, Van Rooyen believes there is no space for moral fundamentalists to be intolerant to diverging views. Intolerance was very common in pre-democratic South Africa and was often the proponent of censorship. The mentality was to ban anything that opposed apartheid. This is why after the drafting of the 1996 FPA Dr M Buthelezi said “Never again in this country...will anyone decide what other intelligent and rational beings may or may not read, watch or hear” (Mail And Guardian 1994).

In the case of a film or publication that is “problematic”, threats of violence are irrelevant to the adjudication of the said, even if the film is offensive to sections of society such as religious or other (such as political) institutions. Instead only the actual content of the film will be considered, especially if the material itself advocates for violence based on religion, politics, or any other section of society. Advocating for violence is a crime and also amounts to hate speech. An example of this is seen in the case of Jamiat Ul Ulama (Council of Muslim
Theologians) Versus Johncom Media Investment case number 1127/06. The courts interdicted the newspapers from publishing pictures of the Prophet Mohamed, not because of the threats of violence if the cartoon was published but, because of the need to protect the dignity of Muslims regarding their religious adherence to the teachings of the Prophet. This judgement has no reference to the threat of violence despite this having been raised in the original application.

It is well and true that Parliament represents the electorate and that the Constitutional Court has held that Parliament has the right to protect the morality people. That having been said it is essential to note that only the Constitutional court can define morality, that is, constitutionally acceptable morality. This means that Parliament may not simply give in to the voice of moral fundamentalist or even the voice of the majority. This is why on occasion the Constitutional Court has rejected religious doctrine as a source for the interpretation of the constitution and rather emphasises on freedom of choice.

Van Rooyen also highlights the need for greater language clarity, in legislation and adjudication regarding the criteria to be applied, must be a constant legislative aim. Terminology used in the Publications Act of 1974 and the Obscene Photographic Materials Act of 1967 has been regarded as too vague and ambiguous to withstand constitutional scrutiny. Vague words include words such as “obscene”, “offensive”, “indecent” and “harmful to public morals”. The 1994 Drafting Task Group expressed criticism against these type of words and resultantly these vague words were excluded in the FPA of 1996. The same scrutiny by the Constitutional court rendered the Obscene Photographic Materials Act of 1967 invalid in 1996.

An adult must have the right to choose when material has not, judged in context, clearly been shown to fall under the categories to be mentioned below. Only a limited number of categories are forbidden from distribution and these are: Child pornography, violent sex, bestiality, material that advocates hatred based on gender, religion, ethnicity and excessive violence (Van Rooyen 2011: 160). However all the materials mentioned may be possessed with the exception of child porn. It must also be noted that drama, literature, science and art are not included in this ban. The logic behind this way of dealing with these materials,
that were previously a bone of contention, is that classification and age restrictions will prevent them from falling into the hands of children and sensitive viewers.

Van Rooyen also laments that children’s rights are very important so are the rights of everyone else. There is a need to balance rights as all rights are considered equal before the law and no rights are more equal than others. It must be respected and accepted that another important part of constitutional law is the freedom of expression, which includes expression of offensive ideas. The limitation of this right is only acceptable and justifiable when the reasonableness test of Section 36 Of the South African Constitution is satisfied. It states that:

Limitation of rights.- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

1. the nature of the right;
2. the importance of the purpose of the limitation;
3. the nature and extent of the limitation;
4. the relation between the limitation and its purpose; and
5. less restrictive means to achieve the purpose.

Pre-democratic tendencies, such as banning because a publication was “offensive”, are (theoretically) not acceptable in a constitutional democracy. There has been a paradigm shift in the introduction of the Film and Publications Act of 1996. The shift was from an attitude of “when in doubt ban” to “when in doubt set free” (Van Rooyen 2011:164).

Conclusion

This chapter examined in detail the purpose of classification, that is, mainly to protect children and sensitive viewers from viewing films that may disturb them. The link is made to how classification may sometimes result in censorship and this is called “refused classification” in accordance with the FPA. Classification is also located as an independent administrative procedure, although the FPB is overseen by the Ministry of Home Affairs.
Chapter 3 described the elements of classification such as, but not limited to, sex (S), Language (L) and violence (V). These elements are graded to determine their level of impact on the viewer from no impact to extreme. The combination of the element and level of impact are then used to determine the category in which the film being classified should fall into, such as all ages (A), no under 16 (16) or XX (only those over 18- extremely graphic content).

Professor Kobus Van Rooyen’s insight on the law, censorship and classification is then drawn from his literature. He is also interviewed and discussed in chapter 6. This chapter extensively dealt with the issues surrounding classification. The next chapter will briefly look at the theoretical framework adopted by the research.
Chapter 4 Theoretical Framework

Introduction

A theoretical framework helps to provide direction through which a topic is to be viewed and allows for academics to locate their research in larger theoretical traditions. The selection of a theory for this research was developed during an analysis of related literature. The researcher also realised he was free to use concepts used by past researchers and also develop questions similar to those used in previous studies (Marshal and Rossmann 1999). In this regard the research used the theoretical framework deemed appropriate after examining various literature and researches on the same topic.

The use of a theoretical framework is to go beyond just capturing what happened, but to create an opportunity to analyse as well. Using a theoretical framework helps to analyse past events by providing a particular set of questions to ask, and a particular perspective to use when examining a research question (Trent University 2014). The theoretical framework acts to frame and inform every aspect of the research.

Free thought and critical self-consciousness are an integral part of society and can only be explored through freedom of speech. When this freedom is denied or limited, the capacity and ability for humans to think is undermined. Freedom of speech is especially vital in politics as it allows individuals to submit their thoughts, opinions and beliefs to the public for critical scrutiny.

Theoretical frameworks can be defined as “Theories [that] give researchers different ‘lenses’ through which to look at complicated problems and social issues, focusing their attention on different aspects of the data and providing a framework within which to conduct their analysis” (Reeves et al 2008: 631). Different theoretical frameworks focus on different aspects of a problem and can only present a partial view of reality. In the case of this research the object being investigated is censorship. The research will investigate its causes and effects, as well as the experiences of those who have been affected by censorship as well as the perspective of those authorities who effect censorship. It is important to explore different types of frameworks and focus on one that best addresses
the particular problem under scrutiny through an extensive study of previous literature in the field (Bordage 2009). In this research there will be a combination of the use of phenomenology and Pieter Fourie’s (2001) media censorship approach. Phenomenology, as will be discussed later, allows for the capturing of people’s experiences, which is necessary in this topic. Fourie’s approach also allows for the main tenets of censorship to be easily identified and therefore critically analysed.

The purpose of the research is to carefully capture and describe how classification has resulted in censorship and compare this to past traits of censorship in pre democratic South Africa. The research also describes the experience of victims of censorship: how they perceive it, describe it, feel about it, judge it, remember it, make sense of it, and talk about it with others (Patton 2002). This approach will highlight the main reasons and justifications of censorship, and compare the law and its interpretation by the FPB classifiers to the experiences of those interviewed, particularly the experiences of those who have been victims of censorship.

Data can be gathered by speaking to people who have experienced the phenomenon (in this case censorship) or lived through the experience hence the use of in depth interviews (Gelling 2011: 333). Description consists of what they experienced and how they experienced it (Creswel 2007: 58). The phenomenon also requires the researcher to set aside any preconceived judgments or bias and to focus on what is real, based on the information collected from interviewees as well as the literature review. The researcher has to constantly reflect and examine how his own standpoints and views may affect the data collection and analysis to avoid bias in the research. The researcher will remain objective by using guidelines from statutory instruments already highlighted in previous chapters. The next section will explain the theory in greater detail.

**Theories in qualitative research**

Phenomenology aims is to discover the qualitatively different ways in which people experience, conceptualize, realize and understand various aspects of phenomena in the world around them (Marton 1986:31). In phenomenographic research, the researcher chooses to study a given phenomenon, as well as how people experience the said phenomenon. This is to say the research will not only describe censorship but also examine
how people have experienced it. The data analysis chapter will deal specifically with how people have experienced censorship, from the perspective of both the one being censored and the one administering it. It takes a non-dualistic ontological perspective; meaning that object and subject are not separate and independent of each other (Walker 1998). In this case censorship is the object and the people interviewed were subjects of it together with the case study. The two can never be viewed in isolation but each has an effect on the other. The object affects the subject and the subject contextualizes the object.

Phenomenology examines how people describe events and how they experience them through perception, thought, memory, emotion and social activity (Richards 2011:10). The main focus of phenomenology is to describe people’s experiences as they are given from the first person perspective. Phenomenological analysis acknowledges that human beings do not exist only for themselves but also for others and that one’s existence is not only defined by how they view themselves but also by how others view them (Zahavi 2003). “Phenomenography is focused on the ways of experiencing different phenomena, ways of seeing them, knowing about them. The aim is, however, not to find the singular essence, but the variation and the architecture of this variation by different aspects that define the phenomena” (Marton and Booth 1997:110). This is to say the research will use phenomenology to identify, compare and contrast the different aspects that define that phenomenon.

Based on this premise the different experiences of the interviewees and their involvement in pre- and post-democratic censorship may be interrogated within the relevant context. The different experiences create different perceptions of, and knowledge on censorship. However, simply experiencing a phenomenon is not a guarantee that one has gained new knowledge, learning only happens when the individual reflects on the experience and processes it internally to actively make sense of the experience (Reich 2013). This is why in-depth interviews are relevant and were chosen in this case as a way of data collection, because it gives the interviewee time to reflect.

Phenomenology also acknowledges and encourages the need for “bracketing”. One of the pioneers of phenomenology in South Africa, Dreyer Kruger, has said “it is necessary to give up manipulation of the phenomenon in favour of allowing this to show itself by an intimate
communion with it” (Kruger 1990:404). We can only enjoy this intimate communion by getting rid of our preconceived notions and prejudices by bracketing them. In essence this means temporarily forgetting everything we know and feel about the phenomenon and simply listen to what the phenomenon is telling us.

The research also employed a theoretical approach where media censorship was guided by five key issues in accordance to Fourie (2001). The division of media censorship will help in categorising the types and forms of censorship in the collected data. Fourie’s five key aspects are examined below.

**Freedom of Expression:**

The South African constitution is similar to the Universal Declaration of Human rights in its recognition of the need for Freedom of Expression. Freedom of expression has been defined in the previous chapters and it applies equally to artistic as well as socio-political opinion and expression. This freedom is considered to be “fundamental to the development of individual maturity as well as the maturity of human society” (Fourie 2001: 571). This implies that in order for humans to develop fully, they require access to a wide variety of information, opinions and ideas. Whilst freedom of expression is fundamental it is not unlimited, it too may be limited particularly if it negatively affects other fundamental rights. For example one cannot draw a picture that explicitly depicts a sexually abused child, because that would infringe on the child’s right to dignity. This aspect of the limits of freedom of expression is particularly relevant to film censorship where some forms of expression are considered offensive to other groups of society, such as erotic expression. There is a constant need to make sure freedom of expression does not infringe on other fundamental rights.

**Public good or individual liberty:**

One of the main reasons for censorship is to stop certain messages from harming society or sections of society (Hart 1961, Van Rooyen 1987). The question is whether the authorities have the right to prevent certain material from the public on the grounds of protecting public good. The other argument is that people, specifically adults, have the right to see whatever they want to and to make a decision on whether or not they like it. This is the
essence of the debate between individual liberty and the good of the public. “it has been argued that it is in fact harmful to society to withhold messages or information, since a well informed public is necessary for a strong and informed democracy” (Fourie 2001: 571).

The Right to know and the right to privacy:

It is common for rights conflict. In this case it is the right to be informed clashing with that of the individual’s right to a reasonable degree of privacy. In both cases it is necessary to weigh up both rights against each other (Fourie 2001:572). Individuals have the right to the prevention of the release of particularly private and sensitive information that may result in them being humiliated or embarrassed. An example of this is the protection of the identities of rape victims (Grolier 1995 :246) or, in the case of South Africa, the consent of winners of the lotto to publish their names (Fourie 2001: 572).

Besides the release of accurate information, individuals have a right to be protected from the dissemination of untrue information about them, this comes in the form of slander and libel. Despite this, often negative opinion about individuals is misunderstood as defamation. Strict defamation laws can often behave as a kind of censorship as media personnel will be scared to publish negative opinions (whether true or not) about individuals (Hutchinson 1999:104)

Free Speech and hate speech:

Freedom of speech differs from freedom of expression in that it deals specifically with speech whilst freedom of expression deals with political, artistic, scientific and academic expression.

Hate speech may be defined as any material likely to stir up hatred against a specific group of people (Fourie 2001:574). It also “expresses, encourages, stirs up or incites hatred against a group of individuals distinguished by a particular feature” (Herz and Molnar 2012:40). These particular groups are usually identified and defined by race, culture, gender, sexual orientation, language, religion, age or by various other characteristics. Hate speech usually advocates for, and may result in harm to the group concerned, and therefore it is often argued that it should not be allowed in order to protect the target group. This is to say, freedom of speech and freedom of expression should not include hate speech. Finding a
balance between the two is often a tricky task, as it is hard to determine at what point freedom of speech degenerates into hate speech.

Hate speech takes many forms, for example some of it expresses and advocates views but does not call for action. Sometimes it is abusive and insulting but not threatening, and at times it expresses dislike for a group but not hatred. It is this difference in forms that necessitates that it is always dealt with on an individual and case to case basis. Hate speech must not be considered the same as disrespect, dislike, disapproval or demeaning the views of others, but instead implies the will and intention to do ill will, severe contempt, harm and destruction on a target group (Herz and Molnar 2012). There are three main characteristics of hate speech.

(1) It is targeted at an individual or group based on arbitrary features, and therefore is discriminatory.

(2) Hate speech stigmatises the target group by overtly or covertly ascribing to the target group qualities widely regarded as undesirable.

(3) Because of this negative quality, the group is regarded as undesirable and a legitimate object of hostility. This may result in a seemingly legitimate expulsion or extermination of the target group.

It is hard to conclusively and definitively define hate speech.

Morality:

The idea that certain messages are harmful is based on one's view of morality, that is, what is or is not acceptable. History has shown that most societies are dominated by a particular religion, which has often sought to entrench their values at the expense of others (Fourie 2001). This was the case with Apartheid in South Africa which sought to justify segregation as a religiously and morally correct action (Van Rooyen 2011:14).

It is alleged that there is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of social disintegration. Therefore the society is justified in taking the same steps to preserve its moral code as it does to preserve its government. The suppression of vice is as much the law's business as
the suppression of subversive activities (Devlin 1959).

According to Hart (1961) censorship should only be used to avoid injury to others. This assertion agrees with Van Rooyen (1987) who says acts which offend against decency should be prohibited if committed publicly and if tangible harm to others ensues. Hart’s assertion is based on the theory that most people’s views are coloured by superstition and prejudice, and therefore morality without the danger of harm to people is not a good enough reason to censor. This view concurs with Venter (1989: 21) who says “censorship is to be used only when unambiguous and immediate threat to the commonwealth exists, such as in wartime”, this is also known by Kennedy (1986: 393) as the doctrine of “clear and present danger”.

In viewing the data to be collected, these key issues will be used as a yard stick to determine the reason for censorship as well as analyse the effects of censorship. For example, if a film is censored on moral grounds the research will establish the basis of the morality and whether it is lawful and constitutional to censor in that manner. It can also be checked whether the censorship of a film infringes on the freedom of expression of the writer, and if so whether it is justified, as it might be protecting another fundamental right.

Conclusion:

These five elements are not mutually exclusive and they often co-associate and overlap. These five just act as a guideline and lens through which censorship and perspectives on censorship may be looked at from the framework of specific and defined parameters. The application of these frameworks to the research topic, and specifically to the analysis of data will consist of research data being viewed within the definition of one or more of these frameworks. The literature review will also be considered in the analysis.
Chapter 5 Research Methods and Data Collection

Introduction

In this chapter the author outlines the methodology used in the pursuit of an empirical study. The chapter will explain how the research was conducted and why it was conducted in that way. It will identify how the data to be used in the Analysis chapter was obtained as well as how it will be analysed. As mentioned the topic of the research looks at the relationship between film censorship, classification and the banning of OGR. There are specific methods used to collect data and approach this particular research. The approach and reasons for the approach and methods are discussed in greater detail in this chapter.

Research design

Every research project needs a plan or a map for it to show what it will achieve and how it will do that. This plan is a research design, and “a research design is a plan structure and strategy of investigation so conceived as to obtain answers to research questions or problems” (Kerlinger 1986: 279). A research design is also described and defined as “a blueprint or detailed plan for how a research study is to be completed” (Thyer 1993: 94). This detailed plan of action involves rationalising and balancing variables so they become measurable, choosing a sample of interest to the study, testing for hypothesis all the data that will have been collected and analysing the results (Thyer 1993: 94). The research design allows the researcher to answer questions “validly, objectively, accurately and economically” (Kumar 2011: 94). The research design will communicate what study design will be used, how respondents will be selected as well as how information will be collected from them. The research design also outlines how the information collected will be analysed and finally how these findings will be communicated. At each step the researcher will offer rational and justification for selecting each method. In order to establish this chapter and the research there is a need to briefly review the objectives of the research.

The data about the case study was acquired primarily from the legal judgements made on the classification (refused and later allowed classification) of the film OGR. The research is qualitative in nature, and this is best described in the statement below.
Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that makes the world visible. These practices ... turn the world into a series of representations including fieldnotes, interviews, conversations, photographs, recordings and memos to the self. At this level, qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them. (Denzin and Lincoln 2000: 3)

The qualitative approach was chosen because it “allows researchers to get at the inner experience of participants, to determine how meanings are formed...and to discover rather than test variables” (Corbin and Strauss 2008: 12).

Research objectives

1. To identify and compare the trends and developments of film censorship between pre and post democracy South Africa. This will involve examining the two eras and identifying the how each is different. This is important in the research as it outlines the origins of censorship in South Africa in comparison to contemporary trends.

2. To ascertain the process and procedures of film classification in South Africa. This will consist of looking at how classification is applied and functions now. This objective investigates current classification procedures, and compares and makes links to censorship.

The first two objectives will enable the research to:

3. To critically analyse the banning of the film Of Good Report (OGR). This will look at how the law was applied and interpreted in the banning (and unbanning) of OGR. Also whether the application of this law has been consistent through the years in order to establish whether there has been consistency in the form and occurrence of censorship in South African film. The case study will create context for the first two objectives.

Sampling strategy

The research results must be credible and therefore there is a need to choose interviewees who are knowledgeable and who’s combined views will present a balanced perspective
In this research purposive sampling is the method that was used to select interview participants.

This means that participants were selected because they were more likely to generate useful data for the research. To ensure credibility of the sample the “Maximum variation sample technique” was used in conjunction with purposive sampling. This involves “selecting key demographic variables that are likely to have an impact on participants’ view of the topic” (Brikci 2007:9). The key elements the researcher sought in identifying research participants was experience with censorship as victims, knowledge of censorship and classification laws and protocols, and finally knowledge on banning of OGR. Based on this, the interviewees were selected who’s experience and expertise catered for the following elements:

1. An expert in constitutional law, in order to appreciate the fundamental rights and freedoms.
2. Victim of censorship in either one or both pre and post democracy South Africa.
3. A voice from the censorship/ classification authority.
4. As well as a voice from the FPB independent Appeals Tribunal, so as to link the classification to the checks and balances in place to ensure correct decisions have been made by FPB classifiers.
5. A victim of censorship outside of South Africa so as to contrast the trends here to the ones outside the country.

Some of the interview participants overlap into more than one of these categories. The five characteristics listed above motivated for the use of purposive sampling. Together with these elements it must be noted that logistics also had to be considered in the selection of interviewees. The researcher would have liked to interview other people who would have contributed positively to the research such as Professor K Van Rooyen, the Chairman of the Task team that drafted the current FPA, but this was not possible as the researcher had no funds to travel to Pretoria to conduct this interview. However, his contribution to data was instead derived from books he has previously published and he was interviewed by email. Two other two legal experts were interviewed, Judge Albie Sachs and Prof Karthy Govender, who chairs the current Appeals Board.
The number of people being interviewed may be numerically low (six participants) but the depth of information and data collected from them is very rich as each has direct experience of the legal apparatus under study. Each has a specific contribution to data and that is why they were handpicked through purposive sampling. The interview schedules are located in the appendix at the end of the research. By the term 'qualitative research' we mean any type of research that produces findings not arrived at by statistical procedures or other means of quantification (Strauss and Corbin, 1998: 11). In this research quantification of any sort is not relevant but instead strength of the research is found in the qualitative significance of a research participant in the form of the depth of his contribution to the research topic. Qualitative research also allows a researcher to connect with participants at a human level not just as a statistic (Strauss and Corbin, 1998: 12).

**Data Collection:**

The data will be collected by two primary ways, that is semi-structured, in-depth interviews and well as the case study on OGR.

**Data Analysis**

A researcher cannot continue to just collect data because at some point something has to be done with it, that is, it has to be analysed. This section deals with the transition from data collection to analysis and how to move forward with analysis. Analysis can described as “a process of examining something in order to find out what it is and how it works” (Corbin and Strauss 2008:46). Each instance (in this case, an interview) must be broken down to examine the components so as to establish their properties and dimensions. The knowledge acquired from this can be used to make inferences about the object of the research. Therefore in this particular research data collected from interviews will be taken and broken down into smaller components (codes) and themes. It will then be determined how these components relate to each other and the issue of censorship and classification as a whole.

The process of analysis is dynamic. It may involve trying many ideas, eliminating some and expanding others before reaching a conclusion. Therefore the analysis process, though it is empirically accepted in research, is a subjective process (Corbin and Strauss 2008). Many different stories can be constructed from the data, and the arranging of the concepts usually
requires many tries before it feels right. The researcher must feel completely confident, after immersing in the data, that the findings reflect the essence of the research.

In data analysis there is no clear point where data collection ends and analysis begins. This is because in an interview you may start off collecting data but as the interview progresses one begins to analyse the responses being made by the participants and restructuring the follow up questions in order to address the research objectives more accurately (Durrheim and Terre-Blanch 1999:321).

The analysis in this research is interpretive in nature. “The key to doing good interpretive analysis is to stay close to the data, to interpret it from a position of empathetic understanding” (Durreim et al 1999: 321). The purpose of interpretive analysis is to give a thick description of the characteristics, processes, transactions and contexts that constitute a phenomenon (Geertz 1973, Durreim et al 1999). This thick description is more than just a copy of the phenomenon it is an expansion and explanation of it. The ultimate goal is not to collect bits and pieces of real life but to place real life events and phenomenon into some kind of perspective. Therefore interpretive analysis can be seen as one or a combination of the following dimensions: description and interpretation, foreground and background, and part and whole (Durreim et al 1999: 322). The result of this is a comprehensive and compelling account of the phenomenon being studied. The phenomenon must be close enough to the context for those familiar with the context to recognise it as true, but far enough so as to allow them to see the phenomenon from a new perspective.

The interpretation of data will be done using the immersion and crystallisation styles (Borkan 1999), which involves being thoroughly familiar with a phenomenon, carefully reflecting on it and then putting together an interpretation by relying on ones grasp of what’s going on rather than on any particular analytical technique. In order to grasp what is going on in the data a certain set of systematic steps will be taken. These steps will be used to immerse and reflect on the data. These steps are not set on stone but rather they act as a guideline on how to start and move forward in the analysis. The steps that will be taken in interpreting the data will be described later in this chapter.

Analysis involves a constant moving back and forward between the entire data set, the coded extracts of data that you are analysing, and the analysis of the data that you are
producing. Writing is an integral part of analysis, not something that takes place at the end, as it does with statistical analyses. Therefore, writing should begin in phase one, with the jotting down of ideas and potential coding schemes, and continue right through the entire coding and analysis process.

There are different positions regarding when to engage with the literature relevant to analysis. Some scholars argue that early reading can narrow one’s analytic field of vision, leading you to focus on some aspects of the data at the expense of other potentially crucial aspects. Others argue that engagement with the literature can enhance your analysis by sensitizing you to more subtle features of the data (Tuckett 2005). Therefore, there is no one right way to proceed with reading for thematic analysis, although a more inductive approach would be enhanced by not engaging with literature in the early stages of analysis, whereas a theoretical approach requires engagement with the literature prior to analysis. I will be employing a theoretical approach research, and that is why I engaged with literature from the early stages of my research.

Moreover, analysis is not a linear process of simply moving from one phase to the next. Instead, it is more recursive process, where movement is back and forth as needed, throughout the phases. It is also a process that develops over time and should not be rushed (Ely et al 1997).

**Thematic Analysis**

According to Rubin and Rubin (1995: 226) analysis is exciting because of the discovery of themes and concepts embedded throughout the interviews. It is important to acknowledge theoretical positions and values in relation to qualitative research. It is argued that a ‘giving voice’ approach ‘involves carving out unacknowledged pieces of narrative evidence that we select, edit, and deploy to border our arguments’ (Fine 2002: 218. My analysis of the data therefore aims to give voice to the data in support or refute of the research arguments.

One of the reasons why thematic analysis was selected as a method is because it offers a more accessible form of analysis, particularly for those still learning how to conduct qualitative research. This is because it does not require the detailed theoretical and technological knowledge of approaches, such as- for example- grounded theory and
discourse analysis. Thematic analysis is also not wedded to any pre-existing theoretical framework, and therefore it can be used within different theoretical frameworks and can be used to do different things within them. It is established then that thematic analysis can be a method that works both to reflect reality and to unpick or unravel the surface of reality (Braun and Clark 2008).

A description of thematic analysis is offered as “a method for identifying, analysing and reporting patterns (themes) within data” (Braun and Clark 2008: 79), it also serves to organize and describe data sets that are rich in detail. Thematic analysis is a poorly demarcated and rarely acknowledged, yet widely used qualitative analytic method (Boyatzis, 1998; Roulston, 2001). Thematic analysis is seen by Braun and Clark (2008) as a foundational method for qualitative analysis. On the other hand Holloway and Todres (2003: 347) identify ‘thematizing meanings’ as one of a few shared generic skills across qualitative analysis. This idea of a shared generic skills concurs with the earlier mentioned assertion by (Braun and Clark 2008) that thematic analysis can be used within different theoretical frameworks. One of the benefits of thematic analysis is its flexibility. According to Braun and Clarke (2008) it is through its theoretical freedom, that thematic analysis provides a flexible and useful research tool, which can potentially provide a rich and detailed, yet complex, account of data.

**Identifying themes:** A theme captures something important about the data in relation to the research question, and represents some level of patterned response or meaning within the data set (Braun and Clark 2008: 82). An important question to address in terms of coding is: what constitutes as a theme? This is a question of prevalence, in terms both of space within each data item and of prevalence across the entire data set. Ideally, there will be a number of instances of the theme across the data set, but more instances do not necessarily mean the theme itself is more crucial. The researcher’s judgement is necessary to determine what a theme is. My initial guidance around this is the need to retain some flexibility, because according to Braun and Clark (2008) rigid rules do not work. Themes can also be described as “abstract (and often fuzzy) constructs the investigators identify before, during, and after analysis” (Ryan and Bernard 2000: 780).
The identification and importance of a theme is not necessarily dependent on quantifiable measures but rather on whether it captures something important in relation to the overall research question. For example, in Victoria’s research on representations of lesbians and gay parents on 26 talk shows (Clarke and Kitzinger 2004), she identified six ‘key’ themes. These six themes were not necessarily the most prevalent themes across the data set they appeared in, but together they captured an important element of the way in which lesbians and gay men ‘normalize’ their families. In other words a theme is determined by the significance of its content, with relation to the research questions and objectives, rather than being determined by its frequency.

A rich description of the data set and a detailed account of one particular aspect is important to determine the type of analysis that was done. For instance, I will provide a rich thematic description of the entire data set, so that the reader gets a sense of the prevalent and pertinent themes. In this case, the themes that are identified, coded, and analysed are an accurate reflection of the content of the entire data set. An alternative use of thematic analysis is to provide a more detailed and nuanced account of one particular theme, or group of themes, within the data. This might relate to a specific question or area of interest within the data (Braun and Clark 2008).

**Inductive versus theoretical thematic analysis:** Themes or patterns within data can be identified in one of two primary ways in thematic analysis. Data can be analysed either in an inductive or ‘bottom up’ way (eg, Frith and Gleeson 2004) or in a theoretical or deductive or ‘top down’ way (eg, Boyatzis, 1998; Hayes, 1997). A theoretical thematic analysis would tend to be driven by the researcher’s theoretical or analytic interest in the area, and is thus more explicitly analyst driven. This form of thematic analysis tends to provide less a rich description of the data overall, and more a detailed analysis of some aspect of the data. In addition to this the choice between inductive and theoretical shapes and determines the how and why of coding data. This is because one can either code for a quite specific research question- which fits into the theoretical approach, or the specific research question can evolve through the coding process which fits into the inductive approach (Braun and Clark 2008:84). In this research I have opted to use the theoretical approach. This means that I will be using predetermined themes and seeing if the data collected compliments these themes.
**Semantic or latent themes:** Another decision revolves around the level at which themes are to be identified. That is either at

(1) a semantic or explicit level, or

(2) at a latent or interpretative level (Boyatzis, 1998).

Thematic analysis typically focuses exclusively or primarily on one level. With the semantic approach, the themes are identified within the explicit or surface meanings of the data, and the analyst is not looking for anything beyond what a participant has said or what has been written. Ideally, the analytic process involves a progression from description, where the data have simply been organised to show patterns in semantic content, and summarised, to interpretation, where there is an attempt to theorize the significance of the patterns and their broader meanings and implications (Patton 1990), often in relation to previous literature (Frith and Gleeson 2004).

Qualitative research involves a series of questions, and there is a need to be clear about the relationship between these different questions. First, there is the overall research question or questions that drive the project. A research question might be very broad and exploratory. Second, if data from interviews has been collected, there are the questions that participants have responded to. Finally, there are the questions that guide the coding and analysis of the data. There is no necessary relationship between these three and it is often desirable that there is a disjuncture between them (Braun and Clark 2008:85). Understanding of these question assists in the coding and analysis of data.

In conclusion thematic analysis involves searching across a data set in the form interviews and texts to find repeated patterns of meaning. There are no hard and fast rules in relation to thematic analysis and different ways of conducting it are possible. What is important is that the finished product contains a detailed account of what was done and why (Braun and Clark 2008:86).

An account of themes ‘emerging’ or being ‘discovered’ is a passive account of the process of analysis, and it denies the active role the researcher always plays in identifying patterns and
themes. This is not the case as the researcher is actively selecting which texts are of interest, and reporting them to the readers (Taylor and Usher 2001)

Conducting thematic analysis: a step-by-step guide: Some of the phases of thematic analysis are similar to the phases of other qualitative research, so these stages are not necessarily unique to thematic analysis. The analytic process starts during data collection, when the analyst begins to notice and look for patterns of meaning, and issues of potential interest in the data. The endpoint is the reporting of the content and meaning of patterns or themes in the data (Braun and Clark 2008).

Familiarisation with data: This is the initial stage and is conducted during data collection, in my case, during interviews. It basically involves paying enough attention to the data being collected to be familiar with it. This is bound to happen because in in-depth interviews the researcher is actively engaging the participant and even asks follow up questions if he feels the interviewee has not answered a question suitably. This goes to show the interviewer is analysing the answers of the participants in real time. Once the researcher is familiar with the data he goes on to immerse himself in the data by listening to the audio recording and reading the transcript again. In fact, the process of transcription or transcribing is an automatic familiarisation technique on its own. This is because the researcher has to listen to an audio interview numerous times during the process of transcription. Once the transcript is ready the researcher reads it again, this is all part of immersion. One of the purposes of immersion, according to (Durrheim and Terre-Blanch 1999:323) is to enable the researcher to know the data well enough to know “what kinds of things can be found where”. The researcher is also familiar enough with the data to know the kinds of interpretations that are likely to be supported by the data.

The data was collected through interactive means and therefore I began the analysis process with some prior knowledge of the data. Regardless of this it was vital to immerse myself in the data to the extent that I am familiar with the depth and breadth of the content as suggested by Braun and Clark (2008:87). Immersion involves repeated reading the data, and engaging the data in an active way searching for meanings and patterns. Based on this I read the data, that is the interview scripts, several times before I began my coding process. Ideas and identification of possible patterns were being shaped as I read through and
immersed myself in the data. During this phase or step I quickly realised one of the reasons why qualitative research tends to use far smaller samples than quantitative research. The immersion, transcription, reading and re-reading of data is time-consuming, as a one hour interview can take a whole day or more to transcribe. It was very tempting to skip over this phase or be selective on what to read, but I was strongly advised against this as this phase provides the bedrock for the rest of the analysis. During this phase I was already taking notes and marking ideas for coding that I would refer to in subsequent phases. Coding continues to be developed and defined throughout the entire analysis. Transcription of verbal data in the form of interviews into texts was done in order to conduct a thematic analysis. The process of transcription, though time-consuming, frustrating and boring, was an excellent way to start familiarizing with the data (Riessman, 1993). That is also one of the reasons why I transcribed the interviews myself rather than employing someone to do it. I spent a lot of effort and time on this stage as some researchers argued that this stage is “a key phase” of data analysis within interpretative qualitative methodology (Bird 2005: 227). Once I was familiar with the data I moved on to the next step.

**Generating initial Codes**: The coding process may be conducted simultaneously with the developing of themes. Coding “entails marking different sections of the data as being instances of, or relevant to one or more of your themes” (Durrheim *et al* 1999:324). The researcher may code a phrase, a line, a sentence or a paragraph”. This phase consists of the production of initial codes from the data. Codes identify a feature of the data that is interesting, and refers to “the most basic segment, or element, of the raw data or information that can be assessed in a meaningful way regarding the phenomenon” (Boyatzis 1998: 63). These pieces of text or codes will be identified by virtue of them containing material that is relevant to the themes under construction. The content of the selected text might refer to a discreet idea, an explanation or an event to do with the theme. A code may also fall under more than one theme as long as it fits comfortably into these other different themes.

Practically, this would mean having a different page for each theme and copying and pasting a code from the interview text into the relevant page. Therefore if a code falls under more than one theme it will be copied and pasted to the other themes’ pages. It is important in this regard that the researcher marks clearly where each code comes from, as it is common
when dealing with large amounts of information that the researcher may forget where some of the information came from and who said what. This potential challenge was overcome by colour coding every interview text in a different colour and immersing in transcripts more thoroughly.

The coding process depended on the thematic approach used in this research, in this case, the theoretical approach (Boyatzis 1998: Haynes 1997). This basically means that coding was guided by predetermined themes as opposed to letting the data develop its own themes (inductive approach).

Coding can be performed either manually or through a software programme (Kelle 2004; Seale 2000). When the research began I had intended on using Nvivo software for my coding and analysis, but due to logistical challenges at the University of Kwazulu Natal the software is unavailable for students to use. I therefore resorted to manual (hand written) coding and analysis.

Defining themes involves working systematically through the entire data set, giving full and equal attention to each data item, and identifying interesting aspects in the data items that may form the basis of repeated patterns (themes) across the data set (Braun and Clark 2008). There are three main strategies I used to complete this stage and those are:

1. Coding for as many potential themes as possible, this allows for openness to whatever the data is saying.

2. Coding the extracts inclusively. This is to say when coding, I must take the surrounding sentences as well so that context is not lost (Bryman 2001).

3. Coding extracts into as many codes as they will fit. This means a code may fall under more than one theme (Braun and Clark 2008).

Searching for themes. This process involves looking at the material (transcripts) and identifying what organising principles naturally underlie the material. This step is well described in the statement: “Induction means inferring general rules or classes from specific instances” (Durrheim and Terre-Blanch 1999:323). This is a bottom-up approach, meaning the researcher first analyses the material then creates themes and categories. This is
opposed to the top-down approach where categories and themes are first created then the researcher looks for instances in the material which fit into these categories. In this research I used the top down approach but flexibly enough to allow for any outlying themes to also be catered for. In this regard Braun and Clark (2008:90) even allow for the creation of a miscellaneous theme, of important and interesting but not necessarily relevant data. There are no hard and fast rules about organising a collection of raw data, but the researcher has used guidelines as outlined by Durrheim et al (1999). This guideline consists of four check points.

The first check point is using the language of the interviewees to label the categories. This is particularly relevant and useful to the “bottom-up” approach already mentioned earlier. This means categories will come from the words of the interviewees. This means not using obscure theoretical language but using the perspective and language of the participants to label categories.

The second point of call involves moving beyond merely summarising content. In this regard the researcher thinks in terms of “processes, functions, tensions and contradictions” (Durrheim et al 1999:323). This goes to say, data analysis goes beyond just summarising the interviews but should involve analysing inferences and opinions, and comparing and contrasting them against the literature review, theoretical framework and the other interviewees. Therefore a practical example how the interviewer will do this is by analysing Judge Albie Sachs perspectives and experience of censorship. The researcher will then go on to summarise his main points and compare them to the theoretical framework, literature review and other interviewees experiences of censorship. After this is all done there will be a summarising of similarities and differences between all the interviewees, theoretical frameworks and literature review. The trends will be highlighted and discussed. This in essence is the crux of data analysis.

The third point of call in the guidelines involves finding an optimal level of complexity in the discussions outlined above. Whilst having one or two themes may not be enough to create a meaningful discussion, having ten or fifteen themes may be overwhelming. This is particularly acceptable in the case of this particular research because of the amount of detail the researcher goes into in both the data collection and analysis of themes.
The fourth and last check point involves not settling for one system too quickly and setting it on stone. There is a need to have an open-minded approach as well as to play around with and try many different approaches and themes. In all of this the researcher must not forget what the focus of the study is. In this case the focus must remain on the links in censorship, classification and the banning of ORG.

**Reviewing Themes:** This process involves reviewing themes that have been devised, because during this phase it becomes evident whether some themes are really themes. Themes may be disqualified if there isn’t enough data to support them or the data under them is too diverse to fall under one theme. This means some themes may need to be combined whilst others may need to be broken down or divided (Braun and Clark 2008:91).

Reviewing themes is done at two levels, the first involves reviewing the data coded extracts for each theme and checking if they coherently form a pattern under that theme. If they fit, I move to level two, if not then there is a need to consider whether the problem is the data codes or the theme as a whole that needs to be changed. In the second level the process is the same as the first level but looks at the entire data set. This means I am considering the themes with relation to the entire data set, and whether the thematic map or direction accurately reflects meanings that are evident in the data as a whole (Braun and Clark 2008:91). But this is also dependent on the thematic approach already discussed earlier. This is to say the themes, even if predetermined, should be reflective of the data collected as well as remaining true to the research objectives.

**Defining and naming themes:** This is a process that further codes and analyses data collected. When material is collected it is usually done in a linear and chronological order. This is also the case with reviewing the transcripts done in a linear sequence. In the process of inducing themes and coding, the linear sequencing is broken up and remarks that were apart may now be grouped together depending on their content. This results in fresh data being available, that is, data that is grouped by theme rather than linear chronological sequencing (Durrheim at al 1999:326). This fresh data can then easily be compared to each other. This results in a satisfactory thematic map of data.

In comparing these thematically grouped codes their similarities and differences will be compared and contrasted and give rise to sub issues and themes. This exploration is what
can be defined as elaboration, and the purpose of elaboration “is to capture the finer
nuances of meaning not captured by your original... coding system” (Durrheim at al
1999:326). Elaboration also creates an opportunity to revise the coding system and make
changes if necessary. The point of all of this is to give a good account of what is happening in
the data.

The essence of this section is best captured below:

At this point, you then define and further refine the themes you will present for your analysis,
and analyse the data within them. By ‘define and refine’, we mean identifying the ‘essence’ of
what each theme is about (as well as the themes overall), and determining what aspect of the
data each theme captures. (Braun and Clark 2008:92).

This stage also includes going back to the codes in each theme and organizing these codes
into coherently and internally consistent account of what is happening, with supporting
evidence where necessary. The data should not just be paraphrased but it should be
identifiable why the particular data extracts are of interest, that is what is interesting and
why. Themes must also be assessed in themselves and in relation to other themes. Sub
themes may also be created particularly to help giving structure to large and complex
themes. At the end of this section it should be explicitly obvious what themes are and what
they are not (Braun and Clark 2008:92).

**Producing the report:** This is the final stage and is done when all themes are set. This
involves final analysis and the writing of the final report. The purpose of writing a final
report is “is to tell the complicated story of your data in a way which convinces the reader of
the merit and validity of your analysis” (Braun and Clark 2008:92). It is also important that
the analysis presents a clear, consistent, coherent, rational, logical and captivating account
of the story the data is telling, within and across themes (Braun and Clark 2008). The write
up is also done to summarise the findings and present examples or evidence where
necessary to support themes and their prevalence. This section is not a mere summary but
also makes arguments in relation to the research questions.

**Ethical clearance:** The research conducted by the student has been approved by the Ethics
committee at the University of KwaZulu-Natal. It received full approval and the certificate
number is HSS/0503/014M. This goes to show the student has taken the necessary procedures to ensure that the research will be conducted in an ethically acceptable manner.

**Informed consent:** As part of the ethical procedures and requires that the student explains his research to every participant and goes on to ask the participant to sign an informed consent. The informed consent is a document that states that the participant has taken part willingly and will be as truthful as possible in the interviews. It also allows the interviewee to know who to contact from the University of KwaZulu-Natal should they have any questions about the research. The signed informed consent form acknowledges all of the above points and a record of informed consent is also recorded verbally on the interview recording.

**Conclusion**

At the end of this chapter the researcher is prepared and equipped to conduct data collection and analysis. The next chapter will explain the meaning of the data collected as explained above.
Chapter 6 Data Analysis and Findings

Introduction

There are numerous reasons for employing a qualitative approach to research but possibly one of the main one is “the desire to step beyond the known and enter into the world of participants, to see the world from their perspective and... contribute to the development of empirical knowledge” (Corbin and Strauss 2008:16). This chapter aims to contribute to the world of empirical knowledge by engaging and analysing the experiences and perspectives of the research participants.

As discussed in the previous chapter a theme captures something important about the data in relation to the research question, and represents some level of patterned response or meaning within the data set (Braun and Clark 2008: 82). As such the study will collate different responses and perspectives from the various research participants. Once this was gathered I analysed and highlighted the trends and themes that seemed to be the most pertinent, and fell within the research objectives.

Trends in apartheid (pre-democracy) South Africa

Banning was common place and practice in pre-apartheid South Africa. There is a stark and apparent difference between pre and post democratic censorship in South Africa. The use of the term “different” does not necessarily highlight a change for the better but just means that what happened during apartheid is not the same as what is happening now. The forms and functions of pre-democratic bannings are outlined in the literature review chapter. One of my research participants is retired constitutional Judge Albie Sachs. He has been an equal rights activist and lawyer since his youth, fighting for the right of the majority. He has been a target and victim of apartheid censorship. Judge Sachs explains one the ways the apartheid government suppressed freedom of expression in my interview with him. He details the extent of censorship in his life below:

[My doctoral thesis] was banned not once but like four times. It was banned because I was banned. So nothing I wrote or produced could be published, it was a criminal offense in South Africa. Secondly it was banned because it quoted from Nelson Mandela and Oliver Tambo who
were banned. Thirdly it dealt with lawyers who had been active in the struggle for justice, many of whom supported the ANC, that was the third thing that made it banned. Finally it was expressly banned in itself.

Sachs, interview 21 July 2014

In this statement Judge Sachs explains how his doctoral dissertation was subject to apartheid censorship. It was not taken into consideration that this was an academic piece of work, but was banned because of its content and association. This is different to the current dispensation (democracy) where academic merit or scientific research, with the exception of child pornography, is a justification for pursuing and documenting material that otherwise could justifiably be banned\(^\text{10}\). Judge Albie Sachs was also a banned person and therefore spent many years in exile living in Mozambique. Sachs experienced just about all the forms of censorship outlined by Merrett (1994:117-150), including arbitrary detention without trial, solitary confinement, banning, listing, exile and even an unsuccessful attempt at terminal censorship in the form of a car bomb, which left him without an arm and an eye.

In an interview with a senior official from the Film and Publications Board (FPB), whom I named Alpha Bravo- because he chose to remain anonymous- we discussed apartheid censorship. He expressed similar sentiments to Sachs (2014). “These books were banned, and not only were the books banned but the writers themselves went to jail because they were classified as terrorists ...they were a danger to society” Alpha Bravo Interview 18 July 2014.

Many people including writers were jailed, beaten, tortured, censored, exiled and even killed because of their belief in the need for the emancipation of the majority. Challenging the apartheid status quo in word or deed resulted in severe consequences for many people. (Dyzenhaus 1998; Merret 1994; Dubow 2014)

Censorship took many shapes and forms, and some forms were less discussed and less explicit than others, but the effects were just as bad if not worse. An example of this is explained:

there were many shapes and forms [of oppression] and at times there was the one thing people do not talk too much about, that is the psychological intimidation that was there for the writer

\(^{10}\) Film and Publications Act of 1996 Chapter 3 Section 4
and other people who were artistic. For example people like Nat Nakasa, very close friends with Nadine Gordimer, he went to study to at Harvard. As he left do you know the apartheid government did, they gave him a one way visa. This is to say “don’t come back, just get lost”. And Nat Nakasa went and studied at Harvard and committed suicide in New York. He jumped from an apartment.

Bravo, interview 18 July 2014

Nat Nakasa was a recognised literary genius and one of the founders of Drum movement which lead to the formation of Drum Magazine. He was banished from South Africa by the apartheid government. His remains were recently exhumed from New York and reburied in South Africa (Timeslive online 13 September 2014). Solitary confinement was also one of these psychological methods of torture and oppression, as lamented by Judge Albie Sachs.

In as much as the government attempted to control the flow information and freedom of thought, those who were oppressed often came up with creative ways of circumventing the checks in place. One of the methods used to avoid the literature police included importing of banned books by putting fake covers on them, as the border control authorities would often not actually read the content of books but just look at the titles. This was expressed in the interview with Judge Sachs when he said “the irony was that people would smuggle it [his banned dissertation] in with a false cover and read it”. Alpha Bravo also expressed similar sentiments in the creative methods of bypassing censorship apparatus. This creativity was especially true “when it came to African languages, the literature was very coded, although you would find that if you read artificially you would not see anything but if you understood the language there was a lot that was there” (Bravo, interview 2014).

Literature in African languages often employed cryptic language, idioms, phrases or parables that at a superficial level would not be saying anything but after decrypting it would be a fierce criticism of the government and the system.

In India similarly creative methods of circumventing censorship are expressed in an interview with Jayan Cherian a poet and film maker who has been the victim of censorship in India. He is the director of a film entitled Papilo Buddha (2014) about the fight of a low caste society called the Untouchables or Dalits in India. This community has been subject to segregation and caste-based discrimination from the government, and their struggle is one for land. The government has prevented the media from covering their struggle. The
significance of the title *Papilo Buddha* is very important. Papilo Buddha is a rare and very valuable butterfly found in India. In order to get permission to shoot his film on the plight of the Untouchables Cherian told the authorities that he was shooting a documentary on the Papilo Buddha Butterfly. Instead this was just the title of his film and the film was actually about the struggles of the Untouchables:

So I got permission to make a documentary on Papilo Buddha. So the government thought when I got permission that I was making a documentary on this butterfly. After that I finished my shoot and reached New York with my footage then I start to edit and submit. Outright they denied because the land struggle is a big issue and also the new militant group getting power- DHRM (Dalit Human Rights Movement), they considered us a terrorist movement.

Cherain, interview 23 July 2014

The significance of this statement is that one may attempt to suppress freedom of expression but it is futile, an idea can never be suppressed. It also goes to show that the battle for freedom of expression, as outlined by Fourie (2001) is not unique to South Africa but is manifest in different forms all over the world.

The struggle of the Dalits in India is similar to that of the black masses in South Africa during apartheid. The censorship currently occurring is a political tool to repress the ideas of the marginalised Dalits. In his interview with me Jayan Cherian explains a brief outline:

the central character in the film, Kalan Pokudan, he is a real Dalit leader who was born as an agrarian slave in 1935. At the age of 9 he left the fields, he ran away and went to join the communist party. He killed a land owner and went to jail. He did his time and came back. He came back and India was independent, and communist party was ruling Karala [the state where Dalits live]. When he was a communist party worker he felt discriminated within the party...he would go to meetings with upper caste leaders he had to sit in the kitchen and get [a] separate cup. That kind of thing made him quit the communist party and refused to conform to the caste system of the communist party and he started a movement, a Dalit group movement, and he is also supporting several land struggles.

Cherain interview 23 July 2014

This struggle is very similar to the one against apartheid, that is, a struggle against segregation, oppression and unjust laws. The untouchables have suffered many atrocities at the hands of the government such as torture (young men tied and having condoms with chilli powder put on them), punitive rape of women who delve into male dominated sectors
such as cab drivers, not being allowed to walk on certain roads- despite that animals can walk on those same roads- and many other types of psychological and physical oppression (Cherian, interview 2014).

The drafting of the 1994 constitution and even the film and Publications Act was meant to restore freedoms that were previously not there in South Africa. The purpose of the Act was to enshrine freedom of expression albeit with justifiable limitations. As one of the first constitutional judges in South Africa and one of the people who drafted the Freedom Charter and the 1994 Constitution Judge Sachs is someone whose view was sought on the vision of the new constitution. His response to the question of the vision of the new (1994) constitution Judge Sachs responded that “the first thing was to get rid of the whole apparatus and mindset of the past, that ‘somebody knows best for the people’ mindset, and the people usually very narrow minded, very restricted world view and imposing that world view on everyone else”. This is similar to the challenges expressed by Jayan Cherian in India, he explains “these are colonial patronising mentality, that the white man is the civilised father and the subjects are children and they don’t know what to watch. That is the same mentality being used by the upper caste people, looking at lower castes as subjects”. These two perspectives go to show that authorities in their attempt to justify censorship act like they know better than the people. The People should be allowed to think and decide for themselves.

If ever there is a need to influence an opinion it must be done through tact and diplomacy not through the use of the law (Carnegie 1998). This point of view is concurred by Sachs (2014) as he explains “you try where ever possible not to use the force of the law, [but instead use] public opinion, debate, argument, presenting better arguments- even against racists, even against homophobes, even against misogynists, to take three to areas of great public sensitivity”. The only way to mutual understanding (even when we do not agree with each other) is through dialogue and diplomacy. Force never results in understanding but breeds resentment instead.

It is the contention of Van Rooyen (2014) that the foundations of the current dispensation were actually established when he became the chair of the Publications Appeal Board in 1980. He explains:
From when I took over in 1980-90 as Chair of the PAB, we unbanned all books of merit and also only banned books on grounds of state security where there was a real and imminent threat to safety. Thus we unbanned the Freedom Charter in 1983, South and New Nation newspapers in 1987 and Cry Freedom in 1988 also many other books in their hundreds. Earlier the Board protected apartheid under the guise of security. We rejected that and even in the Emergency State from 1986... For this my house was set alight in 1988. In this dispensation state security is no longer a ground to ban. Thus: basically freedom for adults and protection of children by classification of films.  

K Van Rooyen, interview 2014

The perspective offered by Van Rooyen (2014) is confirmed by Tomaselli (2000:3) who argues that as apartheid entered its final decade in the 1980’s the influence of the military securocrats diminished and instead the influence of those in government who preferred a negotiated settlement increased. This was becoming the more preferred line of thought as it ensured the possibility preserving and protecting a relative amount of Afrikaner privilege. Despite this shift the public, both white and black were polarised and “lines of tension crossed all classes and groups within the social formation as a whole...[and] academic practices at the anti-apartheid English-language universities during this period also reflected the political and ideological schisms of the society as a whole” (Tomaselli 2000:3).

Prior to 1980 “any book, play or film which criticised the police in their treatment of black people was under suspicion” (Van Rooyen 2011:108).

Post-apartheid South Africa

As South Africa entered the dawn of democracy one of the first objectives of the new government was to establish fundamental human rights and capture them in the new Constitution. One of these rights is freedom of expression as mentioned in Section 16\textsuperscript{11}. The establishing of this constitution, and the freedoms it comes with, is considered a fundamental departure point in establishing freedom of expression. The current constitution reflects an “open and democratic society” (Sachs 2014) and this is a spectacular advancement from the previous dispensation. An example of this freedom is the ability of members of the public to “go to Adult World, they go in there as free and horny citizens or rather as well purposed citizens and they get whatever they want” (Bravo, interview 2014). This was not previously possible in the apartheid era as pornography was banned under the

\textsuperscript{11} Section 16 of the Constitution Of South Africa: Freedom of Expression.
Publications Act of 1974 as well as the Obscene Photographic Materials Act of 1967, though live theatre was granted exemption from instances of nudity such as occurred in the Athol Fugard play, *Sizwe Banzi is Dead*. For cinema, this is a fundamental shift in censorship between the two eras. One of my research participants is Prof K Van Rooyen, a legal expert and Chair of the Publications Appeal Boards (1980-1990), the current Chair of the Broadcasting Complaints Commission of South Africa and, more relevantly, the Chair of the Ministerial Task Group for the Film and Publications Act (1994-1996). In brief the relevance of interviewing Prof Van Rooyen is mainly because of the role he played in the drafting of the current Film and Publications Act. In my email interview with him I asked him what the vision was in the drafting of the FPA, and he laments “Freedom for adults to read and see what they choose”. This is similar to the above sentiments by Bravo (2014) and Sachs (2014).

The interviews also revealed that it is considered by experts that there is more freedom of expression now than there was during the apartheid era, though some apartheid Acts such as the Key Points Act (1980) continue to be invoked by the government. The Key Points Act basically states that there are certain locations in South Africa that are declared key points, and as such the country would not function if their security is compromised. These places include the Reserve Bank of South Africa, President Jacob Zuma’s Nkandla residence, Koeberg Nuclear Power Station Durban Harbour and many other unnamed locations (Section 2 (1) of the National Key Points Act 102 of 1980). These specific sites have been identified from government responses to the new media, but for the most part such sites are not listed anywhere, meaning that anyone can transgress the act unwittingly by just being seen with a camera or a pen and pad in their vicinity. Key Points are determined and declared by the Minister of Defence and Of Police in accordance with the Act (Section 2A of the Key Points Act). The Right to Know Campaign (R2K) is opposed to this Act mainly because it states that one may face up to three years in jail and/or R10 000 fine for disclosing any information about a key point, regardless of whether it is of public interest or not12. This is considered by the media to be a form of censorship, specifically used to prevent politicians from being exposed when engaging in corrupt activities. Such Acts may

be open to abuse as Marcus (1992:209) points out “in a democracy, laws facilitating censorship require careful scrutiny. Opponents of such laws persuasively argue that they are open to shocking abuse and that the advantages of free and open exchange of ideas are preferable to suppression”.

In the current dispensation people have the freedom to criticise the government and even poke fun at them as captured below “freedom of speech is now part and parcel of the new South Africa. You could poke fun at powerful figures and that’s actually good, not just permissible but actually good for the society” (interview with Sachs 2014). This ability to criticise and ridicule government, popular figures as well as big companies and organisations is an integral part of a free and democratic society.

The freedom to criticise and lampoon senior government officials is also reflected in the case of “The Spear” (2012). A painting with striking resemblance to the president Jacob Zuma displaying a flaccid penis caused controversy when it was displayed at the Goodman Gallery in Johannesburg in an exhibition titled “Hail to the Thief II”. In the article for the Apartheid Archive Project, Prof K Tomaselli (2013:7) asserts that “… the furore of Brett Murray’s The Spear, encapsulated similar conditions and contestations barely 20 years after so-called liberation. A perverse re-conscripted Althusserian moment has returned – literally with the power of the phallus/Authority – pessimism is once again in the air”.

The Film and Publications board received complaints from the public that the painting was pornography and exposed young children to premature adult experiences13. The Board then assigned the painting a classification of 16N, meaning no one under the age of 16 was allowed to view it. This decision was successfully appealed by the Goodman Gallery and the paintings’ rating was set aside as it was considered an aesthetic work of art and not something that stimulates erotic sentiment. The judgement followed the precedent already formed and made reference to the ruling of XXY (2008) and the De Reuck14 case.

The current dispensation according to Bravo (2014), unlike the apartheid government, does not dictate what people may read, hear or see. In the interview Sachs(2014) claims that during apartheid when films were screened about 10% of the audience would be state

---

13 See Goodman Gallery vs Film and Publications Board 8/2012
14 De Reuck v Director of Public Prosecution CCT 5/03
agents who were there to see whether what was being screened complied with the law. This cannot be verified and is highly unlikely since most films had to be cleared by the respective Publications Authorities of that era. Despite this Bravo (2014) says “classification is just an advisory note, that’s all it is. It does not say ‘you cannot’, which censorship says”, this is to say the current dispensation does not censor. Therefore as suggested by the FPB and Van Rooyen (1994) censorship does not exist in South Africa, only classification (even though refused classification technically amounts to censorship). Classification, as opposed to classification, “is a system that rates material, and classifies it into appropriate categories on the basis that adults should be free to choose for themselves”. Therefore classification is driven constitutionally protected rights and freedoms that adults have to consume whatever information they want to. On one hand censorship results from politics whilst on the other classification is an administrative procedure (Tomaselli 2013:2).

One of the key differences between current day and pre-democratic censorship is the method used to determine whether a film or publication may not be shown. In pre-democratic South Africa factors such as morality, racial interaction, and political messages were some of the factors used to decide if a publication was “undesirable” (Section 47(2) of the FPA)

A publication, object, film or public entertainment or any part is deemed to be undesirable if it :

a. Is indecent or obscene or offensive or harmful to public morals:

b. Is blasphemous or offensive to the religious convictions or feelings of any section of the inhabitants of the Republic:

c. Brings any section of the inhabitants of the Republic into ridicule or contempt:

d. Is harmful to the relations between any sections of the inhabitants of the Republic:

e. Is prejudicial to the safety of the state, the general welfare or the peace and good order:

f. Discloses with reference to any judicial proceedings

   i. Any matter which is indecent or obscene or is offensive or harmful to public morals:

   ii. Any indecent or obscene medical, surgical or physiological details, the disclosure of which is likely to be offensive or harmful to public morals.

Section 47(2) of the Publications Act (1974)

Despite this strict legislation during the apartheid era, numerous films from Hollywood were shown in South Africa despite showing explicit violence whilst on the other hand the same laws would ban many films showing black and white South Africans interacting together in
any way let alone affectionately or sexually (Sachs 2014). This perspective is described below when he says “all the trash in the world could come from Hollywood in particular, American people murdering and killing each other but heaven help a black and white holding hands let alone kissing” (Sachs 2014). The SABC’s TV4, however, which had been introduced early in 1987 to compete with MNET, a privately-owned pay service using SABC transmitters, consistently screened American multiracial programmes (Benson, The Cosby Show, The Jeffersons, etc). While Alex Holt (1998:164) argues that to some extent this programming may have been intended to make up for the shortcoming of TV2/3 in respect of English-speaking urban blacks. Also with SA Breweries Castle Beer advertising, multiracial imaging was being successively opened up on all SABC TV channels (Holt 1998:164). In film, a host of South African producers and directors were even depicting black resistance against apartheid and using the form to skewer the dominant impression of (apartheid) reality (see Tomaselli 2006: Chapter 3).

The state often overstepped their mandate in deciding what people may watch, as “it is no business of the state what you view in your own home. Is this a privacy issue or a freedom of speech issue? Both!” (Sachs 2014). A similar sentiment is captured by Van Rooyen (1989) in that “the state cannot, of course, ultimately take over the important role which the family unit, the school and the church play in education children in the field of morality and religion…. it is not in the first place its task to promote morality or religion. The point here is that the state is not there to regulate morality (or immorality) more so what people watch in the privacy of their homes.

Context and aesthetics

Freedom of speech cannot be absolute and reasonable limits on it are acceptable all over the world in open and democratic societies. The test on freedom of speech is largely determined by the context (Sachs 2014). That is to say, a statement cannot be considered to be against the law or unconstitutional without considering the context under which it was made. Even the Film and Publications Act allows for the context of a text to be considered, though with child pornography this is not the case in law. Whilst in terms of law the consideration of context may not be acceptable, precedent can be used to allow the
consideration of context. Previous judgements by the South African courts\textsuperscript{15} as well as the Tribunal\textsuperscript{16} set a precedent that child porn, like pornography is explicit, and therefore where a material is suspected of being child porn, if it is not explicit and does not generate erotic sentiments, then that gives leeway for classifiers to account for context. When a material is proven to be child pornography (when explicit or predominantly generates erotic feelings) it cannot be redeemed, regardless of its context or whether it is an academic, artistic, literary or scientific piece of work. These factors can legally redeem other banned material such as propaganda for war, films that promote hatred or imminent violence (Section 18 (3)a of the Film and Publications Act of 1994). Therefore, an example is the instance of academic or scientific research. A certain measure of academic autonomy is expressly indicated in the South African Constitution (section 16 [d] of the constitution of South Africa). This was not the case during apartheid as explained in Chapter 2.

In this current dispensation the law allows for the consideration of context and aesthetic elements in determining of pornography. Even in the case of child pornography it is important to allow the consideration of context jeffin determining it. In the case of South African law, particularly the FPA; when are classifiers determining what child pornography is, there is a need to refer to the law, to jurisprudence and precedent set by previous judgements –both by law and the appeals tribunal-, and context. These three elements are all inclusive and should all be considered as captured below:

Ignoring the Constitutional jurisprudence on the classification of “child pornography” (which it is bound by), as well as the decisions of the Film and Publications Review Board (which ought to guide its work) classifiers at the Film and Publications Board (FPB) last week wrongly banned a movie which would have been shown at the Durban Film Festival, either because they are ignorant of the law in terms of which they must exercise their powers, or because they decided to be guided by a misplaced, conservative, moralistic fervour – rather than by the law that they are bound by. \textsuperscript{(De Vos P, 2013 The Daily Maverick)}

The above article by De Vos(2013) accuses the FPB of being guided by morality instead of the law.

\textsuperscript{15} De Reuck v Director of Public Prosecution CCT 5/03

\textsuperscript{16} Out in Africa: South African Gay and Lesbian Film Festival vs FPB 1/09
Interpretation of the Film and Publications Act

In banning *OGR* the classifiers did not account for the context and aesthetic element of the film because they stopped the film after only watching 28 minutes, after realising the young woman in the film was depicted as being underage. They did so despite the fact that the scene in question was not explicit. This action was a rigid and religious interpretation of the FPA and the FPB supports this approach by relying on Regulation 16(1)(a) of the Films and Publications Regulations (the regulations), which provides that "if a classification committee discovers child pornography during any classification process, the film, game or publication process shall be ...stopped". In law the classifiers did not err because they followed the law to the letter, but this resulted in two major debates i) Can classifiers realise aesthetic merit when they see it? And ii) Does the law allow them to cater for aesthetic merit? I therefore think in my opinion that there is a need for the law, that is the FPA, to explicitly allow for classifier to take context and aesthetics into consideration. And even if the law does not change the classifiers in their training course, must be made familiar with previous judgements so they can make decisions also based on those precedents and not primarily on the law as explained by De Vos (2013):

> if they were to familiarise themselves with the relevant Constitutional Court judgments as well as the decisions of their own Review Board, they would have to stop banning films without even taking into account either the context or the artistic merit of the movie. But it is, of course, an open question whether most classifiers working for the FPB are capable of identifying artistic merit in a creative work of fiction.

A key question that comes out of the issue of context is, what is the director’s position on the issue of underage sexual activity? What is he trying to portray in his film? It is important to address this issue because the director emphasised that the film seeks to bring awareness on the issue of child abuse by adults and scare young girls out of getting sugar daddies (McCracken 2013). Not clarifying these issues then implies that the film is actually contains child pornography, and can go further to imply that Qubeka supports paedophilia. It was investigated whether the director may have the effect of (intentionally or unintentionally) promoting child porn by the way he expressed the inter-generational relationship in his film (Tomaselli 2013:6). Being overzealous and over sensitive to an instrumentalist interpretation of the letter rather than the spirit of the law may result in such misplaced
cases of censorship. Using this precedent set by the FPB, even talking about child porn would constitute child pornography. All these issues need to be fully engaged and addressed, so that the classifiers are able to consider context.

Reception Analysis

In this context reception analysis is used to determine possible interpretations of the film ORG. It is not used as a data analysis tool. There is a need to examine Stuart Hall’s “Encoding/ Decoding” framework to have an objective and academic approach, not just a legal one, to interpreting the intended meaning of message by the director of the film. The field of cultural studies is replete with studies of reception and how South Africans drawn from different classes, races and locations have interpreted films and TV (Tager 2002, Govender and Dyll 2013; Levine 2007).

Academics such as Stuart Hall (1973) offer a comprehensive theoretical analysis encoding/decoding of messages, that is, the process of producing, disseminating and interpreting information. Hall (1973:507) believes the “coding of a message does not control its reception”. This is to say the message is not always received the way it was intended to be. Reception and interpretation of a message can be divided into three categories which will be discussed a little later. Often producers “who find their messages failing to get across are frequently concerned to straighten out the kinks in the communication chain” (Hall 1973:514). This means that ideally every producer would like their films interpreted the way they intended it to be, and this is often not the case. Sometimes the misunderstanding of the message is literal. In this I mean “the viewer does not know the terms employed, cannot follow the logic of argument ... is unfamiliar with the language ... or finds the concepts too alien and difficult” (Hall 1973:514). Hall also attributes the failure to “correctly” interpret messages to what he terms “selective perception” that people have, this is on top of, and in spite of, variations in individual and private perspectives and interpretations (Hall 1973:514).

There is no link or correspondence between encoding and decoding besides that the “former can attempt to prefer but not prescribe the latter” (Hall 1973:514). This is to say

---

that a producer may not actually be able to influence the interpretation of his message as
everyone has the own experiences that help shape how they see the world. I will now delve
into the three hypothetical categories of interpretation. Stuart Hall’s (1973; 1980) basic
“Encoding/ Decoding” framework consists of three primary ways in which a message can be interpreted by a recipient:

a) The first is the dominant-hegemony position: “hey man, sharp sharp, I agree with you”
(Tomaselli 2013: 4). This is when a viewer takes the intended message and meaning of a film completely. When a message is decoded using the code referred to in the encoding this is an example of the viewer operating in the dominant code. This is the ideal situation any encoder would want as it exhibits a “perfect transparency” (Hall 1973: 515), and thus the dominant hegemony is also referred to as the transparent interpretation. In the case of ORG the ideal situation is the film being received as an aesthetic piece of art which confronts the social ills of intergenerational relationships. This interpretation was shared by the DIFF (that is why the film was chosen as the official opening film, it had immense artistic merit), the Appeals Tribunal (who recognised the aesthetic merit and message being conveyed) and numerous art lovers and film festivals around the world.

b) Secondly is the negotiated interpretation or position: “yes I agree but …” (Tomaselli 2013:4). In this interpretation most of “the audience probably understand quite adequately what has been dominantly defined and professionally signified” (Hall 1973: 516). Despite this the viewer does not completely agree with the encoded message. Decoding under the negotiated element typically consists of a mixture of “adaptive and oppositional elements” (Hall 1973:516), that is, it accepts the dominant hegemonic rule but operates with exceptions to the rule. The negotiated position accords more prominence to the dominant hegemonic position but utilises the right to a negotiated the application of local conditions to create a more corporate position. An example of a negotiated interpretation is the media and their perspective on the banning of ORG. The media did not agree with the banning but also appreciated that the law was applied, and therefore attributed the problem to the law.

c) Rejected Interpretation – “I disagree with your interpretation, and here are my reasons”
(Tomaselli 2013:4). This rejected position is best described by Hall (1973:517) who says “it is possible for a viewer [to] perfectly understand both literal and connotative inflection given
by a discourse but decode the message in a globally contrary way”. Such a viewer is operating in what Hall (1973) calls an “oppositional code”. This code is exemplified by the FPB refusal to classify OGR. They did this despite the literal and connotative inflection that the directors had. They did not interpret the film the way it was intended.

I will briefly describe the pre-apartheid dispensation’s processes of censorship. The PCB’s decisions on whether to ban or not were based on the notional construction of the ‘average’ viewer and how s/he was expected to respond to a film. This was an imaginary person with limited intellectual or aesthetic expertise, someone who was thought to harm easily. This infantilisation of the viewer by the PCB was recast by the Directorate of Publications when it shifted the category to that of the ‘probable viewer’. The latter granted much more autonomy, agency and responsibility to individual spectators, as being adults able to make their own choices and come to their own conclusions. This shift enabled the much more lenient regime won by film festival organisers in the 1980s and which underpinned the 1996 Act. The issue, really, is not what a film depicts, but how audiences interpret what they are watching.

Application of this framework will help classifiers understand the intention of the director and there by determining if the director intended for his work to be, in this case, erotically appealing - in which case the label of child pornography would have been appropriate. What may be erotically appealing for a paedophile is absolutely abhorrent to everyone else. The form used by the film and the depiction of its tortuous characters positions – in the normal course of discourse – viewers as responding negatively to the sex scenes, as they are aware from film form and narrative progression of the dire (social, personal, psychological) consequences of this kind of activity. Despite what the directors intentions are it must be noted that interpretations of meanings are flexible in a text. Authors cannot control how their work is interpreted. A reader brings his/her own subjective views and experiences to interpretation of material (Sless 1986).

Whilst it is acknowledged that every reader/ viewer comes with their own views and experiences there is how ever a probable interpretation of films screened at film festivals. This is based on that, firstly, film festivals screen films that would otherwise not be screened on the regular movie circuit. This means that the people who attend film festivals are a
niche and film festivals generally know their “probable audience”, who tend to be people who are well-versed and read on film (Tomaselli 2013:8). As a result of this speciality of films at festivals, Prof Van Rooyen advocated for exemption of classification for film festivals during his tenure as the head of the Directorate of Publications Appeals Board (1974-1990). Despite this, the current dispensation allows for the FPB to refuse classification to films that do not adhere to the Film and Publications Act (Tomaselli 2013:6).

There are many instances where freedom of expression may be suppressed such as “material that shows children being used as sexual objects to excite the sexual imagination and fantasy of adults ... it was creating a climate in which the rights of the child were being diminished, and therefore could be justified” (Sachs 2014). This is reiterated by Bravo (2014) who explains that it is more appropriate for governing authorities to protect human rights rather than enforcing morality.

I don’t think, I am not comfortable in the space of guiding morality, there are other people who can do that. The churches are there for that, mosques, temples and all of that, I am not about that. I am more comfortable about working in a space that would say how do we protect against child trafficking? When I am in that space I am in the space of human rights. Child trafficking, child pornography, and of course where ever you find those there is absolute violation of basic human rights. I am more comfortable working in that human rights space than governing morality. (Bravo, interview 2014)

This statement by Bravo (2014) is reinforced by Boyle (1992:1) who say ”it is possible to conceive of a different selection of materials and opinions which might operate from a starting point which favours equality and non-discrimination over freedom of expression”. In a space of protecting human rights suppression of subversive ideas is justified. Sachs (2014) agrees with the above point of view of limitations in freedom of expression: “the law can be used to protect vulnerable groups, and international law recognises that, that racial hatred and racial discrimination can be suppressed by the law”.

The interesting part of this debate - of the limitations of freedom of expression- is determining how far one may go in this freedom. Eventually it is up to the artist, the industry, the law and the constitution to determine when one has gone too far. This is detailed below:
What does the law allow and what does the conscience of the artistic creator feel is appropriate? The artist, whether a film maker, or writer, or poet or broadcaster has a responsibility to our history, to the values of our constitution not to go representing people in a grossly undignified manner that is gratuitous and sensationalist. You can deal with it by other artists standing up and saying we don’t want that kind of thing, we don’t allow it. The constitution gives a huge scope for freedom of expression and that’s good, and it basically says at the end of the day it is the courts that will decide if the limitation on your expression has been appropriate.

Sachs, interview 2014

Allowing freedom of expression goes beyond just protecting artists to a place where people are allowed to have access to alternative points of view, alternative interpretations to their realities and the freedom for thinking and assessing their realities critically (Sachs 2014). It is not ideal for any society to have “people with very narrow tight vision dictating to the rest of society” (Sachs 2014). Freedom of expression in the form of public opinion is a check and balance, and guarantee of freedom, and where this fails ultimately the fall back is on the constitutional court (Sachs 2014).

In order to try and establish some of the traits and effects of censorship in both pre and post democratic South Africa I interviewed a legal expert, former constitutional judge, legal academic and victim of Pre-democratic censorship, Judge Albie Sachs.

**Trends in classification**

Often classification is considered to be synonymous with censorship. This is not the case according to the senior FPB official, who was at pains to describe what classification is”

> Film classification acts as an advisory, it does not say you cannot it just says to you, for example as a parent, and you can watch comfortably with all your kids... you can watch this. an also say to you, in this movie there is a lot of violence, there are issues with language. So classification is just an advisory note, that’s all it is.

Alpha Bravo, interview 18 July 2014

Classification is carried out by classification committees that are employed on a part time basis and from various backgrounds. As explained by Professor K Govender (interview, 15 August 2014) “you have a number of classifiers that are appointed on a part time basis and they are drawn from various segments of the South African community, and they classify all films shown in South Africa. And they classify publications that are referred to it”.
In order for the classification process to be viewed as legitimate and relevant there is also a need to examine the classifiers as well not just the process. In the selection of classifiers, as explained by Bravo (2014) “we take into consideration things like the cultural diversity of South Africans, and issues of multi-culturalism and non-racialism and issues of gender, and then age, of course academic qualifications, we have people with legal background, humanities, psychology background and all of that”. Once people from these various backgrounds are selected as classifiers and trained on how to conduct their duties. In this training there is a basic point of departure according to Bravo (2014) and this is the constitution and fundamental human rights. He goes on further to say despite this being the basic departure point, it is not that simple because:

You cannot simply classify without understanding and/or appreciating those basic rights. As you come across that freedom of expression there are non-discriminatory clauses, there are cultural rights clauses, children’s rights - that is your fundamental point of departure. That on its own is complex. And that is before you even decide whether this is artistic or not artistic.

Alpha Bravo, interview 2014

The preparation and training of classifiers is, therefore, not as easy as the media and public may be lead to believe because so many factors have to be considered and taught before any classification even occurs.

The FPA creates structures, checks and balances to make sure there is transparency and accountability in the classification process as well as the management of the FPB. This structure is explained by Prof K Govender (interview, 2014):

The power to act comes from this piece of legislation [FPA] and that’s the most important piece of legislation. It effectively creates three bodies, it creates the council which has an oversight [Like a board of directors] ... it creates the Board (FPB) which is essentially the secretariat or the administration, and then it creates the Appeals Tribunal.

The council oversees the FPB as a whole, giving it vision and direction to it as well as overseeing both administration and management. The Appeals Tribunal on the other hand is an independent body of experts that specifically reviews classification decisions that have been disputed. Each member of both the Council and Appeals Tribunal is expected to be “a
fit and proper person” and “be of good character” according to Section 6.4 (a) of the FPA. A member must also be an expert in one or more of the fields of:

(i) community development; (ii) education; (iii) psychology; (iv) religion; (v) law; (vi) drama; (vii) literature; (viii) communications science; (ix) photography; (x) cinematography; (xi) gender matters; (xii) children’s rights; or (xiii) any other relevant field of experience as may be prescribed

(Section 6.4 (b) of the Film and Publications Act of 1994: 9)

Despite the wide variety of expertise on the Appeals tribunal, they still have and exercise the freedom to invite other experts on matters they have to adjudicate on. This was the case with the OGR hearing where, according to Prof K Govender, this right was exercised. It is intimated that “what we did in order to balance the issues a little, we invited a child rights expert to sit with us, and our unanimous view was that in terms of the law it was wholly incorrect to classify that film as child pornography” (Govender 2014). The board, having sat and watched the film, made a unanimous decision that the classification committee had erred.

The Appeals Tribunal acts as a court of appeal would, hearing appeals on decisions made by the FPB classification committees.

We sit similar to a court of law. And what we do, if it is a film we watch it, we then hear arguments from the lawyers representing the distribution company, we hear arguments from the classifiers; then we make a decision. Once the Tribunal has spoken that’s the final decision on the matter, except if they take me to court and the court sets aside my decision.

Prof K Govender, interview 15 August 2014

The decision of the Appeals tribunal is legally binding and is considered to be the final decision of the FPB. The only other recourse a publisher, distributor of film maker can take after this process is to go to the high court and ultimately the constitutional court.


The banning of OGR has been regarded as an error by the Independent Appeals Tribunal of the FPB.
the fact that everyone agrees that the offending scene contains no explicit sexual depictions;
that the movie was chosen to open the Durban Film Festival and must be of some artistic value;
that the FPB classifiers only watched 29 minutes of the movie before banning it; and that (given
its important overall message) it would be difficult if not impossible for a reasonable person
(judging objectively) to conclude that the main purpose of the movie was to “stimulate sexual
arousal” in the target audience (those who hang out at film festivals); the decision by the
classifiers of the FPB seem to make no sense.

(De Vos P, 2013 The Daily Maverick)

The Act (FPA) which governs classification was rigidly and therefore erroneously applied.
Also the banning of OGR revealed the lack of jurisprudence and precedent on the part of the
FPB and their classifiers who failed to take into account key aspects of similar judgements
made in the past, specifically the De Reuck\textsuperscript{18} case and the XXY\textsuperscript{19} case. These sentiments are
echoed by Van Rooyen (interview, 2014) who believes that:

The Board should have passed it [OGR] without cuts and with an age restriction. The problem is
that there was a policy at Board level to stop watching the moment anything amounted to sex
between children or an adult and a child. That is an incorrect approach. Everything must,
according to De Reuck 2004(1) SA 406(CC) be considered in context. That is why the Appeal
Tribunal allowed the film. Bear in mind that where there is substantial artistic or other merit it is
not regarded as pornography by De Reuck. That is the core of the test: no overwhelmingly
aesthetical material may be regarded as child porn.

However, it must be noted that decision to ban OGR was not illegal but rather a
misinterpretation of the FPA, as explained in my interview with the senior FPB official, Bravo
(2014), he said “I find that what my colleagues did was not illegal, they were not censoring,
they were applying the law, but I think the law needs to be updated. So we are working on
some amendments and so forth”. He suggested that the law is amended to allow classifiers
to account for context. This slightly differs from Prof K Govender, the Chair of the Appeals
Tribunal, who suggests:

I don’t think there should be changes to the law, there are sufficient safeguards. All we need to
do is get people who are applying their minds to act in accordance with the law. And that is an
administrative role not a legal role. The system worked [checks and balances], because the

\textsuperscript{18} De Reuck v Director of Public Prosecution CCT 5/03
\textsuperscript{19} Out in Africa: South African Gay and Lesbian Film Festival vs FPB 1/09
correct decision was reached [eventually]. Some of the stuff [the guidelines manual] needs to be updated a bit.

He suggested that the law must not be change as it gives enough leeway for classifiers to appreciate context whilst still protecting fundamental rights. Also changing the law would mean setting new legal precedents and jurisprudence, which would take time to do and get consistency in interpretation of the law. He therefore proposes better training of classifiers to help them interpret the FPA more relevantly and consistently. One of Prof K Govender’s recommendations is also the professionalization of the classification process, even going as far as working with UNISA (University Of South Africa) in coming up with a course in classification. This will help in not just making classifiers proficient but will also result in the creation of knowledge, which can also be rolled out to other African countries.

The argument that is emerging, however, is that a course on classification alone is insufficient. What is needed also is a course on reception analysis, how viewers make sense of film, and the psychology of reception, what kinds of gratifications and uses derive from the viewing experience.

The banning of OGR could also possibly be as a result of lack of knowledge on the part of the classifiers. In an article a few days after the banning De Vos (2013) contends that the FPB;

Wrongly banned a movie which would have been shown at the Durban Film Festival, either because they are ignorant of the law in terms of which they must exercise their powers, or because they decided to be guided by a misplaced, conservative, moralistic fervour – rather than by the law that they are bound by.

In his article De Vos (2013) argues that the classifiers lack the knowledge to correctly interpret and apply the law by which they are bound, and that the result and evidence of this is the banning of OGR. At the same time the lack of understanding of the law also results in classifiers being driven by moralistic zeal rather than the FPA. Either way there is a need to generate more knowledge, and this perspective is shared by Bravo (2014). In the interview with me, Prof K Govender (2014), explains how he and the Head of the FPB are developing an academic course for classification in conjunction with UNISA in order “to have a scenario where there is production of knowledge, and that we (sic) are not just engaging in a technical exercise [classification]”. The conclusion is that many stakeholders such as the
FPB, the media and Appeals Tribunal realise that in order for classification to happen more objectively, consistently and effectively there is a need to generate knowledge.

In generating knowledge there is also a need to understand “how that knowledge is acquired [and] Critical Arts argued the necessity of examining the contexts of both reader/viewer and writer/director, as well as the relationship between media, ideology, and economy”, Tomaselli (2000) goes on further to argue that “ideology reveals conclusions but not necessarily the mechanisms for arriving at those conclusions (Tomaselli 2000:5-6). This is to say in generating the knowledge or course the FPB must consider the contexts of the probable audience, the intended meaning of the message by the author. As Tomaselli (2000:6) reiterates the works of Hall (1980) he suggests that, “in encoding/decoding an article, the author (or protagonist) or work-as-object are decoded within ‘fields of significations’, and experienced in conjunctures of social, historical, political and economic conditions, which structure both the author’s and readers’ ‘realities’. This shows that every reader’s interpretation of a work of art is influenced by their realities. This should not be the case with FPB classifiers who must be objective and rooted in the law that governs them. They should not allow outside influences such as moral perspectives to cloud their judgement as opined by (De Vos 2013).

Another essential part in the classifying Of Good Report (2013) as child pornography is the application of the definition of child pornography. I will start by examining the definition of pornography as outlined in the judgement of OGR20, Prof K Govender (2013:10) defines it as “the explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc”. Child pornography is just an extension of this definition mainly in that it incorporates children, that is, people below the age of 18 as the primary subjects, objects and/or participants stimulation of erotic sentiments. In the judgement that exonerated OGR from the label of child pornography Govender (2013:10) went on to say “the critical aspect of this definition [of child pornography] is whether the film was intended to stimulate erotic as opposed to aesthetic sentiments; and if the intent was to achieve the latter, then the film [OGR] could not be deemed to contain child pornography”. The element of erotics in determining child pornography is also echoed Smit (1989:86) who says “detecting the

20 Spier Films and JXT Qubeka vs FPB 2/2013
obscene depends on criteria like stimulating lust, artistic merit, community standards and promotion of crime”.

The sentiments of Govender (2013) are in cohesion with the OGR producer, Mike Auret, who said in an interview on with the media in the aftermath of the banning that:

I defy anyone to be sexually gratified by this scene. It’s accompanied by disturbing music, it’s sinister. There is no Barry White in the background. The scene is designed to disturb. She is falling into the clutches of monster. It is a disturbing film because it shines a light on sexual predators, it is not designed in any way to cause arousal, but rather the opposite. We are not denying that the film is about a teacher having sex with a pupil but it’s not designed as pornography, it cannot be used as pornography.

This definition is materially different from the one in the FPA because it does not explicitly speak the intention of the material being judged; whether it arouses erotic sentiments or not. This is where the precedent set by judgements such as the De Reuck Case (2003) and the XXY Case (2009) are most significant. If the classifiers had been able to refer to this precedent, the film OGR would never have been banned in the first place. Even in my interview with Prof K Govender (2014) he reiterated and emphasised the past judgements he has made and the need for precedence to be followed in order to achieve consistency in classification decisions made. As explained in my interview with him Prof K Govender (2014) intimates:

I went through constitutional court judgements and previous judgements I’ve written, demonstrating that this could not be classified as pornography and therefore was not child pornography. Child pornography is something that appeals to erotic sentiments not aesthetic.

The failure to include essential elements such as the arousal of erotic feelings in the definition of child pornography means that even a newspaper article reporting on the sexual abuse of children would be considered child pornography. This is not the best approach to tackle child porn, according to De Waal (Mail and Guardian Online, 2013) because it implies that when you:

Ban the sight of a woman’s body and the lust for women’s bodies will vanish. Ban all images that refer in any way to child abuse, even if they show its horror, and child abuse will stop. This doesn’t make sense. The men who have raped children in the weird belief that such an act can
The banning of *OGR* was a precarious position for the FPB because according to Tomaselli (*Unpublished*, 2014) there are only three possible ways in which the situation could have been handled. These are:

First, the ethical option which would have seen them make a stand and to have watched the film in its entirety (in contravention of the Act) to get a holistic perspective on the narrative as a whole; second, the legal option to which they held themselves (and thus attracting the ire of the Festivals delegates). In legal terms, a third option in which was found deficient by the appeal process, was the linking of aesthetic considerations over technical ones. For film directors, this failure goes to the heart of the committee’s incompetence.

The FPB handled the situation within the legal frameworks available to them and this did not go down well with the media and public.

With the banning of *OGR*, there was a lot of talk on the banning of the movie and not much talk of the issues it actually addresses. The main issue addressed by the film is the scourge of intergenerational sexual relations. These issues are examined by Tomaselli (2013) who suggests that “criminalising underage sexual relations is no longer possible due to the scale at which is said to be occurring, while b) intergenerational sex is considered an abuse of patriarchal power on the one hand and a significant transmission factor of HIV and other STDs on the other”. The discourse of this film has moved away from the serious message it conveys to the issue of its banning. In a speech on the opening night of the DIFF Dr Lwazi Manzi, Mr Qubeka’s wife (the director of *OGR*), said that “Just because they (the FPB) don’t want to see it, does not mean it does not happen [intergenerational sex]”\(^\text{21}\). After the banning the issue was no longer about what was happening in the film but more about the banning of the film.

**Erotic realism, pornography and Of Good Report**

Erotic realism is often considered a legitimate tool of artistic expression (Smit 1989:84). This is because by nature humans are sexual beings, and therefore sexuality and sex are

\(^{21}\) “Opening night film of the Durban International Film Festival Refused Screening by the Film and Publications Board” 2013. accessed from DIFF website.
aesthetically acceptable tools of artistic expression, depending on how they are used. As in the Case of Mark Hipper, mentioned in previous chapters, erotic pieces of art (including film, books, visual art and theatre) are considered art. There is a boundary between aesthetic eroticism and pornography, “as soon as artists use nudity and sex in a way that appeal more to sensuality than to the aesthetic experience, they cross the boundary of the obscene” (Smit 1989:84). Therefore obscenity is determined more by the “explicitness of the description rather than in the nature of the act” (Smit 1989:84). This reiterates Clor (1969) and Robertson (1979) who believe that transition from eroticism into pornography is mainly determined by the level of sexual stimulation as a key motive as well as the explicitness of the depictions of sex. To suggest that OGR contains child porn (by the definition of porn) implies that the content is explicit and is drives lust; “Pornography relishes the explicitness of the description of organs and sensations and the story is nothing more than glue for pasting one sex scene to the next” (Smit 1989:85). If we are to follow the initial judgement of OGR it is clear that it was not a sexually explicit or stimulating film, but it was still banned on the grounds of child porn. There is a need to include, as a precept to the definition of child porn, words like “explicit” and “sexually stimulating”.

**Media relations**

The media was quick to judge the FPB and call them “censors” equating them to the apartheid government because of an error such as the banning of OGR. This is one wrong decision in many thousands of classifications and it was corrected by the checks and balances that are in place to safeguard against such mistakes. The media also fails to give the FPB credit for its fight against real child pornography and piracy as lamented by Bravo (2013). An example of the media calling the FPB a censorship organisation can be seen in numerous examples in various media especially in the days immediately following the banning of OGR. One such example is the cartoon by Zapiro below published in *The Times* on the 23rd of July 2013
Following the banning of OGR the newspapers featured headlines such as “South Africa’s censors ban film about predatory teacher as child porn”\textsuperscript{22}, which suggests that the FPB is a censory organisation. The FPB is accused in the above mentioned article of “apartheid-style censorship after banning a mainstream film \textit{[Of Good Report]}\textsuperscript{23}. Despite this Bravo (2013) goes on to say that he accepts the media is there to scrutinise and hold everyone accountable. He goes on to say “I am not interested in sweetheart deals, and I am sure they [the media] are not either. It is a profession... I don’t think there is intentional distortion”. This goes to show that despite differences the FPB is determined to continue with their duties.

\textbf{Conclusion}

The trends in the data collected and the analysis of the case study shows there has been a positive change at the dawn of democracy in South Africa. What was seen as blatant
censorship during apartheid no longer exists now. The Publications Act of 1974 set good
ground work in terms of creating a legal framework to deal with undesirable material and
even creating structure for appeal that operated objectively under legal frameworks lead by
Prof K Van Rooyen.

During apartheid a lot of the censorship, as pointed out in chapter 2, was politically and
morally driven. This is different to the current dispensation where censorship rarely occurs,
and when it does it is justified in order to protect other fundamental human rights.
Censorship is now only justified when it is proven beyond doubt that it was done to prevent
incitement of harm, child pornography, hate speech or propaganda advocating for war. The
Film and Publications Act also allows for those not comfortable or happy with decisions
made to appeal to the Tribunal and if this is not satisfactory, to appeal to the courts.

Context is all-important in the determination of child pornography (Van Rooyen 2014).
There is in my view a need for the classifiers to be trained better with regard to recognising
works of scientific, artistic and educational merit. Context should be considered for by
allowing classifiers to watch films in their entirety before concluding that it is an undesirable
material. Under the current system it would mean that even a newspaper article that talks
about how a child was abused, for example, would constitute child pornography. The
definition of child pornography should also include and element of the definition of porn in
general, specifically the element of porn primarily arousing erotic sentiments as opposed to
aesthetic feelings. Erotica and aesthetics are not mutually exclusive therefore where both
are present it must be considered which element dominates.
Conclusion and Recommendations

Freedom of expression is an essential part of a free and vibrant society (Sachs 2014). Whilst it is appreciated that any healthy society needs access to alternative views in order to survive, the freedom of expressing these views may never be absolute. Chief Justice Langa (2005:47) concludes that “it has been established that, section 27(1) [on child porn] constitutes a reasonable and justifiable limitation on the section 16 right to freedom of expression. This is to say specifically where children are exploited or harmed, the depiction and expression of this can be limited or prohibited in order to protect the child(ren). This protection of children is recognized all over the world. I would however recommend that in order to ensure that the limitation of freedom of expression is not abused that’s some measures be implemented.

It has not been established but is strongly suggested that the banning of OGR could have had an impact in the change of leadership at FPB; no one at the FPB was willing to comment on this. As articulated by Bravo (2013) all the public wants is accountable leadership.

We have to agree that classification is not going to be an exact science, and it will never be, hence I want to stress the importance of dialogue, because this for me is vital. Yes, we are trying to professionalise classification, not only for South Africa, but the way classification is an issue for the whole continent.... I have come to understand that there is a gap between the Film and Publication Board and the industry. To be honest, some think that people who work at the FPB do not know aesthetics, let alone how to spell the word aesthetics, and that censorship is what we do. This needs to change. Yes, I am aware of the inconsistencies in terms of ratings. I, for one, find the FPB quite conservative; it is ethically driven not aesthetically driven. The balance is not there in the legislation, and that is something we going to have to work on.

(Themba Wakashe [CEO of the FPB] at the FPB Round table Discussion 2014)

In conclusion all societies, including liberal ones, need an at least some moral consensus. Societies as a whole would not function without mutual trust and respect, and “the right to differ can never replace the security of moral consensus... legal restraint and freedom are not mutually exclusive but complementary ideas.” (Smit 1989:79)
**Recommendations**

Firstly I would recommend a more comprehensive definition of “child pornography” in the Film and Publications Act. This is mainly because the current FPA does not specifically account for the element of erotic sentiment in its definition, as pornography does. The current Act simply states that any sexual conduct, real or imaginary, of a child, with another child or adult amounts to child pornography (Film and Publications Act 1996). This definition is fair but more can be added to it so it serves its purpose more effectively.

Secondly I would recommend that the classification guidelines and even the FPA allow the classifiers to account for context, to watch a film in its entirety before making a decision. The current legislation does allow for context, but it may be necessary to teach classifiers to use a bit more discretion rather that apply the law rigidly as in the case of OGR.

Thirdly I would suggest that in the training of classifiers the FPB should include the past cases and precedents of previous cases concerning refused classification. This would help them to be familiar with the limits that they have. This will also prevent the public from asking questions as to whether they are aware of past precedent (De Vos 2013). A good starting point to this would be familiarizing the classifiers specifically of the De Reuck Judgement as this one set the precedent. XXY Judgement and the OGR Judgement both referred to the De Reuck case. Freedom of expression cannot be absolute, there must be boundaries... these boundaries ultimately have to be set by the government of the day” (Venter 1989:28). The law should be allowed to clearly articulate the limits on freedom of expression. On top of this the classifiers must be trained on how to interpret the freedom and its limitations.

Lastly I would suggest that in all instances where there is an inclination to censor, that dialogue may be the first port of call, and that “the advantages of free and open exchange of ideas are preferable to suppression” (Marcus 1992:209).

South Africa still has ground to cover in the area of freedom of expression, but it must be acknowledged that a lot of ground has been covered since the end of apartheid.
References

Primary Sources

*British Board of Film Classification*. 2014. 6th ed, London

*Classification Guidelines For The Classification Of Films, Interactive Computer Games And Certain Publications*. 2009. Approved by the Council of the Film and Publication Board in consultation with the Minister of Home Affairs in terms of section 4A(1)(a) read with section 31(3) of the Films and Publications Act No.65 of 1996.


Govender, K. 2013. “Appeal Against the Classification of The Film *Of Good Report*”. *Spear Films and J Qubeka Vs The Film and Publications Board*, case number 2/2013


Secondary Sources


Braun, V. and Clarke, V. 2006 “Using thematic analysis in psychology”, *Qualitative Research in Psychology*, 3:2, 77-101


Clarke, V. & Kitzinger, C. 2004. “Lesbian and gay parents on talk shows: Resistance or collusion in heterosexism”, *Qualitative Research in Psychology*, 1, 195 - 217


Dyzenhaus, D. 1998. Truth, Reconciliation and the Apartheid Legal Order, Juta


Hofstee, E. 2006. *Constructing a Good Dissertation: A Practical Guide to Finishing a Master’s, MBA or PhD on Schedule*. EPE. Sandton


Murray, B. 2012. *The Spear* (painting), Goodman Gallary, Johannesburg


Sless, D. 1986. *In search of Semiotics*, Croom Helm, London


Tomaselli, K. G. 1979. The South African Film Industry, African Studies Institute, University of Witwatersrand, Johannesburg


Van Der Vyver, J. D., Brink, A., Boesak, A., Mc Donald, I., and Dutoit, A. 1983. Censorship, Institute of Race Relations, Johannesburg


Bibliography

Films

*Bag of Beast,* 2006. Feature Film, Feature Film


*Of Good Report.* 2013. J, Qubeka. Feature Film

*Papilo Buddha.* 2014. J, Cherian. Feature Film


*The Reader.* 2008. S, Daldry. Feature Film

*XXY.* 2007. L, Puenzo. Feature Film

Interviews

Bravo, A. 19 July 2014. Senior official from Film and Publications Board.


Machen, P. 1 December 2014. Manager of the Durban international Film Festival.


Appendixes

Please Note all interview transcripts are copied in their actual form. No editing or changing of any sort was done to them. This is so they remain as original and authentic as possible.

Albie Sachs Interview

SN: We are at Elangeni Hotel, today is the 21st of July 2014, I am with Judge Albie Sachs and my name is Sipho Ngwenya I am a masters researcher from the University of Kwazulu Natal. My research topic is called Film censorship in South Africa. It basically looks at the progress of film censorship pre democracy to what we now call film classification process after 1996. I would like to pick your brain Judge Sachs, starting from your perspective. This year we celebrate 20 years of democracy, what does this mean to you?

AS: In the area of freedom of expression it means a lot to me because I wrote a doctoral thesis at the University of Sussex, it was published by Heinemann Publications, and in the United States by Carlfornia University Press and it was banned in South Africa. It was in a sense the history of the legal system in South Africa. How did the judges who spoke about justice, equality and fairness, deal with the fact that they were implementing apartheid and that was over centuries. And I gave the usual citations, it was what we call a scholarly piece of work, it earned a doctorate for me at the university of Sussex and it was banned not once but like four times. It was banned because I was banned. So nothing I wrote or produced could be published, it was a criminal offense in South Africa. Secondly it was banned because it quoted from Nelson Mandela and Oliver Tambo who were banned. Thirdly it dealt with lawyers who had been active in the struggle for justice, many of whom supported the ANC, that was the third thing that made it banned. Finally it was expressly banned in itself. So I dnt know how you can ban one book four times and the irony was that people would smuggle it in with a false cover and read it, but the minute it was unbanned people stopped reading it, this was the paradox. That was the kind of justice we had in South Africa and it makes me remark on the spectacular advance our country has made and one of the words used in the constitution is open and democratic society. In fact I was the one who insisted very early on for the word open to go in. A democratic society is one where people can vote for government every five years and you can narrow it down just to that. An open and democratic society means you don’t just have accountability every five years and then democracy goes to sleep and gets kissed away for five years, it means that there is space for alternative positions, for debate, for dialogue, for a plurality of positions and perspectives. And of course that is vital for the open democratic society that we were fighting for that we wanted. In that sense it was the never again of the apartheid era. Under apartheid laws there were a whole series of laws that allowed state officials to say what you could read, say and see and it was up to them and that extended as well to films. I had one of my friends who was on the film board, quite a decent fellow his name was Krouskal. And I knew him from the film society. And the film society had a very strange combination of viewers. It would meet once a month and often show old movies sometimes silent movies, black and white, not great adventure stories with all the modern age, classics from the 30’s and 40’s. The audience would consist of 90% of people who liked movies and 10% police who were there to see what was going on. I almost feel sorry for those guys who had to sit through those old movies that were not very exciting; I wondered maybe they got over time for sitting through those movies. But it was exciting to get movies from
the Soviet Union, the great Maxim Gorki, threeer movies by Pudovkin, his university was working in a factory, he never went to college and became a great writer. We saw Joan of arc. I think black and white films pre-sound and film then was something different. There was an Asian film maker transforming the language of films. And I am not sure if it was there but I saw three films as well from France about Marious. And film for me was part of a world of imagination, a world of wonder, a world of exploration and in the sense an accessible media potentially for mass audiences. But the censorship board would be cracking down on all films coming in, but I did manage when I was very young, I saw some marvellous films, near realist films from Italy “Bicycle Thieves”. Also from France, a wonderful epocol film making, after the war, limited resources, strong stories powerful characterisation and imaginative critical film makers. So these got thru. Then in the 50’s, 60’s 70’s now the censorship board was getting very active. All the trash in the world could come from Hollywood in particular, American people murdering and killing each other but heaven help a black and white holding hands let alone kissing and just this idea that there are some people who can decide what the people can read and see, we loath that idea. Any event in 1994 there is a new constitution and the theme of freedom of speech is strong in that. It not as defined as fully as it was in 1996 when there was a much more extensive clause, a very prolonged debate in parliament about what limitations are permissible but freedom of speech is now part and parcel of the new South Africa, and one of the very first cases we had in the constitutional court, was called... I just remember the letters J and T, it was long before De Rueck, and that dealt with censorship and the board. You must get hold of it, one of our first cases, a long judgement by Justice Yvonne Magoro on freedom of speech, a short one by myself, a short one by John Didkott, and maybe one or two more. It dealt with possession of erotic photographs, in your private home, not for distribution. I remember John writing it is no business of the state what you view in your own home. One of the issues was, was this a privacy issue or a freedom of speech issue. I felt it was both, the two overlap. One shouldn’t have to choose between the two, one shouldn’t have to pigeon hole, it is part of the rights of the individual or person. It’s crazy! You can undress and make love, and go for erotic action in your bedroom but you couldn’t have a photograph of a couple making love, you couldn’t have the image. It just did not make sense. So I think that’s a case you should look at. I remember we had two cases fairly early on, and Yvonnes was the most extensive, dealing with some laws from the United States and elsewhere on freedom of speech. Others would strike down the law as it stood there on much narrow grounds than Yvonne did. John on privacy and Yvonne on freedom of speech and i said it was both, thats the way I remember it. It has never been replaced. The other theme I seem to recall is striking down the idea of a state body censoring in advance. It doesn’t mean you can show anything you want, but its not left to beaurocrats, officials to dictate the taste of the public or even whats permissible, in the end its going to be a court. Much later I was actually on sabbatical when the De Reuck case was decided in our court. A lot of my colleagues were very interested on how i would to go because they knew I was very strong in favour of freedom of speech, but i told them afterwards I agreed with the judgement. The question of the manufacture and distribution of film material that shows children being used as sexual objects to excite the sexual imagination and fantasy of adults could be prohibited. And you don’t have to prove that the particular child in the film had been abused, that wasn’t the basis of it, it was an attack on children, it was creating a climate in which the rights of the child were being diminished, and therefore could be justified. I didn’t go deeply into it myself. Although I am strongly in favour of freedom of speech I would have had no problems if I had been sitting in that case in agreeing with the unanimous decision of the court. Note that was not censorship. Censorship would be people deciding in advance. Since then I
am not sure when the dating was but a classification board has been established and as far as i know they classify films that can be seen by adults only, parental guidance. I am not sure if it has the power to say if the films cant be shown at all.

SN: there is one category where a film cannot be shown, produced or distributed. It has to be handed over to the FPB or to the police for destruction. That is the “refused classification” category, the one where children being used in films where it is being made for the intentions of arousing erotic stimulation, that one category is the only one that is exclusively not allowed.

AS: Then there is a form of censorship and control. Presumably parliament felt that that passed constitutionally, as far as i know it hasn’t been challenged yet, or has it been challenged.

SN: It actually has been challenged but not at the constitutional court, but in the decisions that the FPB has made and last year we did have a case here at the DIFF where the opening movie was banned because of alleged child pornography and when we look into the law, The FPA, we see that the law does not allow classifiers to take context into consideration and that is why when someone was “depicted” as being under the age of 18, engaged in sexual conduct, that constituted as child pornography, despite the fact that it was an aesthetic piece of work and the person taking part was actually above the age of 18. But the law says that someone depicted as under 18, thats what the law says, and it aroused a debate, even in me to say is that law constitutional.

AB: I cant and wont anticipate what the courts may say, there are various ways in which the court can approach it and one is to say that the law must be read in a manner that is consistent with the decisions of the court and the constitution and if that requires attention being given to context then even though the word context is not used in the law, it is implied, it is implicit in it. That’s one way of doing it. The other way is to say that it is unconstitutional to the extent that it doesn’t include context and we the judges will say there has to be a reference to context, they are just technical ways of achieving the same thing. The third is to say the Act is so violatory of the rights of children that it doesn’t matter what the context was, or intention is, the effect will be to diminish public respect for children and the law is sustainable. I don’t know, I would have to read text. But i seem to believe the film has since been shown internationally and in South Africa.

SN: It was actually unbanned by the independent appeals tribunal of the FPB so it has been released and gone into the public realm.

AB: But it might be then that the court will be reluctant to deal with the challenge to the Act if there is no live case or live controversy. But my understanding of that film is that it was actually intended to protect children, the object was that, it wasn’t done in an exploitative way. It didn’t say “I want to protect children” then simply show gross exploitation, it was a very serious film and that was the position talked about by the appeals board.

SN: I also wanted to ask, as one of the people who were very pinnacle in the drafting of the South African constitution, what was your vision? Specifically in the area of freedom of expression particularly coming from the background we were coming from, what was your vision?

AB: The first thing was to get rid of the whole apparatus and mindset of the past, that “somebody knows best for the people” mindset, and the people usually very narrow minded, very restricted world view and imposing that world view on everyone else. We had to move away from that, to an
open society that was curious, that explored and had fun. That you could poke fun at powerful figures and that's actually good, not just permissible but actually good for the society. I must say in the Laugh It Off case, which you might also want to look at, indirectly relevant, the t-shirts that appropriated logos of big companies and parodied them, I wrote very strongly a conferring judgement speaking about the importance of laughter in society as part of democracy and that it's not just public figures that have to take criticism but private entities as well. Exercising important functions in Public life, in this case it was Carling Black Label and the parodist on the t-shirt said “Carling Black Labour” and instead of saying “Americas lusty lively beer” it said “South Africas 300 years of exploitation” and Carling were Dutch people, very upset. They won in the High Court a restraining order, the won in the Springs court of appeals and but our court overturned the prohibition on the sale of those t-shirts. That's something else you might want to look at in your thesis, the Laugh it Off Case. And I deal with freedom of expression in that case. What was your question?

SN: I was saying what was your vision in the drafting of the constitution?

AB: There is a counter-veiling factor. There has been a lot of pain, a lot of hurt in our society, based on race, sometimes based on religion. It doesn't mean anything goes, and in that sense reasonable limitations on freedom of speech are accepted in open democratic societies, that's the test all over the world, and a lot of it depends on context. In Germany if you deny that the holocaust took place and that many Jews were killed in gas chambers you can go to jail. Freedom of speech is not allowed. In the United States, people calling themselves Nazi’s were allowed to parade outside the homes in Chicago, of survivors of the concentration camps they said freedom of speech prevails. And we know in South Africa our wounding words have been. It doesn’t mean anything can go but the forms that any form of restriction regulation takes have to be appropriate not disproportionate, you do not use a sledgehammer to crack a nut. And you try where ever possible not to use the force of the law, public opinion, debate, argument, presenting better arguments- even against racists, even against homophobes, even against misogynists, to take three to areas of great public sensitivity, but it's still an open question, the extent to which it is permissible. I mean say you had somebody making a film that spoke about and represented black people as baboons, I have difficulty even talking about it, and that was the language of the old days, it would be so offensive that our country couldn't sustain that. And I wouldn’t see a problem if the law stepped in, not necessarily sending someone to jail but restricting that kind of a thing because it is not only too damaging to the peace because people will get very angry and who knows what the consequences would be, but because it is wounding to the dignity of a people who have suffered so much, particularly those who suffered in the past, particularly those who belong to groups who even to this day are still vulnerable. So for example a tax on so called foreigners, I lived as a South Africa exiled in Mozambique. They tried to bomb me there, Mozambicans died. We were received all over the continent, we wouldn’t have won our freedom without the support we got from African countries. Now people come here and they get attacked and if speech is used against them as if they are cockroaches who need to be exterminated the law can stop that. Whether is in a film, over a loud halo, in a book or in a pamphlet. Not only could but I would say should [be stopped] and international law recognises that, that racial hatred and racial discrimination can be suppressed by the law. So that's an area of counter balance it hasn’t been fully worked through by the courts, there was a decision by the court, I think the equality court the singing by Julius Malema, I used to march in Maputo and singing songs I didn’t even know what they meant, somebody once nudged me and said “Albie you are singing that you are going to kill
yourself”. It was a freedom song of resisting the power of the oppressors, to sing it after 1994 when we have a new constitution in my mind is completely inappropriate but i am not in the ANC anymore and I don’t have any political control, and we have got to move on. You can look at that case and look at the decision. It brings in different nuances, it is not directly related to film but its connected with the kind of things that could be regulated and controlled maybe through the equality court and then an appeal to the high court.

SN: As we look to round up our time is finishing off, i just want to ask one last question, where do you hope to see South Africa go in the area of freedom of expression?

AB: A distinguish between, to a certain extent, two factors: One is what does the law allow and what does the other is what does the conscience of the artistic creator feel is appropriate. The law might allow more than what I would say is appropriate. The law might allow a certain amount of rough, even offensive material attacks, critiques but I would say in South Africa where we are still aching so much with injuries caused by the past and sustained by so much injustice even today in South Africa, it is not as if its gone by any means, the artist, whether a film maker, or writer, or poet or broadcaster has a responsibility to our history, to the values of our constitution not to go for cheap shots, not to go for representing people in a grossly undignified manner that is gratuitous and sensationalist. But i would say that is the conscience of the artist, the law might allow it. You can deal with it by other artists standing up and saying we don’t want that kind of thing, we don’t allow it. Because the constitution as such gives a huge scope for freedom of expression and thats good, and it basically says at the end of the day it is the courts that will decide if the limitations on your expression has been appropriate . I think it is important that freedom of artistic creation is expressed in our constitution and a certain measure of academic autonomy is expressly indicated in our constitution. So its not just for the ordinary artistic media, its part of the texture of an open society that its being acknowledged. The Chinese used to say let 100 flowers blossom and different schools of thought contend and I think we need that in South Africa. It is not just the rights of the artists but also the rights of the people to have access to alternative view points, critical thinking, imaginative interpretations of our reality and we come through stronger because of that. We cannot have people with very narrow tight vision dictating to the rest of society. You probably know I spent more than half my life working for the ANC fighting for freedom. I worked very closely with Oliver Tambo in exile for decades, I worked very closely with Nelson Mandela, after we returned on the release of the prisoners, on the new constitution. They didn’t create the culture but they articulated a culture of free debate in the organisation, of free debate of openness, of challenging. You respected the institution but you didnt bow down to anybody, not even to Mandela, not even to OR [Tambo] who we loved, and they expected us to criticise and speak out, and for me that approach, these values are incorporated in the constitution. Its not anti-ANC to be critical of the government on the contrary to my mind its a continuation of the values of the ANC the spirit of OR, the spirit of Madiba, to be open, to be critical, to speak your mind and not to be afraid. Always with the view of supporting the rights of the people, supporting the fact that we are so different in this country, that we all have a point of view, that we all have a cultural experience, a right to represent, to come into society as we are. I am basically optimistic, you listen to any speak-in, phone-in program in the radio you hear every point of view from extremely conservative to revolutionary and all the bits in between. We won our freedom in South Africa and we are not going to surrender it. Its public opinion itself thats the main guarantee, and there’s always the fallback if necessary to the courts and ultimately to the constitutional court.
SN: That is a perfect ending to the discussion. Thank you very much for your time. This has been very informative and I look forward to using some of your quotes in my research.

Interview: Jayan Cherian Writer and Director of Papillo Buddha

SN: This is Sipho Ngwenya, its the 23rd of July, im at the Durban International Film Festival, Elangeni Hotel, conducting an interview, my masters research dissertation topic is Film Censorship in South. Please introduce yourself.

JC: My name is Jayan Cherian, I was born in India, from state of Kerala in South India, i’m a film maker and writer, and I write poems and make films. I am based in New York. My film at DIFF is Papilio Budah, its a film about atrocities committed against the Dalits in India and the cast atrocities committed against not only against Dalits but also against nature and against females. There are several issues dealt with in this film. In a nut shell the story of Papilo Budah is about a group of displaced untouchables. Squatting on government land and the refuse to evacuate. In order to escape from the cast system in india this group of Dalits converted to Buddhism by denouncing Hinduism. It has a kind of political relevance in India, especially the great Untouchables leader Dr Ambedkar, who took 15 000 of his people into Nagar in 1955. They took an oath that even though they were born as Hindu’s they were not going to die as Hindu’s. Because of the Hindu ideology of Sanatan Dharma, the theory of Kharma, rationalising the caste system which is there if you are under the yolk of caste masters. Our people cannot be liberated. So Dr Ambedkar did a legendary event in 1955 and all over India several Dalit groups are inspired by this and are doing this. I am depicting a particular group in Karela, it is a “progressive society”, we are very proud of ourselves being a communist state. We elected the communist party into power. One of the first community regimes to come into power by election. Intermittently the communist party rules in Karala. Even in saying that the communist liberals are also part of the caste system, it is not just the Hindu people. It has transgressed the boundaries of religion, political ideology. The Christians in Karala are practicing fiercely the caste system, very endogamous. From there they have a mythology to hold on to. In 1852 St Thomas, one of Jesus’ disciples come to Karala, they consider themselves Syrian upper caste. Islam also practices caste system and the communist party. This very complex system is there but we are in denial, we think we are progressive. But Dalits in Karola they feel like they are being discriminated and marginalised, and there voice is never heard because they are not in power. They predominately are dominated by the upper caste people, the conservative groups, Hindu group all belong to affluent upper caste. That being said after 1990 there is authentic Dalit leadership coming to power. The Dalits is the politically correct term for the untouchables. And they are not a moral ethnic community. We have aboriginal people, tribal people who are fighting in the mountains and we have several Dalit castes and sub-castes in the coastal areas, and in the fields of central Karola. They are traditionally agrarian slaves. And the tribal people themselves are diverse, different tribes and nations that themselves can have their own nationalism. But this new movement, lot of people are displaced because of the mining movement into these areas and starting their quarries, as well as several other reasons such as corporate land grabbers, and these people are being displaced. There is also a fierce ecocide taking place, and this is the last rain forest in South Asia, it is a UN heritage place, there isn’t supposed to be any of this.
SN: what is this rain forest called?

JC: It's called Western Gods. There is a fierce ecocide, lots of deforestation. The quarries are the main worry. This is the devastating quarry mafia. This ecocide is going hand in hand with genocide. For several sociological and economic reasons the dalits and tribal people come together and squat in corporate land and refuse to go. So there is several land struggles going on right now in Karala. But the government forces try to evacuate them, they come back and cut deals with the government. It is not one or two families, its thousands. And we showed this film in Mothenga, one of the land struggle areas, most of these events are real events, we re-enacted the scenes in a way with in the narrative. We use a majority of actors who are from there. They are playing themselves and a strange mix of theatre actors, trained people mixing with them. When you see the film you don’t know who’s a trained actor and who is playing themselves. It was a huge experiment. Also when it comes to censorship, this film in India we have a censor board, its called the film certification board, the use of semantics, and going on. He is illiterate but is the author of three books - *My life among the candle forest, the malgroves*. Because he is very environmentally conscious and started a campaign in the 1980’s to plant mangroves, which is essential to that region of Karala in order to cultivate the land there. He started a mangrove park and it is named after him now. I take some events from his life, and created this character playing himself. Now he is 80 years old and for the first time in Indian cinema a Dalit person is portraying himself, there are Dalit characters in Bollywood but they are played by other people, but this is the first in history where someone is playing himself in Indian cinema. And then there is the reason for the name of the film, Papilo Budah, it is a butterfly, endemic to the Western Gaurds, it is an endangered species. I open the story with Gayle going there to collect the butterfly, it has huge value in the market. And when he takes a Dalit boy, and this was a real life struggle, and I could shoot there. So i got permission to make a documentary on Papilo Buddah. So the government thought when I got permission that I was making a documentary on this butterfly. After that I finished my shoot and reached New York with my footage then I start to edit and submit. Outright they denied because the land struggle is a big issue and also the new militant group getting power- DHRM(Dalit Human Rights Movement), they considered us a terrorist movement, Buddhist terrorist group. The government then started to commit all sort of atrocities, especially in Karala, after the mother of a backward caste person in Alpie district, they accused the DHRM. They are not like a traditional political party. They go to segregated colonies within Karala, we have 24500 colonies, segregation is huge. So the colonies are a traditional muscle power for the political parties. They take people from there to fight on the streets, the communist party and the congress people. Also these Dalit colonies are infested with drugs and all kinds of illicit activities, gang killings etc... the DHRM go there and start addiction centres, and intergrate these people and convert them to Buddism, they are rewriting history, and claiming back their tradition. It is unsettling for all traditional parties but there are losing their muscle power. The communist party is based on untouchable people in the base, they are the pawns, but the leaders are upper caste. So the ground beneath the communist party is draining away. So everyone is unsettled, the communist party, the Hindu people, and so they declared these people as a terrorist group and initiated their hunting, human rights atrocities. Some police stations have little Guantanamo Bays is Karala, and they do all kind of things, and this is happening now. They invented methods, such as putting chilli powder in a condom and making young male boys wear it, and tied them. I went to certain victims, took the testimonies and re-enacted that scene in the film. That is a major scene in the scene. Also punitive rape, another girl was molested, an auto shut driver,
which was committed by the trade union leaders of Northern Karala. Punitively some men they stripped naked a Dalit girl and paraded her in the middle of the square. These kinds of things still happen and us middle class people are still living in a bubble, and we don’t care about what is happening in Dalit colonies, we are upper caste or middle caste so we don’t care. So when we are talking about the Karala model development which is exemplary when considering how to distribute resources all over the world, and sustainable development and sustainable economy, that concept is very large but was all built on this middle class affluence. But they are negating and totally ignoring the Dalit people in the developmental process. This film is unsettling that self congratulatory face of Karala, thats one of the reasons this film was denied certification. After that we went to the revision committee, which consists of professionals, community leaders, they sat and watched the movie. One of the famous directors was the chair of that committee, and they suggested the 56 cuts, and insanely the bisexual reference of Ghandi had to be taken off, also about Ghandi being anti-black and racist had to be removed. But really the rage of untouchable people against Ghandi and his ideology is not a new thing. In 1938, British prime minister, Donald Ramsey allowed untouchable people a separate constituency in the election and at the time it was lobbied and fought for by Dr Ambedkal, and he worked hard to get it, but Ghandi intervened and said the communal award and private constituencies, will never go to the untouchables. Christians have it, Muslims have it, even Anglo-Christians have it but never to the untouchables. He thought if the untouchables have their own constituency a brutal majority will be divided and this will unsettle the majority, and this will hurt the upper caste people. So he decided to force Dr Ambedkal to give up this right, that he had constitutionally fought for, and forced him to give up this right and he refused. If you are upper caste you would not understand but we worked hard for this. Our people will never be under the yolk of Hinduism. We will be untouchable until we die, we are treated worse than animals. Animals can walk down the street, we cannot walk down the street. That situation, Ghandi started his Satyagra in 1932 whilst he was in jail. It was not against the British people but it was against the untouchables of India. Then the rage of the untouchables against Ghandi, and in 1932, this Satyagra, I think it was 22 days of fasting, he almost died, the communist leaders took Ambedkar and threatened him, that if anything happened to Ghandi they will start a genocide. He was forced to sign the poona pact, a pact between Ambidkar and Ghandi, that was Ambidkar giving up his rights, long fought for his people so Gandhis interest was against the untouchables. In this film there is a scene, psycho Ghandi trying to evacuate these people. And the fighters of the resistance groups burning the figure of Ghandi, thats one of the reasons they banned the movie. Finally i refused to accept these 56 cuts so we went to the Supreme Tribunal in Dehli and the finally they agreed to give certification if we blur out all the Ghandi names and statues, and names, remove the words “circumcise the penis” and several weird weird censorships for us to be able to show the film. So in its full form it is still banned. But as it is it shows in the colonies nobody comes there.

SN: So were you fighting this from New York or from India?

JC: I am back and forth from New York.

SN: So are you in any physical danger?

JC: Not me but the Dalit people are. I go there living in the colonies, nobody attacks me, i am a film maker if something were to happen to me there would be a lot of rage. At the same time there is the Karala Film Festival, a progressive festival, they took this film and some politicians asked them to
remove it and they were forced to remove it. I planned to have a separate screening at a private venue during the festival time and invite people to the hall. Cops came and shut down the hall before the film was screened. The people at this screening had a huge protest in the film venue. So this gave more publicity to the Film. Instead of the news covering the Film festival they are covering Papilo Buddah, saying it was banned.

SN: What is this film festival called?

JC: It is the IFFK. And then Montreal, the British film institute said they will show it and give you a preview screen. It was also shown in Montreal, and then Berlin they took it. Indian government have a huge thing in Berlin, India to Germany, celebrating Bollywood, they didn’t even mention the film Papilo Buddah. Now it is in Durban and we are going all over. Officially we have the Indian panorama selection and all other major government funded festivals they refused to take the film. And we don’t have any kind of theatrical. But the cut version can be shown somewhere maybe. But no one has taken it, no distributors, no satellite distributors, no tv, nothing! Practically that film has been killed but it is showing all over campuses and on colonies, there are several private screenings all over, they cannot stop that. In time, an idea, even a democratic government or a dictatorship they cannot control content. Now content distribution is revolutionalised, I can put it on Youtube for everyone to watch, except countries like China the control data. But the current situation we have. Government cant have this space of controlling the narrative. We need counter narrative. If there is no space for counter narrative we cannot call this a democracy. That is a very fundamental thing as an artist, free speech can’t be controlled by the state but that is where we are living. We cannot afford to have these recurring things in history. We are a global village, people are communicating. You probably talk more to people in India or in America or any place in the world more that your people on the next block. You do have cousins here and talk to more people around the world. We live in a very vibrant integrated society, so how can a foolish regime try to control a particular idea, so we are not learning from history. Also being an artist and being violated and mutilated, having our piece of art being mutilated that is the devastating impact on artists. Also not just artists, the culture, in South Africa nobody can talk about censorship because you are being segregated still and controlled. Of course the last 20 years a lot is different but also a lot is the same. The thing is democracy is not a stopping point it is a journey it is a continuum. A vigilant civil society is essential to function that. We have to be vigilant, we have to wake up and the constant fight is a continuous journey. “Oh we are a democratic society, we have reached there”, so we sit back and relax.

SN: Where will you like to see freedom of speech, what is your perfect vision of India?

Jc: In India i’d like to see artistic expression more freely expressed and we should strike down the notorious sessions in penile code 377, that criminalises homosexuality, and also the blasphemy law, 295A. With these laws you can not criticize anything. If you offend anyone for religious reasons you can be muted. The books are being banned, books on Hindi history are banned, the people go to court and have a case against me or my film or poem because it denigrates something or it incites religious feelings then anyone can go there and my work can be banned. So these draconian and anti humane law must be amended then we can call it a progressive constitution. But these colonial laws, because these are colonial laws, these provisions are from the 1850’s, by British people. These are colonial patronising mentality, that the white man is the civilised father and the subjects are children
and they don’t know what to watch. That is the same mentality being used by the upper caste people, looking at lower castes as subjects. This needs to be addressed, challenged and discussed otherwise we are not going to be calling ourselves a democracy. So it’s a continuum, and these colonial ghosts are following us, and we have to change these laws. India is a diverse nation but there is Hindu fundamentalism and Islam terrorism, all kinds of narrow mindedness around. We need to have a progressive space to equally share the cultural space. All democratic lovers must keep vigilant and keep on taking the struggle further, so, that is the story of Pappilo Buddah.

**Interview with Professor K Govender: Chair of the FPB Appeals Tribunal**

SN: today is Friday the 15th of Aug. I am with Professor Govender the chair of the Appeals Tribunal of the FPB. Thank you very much for making time to see me. Professor I just wanted to ask a few questions with regards to your role in the FPB Appeals tribunal. Firstly what does your role as the Chairman of the Appeals Tribunal entail?

KP: The FPB is created by an Act called the FPA, this is what is referred to as an empowering Act, the power to act comes from this piece of legislation and that’s the most important piece of legislation. It effectively creates three bodies, it creates the council which has an oversight over the Appeal Tribunal, it creates the Board (FPB) which is essentially the secretariat or the administration, and then it creates the Appeals Tribunal. Now the Appeal Tribunal is essentially what we in law refer as to as an administrative appeal tribunal, it is a quasi judicial body essentially. And we hear appeals from decisions of classifiers, the way the process works is you have a number of classifiers that are appointed on a part time basis and they are drawn from various segments of the South African community, and they classify all films shown in South Africa. And they classify publications that are referred to it. So in other words, any book, say you don’t like something, somebody didn’t like “The Spear” they referred it to the classifiers. The classifiers then classify it, if people are unhappy, if the distributors are unhappy with the classification of the film then they appeal to the appeal tribunal. We sit similar to a court of law. And what we do, if it is a film we watch it, we then hear arguments from the lawyers representing the distribution company, we hear arguments from the classifiers, then we make a decision. All the judgements I write are on our website, so they are all available for people to read, and i'm trying to create a jurisprudence on how to interpret this. So essential thats the function, its a quasi judicial function, its an appeals tribunal, and we hear appeals and make decisions and they have a binding legal element.

SN: I wanted to ask you specifically with regards to the film OGR, which is my case study for my research, what did you think of the initial classification of the film?

KG: As I said in my judgement I thought it was erroneous and we heard the appeal on what was referred to as an urgent basis, because you recall that it was going to open the DIFF, and they got this decision. What we did in order to balance the issues a little, we invited a child rights expert to sit with us, and our unanimous view was that in terms of the law it was wholly incorrect to classify that film as child pornography. And I went through constitutional court judgements and previous judgements I’ve written demonstrating that this could not be classified as pornography and therefore was not child pornography. Child pornography is something that appeals to erotic sentiments not aesthetic. Have you seen my judgement on OGR?
SN: Yes I have read it.

KG: So I thought they had erred and that’s why I gave a judgement immediately. What I do is, if we are satisfied with the outcome I draft something immediately after the hearing and then I give reasons two weeks later. But if we are unsure about the outcome, if they [the Tribunal] are saying the outcome is quite complicated, I don’t give the outcome immediately. But because I felt it would be unfair for the label that this film contains child pornography to continue, we gave a decision immediately and we gave reasons two weeks later.

SN: But the FPB stuck to their guns, saying that their classifiers had not erred even after that judgement, despising the fact that your judgement is the final one, they never gave an apology for that misjudgement, so the point I am making is legally speaking, does the law need to be amended in order to cater for aesthetics?

KG: My view is that you are correct, that once the Tribunal has spoken that’s the final decision on the matter, except if they take me to court and the court sets aside my decision. So I think it was an unfortunate statement for them to make, the simply should have said “we will wait for the judgement and comment after the judgement”. And the fact that they didn’t take the decision on review places them in a bit of an awkward position because they felt the judgement was wrong and they were right, they should have gotten a review [in court]. So that’s why I think it was perhaps an unfortunate statement to make. I don’t think there should be changes to the law, there are sufficient safeguards that have already been through a judgement called De Reuk24 by the constitutional court and through about three other judgements I have written on this and I think sometimes if you change the law you create a new legal principle. Now we have got the old principle and we have got sufficient interpretation on the old principles, and there is certainty now. All we need to do is get people who are applying their minds to act in accordance with the law. And that is an administrative role not a legal role. In fairness to the FPB I must tell you that they did their level best to have the appeal heard as soon as possible. So whilst they can be criticised for comments made, they did try and have the appeal process expedited. I know the distributors were very unhappy but if you look at it in broad terms, the system worked, because the correct decision was reached.

SN: What is your role in this new program they are trying to implement at the FPB to professionalise classification? How do you see this happening?

KG: My role has been incidental because I chaired a sub committee that drafted a manual, and what we want to do, we want people to make decisions based on the law and make careful decisions, and not to make decisions instinctively. We don’t want them to look at a painting or look at a film and say “what’s my gut reaction?”, we want them to understand that the law lays down the manner in which your discretion is meant to be exercised. And because when matters come to me, there are lawyers analysing the decisions these guys took they need to understand just how the process works. So we have put this manual together, its a fairly substantial manual, we have invited various people to contribute to it, we will improve it as we go along, it took a long time to get it out some of the stuff needs to be updated a bit. We want our new classifiers, this is what the board is doing, we want to train these people on basic constitutional principles, basic legal principles, looking at some

---

24 Tasco Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others Case CCT 5/03
of the judgements I have written, some of the judgements of the constitutional court, so that they acquire a skills base. The present CEO is quite committed to acquiring of advanced skills. A couple of us had a meeting with the vice chancellor of UNISA and one possibility is to get this course accredited as a course at UNISA, and so people would be able to get a diploma hopefully and if things work well we can roll this thing out to the SADC region and hopefully further than that. So he is quite keen to have a scenario where there is production of knowledge, and that we are not just engaging in a technical exercise. He sees our role, as a leadership role of taking classification and saying “here is how we are balancing the various things, heres how we are contributing to this knowledge” and we want to participate in making it a bit more professional and if we can succeed in South Africa then maybe we’ll offer it to other people and they can come over and do courses at UNISA. So thats my role, they are running it, they just use me when they need advice.

Pre-Interview With Senior FPB Official.

Who requested to remain anonymous and will be called Alpha Bravo (AB). Interview was conducted by Sipho Ngwenya (SN).

AB: When it came to African Languages, the literature was very coded, although you would find that if you read artificially you would not see anything but if you understood the language there was a lot that was there. And that literature came through novels, poetry and all of that, so thats the first thing. Then you had second stream, which was blatantly challenging and saying this is who we are as the people, the Natalie Gordimers, she said she grew up in a racist society and racism shaped her everyday life in SA and she had to write about what she saw, it was blatant racism. But she fine tuned it, she wrote so well, to that level of a nobel loriett. There are a lot like Njabulo Ndebele, former vice chancellor at UCT, those are the writers and that is the quality of writing, and Mbulelo Mzamane and so forth. And of course these books were banned, and not only were the books banned but the writers themselves went to jail because they were classified as terrorists and this and that, they were a danger to society.

SN: Were any of them ever killed? Because some books say censorship consisted then of many forms, like in the form of exile, self censorship you are forced to keep quiet and in extreme cases people were killed for political censorship.

AB: Well, so, yeah it was, there were many shapes and forms and at times there was the one thing people do not talk too much about, that is the psychological intimidation that was there for the writer and other people who were artistic. And some, those who went into exile, for example people like Nat Nakasa, very close friends with Nadine Gordimer, he went to study to Harvard. As he left do you know the apartheid government did, they gave him a one way visa. This is to say “don’t come back, just get lost”. And Nat Nakasa went and studied at Harvard and committed suicide in New York. He jumped from an apartment. These are the realities, it would be interesting if you follow Nat Nakasa what is happening now because i am talking in terms of present, although he died he is still part of the South African literary consciousness. His remains are being exhumed in New York to be reburied in KZN in about two weeks time. And just pursuing and looking at this, what is interesting now is if you look at the censorship and black resistance in terms of journalism it is going to lead you to Drum magazine. Then give you Esiem Pahle, Nat Nakasa and all of that. Actually it’s a kind of a
very interesting period because it comes out of a politically from the defiance campaign lead by the ANC, and you find this in novels, in journalism and everybody basically showing the middle finger and saying (hint). Maybe we can look at the question of aesthetics and censorship in South Africa, what informed the aesthetic outlook, and what is aesthetics, and what is it supposed to mean and do? And what happens when aesthetics confronts censorship?

SN: When you say aesthetics you mean it specifically for the arts?

AB: Yes, specifically for the arts, because censorship is always scared of aesthetics

SN: Is that because as you said earlier on, on the superficial level it can look aesthetic but holding a deeper meaning underneath?

AB: Yes, it makes people to think, to reflect, to be critical and to be conscious of their environment and every other thing. Aesthetics is not like pornography. When you censor pornography, your approach is totally different; probably you are looking at child pornography. By the way in our country, after 1994 there is no censorship, that is why yesterday I was talking to people saying there is no censorship, there is a constitutional dispensation. They still go to adult world, they go in there as free and horny citizens or rather as well purposed citizens and they get whatever they want.

Interview:

I wanted to ask you, generally what is film classification if I may start from there?

AB: Perhaps we should, film classification acts as an advisory, it does not say you cannot, it just says to you, for example as a parent, and you can watch comfortably with all your kids, all ages you can watch this. And it can also say to you, in this movie there is a lot of violence, there are issues with language. So that’s why you get age ratings and either “S, V, L” [sex, violence, language] and so forth. So classification is just an advisory note, that’s all it is. It does not say “you cannot”, which censorship says. Sometimes censorship doesn’t even say “you cannot” you don’t even see it. It starts and ends with the eyes of the classifiers. So the classifiers become the most privileged, they see what everyone else does not see.

SN: How are classifiers selected?

AB: Mainly we are looking at now, we take into consideration things like the cultural diversity of South Africans, and issues of multi-culturalism and non-racialism and issues of gender, and then age, of course academic qualifications, we have people with legal background, humanities, psychology background and all of that. As a matter of fact we just finished last week interviewing about 120 candidates to be classifiers and we will be appointing 40.

SN: and when these candidates are selected do they have to have training for that specific job?

AB: You know it is such a tricky subject, because if you look at education as i said, you are looking at a very complex set of things, first how do you classify in a constitutional dispensation that South Africa is in, which guarantees freedom of expression. The constitution has basic and fundamental human rights, that is our point of departure. So you cannot simply classify without understanding and/or appreciating those basic rights. So that as you come across that freedom of expression there are non discriminatory clauses, there are cultural rights clauses, children’s rights, that is your
fundamental point of departure. That on its own is complex. And that is before you even decide whether this is artistic or not artistic. And by the way once you start at that level, you have got a situation when you see people saying classifiers are censors, they are not.

SN: Classification is also for protecting the children, because without classifying the content specifically of film children can just walk in and watch whatever, there are studies that prove that exposure to extreme violence can affect the psyche of children.

AB: At times when people deal with these things they are actually carrying on with backward ideas, if I may say so at the risk of sounding arrogant, but it is backward, because there is so much content in cyberspace that defies classification, there is so much content that parents have no control over, harmful, non-harmful and so forth.

SN: that is an interesting point I never thought of asking, is there a way of moving into cyberspace to classify?

AB: That will not happen, it is impossible, you will not classify that space. Well, you can use the tools we have now. Child pornography is child pornography no matter what, the point is, cyber space does not respect any laws or borders. It knows no borders.

SN: The film classifiers, are they familiarised with the classification guidelines manual when they come on board?

AB: you see, i don’t think that Nokia, Huawei and all these cell phone manufacturers have got bad intentions of distributing any untoward material because it is a question of the reputation of the company, they are clean business people. But there are people who find ready made technology and they use it for other things. So I think that if one is going to be looking at classification one needs to be very futuristic, what worked 10 years ago, even 2 years ago is not working anymore, and whether we want to be able to say to ourselves in the next 5 years can classification exist in the manner me and you talk about right now. If we listen to this conversation 2 or 3 years from now it will sound very stupid.

SN: Because times are changing very fast?

AB: Incredibly so.

SN: Did you get to watch the movie Of Good Report?

AB: No. There is so much content that gets classified. Firstly I was not at FPB then and also I believe that when I go there I find that what my colleagues did was not illegal, they were not censoring, they were applying the law, but I think the law needs to be updated. That is not the world we live in. So we are working on some amendments and so forth. At times when you deal with laws that impact on cultural and artistic life then the laws must anticipate that that space is not mechanical, and because creative people do not function like that, they will not function like that and they have never functioned like that. So at times we have got to look and ask ourselves a question, whether classification is about guiding morality which is what most of censorship is about. I don’t think, i am not comfortable in the space of guiding morality, there are are other people who can do that. The churches are there for that, mosques, temples and all of that, i am not about that. I am more
comfortable about working in a space that would say how do we protect against child trafficking? When I am in that space I am in the space of human rights. Child trafficking, child pornography, and of course where ever you find those there is absolute violation of basic human rights. I am more comfortable working in that human rights space than governing morality.

SN: My final question, the appeals tribunal, how does it associate with the FPB, because we understand it is independent?

AB: I will not answer that question and I will refer you to the chair of the committee. So got talk to Kathy Govender. I am sure you will have a very interesting conversation with him. Because I cannot speak on behalf of the appeals tribunal, because it is an independent outfit that must put to test that decision we take. Talk to him about that, also talk to him about how one can professionalise classification, because it has been one of his passions, how do we professionalise classification legally, constitutionally, culturally. There is a huge number of things that are here. For example people still refuse that there is racism in South Africa, racism in South Africa is much alive and thriving the only thing is that it is not legal. But what is here in the brain we encounter it every day on the streets of this country, in our everyday lives, and it comes in various forms. There is blasphemy out there, people all they think about is that classification is all about sex, violence you know, thats not it. By the way there is nothing wrong with sex its natural, its a human phenomenon. Sex will always be there. We are all here as a result of sex. If there was no sex we would not be here, people must stop being finicky about nature, as I said from a human rights point of view, and sexual abuse, it then becomes a problem. And thats where I feel comfortable as a classifier.

SN: Where would you to see the film and publications act progress to in the future? To get to that place where even the public realises that this act is not here to censor but to protect and serve.

AB: That is mainly the job of the FPB to explain themselves and not expect the public to know who they are, it doesn’t work like that. Yesterday I met with Provincial Police leadership to talk about the question of child pornography and human trafficking. One thing people do not know is the economic role of the FPB, now, there is so much piracy in music the guys, the Nu Metros, Ster Kinekors, they are not concerned about moral debate, they are concerned about piracy because that affects their business directly. When you come to the platform like DIFF the emphasis is on censorship not economic activity, so one might run the risk of having to bend this way and that way but I think there must just be clarity, and I think that clarity will not come from the public, the public requires leadership, and that leadership must come from the FPB. The must explain itself, the work it does, its mandate. Often all people think when they hear FPB is they think I watch pornography all day, I don’t watch porn, I have been there since the 2nd December[2013] and I have not gone to the viewing rooms to watch porn, my job is not to watch porn or classify for that matter. There are classifiers who are there, and they are doing an excellent job. But when you talk sex and censorship it is more interesting than talking rands and cents. So when we meet with stakeholders from the distributers they are not concerned about sex.

SN: Can we say to then, that to a certain extent the media is playing a role in miscommunicating because the only emphasis the media gives FPB is on these negative connotations that it is only associated with censorship but not much is being said about the economic aspects by trying to help people with their businesses by preventing piracy, the struggle against human trafficking.
AB: Most people, let me rephrase, when you come from a repressive environment of over 350 years and all of a sudden, democracy comes in and you are given rights and all these things the first anxiety is, will these rights be taken away from me or are they entrenched and valid. So the first thing you do is test, and push these test to the limit. That is what is happening in South Africa in all fields. We are litigating left, right and centre. Everyone is pushing the limits of this democracy to see whether it can hold, this is what I think is happening. And it is happening in all spheres of South African life. The testing of the validity of our democracy and constitutionalism. At times people push it in a rational manner, at times it is irrational. At times when these things happen they are manifesting other inherent anxieties that are there. For example there is a lot of racism that gets pushed and paraded in this country under a constitutional dispensation, its there. So at an intellectual level I understand it, at an emotional level it is very irritating. So its about dealing with that balance.

SN: Do you have any plans to engage the public for one but even more specifically engaging the media, on how the FPB can be on the same page with them?

AB: We are not alone in the world to find that all institutions that that operate under the law, anywhere in the world, tend to be paranoid about the media. Because most of the time media means scrutiny, and I think that any civil society organisation must be ready to open up itself to scrutiny. So yes we must engage with the media. And this is not a sweetheart deal, I am not interested in sweetheart deals, and I am sure they are not either. It is a profession and they have to carry themselves through that and be able to say look what is happening. I don’t think there is intentional distortion, I think most of the misunderstanding that happens is because the media does not get what it needs, by that I mean- the media including the public, wants credible leadership. Basic credible leadership, does the thing that comes out of the mouths of the leadership, is it credible, believable and justifiable. I don’t think people always start from a position of mistrust. In as much as the media wants a credible, reliable leadership from public institutions we also demand the same of them. That is the space we are working in. I hope you can come and visit the FPB, you will find that there is little time for pornography. People must liberate themselves. All we want is the basic human rights protection. Whether you watch a triple X rated pornography, who you watch it with, where you watch it, that is up to you. That is not my mandate.

SN: I think officially I can stop at this point. You have touched on all the critical areas that I was hoping you would touch on, and you made a lot of valid statements that I was hoping to ask you and you seem to be far ahead of me in the way you were thinking. So I thank you for your time. My only request is can the FPB be more engaging in the way they open their doors to people like me, I had a very tough time getting to this point, I am very happy you are here and I am very grateful, we academics we can work for the FPB in gathering vital research, we are working in the same direction.

Interview Schedule for Prof K Van Rooyen

- What was your role in the development of classification protocols and the relevant legislation (Film and Publications Act) in South Africa? What was your vision? I attach my
book for your personal use. See page 143 as well as page 156 et seq. Also see the copy of our 1994 report which is to be found on the website Bccsa under Reports (it is the last one). To put it in short: Freedom for adults to read and see what they choose. Even in the case of pornography to buy or rent it at special shops. In the case of hate speech the material would be classified as XX and also in the case of hard pornography. Only in the case of child pornography, as defined, would a possession ban apply. See my book 151 et seq and 173 et seq.

• What are the key differences between the Apartheid era and the current democratic dispensation with regards to freedom of Speech? You will see in my book that from when I took over in 1980-90 as Chair of the PAB, we unbanned all books of merit and also only banned books on grounds of state security where there was a real and imminent threat to safety. Thus we unbanned the Freedom Charter in 1983, South and New Nation newspapers in 1987 and Cry Freedom in 1988 – see my book 108 et seq. Also many other books – in their hundreds! Earlier the Board protected apartheid under the guise of security. We rejected that and even in the Emergency State from 1986- did that. For this my house was set alight in 1988 – see page 132 et seq. In this dispensation state security is no longer a ground to ban. Thus: basically freedom for adults and protection of children by CLASSIFICATION of films.

• How do you see the development of freedom of expression over the years in South African media and specifically in film? Adults are free to see anything except XX material. However, they may possess XX material except child porn, as defined. See page 164-168 of my book. See last para on 168!!

• What is your insight on the banning of the film Of Good Report (2013)? The Board should have passed it without cuts and with an age restriction. The problem is that there was a policy at Board level to stop watching the moment anything amounted to sex between children or an adult and a child. That is an incorrect approach. Everything must, according to De Reuck 2004(1) SA 406(CC) be considered in context. That is why the Appeal Tribunal allowed the film. Bear in mind that where there is substantial artistic or other merit it is not regarded as pornography by De Reuck. That is the core of the test: no overwhelmingly aesthetical material may be regarded as child porn.

• Would you say the classification committee erred in their decision? Yes, of course. I agree with the decision of the Appeal Tribunal which passed it.

• Does the current law (Film and Publications Act) allow for the appreciation of context in making a classification decision? Absolutely! Attempts to exclude it in the 1999 amendment was rejected in De Reuck. Context lies at the heart of the decision process!
• What amendments can be made to the FPA to make it more capable of serving its purpose if any? Ensure that context is always taken into consideration, that vague provisions be removed (the vague provisions were all introduced in 1999, 2004 and 2009) I think the plan is to remove them. See Print Media South Africa and Another v Minister of Home Affairs and Another 2012 (6) SA 443 (CC) where hard words against pre control of publications were spoken. The amendment of 2009 was found to be unconstitutional. This is where pre control of sex publications was introduced. Only pre-control of hate speech is still on the law book: since it was not challenged in the court case – is my view. Also in that case there should not be pre control of publications. Pre Classification of films was introduced in 1996 with the consent of the distributors.

• Where would you like to see South Africa in the next few years, with regards to freedom of expression? Context is fundamental! Emphasis on classification of films and where necessary books. No bans except where XX material is involved (that is hard porn) Possession ban only in the case of child pornography. X18 available for adults in licensed sex shops – as is presently the Case. Regulation of online X18 material either by the Board or an organisation approved by the Board. No works of art, science, drama and documentary to be classified as X18 or XX. See page 156 et seq of my book.