

WHEN POLITICAL EXPRESSION TURNS INTO HATE SPEECH:

Is limitation through legislative criminalisation the answer?

by

Michelle Vosloo

submitted in accordance with the requirements
for the degree of

Master of Laws (LLM)

at the

UNIVERSITY OF SOUTH AFRICA

Supervisor: Ms Amanda Spies

October 2011

WHEN POLITICAL EXPRESSION TURNS INTO HATE SPEECH:

Is limitation through legislative criminalisation the answer?

ABSTRACT

This study investigates the interaction between freedom and limitation as applied to political expression and hate speech. The need for the limitation of hate speech, with its inherent risk of escalation into other serious crimes such as genocide, is established. The view of the South African courts is identified as pro-limitation but generally respectful of the right to freedom of expression. A *lacuna* in current constitutional law, common law and legislative remedies is evident and the various ways in which limitation can be effected are explored; the researcher finds for criminalisation as an effective measure to address this *lacuna* in hate speech regulation. The importance of complying with the international call for the criminalisation of hate speech is analysed. Insight is gained regarding what would be an effective model for criminalisation. Here lessons are taken from foreign comparatives that have successfully criminalised hate speech in the context of their cultural identity, history and social needs. Ultimately, a framework for effective hate speech criminalisation in South Africa is formulated.

ACKNOWLEDGEMENTS

All honour and thanks goes to my first love Jesus: Everything I do is through You and for You.

This project has been a great learning experience, in both personal and academic terms, and I would not have been able to complete it without the help of my study leaders; Amanda Spies and Inge Harms.

To Shelley van der Sandt, Elzabe Coetzee and Jacqui Boucher: Thank you for your continuous support and friendship throughout the years and especially on this project.

Thank you to my uncle, Dr Louis Abrahamson, for sharing your advice and extensive academic experience with me; your love, guidance and mentoring has broadened my academic insights.

My thanks to Sandra Mills for editing this research study.

Lastly, thank you to my parents and Jakes for your continuous support.

DECLARATION

I declare that the dissertation entitled **WHEN POLITICAL EXPRESSION TURNS INTO HATE SPEECH: Is limitation through legislative criminalisation the answer?** is my own work and that all the sources used have been indicated and acknowledged by means of complete references.

Michelle Vosloo

Signature (M Vosloo)

27/03/2012

Date

KEY TERMS

Absolutism, criminalisation, Draft Hate Speech Bill, freedom of expression, hate speech, internal modifiers, libertarianism, limitation of rights, political speech, Promotion of Equality and Prevention of Unfair Discrimination Act, unprotected speech

LIST OF ABBREVIATIONS

African Court on Human and Peoples' Rights	ACHPR
African National Congress	ANC
American Convention on Human Rights	ACHR
American Declaration of the Rights and Duties of Man	ADRDM
Banjul Charter on Human and Peoples' Rights	Banjul Charter
Broadcasting Complaints Tribunal of South Africa	BCTSA
Code of Conduct for Broadcasting Services	CCBS
Constitutional Court	CC
Constitution of the Republic of South Africa	1996 Constitution
Convention on the Elimination of all Forms of Discrimination Against Women	CEDAW
Draft Hate Speech Bill	DHSB
Draft Prohibition of Hate Speech and Incitement to Hatred Bill	DHSIH
European Convention on Human Rights	ECHR
Freedom of Expression Institute	FXI
Human Rights Commission	HRC
International Covenant on Civil and Political Rights	ICCPR
International Convention on the Elimination of all Forms of Racial Discrimination	ICERD
International Criminal Tribunal for Rwanda	ICTR
Promotion of Equality and Prevention of Unfair Discrimination Act	PEPUDA
South African Human Rights Commission	SAHRC
United Nations	UN
United States of America	USA
Universal Declaration of Human Rights	UDHR

TABLE OF CONTENT

ABSTRACT.....	1
ACKNOWLEDGEMENTS.....	2
DECLARATION.....	3
KEY TERMS	4
LIST OF ABBREVIATIONS.....	5
TABLE OF CONTENTS.....	6-8

CHAPTER 1:

INTRODUCING HATE SPEECH AND ITS LIMITATION IN SOUTH AFRICA.....9

1.1 Introduction	9
1.2 Research questions	12
1.3 Chapter layout	13
1.4 Research rationale: A possible <i>lacuna</i> in hate speech regulation	15
1.5 Research design.....	16
1.5.1 Research approach.....	16
1.5.2 Research methodology	18
1.6 Conclusion.....	19

CHAPTER 2:

POLITICAL EXPRESSION versus HATE SPEECH: Definitional analysis and the need for limitation from a constitutional law perspective.....20

2.1 Introduction	20
2.2 Theories underlying freedom of expression.....	20
2.2.1 Absolutism.....	21
2.2.2 Libertarianism.....	22
2.3 The need for the existence of freedom of expression.....	23
2.4 Negative forms and manifestations of free political expression	27
2.5 Defences for limiting freedom of expression in libertarian dispensations.....	31

2.6 Ways in which freedom of expression and specifically hate speech is limited	34
2.6.1 General limitation clauses	35
2.6.2 Internal modifiers	38
2.6.3 Balancing of rights	39
2.6.4 States of emergency.....	40
2.6.5 Human duties.....	41
2.7 Conclusion.....	43
CHAPTER 3:	
COMPARATIVE LAW: International support for the limitation and criminalisation of hate speech	44
3.1 Introduction	44
3.2 Freedom of expression in international law	45
3.2.1 Universal.....	45
3.2.2 Europe.....	49
3.2.3 The Americas.....	57
3.2.4 Africa.....	66
3.3 Conclusion.....	70
CHAPTER 4:	
CURRENT SOUTH AFRICAN LAW AND CASE LAW PRECEDENT ON HATE SPEECH: Affirming a <i>lacuna</i> in hate speech regulation	72
4.1 Introduction	72
4.2 Unprotected speech: A need for further limitation through legislation?	72
4.3 Current South African legislation on hate speech.....	78
4.3.1 PEPUDA.....	79
4.3.2 The Draft Hate Speech Bill	83
4.4 The South African courts, commissions and tribunals on freedom of political expression and hate speech.....	90

4.4.1 The Constitutional Court's interpretation of hate speech and freedom of political expression	90
4.4.2 Findings of the South African Human Rights Committee (SAHRC)	93
4.4.3 Hate speech, political expression and the Broadcasting Complaints Tribunal of South Africa (BCTSA)	98
4.4.4 The hate speech findings of the Equality Court and the High Court.....	102
4.5 Concluding on the hate speech <i>lacuna</i> in South African law	106
CHAPTER 5:	
CONCLUSION: Paving the way for hate speech regulation in South Africa.....	108
5.1 Analysing criminalisation of hate speech.....	108
5.1.1 The advantages and disadvantages of criminalising hate speech	109
5.1.2 The advantages and disadvantages of not criminalising hate speech.....	110
5.2 Criminalisation as an effective measure against hate speech in South Africa	111
5.3 Paving the way for criminalisation of hate speech.....	113
5.3.1 Clear definitions and protective in nature	115
5.3.2 Immunity clauses.....	116
5.3.3 Comprehensible burden of proof.....	117
5.3.4 Rights balancing and room for judicial interpretation.....	117
5.4 Conclusion.....	118
BIBLIOGRAPHY	119-143

CHAPTER 1

INTRODUCING HATE SPEECH AND ITS LIMITATION IN SOUTH AFRICA

‘We hate what we fear and so where hate is, fear is lurking.’¹

Cyril Connolly

1.1 Introduction

Understanding the workings of human rights as a multi-faceted reality remains a constant challenge for those engaged in the legal field. The limitation of human rights is a controversial, yet essential part of human rights jurisprudence. This study investigates the interaction between freedoms and limitations in relation to free political expression and hate speech. The premise that freedom of political expression is an integral right in democratic dispensations is rarely challenged. The extent of that freedom when it is exercised in the territory of hate speech is an issue that is widely debated.

The importance of a right is indicated by the resistance to its limitation. The recent upsurge in hate speech litigation in South Africa highlights the need for a thorough analysis of the legal safeguards that protect against the negative effects of hate speech, as found in the common law and current legislative measures.²

Hate speech has often served as a conduit instrument to further genocide and serious crimes against humanity such as apartheid amongst others.³ While absolutists hold that hate speech serves an important purpose in the democratic process and that it should be protected regardless of its possible negative consequences,⁴ the victims of the Holocaust,⁵ the 1994 Rwanda Genocide⁶ and apartheid crimes do not agree. When the exercise of one human right begins to

¹ Murphy 2715 *One-Line Quotations for Speakers, Writers & Raconteurs* (1996) 101.

² *Mephisto* BVerf GE 173 (1971).

³ Dovell <http://www.worldpolicy.org/blog/2010/11/11/hate-speech-leads-genocide> (Date of use 12/09/2011).

⁴ Wilson 1993 (1033-2) *University of Tulsa* para 16.

⁵ Leventhal <http://www2.iath.virginia.edu/holocaust/basicist.html> (Date of use 12/09/2011).

⁶ Amnesty Report <http://www.internationallawbureau.com/blog/?p=1698> (Date of use 12/09/2011).

manifest in negative and destructive ways and becomes counterproductive, one is reminded of the importance of limitation and the role government plays in overseeing the limitation of human rights.⁷

The Universal Declaration of Human Rights (UDHR) conceptualises freedom of expression as follows in article 19:

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.⁸

Freedom of expression is therefore defined as the right to express one's beliefs, ideas and opinions without unwarranted restriction.⁹ During the reign of the apartheid government freedom of expression was often severely limited and the voice of those involved in the struggle for freedom was silenced in favour of governmental ideology through numerous laws enacted to achieve this agenda.¹⁰ The risks involved in legislating on freedom of expression are duly noted.

The constitutional drafters modelled the right to freedom of expression in the Constitution of the Republic of South Africa (1996 Constitution) on articles 19 and 20 of the UDHR and the importance of freedom of expression in the new South African democracy is affirmed and guaranteed in section 16(1):

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.¹¹

⁷ Koskeniemi <http://www.humanityjournal.org/humanity-volume-1-issue-1/human-rights-mainstreaming-strategy-institutional-power> (Date of use 12/09/2011) 49-50.

⁸ Universal Declaration of Human Rights (1948).

⁹ The Free Dictionary <http://legal-dictionary.thefreedictionary.com/Freedom+of+Speech> (Date of use 12/09/2011).

¹⁰ Van Wyk *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 2. Apartheid is the ideology of the former pre-democratic South African government and consisted of a policy of racial segregation which advocated the separation of peoples and resources.

¹¹ The Constitution of the Republic of South Africa 1996.

This guarantee represents a decisive move away from governmental abuse but at the same time the necessity of and susceptibility to possible limitation of this right, are highlighted by the modification in section 16(2). It demarcates certain forms of expression that do not fall within the ambit of the guaranteed right in section 16(1). Section 16(2) stipulates the following:

2. The right in subsection (1) does not extend to
 - e. propaganda for war;
 - f. incitement of imminent violence; or
 - g. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The constitutional drafters recognised certain forms of negative speech which do not further the democratic ideal and separated them constitutionally by not extending the protection of the 1996 Constitution to these types of speech in the way that absolutist dispensations following the ‘liberal theory’ do.¹²

In defining freedom of expression, political expression and hate speech in the South African context, three assumptions are made for the purpose of this study. Freedom of expression is regarded as:

- an innate human right which accrues to every individual as a result of birth¹³
- a right that covers more than mere speech and includes all forms of expression, whether artistic, scientific, academic or of any other nature¹⁴
- not topically limited and could relate to any matter

The nature of hate speech makes it difficult to define unambiguously. Hate speech can broadly be defined as words and other forms of expression that are deemed threatening, abusive, insulting and degrading¹⁵ and that promote ‘hatred, distrust and strife on political, racial, ethnic

¹² Currie & De Waal *The Bill of Rights Handbook* (2005) 359.

¹³ Roman law proposed that personhood begins at birth and it is at this point that the individual is endowed with human rights. Gray *The Philosophy of Law: An Encyclopedia* (1999) 832.

¹⁴ Currie & De Waal n 12 362. In their analysis of freedom of expression the authors include dancing, photography, sculpting, physical gestures such as finger-pointing and even flag burning as forms of expression.

¹⁵ Definition derived from section 5 of the United Kingdom’s Public Order Act 1986.

or religious grounds'.¹⁶ Hate speech encompasses speech that propositions, calls for or incites hatred which is 'an extreme emotion'.¹⁷ In South Africa two elements must be present concurrently in order for any utterance to qualify as hate speech: incitement to imminently cause injury/damage and the advocacy of hatred based on 'race, ethnicity, gender or religion'.¹⁸ Hate speech is closely related to political expression, which is a form of protected speech under section 16(1).

Political expression entails all forms of expression that are concerned with partisan interests,¹⁹ governance, politics or the state.²⁰ One should distinguish between politically important communication and 'politically correct' communication.²¹ Information is regarded as 'politically correct' if it is viewed as 'officially agreeable'.²² Politically important information falls within the ambit of political expression as it is information that 'stirs public thought, provokes public controversy, or converts [the] public's (sic) minds'.²³ Free political expression includes advocating, governmental criticism, deliberation, evaluation, propaganda as well as electioneering and it is integral to a fully functioning democracy.²⁴

When political expression takes on the form of hate speech the question becomes one of limitation instead of protection, which has given rise to the research questions in this study.

1.2 Research questions

This research study will explore the tension between hate speech and free political expression and will aim to answer the following questions:

- Should freedom of expression, when manifesting as hate speech, be limited?

¹⁶ Definitional elements obtained from *Prosecutor v Dario Kordic & Mario Cerkez* (2001) ICTY 3.

¹⁷ Currie & De Waal n 12 375.

¹⁸ Currie & De Waal n 12 375.

¹⁹ Hawkins *et al The Oxford Study Dictionary* (1992) 497.

²⁰ Hawkins n 19 528.

²¹ Braun *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (2004) 37.

²² Braun n 21 37.

²³ Braun n 21 37.

²⁴ Nelson *Beyond the First Amendment: The Politics of Free Speech and Pluralism* (2005) 41 and 57.

- Are the limitations placed on hate speech in terms of section 16(2) of the 1996 Constitution, common law remedies and current legislation sufficient to limit hate speech?

If the above-mentioned forms of limitation are not sufficient, this indicates a *lacuna* left by the section 16(2) modification of freedom of expression.²⁵ If further limitation is deemed to be necessary in the South African context, the final question to be answered is:

- Should this *lacuna* in hate speech regulation be filled with criminalising legislation?

In order to arrive at a finding for criminalisation, the study examines whether or not a duty rests on the state to punish hate speech perpetrators. If such a duty exists it confirms a need for criminalisation and clear punitive measures. If it is not possible to formulate an effective criminal sanction for hate speech the question becomes void and therefore the study investigates the following subordinate questions: Is it possible to criminalise hate speech effectively through legislation? Can the legislation be written to clearly distinguish between which forms of expressions are criminal and which forms are not? Should culture and history influence the content of criminalising legislation to avoid the recurrence of historical realities?

1.3 Chapter layout

Chapter 2 discusses the theoretical frameworks that underlie freedom of expression, analysing the difference between libertarianism and absolutism. It seeks clarity why hate speech should or should not be limited by analysing the importance of freedom of political expression and the arguments in favour of limitation of certain forms of expression. The conceptual question, namely when does free political expression turn into hate speech, is answered through the definitional analysis. The ways in which hate speech can be limited are investigated and the ideal manner of limitation for South Africa is explored. Chapter 2 then analyses whether limitation of hate speech is needed in the South African context. Insight is gained into the South African cultural connection and its impact on the legislature's predisposition to criminalise certain forms of expression.²⁶

²⁵Teichner 2003 (19) *SAJHR* 1. Internal modifiers entail possible rights curtailments which are written into the document that grants the right.

²⁶Olsen 2011 (44) *British Journal of Aesthetics* 125. The cultural connection is what Olsen terms a 'mode of historical interpretation' and it implies an interpretative restraint because of certain historical realities.

Chapter 3 reviews the international position on the criminalisation of hate speech through an inspection of universal and regional treaties in order to adhere to section 39(1) of the Constitution. This chapter goes on to discuss foreign comparatives and the manner in which they have dealt with hate speech. It draws on case law and legislation on how to approach, interpret and limit hate speech successfully while preserving the democratic ideal. The chapter concludes with a framework for effective criminalisation, constructed from the various foreign comparatives studied and designed to serve as guidance for effective South African hate speech legislation.

In chapter 4 the writer attempts to show that the identified *lacuna* left by the modification of section 16 of the 1996 Constitution, the current insufficient common law and legislative remedies on hate speech needs to be filled by criminalising legislation. An analysis of South African case law dealing with hate speech is undertaken to gain insight into the South African cultural connection and libertarian approach to the limitation of freedom of expression. Current legislation safeguarding against hate speech such as the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)²⁷ and proposed legislation such as the Draft Hate Speech Bill (DHSB)²⁸ are analysed to ascertain their possible shortcomings. A possible way forward is formulated through an investigation of the mechanisms of redress which could be utilised in order to obtain the most effective limitation result that will protect the spirit and purport of the 1996 Constitution.

Chapter 5 concludes the research study, offering suggestions as to the most effective measures of redress for hate speech perpetrations in South Africa. It draws on international, foreign and local experience to constructively formulate a suggested legislative framework for South African hate speech limitation through criminalisation.

²⁷ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁸ Draft Prohibition of Hate Speech Bill 2004.

1.4 Research rationale: A possible *lacuna* in hate speech regulation

Protected speech consists of forms of speech and expressions as contemplated in section 16(1) and is subject to reasonable constraints in terms of general limitation clauses and if applicable ‘internal or special limitations’ whereas unprotected speech consists of forms of speech and expression that fall outside constitutional protection as a result of internal modifications.²⁹

The general limitation clause in section 36 protects right bearers from arbitrary and unconstitutional limitation of rights.³⁰ Section 16(2) represents a modified model of freedom of expression which affirms that the constitutional drafters were of the opinion that the right to freedom of expression can and should be limited.³¹ A detailed analysis of this assumption follows in chapter 2.

Constitutional protection is therefore not extended to the forms of expression listed in section 16(2) and Currie and De Waal are of the opinion that ‘[l]egal restrictions of speech falling into one of these categories are not limitations of freedom of expression and will require no justification’ in terms of section 36.³² This means that once rights are modified they have been limited. These rights are then not protected by the constitution and the fairness test of the general limitation clause set out in section 36 will not apply. Should the legislature limit forms of section 16(2) expression the right to freedom of expression will not be infringed. Limitation of hate speech as contemplated in section 16(2)(c) is therefore deemed justifiable and does not represent a limitation of freedom of expression. The limitation is rather found in the modification of section 16. Currie and De Waal are correct in their interpretation that no justification in terms of

²⁹ Teichner n 25 2.

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

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.’

³¹ Teichner n 25 1. Rights can be afforded without limitation (limitable by general limitation clauses), internally modified/demarcated or with ‘special limitations’ which limit the right textually and from inception. Demarcations are synonymous with internal modifications: It is a textual qualification found within a declaration that affords the rights which distinguishes and defines the scope of the right.

³² Currie & De Waal n 12 372.

section 36 is needed for the limitation, which supports the presumption of a *lacuna* in hate speech regulation.

The internal modifier placed on freedom of expression in section 16(2) distinguishes the types of expression that are not constitutionally protected. The modification in section 16(2)(c) does not bar hate speech from inception nor does it criminalise hate speech through a ‘special limitation’.³³ Hate speech has therefore been left open for further more stringent forms of limitation. The need for legislative intervention and ultimately criminalisation is analysed in chapters 3 and 4.

Judicial interpretation of freedom of expression defines the boundaries of the right.³⁴ In South Africa this currently takes place at the hand of the constitution, common law remedies and legislation such as PEPUDA, which imposes a civil liability for hate speech perpetrations. If these remedies are insufficient safeguards against the negative effects of hate speech this is confirmation that there is a *lacuna* which should be filled with alternative forms of limitation. This question will be analysed in chapter 2 and answered in chapter 4 of this study. The writer attempts to establish that a *lacuna* exists in the South African common law remedies and that current legislation dealing with hate speech is insufficient, thereby affirming the need for further criminalising legislation.

1.4 Research design

1.4.1 Research approach

In section 39(1) of the 1996 Constitution the drafters of the Constitution made it clear that:

1. When interpreting the Bill of Rights, a court, tribunal or forum

³³ Teichner n 25 2. When a form of expression is not barred from inception it means that it is still possible to express oneself in that manner (it is not a crime *per se*) but the specific expression cannot claim constitutional protection when it imposes on the rights of others. In a rights balancing process no value will be attached to such a form of expression.

³⁴ Botha *Statutory Interpretation: An Introduction for Students* 4th ed (2005) 65.

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b. must consider international law; and
- c. may consider foreign law.

As a result, in any analysis of rights it is mandatory to consider international law instruments and it is left open as an option to consider foreign law in order to arrive at a definitive answer on the debated question. When investigating freedom of expression one should begin with an analysis of the two opposing theoretical continuums: Those who conservatively oppose absolute freedom of expression (libertarianism)³⁵ *versus* those who promote freedom of expression absolutely (absolutism).³⁶ These viewpoints are discussed in detail in chapter 2.

Bearing section 39(1)(c) of the 1996 Constitution in mind, Canada, Germany and Kenya were selected as foreign libertarian comparatives and the United States of America (USA) was selected as an absolutist opposite. The Canadian Charter serves as a good liberalist comparative for the South African model in that its general limitation clause, found in section 1, is similar to section 36 of the South African Constitution.³⁷ The German Basic Law serves as an excellent conservative liberalist comparative since it is a model that is internally modified in its section 5(2) construction of freedom of expression, which is correlative to the South African section 16.³⁸ In addition, Germany shares a historical background of rights abuses with South Africa. Kenya is selected as African libertarian comparative sharing historical and cultural parallels with South Africa.

The USA espouses the opposing absolutist view, with an unmodified model of freedom of expression and no over-riding general limitation clause. The USA's long-standing history of litigation on freedom of expression has been helpful in this study by throwing light on the interpretation of difficult concepts and supplying guidance for specific applications. In order to

³⁵ McDougal & Littell *Webster's High School Dictionary* (1986) 516. Definition derived from libertarian, libertine and liberty.

³⁶ Nelson n 24 3.

³⁷ The Canadian Charter of Rights and Freedoms 1982.

³⁸ Basic Law for the Federal Republic of Germany (as amended by the Unification Treaty of 31/08/1990 and Federal Statute 23/09/1990). An example of this internal demarcation approach can be found in art 5(2), which limits the right to freedom of expression as follows: 'These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.'

give adherence to section 39(1)(b) of the 1996 Constitution, generally applicable international law will be analysed. This comparative study follows in chapter 3.

The current and proposed legislative measures such as PEPUDA and the DHSB are scrutinised in chapter 4. Judicial decisions on the remedies afforded by the Constitution, PEPUDA and the common law are studied in order to affirm the existence of the *lacuna* in hate speech regulation. Based on South Africa's libertarian predisposition as clarified in chapter 2, and drawing on the foreign and international instruments, laws and cases studied in chapter 3, a possibly effective model for legislating on hate speech is formulated. Such an analysis needs to be done to adhere to section 39(2), which mandates that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Inevitably there is a risk that political expression will change into hate speech, and occasionally into incitement to imminent violence, and at its worst into war propaganda. The question is: Up to what point should freedom of political expression be protected? When does political expression change into an unprotected and dangerous form of speech which is counter-democratic? How and when does the state limit freedom of political expression that manifests as possible hate speech? These conceptual questions will be analysed and discussed in detail in chapter 2. Once the need for limitation has been established the sociological question as to whether criminalisation is an effective measure of redress, particularly for South Africa, will be addressed in chapter 4.

1.4.2 Research methodology

The research methodology is a non-empirical study taking the form of an in-depth literature review.³⁹ The literature study includes the review of case law (international, foreign and local), books, articles, journals, Acts (foreign and local) and international human rights instruments. The researcher uses meta-analytical questioning to investigate the key debates surrounding freedom

³⁹ Mouton *How to succeed in your Master's and Doctoral Studies: A South African Guide and Resource Book* (2001) 53.

of political expression and hate speech.⁴⁰ Philosophical questioning is used to ascertain the necessity of limiting hate speech in the South African context and the possible *lacuna* evident in current common law and the legislative measures in place alongside the 1996 Constitution.⁴¹ Finally, philosophical questioning is used to investigate the optimum approach to limitation through possible criminalisation in a democratic society with reference to practical examples from international law instruments and the selected foreign law comparatives.

1.5 Conclusion

Freedom of political expression is an important mode of democratic mobilisation but a balance must be struck between protecting political expression and furthering hate speech with its inherent risk of escalation into other more serious crimes. This study aims to establish whether a *lacuna* exists within South African hate speech regulation and proposes to suggest an effective model for regulating this phenomenon while preserving the spirit of freedom of expression.

⁴⁰ Mouton n 39 54.

⁴¹ Mouton n 39 55.

CHAPTER 2

POLITICAL EXPRESSION *versus* HATE SPEECH:

Definitional analysis and the need for limitation from a constitutional law perspective

2.1 Introduction

Chapter 1 established the interaction between freedom of political expression and hate speech. The reason for the existence of freedom of expression in democratic dispensations will now be explored. The philosophies which underlie freedom of expression, identified as absolutism and libertarianism, are analysed in chapter 2 in order to aid the understanding of the probable need for the limitation of certain forms of expression.

Negative manifestations of freedom of expression such as hate speech are introduced along with the possible need for the limitation of these forms of expression. Defences for the limitation of freedom of expression, as it applies in libertarian dispensations, are studied and this is followed by a detailed analysis of the manner in which limitation can be effected.

The chapter concludes with an analysis of the need for limitation in the South African context in order to effectively regulate hate speech and its negative effects while preserving the spirit and purport of the Bill of Rights.

2.2 Theories underlying freedom of expression

Understanding legal realities begins with analysing the theories that underlie them. Absolutism and libertarianism represent the two opposite sides of the continuum and are discussed in order to gain insight into the opinions of those who oppose and those who support the limitation of certain forms of expression.

2.2.1 Absolutism

Absolutism represents a radical rightist perception that freedom of expression is the most pervasive and important human right, taking precedence over all other rights in an incontestable manner.⁴² Free speech absolutism proposes an unwavering protection for all speech.⁴³ Content, opinion or manner does not influence the presence of protection.⁴⁴ This form of radicalism proposes that ‘speech can never be regulated by the state, even in an effort to balance speech against other values’.⁴⁵

Absolutism is contradictory to the UDHR’s article 1, which states that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Declaring one individual’s right to be more important than that of another individual or the rights of society at large undermines the spirit of brotherhood. Equality of rights, which implies that all rights are equally important, is a safeguard embedded in human rights jurisprudence. At the first conference on human rights, held in Teheran in 1968 by the United Nations (UN), it was held that human rights and freedoms are ‘indivisible’ and inherently equal.⁴⁶ If equality of rights is compromised and one right is favoured above another, balancing of rights does not take place. Rather, it gives way to an attempt to give precedence to one right over others illegitimately.⁴⁷ Absolutism is in line with the individualistic notion of rights but is not entirely reconcilable with the spirit of human rights.⁴⁸

Absolutist dispensations therefore deny that there is value in limiting negative forms of expression such as hate speech in order to preserve democratic values.⁴⁹ The USA serves as an

⁴² Nelson n 24 3.

⁴³ Nelson n 24 32.

⁴⁴ Absolutists will rely on the speech/action divide to allow for limitations: i.e. if it constitutes speech no limitation is allowed but if it takes the form of conduct the law can step in and limit where it deems necessary.

⁴⁵ Nelson n 24 33.

⁴⁶ Koji 2001 (12) *Ejil* 917.

⁴⁷ Haigh 2006 (5) *Washington University Global Studies Law Review* 187.

⁴⁸ Donisthorpe *Individualism: A System of Politics* ch IX para (1998) 23.

⁴⁹ Miller *Alternatives to Freedom: Arguments and Opinions* (1995) 17.

example of pure absolutism and is studied as a foreign comparative opposite, in order to fully comprehend the intricacies of limiting freedom of expression.⁵⁰

2.2.2 Libertarianism

Libertarianism is an individualistic predisposition which advocates the dogma of free will while upholding the following ideal: Thought and actions are emancipated without moral constraint but are not separate from the societal ideal.⁵¹ Libertarianism therefore supports free expression but at the same time recognises reasons for restraint.⁵²

Thomas Jefferson stated that freedom of religion, speech and the press is tripartite and ‘whatever violates either throws down the sanctuary which covers the others’.⁵³ Cram supports this view by identifying the interconnectivity between rights and pointing to the fact that freedom of expression cannot be viewed as a stand-alone, superior right that trumps all other rights.⁵⁴ The libertarian view recognises the importance of the right to freedom of expression as it exists simultaneously with other fundamental rights and, as Jefferson stated, as a right that is at times inseparable from other rights.⁵⁵ In an analysis of rights one cannot separate and view one right in isolation; its interaction with other rights must be considered.

Libertarianism is aligned with John Locke’s naturalist perception of the right to freedom of expression.⁵⁶ Freedom of expression as a natural right is one of those rights which ‘appertain to man in right of his existence’.⁵⁷ Proponents of this construction ‘wish to put the desirability of certain liberties beyond the ups and downs of political deliberations and positive law’.⁵⁸ The naturalist perception claims that freedom of expression as an absolute right is a far-fetched

⁵⁰ Nelson n 24 3.

⁵¹ McDougal & Littell n 35 516.

⁵² Smith *Freedom of Expression and Partisan Politics* (1989) 10.

⁵³ University of Virginia Library http://etext.virginia.edu/jefferson/_quotations/jeff1500.htm (Date of use 06/06/2009).

⁵⁴ Cram *Contested Words* (2006) 1.

⁵⁵ South Africa upholds a libertarian view of freedom of expression along with foreign comparatives such as Germany and Canada. This will be analysed in chapter 3.

⁵⁶ Arnold (ed) *Ideas and Ideologies: Human Rights* (1978) 60.

⁵⁷ Paine (ed) *The Rights of Man* (1906) 24.

⁵⁸ Trager & Dickerson *Freedom of Expression in the 21st Century* (1999) 16.

ideology. Limiting freedoms does not extinguish them, but overrules them in favour of a weightier consideration.⁵⁹

Naturalism and libertarianism are interconnected with the pluralist ideology which promotes a position where free speech values political debate but at the same time applies judgment in ascertaining its boundaries.⁶⁰ Libertarianism supports limitation of freedom of expression in certain circumstances and favours the idea of balancing rights as opposed to hierarchically classifying rights.⁶¹ Libertarianism consequently acknowledges that hate speech should possibly be limited.

2.3 The need for the existence of freedom of expression

Emerson is of the opinion that freedom of expression is integral to effective governance, stable communities and self-fulfilment but at the same time complete and universal acceptance of freedom of expression is absent, which confirms the right's susceptibility to limitation.⁶² Bloustein formulates Emerson's opinion in four premises upon which freedom of expression rests:⁶³

- Freedom of expression is essential for self-fulfilment.⁶⁴
- Freedom of expression is integral to learning and development through truth discovery.
- Freedom of expression is integral in the societal decision making process.
- Freedom of expression is the glue that enables stable community formation.

Included in the third premise is the concept of the 'marketplace of ideas'⁶⁵ and the fourth premise supports the idea that freedom of expression is integral if stable democracies are to form and continue to exist.⁶⁶

⁵⁹ Benn *Human Rights – for whom and for what?* in Arnold n 56 61.

⁶⁰ Nelson n 24 3.

⁶¹ Wellington 1979 (88) *Yale Law Journal* 1105.

⁶² Emerson in O'Brien *et al The Lanahan Readings in Civil Rights and Civil Liberties* (1999) 4.

⁶³ Bloustein 1981 *Rutgers Law Review*.

⁶⁴ Nieman & Bennett *Business Management: A Value Chain Approach* (2002) 180. See Nieman's discussion on Maslow's hierarchy of needs. Maslow identified five basic needs that act as the driving force behind human behaviour. The lowest unfulfilled need acts as the main driver behind human behaviour, and the need for self-fulfilment is at the top of the hierarchy.

⁶⁵ Milton *Complete Prose Works of John Milton: Areopagitica* (1959) 491-92.

The academic father of the truth discovery school of thought is Milton, who argued as a libertarian that truth is the driving force behind freedom of expression.⁶⁷ He spoke of the ‘marketplace of ideas’ which must be freely explored to ultimately discover the truth. The ‘marketplace of ideas’ is a continuation of the economic free market system which allows for free trading of all products between market participants to stimulate economic growth and development.⁶⁸ Theoretically ‘free trading of ideas’ would result in democratic growth and ultimately self-realisation.

As Milton assumes truth to be the central premise to freedom of expression, speech that is not true can and possibly should be limited.⁶⁹ Truth is defined as a statement having the characteristic of ‘being in accord with reality’.⁷⁰ It encompasses fidelity, constancy and sincerity.⁷¹ Libertarianism that takes a consequentialist view argues that in order to justify freedom of speech it must serve a purpose and have positive consequences; if not, it should rightfully be limited.⁷² The political debate between state and citizen will aid truth discovery, which ultimately gives the citizen all the relevant information needed to make his political choices.⁷³ The importance of the political debate affirms the need for freedom of political expression, but this does not extend to hate speech.

Political expression should possibly be regarded as the most imperative form of expression as it is the citizen’s main way of communicating governmental grievances through public debate and

⁶⁶ In *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) O’Regan J affirmed the position of freedom of expression in the South African democratic dispensation by stating: ‘Freedom of expression lies at the heart of a democracy. It is valuable for many reasons including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.’

⁶⁷ Milton n 65. The marketplace of ideas is an adaptation of the economic free market system to represent a free market of ideas as formulated by Holmes in *Abrahams* n 426 and is closely connected to truth: ‘...the best test of truth is the power of thought to get itself accepted in the competition of the market, and that the truth is the only ground upon which their wishes safely can be carried out’.

⁶⁸ Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* Ch V.I (1776).

⁶⁹ Nelson n 24 35. Milton is supported where he echoes truth as the central reason for the existence of freedom of expression.

⁷⁰ Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/truth> (Date of use 18/04/2011).

⁷¹ Milton n 65.

⁷² Nelson n 24 37. Nelson explains that the ‘interest of the speaker is recognized not primarily as an end, but only instrumentally to the public interest in the ideas presented’.

⁷³ Nelson n 24 60.

vice versa the government's vehicle for communicating its mode of governance.⁷⁴ The truth argument proposed that individuals should be allowed the constant opportunity to express how they wish to be governed but that government should be at liberty to communicate its policies and procedures to its subjects sincerely. This process of reciprocal fidelity will aid the ultimate discovery of truth in the 'marketplace of ideas' and will thereby further advancement towards self-actualisation.⁷⁵

Dworkin as an absolutist opposes limitation of freedom of expression and identifies two categories of defence for freedom of expression, namely constructive and instrumental.⁷⁶ As is evident from the name, the instrumental approach sees freedom of expression as a means to an end, a vehicle that has a purpose and that can achieve something for mankind.⁷⁷ The defence is therefore structured around what freedom of expression can do for people and their development in this process of 'truth discovery'.⁷⁸ The constructive defence category proposes that freedom of expression is an integral part of being human.⁷⁹ Dworkin implies that freedom of expression builds humanness and cannot be severed from it. Through his two defences Dworkin therefore implies that freedom of expression exists because it aids human development and is an inherent part of the human condition.

As a libertarian De Spinoza affirms the need for and importance of free political expression as a channel for democracy.⁸⁰ He defends free speech with the exception of expressions that 'by their very nature nullify' the concept and spirit of freedom of expression as a human right, such as hate speech, war propaganda and incitement to cause harm.⁸¹ According to De Spinoza, hate

⁷⁴ Nelson n 24 58. Nelson steers away from the narrow approach of absolutists. Libertarians are of the opinion that a 'representative sample of people's opinions rather than the expression of each individual opinion' is needed in democracy. This is in line with the realistic approach that libertarians take with regard to freedom of expression and is based on the consideration that it is virtually impossible to collect the opinion of each individual.

⁷⁵ Nieman & Bennet n 64 181. Self-actualisation can only be achieved once all other lower-level wants and needs are satisfied. Freedom of expression will therefore not be regarded as the most imperative position for the majority of individuals who are still moving through the hierarchy of needs, developing towards self-actualisation as the ultimate desire.

⁷⁶ Currie & De Waal n 12 361.

⁷⁷ Currie & De Waal n 12 360.

⁷⁸ On the basis of an analysis of John Locke's writings, Locke is identified as an instrumental defender of free speech as his opinions reflect the view that free speech helps man to achieve his purpose and ideals.

⁷⁹ Anonymous <http://www.guardian.co.uk/media/2006/feb/05/religion.news> (Date of use 08/06/2009).

⁸⁰ De Spinoza *A Theologico-Political Treatise* (1951) 259.

⁸¹ De Spinoza n 80 259.

speech is demeaning and undignified speech which undermines the self-development of the audience and therefore cannot be protected by the law.⁸² This view proposes that self-actualisation is achieved through positive expression that adds societal value and aids truth discovery.

Libertarianism promotes the equal protection of the self-actualisation of both the audience and the speaker.⁸³ Langa DCJ embeds this view in South African law in *Islamic Unity*, warning against absolute freedom of expression under the guise of political emancipation which could result in societal demise and inequality in rights.⁸⁴ Equality of rights aims to avoid the contradictory position where the self-actualisation of one right bearer (the speaker) trumps the self-actualisation of another right bearer (the audience), a situation which represents the absolutist sentiment of the USA.⁸⁵ Self-actualisation as a defence for freedom of expression is inherently ill-conceived and contradictory as it claims to be important for one right bearer (the speaker) at the expense of another right bearer (the audience).

Freedom of political expression is regarded as a cornerstone civil liberty in democratic dispensations.⁸⁶ Political expression is needed to mobilise democratic development and to aid the advancement of a nation's political process.⁸⁷ Van der Westhuizen identifies the protection of public morale as an integral and essential part of a functioning democracy.⁸⁸ Negative speech such as hate speech which adversely affects public morale could therefore be interpreted as being counter-democratic. Absolutism almost proposes that freedom of expression embodies the entire democratic ideal but libertarianism offers a more balanced view, taking cognisance of the fact that freedom of expression is 'accompanied by statements of other fundamental rights and freedoms'.⁸⁹

⁸² De Spinoza n 80 260.

⁸³ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

⁸⁴ *Islamic Unity Convention* n 83.

⁸⁵ *Reno v American Civil Liberties Union* 117 S. Ct. 2320 (1997) 2351. 'The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproved benefit of censorship'.

⁸⁶ Harer & Harrell *People for and Against Restricted or Unrestricted Expression* (2002) introduction.

⁸⁷ USAID Policy 1991 *Directorate for U.S. Agency for International Development* Washington, D.C. 20523 8.

⁸⁸ Van der Westhuizen in Van Wyk n 10 271.

⁸⁹ Cram n 54 1.

Freedom of expression is therefore seen as part and parcel of democratic values but does not represent democracy in its entirety. However, both libertarianism and absolutism affirm the value of freedom of expression in democratic dispensations. What differentiates the two is the fact that absolutism proposes no limitation whereas libertarianism does propose a limitation; they both base their argument on the need to preserve democracy. This tension must be analysed in detail in order to identify whether there is a need to limit certain forms of expression.

2.4 Negative forms and manifestations of free political expression

The constitutional drafters have identified hate speech, war propaganda and incitement to imminent violence as negative forms of speech that are not constitutionally protected in section 16(2). For the purposes of this research study, a link is made between freedom of political expression and hate speech with possible incitement to cause harm because the nature of political expression makes it susceptible to being transformed into one of the 16(2)(c) forms of unprotected speech.⁹⁰

Braun is of the opinion that defining hate speech is a cumbersome and virtually impossible task.⁹¹ The language used to express this so-called hate may conceal ‘related concerns in the package of a singular goal’ and if classified as hate speech in its entirety, it can easily be subjected to governmental censorship bias.⁹² This content analysis problem, which is due to the often ‘troublesome mix’ of expressions that is included in the package, is best left to the courts to unravel.⁹³ Hate speech can only be identified if it is read in context, taking all the facts and circumstances into consideration. Legislating on and defining hate speech clinically seems a virtually impossible task when it is removed from its context. This is a strong argument against the criminalisation of hate speech.⁹⁴ Judicial interpretation of the common law remedies, read with the constitutional modification of the right to freedom of expression in section 16(2), is offered as a plausible alternative to hate speech criminalisation but it is unclear whether the

⁹⁰ As a result of the content of political expression along with the emotion and tension that accompanies this type of communication the possibility of it becoming hate speech and incitement to violence is very real.

⁹¹ Braun n 21 95.

⁹² Braun n 21 95.

⁹³ Braun n 21 96.

⁹⁴ Braun n 21 96.

current common law remedies offer sufficient cause of action.⁹⁵ Without cause of action and effective guidance as to what exactly it is that the courts are guarding against the alternative becomes diluted.⁹⁶

Another problem that is part of the hate speech issue is that of time and circumstance.⁹⁷ Subject matter that injured and caused harm to people immediately after the fall of apartheid may now no longer aggrieve recipients of the message, or alternatively, cause exponential injury.⁹⁸ Injuries are ‘time and circumstance dependent in political practice’.⁹⁹ The interpretation process therefore needs to be dynamic and take all the facts and circumstances into account along with the constantly evolving societal *boni mores*.

All forms of political expression do not constitute hate speech and political expression has a pivotal role to play within the political process.¹⁰⁰ It is ‘precisely because of its *content*’ that political expression is so necessary and total exclusion is not feasible.¹⁰¹ It can be said that ‘freedom of political expression has never been fully realized in practice’ owing to the continued modifications and limitations imposed on it.¹⁰² Limitations are, however, pivotal in order to avoid circumstances which are counter-democratic and do not take cognisance of dignity, freedom and equality.¹⁰³

Heyman is of the opinion that hate speech has limited value even if it is a form of political speech, as it usually victimises specific individuals and is not expressed for the greater good of society.¹⁰⁴ The only value that can be seen in such types of expression is the marginal value that it has for the self-development of the expresser, albeit negative development. This type of speech

⁹⁵ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC) para 437.

⁹⁶ A recent upsurge in hate speech cases in South Africa attests to the lack of clear guidance and prohibitive measures: See *Afriforum* n 471, *Strydom* n 368, *Chetty v Durban University of Technology* (1/2007) [2008] ZA KZHC 15 as examples.

⁹⁷ Braun n 21 96.

⁹⁸ Braun n 21 96.

⁹⁹ Braun n 21 96.

¹⁰⁰ Anonymous 1967-1968 (66) *Michigan Law Review* 1044.

¹⁰¹ Delgado 1982 (17) *Harvard Civil Rights-Civil Liberties Law Review* 1044.

¹⁰² Emerson n 62 4.

¹⁰³ Smith *The Reader's Companion to U.S Women's History* (1999) 146.

¹⁰⁴ Heyman *Hate Speech and the Constitution* (1996) xx.

is usually channelled towards a marginalised group of individuals and it discourages their political interaction. Hate speech is furthermore destructive and contrary to the ideals of human rights as it infringes the core right of dignity.¹⁰⁵ Heyman therefore argues that if speech does not have ‘positive value’ it should not be able to claim constitutional protection.¹⁰⁶

When the original deliberators had to decide on how to formulate the UDHR, all of the proposals for the formulation of the right to freedom of expression ‘contained limitations which had been framed as permissive rather than obligatory’.¹⁰⁷ The reason for this is the need to preserve democracy while understanding that there is a constant imminent risk that certain types of political expression can take on the form of war propaganda, hate speech or incitement to imminent violence, among other forms of negative expression.

After hate speech the second possible negative manifestation of free political expression is war propaganda. In article 20(1) of the International Covenant on Civil and Political Rights (ICCPR), war propaganda is prohibited through legislative measures made mandatory in the hands of the sovereign legislatures in article 20(2).¹⁰⁸ Smith argues that this inclusion is of ‘paramount importance to the realization of the purposes of the UN itself’.¹⁰⁹ The main purpose of the UN is the protection of international peace. The *travaux préparatoires*, the antecedent to the UDHR and ICCPR, viewed penal provisions as the ‘most suitable and perhaps the only effective means’ to achieve the prohibition of war propaganda, which is internationally regarded as destructive conduct.¹¹⁰ The manner and form of limitation are left open to each sovereign state.

A third possible negative manifestation of free political speech is incitement to imminent violence. Braun makes it clear that ‘social incitement’ is a valuable ingredient in the recipe for a democratic society.¹¹¹ This form of expression clarifies the intensity and depth of the discontent which helps to define a political position and social stance.¹¹² The South African model does not

¹⁰⁵ *Islamic Unity Convention* n 83 para 10.

¹⁰⁶ Heyman n 104 xl.

¹⁰⁷ Kearney *The Prohibition of Propaganda for War in International Law* (2007) 102.

¹⁰⁸ International Covenant on Civil and Political Rights (1966).

¹⁰⁹ Smith *Textbook on International Human Rights* 2nd ed (2005) 289.

¹¹⁰ Smith n 109 134.

¹¹¹ Braun n 21 205.

¹¹² Braun n 21 205-3

deny the value of provocative social talk, but places communication that incites to imminent violence outside the protection of the 1996 Constitution.

The concept of a constitutional crime now warrants attention.¹¹³ Currie and De Waal are of the opinion that section 16(2)(b) cannot be interpreted as a sanction to criminalise speech that incites violence.¹¹⁴ The 1996 Constitution does not in any way criminalise unprotected speech. Under current South African law the aftermath of the speech, if manifesting in actual acts of violence, could constitute crimes such as malicious injury to property, assault or murder etc. The modification in section 16 indicates that there is scope for further limitation and in consequence the option of criminalisation is available to the legislature.

When political expression incites the masses to take action and mobilise themselves towards a greater political ideal, such speech should be protected. When it does so accompanied by instigation to commit violent acts, the libertarian view is one of disallowance. The very nature of political expression makes it susceptible to becoming one of the three previously mentioned forms of unprotected speech. Emerson's analysis that freedom of political expression is an integral part of the political process is correct. His absolutist opinion stating that:

No matter what dangers may arise from permitting full freedom of expression they can scarcely justify the resolution of our problems by repression and force. But imagination and resourcefulness will be required to realize the full potentialities of political freedom under existing conditions of modern times...¹¹⁵

is regarded as counter-democratic. By ignoring the menace that often hides within the content of political expression, a state runs the risk of anarchy or sponsored minority oppression.

¹¹³ The notion that a constitution can criminalise an action is what the researcher has termed a constitutional crime. This is not widely advocated. The nature of a constitution is rights based loaded with protections and a constitution is not necessarily the same as other Acts of parliament which set out rules for conduct criminalising certain actions.

¹¹⁴ Currie & De Waal n 12 374.

¹¹⁵ Emerson n 62 2.

2.5 Defences for limiting freedom of expression in libertarian dispensations

The following three defences for the limitation of freedom of political expression that manifests as hate speech are identified:

- the harm principle
- the offence principle
- naturalism and its 'social contract' theory¹¹⁶

Harm involves a 'perception of injury' and may be either physical or mental. It generally causes damage or loss to another.¹¹⁷ Mill argued that liberty and the power to rule are two competing forces but that one cannot exist without the other.¹¹⁸ He is of the opinion that absolute freedom in the liberty of expression is imperative for societal discourse, a view which almost equates to absolutism.¹¹⁹ His libertarian orientation is, however, reflected in the construction of his harm principle, which states that there is only one legitimate reason to exercise power over a member of a civil community and that is to prevent harm to the other members of the society.¹²⁰ Limitation is therefore in order if it prevents injury or damage to another which could take the form of either mental or physical harm.¹²¹

Feinberg as a libertarian is of the opinion that not only harm but also offence should act as a restricting factor when it comes to hate speech.¹²² Offence includes elements of 'annoyance, displeasure, or resentment' and is less severe than the injury implied by harm.¹²³ Offence can entail an affront or insult but does not necessarily go as far as to cause damage. Feinberg formulated his offence principle somewhat more conservatively, stating that the harm principle is not exhaustive and too open in its formulation, allowing too much freedom.¹²⁴ Varying degrees of limitation should therefore apply and should be correlated with the degrees of

¹¹⁶ Heyman n 104 xlvii.

¹¹⁷ Legal definitions <http://definitions.uslegal.com/t/threat-of-harm/> (Date of use 16/04/2011).

¹¹⁸ Mill *On Liberty* (1978) 3.

¹¹⁹ Plato quoted in Mill n 118 4.

¹²⁰ David & Mill <http://plato.stanford.edu/entries/freedom-speech/> (Date of use 15/06/2009) 9.

¹²¹ Plato in David & Mill n 120 9.

¹²² Feinberg in David & Mill n 120 8.

¹²³ The Free Dictionary <http://www.thefreedictionary.com/offence> (Date of use 16/05/2011).

¹²⁴ Feinberg in David & Mill n 120 8.

encroachment.¹²⁵ If harm has been caused to another person, the extent of the limitation should be greater than if mere offence was present.

Pinto agrees with this approach, arguing ‘that some claims of offence to feelings boil down to a struggle for equality in the public sphere between competing cultural identities’.¹²⁶ This implies that offence can be seen as an identifier of feelings of inequality. Cultural identities can vary from religious to ethnic or even to sexual preference groups.¹²⁷ Each of these cultural identities therefore has their own ‘way of life’ which causes a struggle when their identities are balanced against that of another cultural group.¹²⁸ Rights need to apply equally and consistently in order to achieve the ideology that underlies human rights: It befalls man because he is man.¹²⁹

Feinberg therefore aligns himself with conservative libertarianism, believing limitation for the sake of the audience’s rights is just as important as freedom is for the sake of the speaker’s self-actualisation.¹³⁰ This principle is difficult to apply in practice and is best used at the hand of the objective reasonable person test, as different people are offended by different things and oversensitivity, ‘bigotry and unjustified prejudice’ could hamper its implementation.¹³¹

As a naturalist Hobbes was of the opinion that reciprocity in recognition is the basis for societal formation.¹³² The very premise behind the ‘social contract’ is to escape the original point of ‘universal hostility’ by state governance in order to avoid societal destruction as a result of

¹²⁵ Feinberg in David & Mill n 120 8.

¹²⁶ Pinto 2011 (31) *Oxford Journal on Legal Studies* 1.

¹²⁷ Culture is defined as ‘ways of life’ and can include a language, forms of expression, thought patterns, spiritual and value systems along with social celebrations, Roshan Cultural Heritage Institute <http://www.roshan-institute.org/474552> (Date of use 16/04/2011).

¹²⁸ See n 127 1.

¹²⁹ UDHR n 8 preamble.

¹³⁰ Feinberg in David & Mill n 120 lists a number of elements that have to be in place before limitation of the right can take place:

- The speech must violate someone’s rights in an unlawful and serious manner.
- The speech must be universally ostracised with a negative emotional connotation.
- Criminalising legislation must be practicable, carrying a lenient punishment.
- The test for the offence should be the balancing of rights (i.e. weighing).

¹³¹ Feinberg in David & Mill n 120 8.

¹³² Heyman n 104 xlv.

competition.¹³³ The protection of hate speech is an absurd notion within Hobbes's perception of society:

The expression of hatred or contempt for others, or the refusal to acknowledge their equal status of rights, violates fundamental principles of natural law by making the establishment of peace and society between them impossible.¹³⁴

As hate speech arises from hostility it cannot be protected when a naturalist view of fundamental rights is supported.¹³⁵ John Locke advocated the disallowance of hate speech, albeit indirectly, in his *Letter Concerning Toleration* of religious freedom.¹³⁶ Legal protection of hate speech as a form of political expression would therefore not be in line with a naturalistic orientation of the law and should be denied.¹³⁷

Heyman gives three reasons why hate speech is not a defensible form of speech and should be limited in terms of the naturalist argument: Firstly, hate speech violates the requirement of respect for others that is a central premise within the 'social contract' theory.¹³⁸ Secondly, the injuries caused by malicious hate speech outweigh the value that hate speech has as political speech¹³⁹ and, finally, hate speech violates the duty of recognition that each citizen incurs as a result of the 'social contract' which puts him in the position of both ruler and ruled.¹⁴⁰

When viewed from both a naturalist and a libertarian perspective, there is a clear need to limit certain forms of expression and the ways in which limitation can be effected will now be investigated.

¹³³ Heyman n 104 xlvii.

¹³⁴ Heyman n 104 xlix.

¹³⁵ Heyman n 104 xlix.

¹³⁶ Heyman n 104 xlix.

¹³⁷ Heyman n 104 xlix.

¹³⁸ Man is endowed with freedom of political expression for the purpose of deliberating on matters that demand a decision by society. Within such a communitarian perception of freedom of expression, slurring and demeaning hate speech is not acceptable.

¹³⁹ As hate speech in itself encroaches upon a variety of other rights such as equality and dignity, its value is diminished to something that is counter-democratic.

¹⁴⁰ As the 'social contract' implies both rights and duties, one cannot claim the one without at the same time adhering to the other.

2.6 Ways in which freedom of expression and specifically hate speech is limited

A natural consequence of rights entitlement is rights enjoyment.¹⁴¹ The actual application of rights entitlement is far more complex as limitation is inevitable when other right bearers enter the equation.¹⁴² The inevitable clash of rights, due to numerous right bearers interacting with one another, calls for the process of limitation within a societal structure and this requires compromise.¹⁴³

Five ways in which limitation of freedom of expression can be achieved have been identified:¹⁴⁴

- general limitation clauses embedded as a safeguard in documents regulating human rights
- internal modifiers¹⁴⁵
- constitutional balancing of rights¹⁴⁶
- states of emergency
- human duties¹⁴⁷

This section will analyse freedom of political expression and hate speech limitations at the hand of the five elements listed above.

¹⁴¹ Domat *The Civil Law in its Natural Order* (2008) 472.

¹⁴² Sumner *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004) 5.

¹⁴³ Sumner n 142 6.

¹⁴⁴ Waiver of rights is a possible sixth way in which rights can be limited. The formulation of the basic rights of man, UDHR confirms the majority opinion that human rights can't be subject to waiver at any point in time. Oliver JA in a dissenting judgement to *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) held that waiver of rights is indeed possible, identifying this as another form in which rights can be limited by stating that 'waiver of a right is a limitation thereof'. Currie & De Waal n 12 39 are of the opinion that this form of limitation could exist but it is not explored further in view of its contested nature.

¹⁴⁵ Synonyms for internal modifiers are demarcations, clawback clauses (within the African rights jurisprudence) and constitutional exclusions.

¹⁴⁶ Seleane M "Freedom of expression: A comparative analysis" conference article for presentation at a South African National Editors' Forum (Sanet), the South African Human Rights Commission (SAHRC) and AR conference 1. Balancing of rights is a process of weighting the importance attached to two or more opposing/conflicting rights.

¹⁴⁷ Within a naturalist perception of human rights there is a corresponding human duty for each human right and occasionally a duty regardless of rights existence.

2.6.1 General limitation clauses

None of the rights and freedoms afforded in the 1996 Constitution or other human rights documents is absolute.¹⁴⁸ The boundaries to individual rights are set by the rights of others and governmental freedoms afforded in the ‘social contract’ of a society.¹⁴⁹ Within this ‘social contract’ some examples of factors that can legitimately limit a human right or freedom are the rights of others, the protection of adolescence and the greater good of society at large.¹⁵⁰

General limitation clauses are clauses that allow limitation of the absolute free application of rights in order to preserve democracy, balance, peace and social cohesion.¹⁵¹ Within the sphere of models of limitation, one finds a one-stage model or a two-stage model.¹⁵² What is characteristic of a two-stage model, such as the Canadian and South African models, is the idea that there is a ‘possibility of setting limits to rights’ which are afforded within the document itself.¹⁵³ In the Canadian Charter rights and freedoms are made subject ‘only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.¹⁵⁴ During the first stage the question is whether or not the right exists and, concurrently, what the scope of the right entails.¹⁵⁵ The conceptual question would therefore be whether the right to freedom of political expression exists and what the extent of free political expression is. Therefore what the first stage does is to ascertain the character and scope of the right that is protected, establishing a safeguard of protection around the right.¹⁵⁶

The second stage only comes into play once the first stage has identified a possible infringement. The second stage involves ascertaining whether this identified interference is justifiable in the

¹⁴⁸Currie & De Waal n 12 360.

¹⁴⁹ Kleyen & Viljoen *Beginnersgids vir Regstudente* 3rd ed (2002) 2.

¹⁵⁰ Dworkin *Taking Rights Seriously* (1970) ch 7. Dworkin is of the opinion that rights are there to protect the minority who find themselves in the weakest bargaining position, against the decisions of the majority made for the so-called greater good of society.

¹⁵¹ Van der Schyff *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005) 10.

¹⁵² Van der Schyff n 151 10.

¹⁵³ Van der Schyff n 151 11.

¹⁵⁴ See n 37.

¹⁵⁵ Van der Schyff n 151 11.

¹⁵⁶ Van der Schyff n 151 12.

light of the limitation rules.¹⁵⁷ If justifiable, the limitation is in order and the scope of the right is diminished but if the infringement is not justifiable redress can be sought.¹⁵⁸

What the second stage would imply for freedom of political expression is that an answer should be sought to the following question: Is the law enacted justifiable within a free and open democratic society? Section 36 of the 1996 Constitution is a good example of this two-stage model and is partly based on the Canadian decision in *R v Oakes*, where the Canadian court explained the two-stage model as firstly a guarantee of the rights afforded and in the second stage the criteria for the justification of limitation of those rights.¹⁵⁹ In *Islamic Unity*¹⁶⁰ the Constitutional Court (CC) made it clear that political expression will be subject to the limitation as provided in section 36(1) but not hate speech as it falls outside the constitutional protection of ‘dignity, equality and freedom’ afforded in section 36 in terms of the scope limitation demarcated in section 16(2).¹⁶¹ Currie and De Waal agree that hate speech can be limited from the onset as it is not covered by the section 36 general limitation clause.¹⁶²

A one-stage model, of which the US Constitution is an example, does not make provision for the distinction between ‘justified and non-justified interferences’.¹⁶³ A distinctive feature of this model is that it does not allow for limitation. The question whether the infringement was justifiable does not arise as the premise is simple: Interference is violation.¹⁶⁴

Baker explains the distinction between one-stage and two-stage models as follows:

Those “absolutists” who reject limitation assert that the central task is to determine the content of fundamental rights. This task, of course, involves consideration of the rationale for or the justifiable

¹⁵⁷ Currie & De Waal n 12 167.

¹⁵⁸ Van der Schyff n 151 12.

¹⁵⁹ *R v Oakes* (1986) 1 SCR 103.

¹⁶⁰ *Islamic Unity Convention* n 83.

¹⁶¹ General limitation clauses are usually applied to all rights afforded protection in the Bill of Rights. As internal modifiers place limitations on rights in their base form/remove them from constitutional protection, general limitation clauses do not apply to the modified portion anymore and the requirements for further limitation are much less stringent.

¹⁶² Currie & De Waal n 12 372.

¹⁶³ Van der Schyff n 151 12.

¹⁶⁴ Nelson n 24 60.

meaning of the right. In contrast, those who accept limitation assert that the appropriate legal inquiry must include consideration of other societal interest unrelated to the rationale of the right.¹⁶⁵

Within the South African two-stage model the societal interest that must be borne in mind is that of ‘dignity, equality and freedom’. This is embedded in the 1996 Constitution as a result of South Africa’s historical realities. The question thus becomes whether the infringement is justifiable in ‘an open and democratic society based on human dignity, equality and freedom’.

One is next confronted with the relationship between general limitation clauses and internally modified rights. Section 36 of the 1996 Constitution functions as an overriding control check for limitations where rights are not internally demarcated as opposed to, for example, the German Basic Law, which does not contain a stand-alone limitation clause,¹⁶⁶ but which attaches internal mini-limitations to each specific right.¹⁶⁷ Based on the analysis above, in South Africa, once the right is limited through an internal modifier such as section 16(2) it is no longer protected by the general limitation clause.

Currie and De Waal’s interpretation was affirmed by the CC in *Islamic Unity* in the statement that regulation of expression can go beyond the three types of negative speech mentioned in section 16(2) only if this intrusion is in line with section 36(1).¹⁶⁸ The Broadcasting Committee’s stringent regulations did not survive the limitation test and the CC found it to be an unjustifiable infringement of freedom of political expression under section 16(1). The CC went on to call for legislation that would help tailor the borders of hate speech stipulating what is allowed and disallowed within the ambit of freedom of expression.¹⁶⁹ This call for legislation clearly acknowledges the *lacuna* left by the section 16(2) exclusion of certain forms of expression which will be addressed in detail in chapter 4.

¹⁶⁵ Baker *Limitation on Basic Human Rights – A View from the United States* (1986).

¹⁶⁶ Cohen & Deng *Masses in Flight* (1998) 2. These authors identify the fact that all human rights treaties permit the inclusion of general limitation clauses which allow for the lawful restriction of rights (save for states of emergency) but which must at the same time be democratically indispensable.

¹⁶⁷ Currie & De Waal n 12 165.

¹⁶⁸ *Islamic Unity Convention* n 83 para 30.

¹⁶⁹ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 (3) SA 345 (CC) para 29. The Court called for ‘a provision which is appropriately tailored and more narrowly focussed’ confirming the *lacuna* and South African pro-legislation predisposition.

2.6.2 Internal modifiers

Teichner distinguishes between internal modifiers and ‘internal or special limitations’.¹⁷⁰ Internal limitations provide a way of limiting the right from its origin, whereas internal modifiers place the action outside the scope of constitutional protection, as is the case with section 16(2). Internal modifiers entail possible rights curtailments that are written into the text of the document that grants the right.¹⁷¹ An internal modifier therefore sets the scope of the right whilst a special limitation is similar to the general limitation clause but applies solely to a specific right.

Heyns is opposed to the use of demarcations and proposes that the right should exist freely without prior restraint, offering rights balancing as a sufficient answer to effective limitation.¹⁷² If the construction of the right is limited by a special limitation Teichner is of the opinion that limitation in terms of a general limitation clause cannot apply.¹⁷³ Teichner does not address the question whether general limitation clauses still apply to internally modified rights, as discussed above.

In *Islamic Unity* the CC was clear in its analysis that section 16(2) merely sets ‘the boundaries beyond which the right to freedom of expression does not extend’.¹⁷⁴ Thus section 16(2) places certain forms of freedom of expression outside the realm of constitutional protection but does not limit the right of freedom of expression by, for example, disallowing all forms of hate speech through constitutional criminalisation. Further limitations placed on such forms of expression are left open for direction by the legislature; the need for this will be analysed in chapter 4.¹⁷⁵

Seleoane is of the opinion that even if a person engages in expression that advocates hatred, but which at the same time does not incite anyone to violence, such expression will still be protected by the 1996 Constitution.¹⁷⁶ Van der Schyff opposed this opinion, agreeing with Currie and De

¹⁷⁰ Teichner n 25 1.

¹⁷¹ Goolam 2006 (39) *CILSA* 333. Goolam affirms that the internal modifiers in section 16(2) of the South African Constitution place certain forms of expression outside the protective ambit of the right of freedom of expression.

¹⁷² See Heyns in Evans & Murray (eds) *The African Charter on Human and Peoples’ Rights* (2004) 140.

¹⁷³ Teichner n 25 1.

¹⁷⁴ *Islamic Unity Convention* n 83 para 10.

¹⁷⁵ *Islamic Unity Convention* n 83 para 10.

¹⁷⁶ Seleoane n 146 2.

Waal, and arguing that the section 36 limitation clause applies to section 16(1) only and not to 16(2). He identifies rights balancing as the most effective manner to conclude limitation.¹⁷⁷

2.6.3 Balancing of rights

The balancing of rights involves analysing the content of rights, the contextual importance of the rights and the application of the rights. It implies a weighing process in which the interests of two different parties are weighed up against one another.¹⁷⁸ It can involve the same right of two or more different individuals/institutions being compared and balanced or the balancing of two different rights of two or more individuals/institutions against one another.¹⁷⁹ The latter applies most commonly to freedom of political expression and entails the ‘tension among the rights’, which is both ‘inter- and intra-rights’.¹⁸⁰

Each balancing of rights is therefore an indirect limitation on the rights involved in the analysis. Seleane is of the opinion that the Vienna Declaration suggests that first prize is to make all rights work together.¹⁸¹ A practical example of rights balancing can be found in *National Media*, where dignity and freedom of expression had to be balanced against each other.¹⁸² Freedom of expression was upheld in this defamation case and the strict liability of the press offence was obliterated, balancing freedom of expression against dignity.¹⁸³ The pronouncement disproves the fear that dignity will always trump freedom of expression in South Africa’s cultural connection. This pronouncement does not in any way create some form -of pecking order which puts freedom of expression above other rights and all the facts and circumstances of each case will be decisive in determining whether a rights limitation is in order. As a rule no right weighs more heavily than another.

¹⁷⁷ Van der Schyff n 151 11.

¹⁷⁸ Banisar http://wbi.worldbank.org/wbi/Data/wbi/wbicms_/files/drupal-acquia/wbi/Right%20to%20Information%20and%20Privacy.pdf (Date of use 17/04/2011) 24.

¹⁷⁹ Seleane n 146 2.

¹⁸⁰ Seleane n 146 2. Inter-rights tension implies the tension that exists between the two or more rights being balanced against each other such as the dignity rights of the audience against the right to freedom of expression of the speaker. Intra-right tension implies the tension that exists within one right such as freedom of expression that is modified in terms of section 16(2) in the 1996 Constitution.

¹⁸¹ Seleane n 146 2.

¹⁸² *National Media Ltd v Bogoshi* 1998 (4) SA 1196.

¹⁸³ *National Media* n 182 at reasons for finding.

2.6.4 States of emergency

Seleoane identifies states of emergency as a fourth means of limiting the right to freedom of political expression.¹⁸⁴ According to section 37 of the 1996 Constitution, certain rights can be limited if the state of emergency calls for such action.¹⁸⁵ A list of non-derogable rights can be found in section 37(5), which does not include the right to freedom of expression.¹⁸⁶ During the apartheid era the South African government was quick to use states of emergency as an escape clause for the benefit of the apartheid agenda when government policies were opposed.¹⁸⁷ As far as freedom of political expression is concerned, section 37 remains contentious and susceptible to abuse. When the opposition's voice becomes too loud a government can easily silence its opposition through manipulation of the system by declaring a state of emergency.

Limitation in the ordinary sense and limitation in states of emergency should be distinguished from one another. When compelling and legitimate reasons exist, a general limitation clause provides an opportunity for the government to restrict and curb certain rights through legislative measures.¹⁸⁸ In states of emergency the reality takes on a different form and in order to protect the 'life of the nation' extraordinary measures may be necessary.¹⁸⁹ Government is then empowered to impose greater restrictions in order to protect the Republic against threats. States of emergency should only ever be declared when absolutely necessary. According to section 37(1)(a) this is in times of general insurrection, war, public disorder, natural disasters and public emergency. Political upheaval can easily be construed as general insurrection when it threatens to upset the *status quo* of the current government and it is in these times that freedom of expression should arguably be most protected. The right of protest is central to the democratic ideal and there will always be a loophole for governmental abuse if freedom of expression is not a guaranteed right during states of emergency.¹⁹⁰

¹⁸⁴ Seleoane n 146 3.

¹⁸⁵ Seleoane n 146 2.

¹⁸⁶ Section 37 list of non-derogable rights: Equality, dignity, life, freedom of person, slavery and servitude, a number of children's rights and the rights of arrested, detained and accused persons.

¹⁸⁷ Currie & De Waal n 12 801.

¹⁸⁸ Currie & De Waal n 12 802.

¹⁸⁹ Steiner *et al International Human Rights in Context* (2008) 389.

¹⁹⁰ Seleoane n 146 3 and Currie & De Waal n 12 801.

It is true that states of emergency can be declared in times of political liberation where the right to freedom of political expression is imperative to attain the revolutionary goal.¹⁹¹ The theoretical question whether political expression should have been included in the section 37(5) list of non-derogable rights is a suitable subject for a separate study.

2.6.5 Human duties

Rights do not exist without duties.¹⁹² In the sphere of private law subjective rights always have duties as their opposite pole as a result of the subject-object relationship that is embedded in private law.¹⁹³ In the field of human rights law, this logical form of reciprocity is diminished. The academic sphere of legal philosophy offers the greatest insight into duty as a form of limitation. Raphael is firm in his opinion that human 'rights bear a clear relationship to duties'.¹⁹⁴ His view is rooted and originates in the 'social contract'.¹⁹⁵ The 'social contract' illustrates the operation and rationale of human cooperation within a society.¹⁹⁶ The concept of human duty is firmly embedded within the natural rights ideology which has a major influence on politics, which is the antecedent to the law.¹⁹⁷

Human duty is therefore defined as the reciprocal duty of respect that a right bearer incurs as a result of rights entitlement.¹⁹⁸ Minogue believes that human duties exist even in the absence of a contra-weight human right because a 'moral, if not legal' duty of respect rests on right bearers.¹⁹⁹ If the Hobbesian 'original position' is adopted a state is required to produce and maintain the reciprocities needed for the effective functioning and maintenance of rights and duties.²⁰⁰ This can only be achieved by the imposition of laws.

¹⁹¹ Luttwak *Coup d'etat: A Practical Handbook* (1979) 38 and 137.

¹⁹² Van der Vyver *Die Beskerming van Menseregte in Suid-Afrika* (1975) 414.

¹⁹³ Kleyn & Viljoen n 149 118 - 119.

¹⁹⁴ Raphael *Political Theory and the Rights of Man* (1967) 50.

¹⁹⁵ Kleyn & Viljoen n 149 2.

¹⁹⁶ Kleyn & Viljoen n 149 2.

¹⁹⁷ Minogue *Natural rights, Ideology and the Game of Life* in Arnold C n 56 17.

¹⁹⁸ Declaration of Human Duties and Responsibilities (1998).

¹⁹⁹ Minogue n 197 18-1.

²⁰⁰ Minogue n 197 18-2.

These duties of respect therefore limit the right bearer's completely free enjoyment of rights. Citizens have duties towards one another and these duties become a natural limitation on the right to freedom of political expression.²⁰¹ Declarations of rights are therefore 'duties of benevolence' which were designed to aid the poor and marginalised and improve the situation of those in weak bargaining positions when compared to the state and other right holders.²⁰² As this form of limitation is based on self-restraint it is unlikely to be consistently effective. Human rights application is flawed when it allows individuals to claim rights while at the same time ignoring the duties that accompany the right entitlement.²⁰³

2.7 Conclusion

South Africa follows a libertarian model of freedom of political expression, promoting the value of such expression but at the same time being protective over all right bearers and society as a whole. There are four main arguments for the existence and protection of freedom of political expression, namely the democratic ideal, the search for truth, self-actualisation and the free 'marketplace of ideas', which are encompassed within the South African libertarian view.

If a naturalistic interpretation of freedom of expression is followed, limitation is deemed the natural consequence of rights entitlement. Justification for the limitation of freedom of political expression is to be found in the harm principle, the offence principle and naturalism itself. Secondary to these are factors such as the protection of minorities in weak bargaining positions, social cohesion and the negative value of certain forms of expression. Within a libertarian dispensation it is clear that limitation of hate speech is mandatory and not discretionary.

As limitation is deemed both allowable and necessary in South Africa, the manner in which limitation can take place was discussed and identified as general limitation clauses, internal modifiers, rights balancing, states of emergency and human duties.

²⁰¹ Benn in Arnold n 56 68.

²⁰² Benn in Arnold n 56 69.

²⁰³ Wasserstrom in Arnold n 56 79.

The *lacuna* in South African hate speech regulation was affirmed in *Islamic Unity* and will be analysed in detail in chapter 4. As a young democracy with growing instances of hate speech manifestations under the guise of free political expression, South Africa will need to seek guidance from international law and foreign comparatives in order to find an effective solution to the hate speech problem.

CHAPTER 3

COMPARATIVE LAW:

International support for the limitation and criminalisation of hate speech

3.1 Introduction

Section 39 of the 1996 Constitution mandates the consideration of international law and suggests an analysis of foreign law when dealing with Bill of Rights interpretations. As South Africa has a relatively short constitutional tradition it is important to seek foreign law guidance on how to approach the limitation of a right from comparatives with a long-standing history of limitation of freedom of expression.²⁰⁴

This chapter analyses the need for criminalisation of hate speech from an international law perspective. It examines the international perception of hate speech and ascertains whether limitation is internationally acceptable. It then investigates the international position on criminalisation at the hand of the various instruments selected for study. The distinction between the duty to prohibit and the duty to punish will be discussed, drawing guidance from various international law instruments. It answers the question whether it is possible to criminalise hate speech effectively.

A comparative analysis of foreign constitutions focusing on Germany, Canada and the USA is undertaken to ascertain the position of freedom of political expression and hate speech within the respective dispensations, utilising their constitutions and case law. Insight is gained into the respective legislatures' inclination towards the criminalisation of certain forms of speech by an investigation of legislation enacted in response to hate speech. The African position on hate speech is supported by an analysis of Namibia and Kenya and the shortcomings in their hate speech legislation as Africa's hate speech legislation in totality is young and developing.

²⁰⁴Oosthuizen & Russo "A Constitutionalised perspective on freedom of artistic expression" 2001(21) *South African Journal of Education*

Inferences are then drawn as to what might be an effective manner in which to criminalise hate speech in South Africa.

3.2 Freedom of expression in international law

The existence of the right to freedom of political expression within the international arena is indisputable. This section analyses relevant international instruments and then focuses on the instruments of Europe, America and Africa in order to gain insight as to the most effective manner in which to limit hate speech.

3.2.1 Universal

The right to freedom of expression is entrenched in the UDHR as an unqualified human right. There are no internal modifiers or demarcations that textually restrict this right. Limitation by law is allowed in terms of article 29(2) if it is to ‘secure due recognition and respect for the rights and freedoms of others’.²⁰⁵ Morality, public order and the general societal welfare are listed as reasons for possible limitation. The UDHR does not define hate speech or other forms of negative speech, neither does it propose criminalisation but it allows for the limitation of all rights if this is in the interests of society at large. This provision indirectly implies a duty to prohibit negative speech.

The ICCPR in article 19 grants every person the right to uphold opinions without interference.²⁰⁶ Its construction confirms the definitional boundaries of freedom of expression in that it includes

²⁰⁵ UDHR n 8 article 19 ‘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’.

²⁰⁶ ICCPR n 108 article 19:

- (1) ‘Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;
 - (a) for respect of the rights or reputations of others;
 - (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.’

written, oral, artistic or any other communication medium of choice, thereby extending the application beyond mere speech. Article 19(3) confirms the human duty as a result of the rights entitlement, thus allowing limitation through the duty that the right bearer incurs as a result of his interaction with other right bearers. The ICCPR clearly states that the right shall be limited only by necessary legal provisions.²⁰⁷ A number of instances that warrant the limitation of freedom of expression are identified in article 19 of the ICCPR as follows: Respect for the rights of others; protection of national security; protection of public order; protection of public health; and protection of the good morals of society.

Article 20 further limits the right to freedom of expression by disallowing war propaganda and hate advocacy, incitement to discrimination and incitement to imminent violence.²⁰⁸ This correlates with the 1996 Constitution's codification of the right to freedom of expression in section 16(2). Article 19 guarantees freedom of expression and article 20(2) 'imposes an obligation to restrict speech'.²⁰⁹ When dealing with forms of expression that are possibly limitable, the question is whether limitation of freedom of expression is necessary based on the five instances that warrant limitation in terms of section 19 or whether it could be limited because it is classified as an article 20 form of expression that is not a guaranteed freedom. Article 19 refers to the human duty as discussed in chapter two by using the phrase 'special duties and responsibilities'. It states that the right to freedom of expression may only be limited 'as provided by law'.²¹⁰

In *Robert Faurisson v France* the Human Rights Commission (HRC) found that Faurisson's denial that gas chambers had been used during the Holocaust fell 'precisely within the boundaries of article 20, paragraph 2'.²¹¹ Even though it did not meet the strict criteria of

²⁰⁷ By including article 19(3) in the construction of the right to freedom of expression the drafters of the instrument made it clear that the right is not unrestricted and should possibly be limited in certain circumstances. The choice whether or not to limit the freedom is left with the sovereign legislatures of each individual contracting party.

²⁰⁸ ICCPR n 108 'Article 20:

(1) Any propaganda for war shall be prohibited by law.

(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

²⁰⁹ Mendel <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf> (Date of use 26/03/2011).

²¹⁰ ICCPR n 108 article 19.

²¹¹ *Robert Faurisson v France* CCPR/C/58/D/550/1993(1996) U.N. Doc par 4.

incitement it was held to fall within a category of hate speech which historically spread religious and racial hatred and amounts to hate advocacy.²¹² This very narrow interpretation is indicative of the international view that hate speech should be strictly dealt with and limited through the use of criminalising legislation.²¹³ Hatred that is not coupled with incitement and elements of harm but is merely an emotional state is, however, regarded 'simply an opinion and is thus absolutely protected under international law'.²¹⁴ International law consequently remains respectful of the right to freedom of expression but aware of the dangers of inciting hate speech.

Care should be taken not to be overzealous in legislation encroaching on the right to freedom of expression as a whole. France contended that in 'order to avoid making it an offence to manifest an opinion ... the legislature chose to determine precisely the material element of the offence'.²¹⁵ France only criminalised 'the negation' or denial of Holocaust practices in order to protect the sanctity of freedom of expression.²¹⁶

Laws enacted should be in accordance with the requirements of article 20. Here a good example is to be found in the Canadian Criminal Code, which prohibits public and wilful incitement of hatred.²¹⁷ In *Malcolm Ross v Canada* a Christian teacher's anti-Semitic publications (albeit outside his profession as a teacher) were found to be a violation of the rights of Jewish people and rights balancing gave the definitive answer.²¹⁸ The Committee held that 'freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others'.²¹⁹ Rights balancing was affirmed as the best measure for limitation, coupled with legislation that clearly defines boundaries.

²¹² Icelandic Human Rights Centre <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/complaintsprocedures/> (Date of use 31/05/2011) 1. The HRC has jurisdiction to hear complaints from individuals or member states of the European Council who have ratified the ECHR.

²¹³ Mendel n 209 9.

²¹⁴ Mendel n 209 9.

²¹⁵ *Robert Faurisson* n 211 para 4.2.

²¹⁶ *Robert Faurisson* n 211 para 4.3.

²¹⁷ The Canadian Criminal Code R.S.C. 1985 c. C-46.

²¹⁸ *Malcolm Ross v Canada* CCPR/C/70/D/736/1997 (2001) U.N. Doc.

²¹⁹ *Malcolm Ross* n 218 para 11.8.

The construction of articles 19 and 20 of the ICCPR leads to the question whether there is a difference between the sovereign state's duty to prohibit hate speech and its duty to punish hate speech. The duty to prohibit simply implies the limitation position; when political or other expression takes on the form of hate speech it should be limited to protect the rights of others, public order *etc.*²²⁰

When a duty rests on a state to punish hate speech it implies the call for criminalisation, as is evident from article 2 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD)²²¹ and article 2 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).²²² Criminalisation is implied because without clear direction on how to punish perpetrators the duty to punish might be breached or the boundaries of reasonable punishment overstepped.²²³ As the type of racial discriminations envisioned by ICERD are usually induced and spread through the expression of extreme emotions such as hate, a link is made between hate speech and racial discrimination.²²⁴ This applies equally to the gender discrimination defined in CEDAW, which correlates with section 16(2)(c), where 'advocacy of hatred that is based on...gender' is left unprotected.²²⁵

²²⁰ Spector 2002 (10) *Miami Int'l & Comp L Rev* 1.

²²¹ International Convention on the Elimination of all forms of Racial Discrimination (1965).

²²² Convention on the Elimination of all forms of Discrimination Against Women (1979) article 2 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:... (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;'

²²³ In *Jersild v Denmark* 36/1993/431/510 (1994) para 28 the ECHR held that when legislating in terms of article 4 of ICERD 'a fair balance had to be struck between the "protection of the reputation or rights of others" and the applicant's right to impart information'. This confirms the international view which is in favour of legislating against hate speech. More importantly it solidifies rights balancing as the most effective manner in which to structure hate speech legislation.

²²⁴ ICERD n 221 article 1 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

²²⁵ As with racial discrimination there is a risk that discrimination against woman can take the form of hate speech which could promote violence, gender inequality and sex-related crimes.

See UN <http://www.ohchr.org/EN/ABOUTUS/Pages/DiscriminationAgainstWomen.aspx> (Date of use 07/05/2011).

ICERD imposes a duty on those sovereign states that choose to ratify the treaty to legislate against racial discrimination.²²⁶ ICERD and its provisions extend to hate speech falling within the ambit of section 16(2)(c) of the 1996 Constitution but only to ‘advocacy of hatred that is based on race [and] ethnicity’. South Africa as a signatory to ICERD is therefore obliged to use legislative measures to curb this form of discrimination (if other appropriate measures are not sufficient) and should restrict hate speech indirectly if and where manifestations of racial discrimination take the form of hate speech.²²⁷ The duty to prohibit hate speech is therefore less cumbersome than the duty to criminalise hate speech, as criminalisation is an extremely complex process. Prohibition can be brought about by less restrictive means such as the imposition of civil liabilities but the state’s duty to punish is effected by a criminal sanction.²²⁸ A careful balance must be struck between punishment for deviant speech and limitation through criminalisation that exceeds the bounds of fairness.²²⁹

Based on an analysis of these international instruments it is clear that both treaties and case law interpretation call for criminalisation of hate speech as a form of negative speech. An international duty therefore rests on state signatories to protect citizens against the negative effects of hate speech, using legislation where necessary.

3.2.2 Europe

The European Convention on Human Rights (ECHR) sets out the position regarding freedom of expression on the European continent.²³⁰ Article 10 is similar in construction to articles 19 and 20 of the ICCPR but in addition it mentions that the guarantee of freedom of expression does not

²²⁶ ICERD n 221 article 2 ‘undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:... (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;’

²²⁷ Thornberry www2.ohchr.org/english/issues/opinion/articles_1920_iccpr/docs/expert_papers/Thornberry.doc (Date of use 15/05/2011) 3 and 9.

²²⁸ Broecker http://works.bepress.com/christen_broecker/2 (Date of use 15/05/2011).

²²⁹ *Zana v Turkey* 69/1996/688/880 (1997) Council of Europe: European Court of Human Rights (ECHR) para 26. The ECHR would not find a contravention of the right to freedom of expression based on a broad construction like ‘an act punishable by law as a serious crime’ or the ICCPR’s general construction of a threat to national security here termed ‘endangering public safety’. This shows that the international view on hate speech legislation is that it must be clear, concise and specific and cannot be constructed overbroad.

²³⁰ European Convention on Human Rights (1950).

detract from each sovereign government's choice as to whether licensing should be required for mass media communication.²³¹ Again, this right is not left open and the duty it imposes on each right bearer is emphasised by highlighting a number of factors that may legitimately limit the right.²³² Article 10(2) implies a need for criminalisation in its construction, making free speech 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law'.

The German Basic Law follows a two-stage model of limitation in its section 5 construction of freedom of expression:

(1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.

(3) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.²³³

Section 5(1) correlates with section 16(1) of the 1996 Constitution as it constructs its definition of expression to include more than mere speech, extending it to written and pictorial representations. The inclusion of the phrase prohibiting censorship protects the importance of freedom of expression and is in line with Nelson's view that the 'direct act of censorship by a government body in the form of prior restraint on publication' hinders the free availability of political facts.²³⁴ The inclusion of the prohibition against censorship affirms the importance of freedom of information and allowing unhindered political debate as it prohibits government from silencing its critics and opponents. In addition, it avoids the situation where a government can manipulate the information that is disseminated to its subjects.

²³¹ ECHR n 230 art 10 '10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

²³² Article 10(2) of the ECHR confirms the fact that the right to freedom of expression incurs for the bearer a human duty and certain responsibilities which are made subject to national legislation, formalities and penalties prescribed in the various democratic societies in which the right bearer finds himself. Following the ICCPR the ECHR identifies a number of factors that would allow for legitimate limitation of the right but expands its list to include: National security and territorial integrity; prevention of crime and protection of the impartiality of the judiciary.

²³³ See n 48.

²³⁴ Nelson n 24 44.

Section 5(2) mentions ‘personal honour’ as a right that could possibly trump freedom of expression along with the protection of the youth and general limiting legislation. Section 5(3) is again reminiscent of the 1996 Constitution in its reference to the spirit and purport of the Bill of Rights in making freedom of expression subject to loyalty to the German Basic Law. Section 5(2) therefore emphasises the duty to protect against forms of expression that in essence violate the rights of others. Section 19 in its restriction of rights, acting as a general limitation clause, disallows arbitrary laws in section 19(1) and in section 19(2) it clarifies that ‘in no case may the essence of a basic right be affected’ during limitation.

In order to give adherence to section 5(2), sedition²³⁵ is criminalised under the German Criminal Code in section 130.²³⁶ Any form of publication of hatred against any members of a group of society or any incitement to imminent violence or incitement to defamation is disallowed even if perpetrated outside the German borders.²³⁷ The German crime of sedition places boundaries on freedom of expression by disallowing the disturbance of public peace and the incitement of hatred through violence or arbitrary measures directed against a specific racial, national or religious group.²³⁸

In section 130(2) a fine or imprisonment for up to three years could follow if a person propagated hatred against the above mentioned groups or against an individual because of their membership of such a group. Section 130(4) imposes the same sanction on anyone who in public or in a meeting approves of, supports or glorifies National Socialist tyranny.

The manner in which the German legislature criminalised sedition speaks of a strong cultural connection with the two World Wars and is evidently an attempt to proscribe forms of expression that could provoke a recurrence of these atrocities.²³⁹ There is an obvious connection between the crime of inciting National Socialist tyranny and Hitler’s Nazi regime. The following guidelines for criminalising hate speech can be derived from section 130:

²³⁵ *Volksverhetzung* in English equates to sedition, which means subversion or incitement to rebellion.

²³⁶ The *Strafgesetzbuch* is the German Criminal Code - *Strafgesetzbuch*, StGB 1998.

²³⁷ See n 236 s 130(1).

²³⁸ See n 236 s 130(2).

²³⁹ Brugger <http://www.germanlawjournal.com/article.php?id=212> (Date of use 21/06/2009) para 4.

- Legislation should draw an obvious distinction between what is allowed and what is disallowed.
- Legislation should define what constitutes hate speech within the specific cultural context.
- Legislation can be geared towards prohibiting a recurrence of specific manifestations of hate speech which are likely to be linked to history and the nation's cultural connection.
- Sanctions imposed should be unmistakably stipulated.

Holocaust denial and apartheid practices regarding racial superiority share certain characteristics: Hate, perpetration of violence, inequality and the denial of dignity. Both represent known historical events with a hate speech connection that had detrimental historical consequences and a close cultural connection exists today in the current interpretation of forms of expression that are linked to these concepts. The German Basic Law's has a great reserve for personal honour and limits freedom of speech when faced with 'internal enemies' that could destroy democracy.²⁴⁰ This is indicative of conservative liberalism, allowing for a more restrictive approach to negative forms of expression.²⁴¹ The German position is similar to that of South Africa in that its cultural connection implies an emphasis on the right to dignity as a result of the historical denial of the right for certain marginalised groups.²⁴² From the German construction it is clear that the duty to protect against hate speech cannot be separated from the duty to punish the perpetrators. There is limited sociological value in saying that people are not allowed to do something without saying what the consequences of the perpetration would be.

In the *Irving* case the German Court displayed a conservative libertarian view on freedom of political expression.²⁴³ Holocaust denial as a form of freedom of political expression was disallowed and constitutional protection was not extended to this form of speech.²⁴⁴ The limitation was effected based on the premise that Holocaust denial equates to false facts and false facts are not protected speech in German law.

²⁴⁰ Internal enemies are those who support socialist tyranny and today represent neo-Nazism.

²⁴¹ Kahn 2006 (83) *U. Det. Mercy L. Rev.* 163.

²⁴² Krotoszynski 2004 (78) *Tulane Law Review* 1549. The German term *ehre* is used to denote honour or dignity.

²⁴³ *Irving v Lipstadt* BVerfGE 90, 241, 247, Decision of 13 April 1994, Auschwitz Lie Case at 625.

²⁴⁴ *Irving* n 243.

Mahoney is of the opinion that racially charged hate speech is ‘illegitimate speech and is properly subject’ to legal restraints within the broader international community.²⁴⁵ Her libertarian predisposition supports the German view on legislating against certain forms of racial, ethnic or religious hate speech. Krotoszynski argues that it might be possible to endorse some form of hate speech regulation but on a miniscule scale.²⁴⁶ The German legislature has, however, affirmed Mahoney’s libertarian position in the rigorous inroads it has made into political expression manifesting as hate speech by means of criminalising legislation. This legislation imposes a strict liability on the glorification of National Socialist tyranny which is directed at disturbing the public peace, inciting hatred, violence or arbitrary process and is expressed publically.²⁴⁷

As a result of Germany’s history the Federal Constitutional Court has reserved the right to prohibit certain activities of and expressions by political parties.²⁴⁸ As this gives the government power to regulate political opinion it opens the door for government to stifle the voice of the opposition. This is reiterated in Brugger’s statement that the message of political speech could possibly cause it to fall within the ambit of hate speech.²⁴⁹ Legislation that uses hate speech as a scapegoat to silence political expression that runs counter to the current government’s agenda is possibly the gravest danger identified in the criminalisation of hate speech. The German Federal Court has taken the stance that the self-initiated ‘communicative development’ of the individual deserves protection but so, equally, does the audience facing the brunt of this ‘communicative development’.²⁵⁰ The Federal Court therefore correctly uses the internationally supported approach of rights balancing when approaching hate speech limitation and interpretation of criminal sanctions.

A possible reason for the strict legislative measures is the fact the German Basic Law was written as a temporary emergency measure to establish a functioning government after World

²⁴⁵ Mahoney 1996 (789) *U. III. L. Rev.* 789 - 803.

²⁴⁶ Krotoszynski n 242 3.

²⁴⁷ See n 236.

²⁴⁸ Brugger n 239 para 3.

²⁴⁹ Brugger n 239 para 4.

²⁵⁰ Brugger n 239 para 5.

War II and has remained entrenched.²⁵¹ What Krotoszynski terms the ‘militant democracy’ which evolved out of and was very much influenced by its predecessor, the Nazi government, is another possible reason for the weak protection that freedom of political expression receives in Germany.²⁵² Some argue that South Africa shares this trait. During the South African democratisation that followed the two-phase multiparty negotiation process and resulted in the 1993 Constitution legislated by the government at that time, a little autocracy may have been transferred.²⁵³ Krotoszynski echoes the cultural connection in his statement that culture, history and the law can never be separated from each other as the one lives within and is born out of the other.²⁵⁴ Both South Africa and Germany have suffered heinous race/ethnic crimes in the past and in a reactive fashion there is an inclination to legislate strictly against conduct that simulates these past atrocities in order to ensure that they are not repeated.

The ‘relational view’²⁵⁵ of the German Court identifies three relationships which could stem from freedom of expression, namely reinforcement, opposition or indifference.²⁵⁶ Brugger is of the opinion that the importance given to the type of relationship is what will ultimately determine the significance attached to the speech and its content.²⁵⁷ Different forms of speech would therefore receive a ‘relational score’ which would determine the protection afforded:

When tensions or contradictions exist The speech in question may be less protected and considered to be “speech minus” or “low-value speech.” It is also possible that the expression in question will not even be considered speech in the constitutional sense at all. Legally speaking, such expressions would amount to “non-speech” unworthy of constitutional protection and easily restricted by government. An illustration of such non-speech is the Holocaust denial²⁵⁸

The message of the German Court is therefore that what is termed value speech will be protected. If the speech does not have relational value, is false or has negative value, the German

²⁵¹ See n 38.

²⁵² Krotoszynski n 242 3.

²⁵³ Napier <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=11605> (Date of use 13/06/2011).

²⁵⁴ Krotoszynski n 242 3.

²⁵⁵ The view of the German Court takes cognisance of the relationships that exist within and as a result of the rights that are attributed to a subject.

²⁵⁶ Brugger n 239 para 5.

²⁵⁷ Brugger n 239 para 5.

²⁵⁸ Brugger n 239 para 5.

Basic Law will not be as protective of it as it would be of speech with positive value. The test therefore seems to be one of societal worth.²⁵⁹ Within this contextual problem lies yet another distinction: Other forms of Holocaust speech which are used for political purposes or guilt denial do, however, receive some protection under section 5 of the German Basic Law, as these kinds of statement are not factual denials but forms of political expression.²⁶⁰

The next question that arises from this analysis is whether complete freedom of political expression actually exists in Germany. At first glance the answer seems to be negative. Section 86 and 86a of the German Criminal Code²⁶¹ prohibits the display of the National Socialist symbols, in particular the swastika, and prohibits the production of such items; this is coupled with criminal sanctions should a contravention occur.²⁶² The construction of section 86 and 86a is clearly retroactive against Nazism. If the criminalisation is viewed from a theoretical perspective it seems that free political expression is allowed as long as it is in line with the national government's ideology of democracy. If this criminalisation is viewed from the cultural connection perception, however, and seen in the light of a rights balancing perspective, the rationale behind the limitation of a particular failed kind of political expression appears to be reasonable and to be in line with conservative liberalism.

²⁵⁹ Krotoszynski n 242 3.

²⁶⁰ Brugger n 239 para 9.

²⁶¹ See the German Criminal Code n 236 s 86 '(1) Whoever domestically disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination domestically or abroad, means of propaganda:

1. of a party which has been declared to be unconstitutional by the Federal Constitutional Court or a party or organization, as to which it has been determined, no longer subject to appeal, that it is a substitute organization of such a party;
2. of an organization which has been banned, no longer subject to appeal, because it is directed against the constitutional order or against the idea of international understanding, or as to which it has been determined, no longer subject to appeal, that is a substitute organization of such a banned organization;
3. of a government, organization or institution outside of the territorial area of application of this law which is active in pursuing the objectives of one of the parties or organizations indicated in numbers 1 and 2; or
4. means of propaganda, the contents of which are intended to further the aims of a former National Socialist organization, shall be punished with imprisonment for not more than three years or a fine.'

²⁶² Brugger n 239 para 11.

Stradella identifies the rights balancing process as the ‘contentious relationship’ between hate speech and its discriminatory effect.²⁶³ Stradella proposes that the rights balancing process allows another form of discrimination to override the ‘negative discrimination’ of hate speech, manifesting as discrimination against hate speech. By equating balancing with discrimination Stradella errs in interpretation and attempts to place speech beyond the reach of limitation in an absolutist manner. Internationally, the answer to the hate speech problem seems to be a call for punitive measures.²⁶⁴ Reasons for this pro-criminalisation approach include the protection of the democratic state, the ‘struggle against discrimination’ and the need to defend the marginalised against the mobilising power of hate speech, which could ultimately result in heinous crimes such as genocide.²⁶⁵ Democracy in itself is built on the premise of competition and when a democracy transgresses the limits to protect itself against this very competition it becomes an autocracy rather than a democracy.²⁶⁶

The hate speech *versus* political expression debate is part of this problem. What Stradella has done is to identify a weakness in the democratic model. Democracies which use limitations to impose repressive measures against the opposition indirectly become oppressors of speech and defy democracy.²⁶⁷ If criminalisation of hate speech is for the protection of the individual whose dignity and equality have been scarred then theoretically limitation would be the ideal position. If, however, criminalisation is used to silence the opposition as a mechanism to preserve the current government’s rule, within the democratic ideal, this would be morally reprehensible.

I propose that criminalisation as a means to achieve rights balancing is the most effective manner to adhere to the international state duty to protect against hate speech and the duty to punish its perpetrators. In line with the German libertarian view, which purports limitation when speech has negative value, in order to preserve democracy and social cohesion it remains imperative to protect the substance of freedom of expression as a conduit of democracy while at the same time remembering the democratic goals of equality, dignity and freedom.

3.2.3 The Americas

²⁶³ Stradella 2008 *German Law Journal* 1.

²⁶⁴ See the ACHR n 270 art 13(5), ECHR n 230 art 10(2) and the ICERD n 221 art 2(d).

²⁶⁵ Stradella n 263 4.

²⁶⁶ Stradella n 263 4.

²⁶⁷ Smolla 1990 *Law and Contemporary Problems* 196.

The American Declaration of the Rights and Duties of Man (ADRDM)²⁶⁸ is a reflection of the US Constitution in its simple, open-ended construction of the right to freedom of expression.²⁶⁹ In article 13 the American Convention on Human Rights (ACHR),²⁷⁰ promulgated after the ADRDM in 1969, again confirms the importance of the right to freedom of both thought and expression.²⁷¹ Rights limitations for the purpose of national order, health and morality, along with respect for dignity, are allowed in terms of section 13(2)(b) and 13(2)(a). Prior censorship is barred but the possibility of incurring civil liability as a result of the infringement of the rights of others is left open for decision by the courts and the legislature. The instances that warrant limitation of the right are a mirror image of those listed in the ICCPR.

Section 13(5) goes beyond imposing a civil liability by further limiting hate speech by criminalising it as follows:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitement to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

²⁶⁸ American Declaration of the Rights and Duties of Man (1948).

²⁶⁹ The ADRDM defines the right to freedom of expression in Article IV as follows: 'Everyone has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.'

²⁷⁰ The American Convention on Human Rights (1969).

²⁷¹ ACHR n 270 art 13 'Freedom of Thought and Expression:

- (1) Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
- (2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) respect for the right or reputation of others; or
 - (b) the protection of national security, public order, or public health or morals.
- (3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
- (4) Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.'

The international call for the criminalisation of hate speech that incites violence and other crimes is again affirmed. For a hate speech crime to exist there needs to be causality between the incitement and the resulting harm. Section 13(3) specifically protects the right from governmental abuse and indirect silencing of the opposition through the use of mechanisms such as media censorship.

Section 2(2)(b) of the Canadian Charter represents a two-stage model of limitation and guarantees the right to freedom expression as follows:

[F]reedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;²⁷²

The Criminal Code²⁷³ and the Human Rights Act²⁷⁴ impose limitations on freedom of expression in terms of section 13(5) of the ACHR. Section 13 of the Human Rights Act restricts the use of telecommunication facilities to promote hate speech, for example through a website.²⁷⁵ Such communication must promote hatred/contempt and must be regarded as discriminatory on the basis of one of the prohibited grounds in order to qualify as a discriminatory practice which leads to grave psychological anguish.²⁷⁶ Section 13(2) does not extend the crime to broadcasting undertakings such as news stations, thereby protecting the freedom of the press. This Act does not mention incitement to violence or imminence, which means that, for example, a repeated web broadcast advocating discrimination based on race could satisfy the requirements of the Human Rights Act. This identifies a narrow construction of hate speech legislation in Canada within its libertarian view. Communication that does not serve a ‘social purpose’ in a democratic state is regarded as limitable, which mirrors Germany’s value speech approach.²⁷⁷

²⁷² See n 37 s 2.

²⁷³ See n 217.

²⁷⁴ The Canadian Human Rights Act R.S. 1985 c. H-6.

²⁷⁵ See the Human Rights Act n 274 section 13 ‘(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination.’

²⁷⁶ Canadian Human Rights Commission (CHRC) http://www.chrc-ccdp.ca/proactive_initiatives/legal_milestones-eng.aspx (Date of use 15/05/2011) para 2.

²⁷⁷ CHRC http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi_qa_qr/page1-eng.aspx (Date of use 02/04/2011).

In *Canadian Human Rights Commission v Taylor* the Supreme Court held that section 13(1) ‘was a reasonable limit on freedom of expression justified in a free and democratic society and did not violate the Charter’.²⁷⁸ As hate speech was found to undermine the dignity of an identifiable group and ‘contribute to disharmonious relations among various racial, cultural and religious groups’, in a manner which is not socially cohesive, destroys the fabric of a society and goes against equality, section 13(1) was considered to be a reasonable limitation in terms of the rights balancing approach followed by the Supreme Court. The use of the word ‘repeated’, which suggests extreme action and the fact that it implies the communication of severe hatred saved section 13 from being declared unconstitutional.

Section 319 of the Criminal Code proscribes statements that disturb the public peace, incite hatred and are likely to breach the public peace.²⁷⁹ The punishment stipulated is imprisonment for a period not exceeding two years. Five elements must be present for conviction of the crime:²⁸⁰

- Statements must be communicated expressly.
- Statements must be communicated in a public place.
- Statements must incite hatred against an identifiable group.
- Statements must be directed against an identifiable group.
- Statements made must be in such a way that they are likely to breach the peace.²⁸¹

The landmark decision is that of *R v Keegstra* which confirms advocacy of hatred against a minority group as a criminal offence.²⁸² In this case a teacher who taught Holocaust denial and advocated anti-Semitic ideas and hatred towards Jewish people was brought to justice. Dickson

²⁷⁸ *Canadian Human Rights Commission v Taylor* (1990) 13 C.H.R.R. D/435 (S.C.C.).

²⁷⁹ See n 217.

²⁸⁰ Media Awareness Network http://www.media-awareness.ca/english/resources/legislation/canadian_law/federal/criminal_code/criminal_code_hate.cfm (Date of use 02/04/2011).

²⁸¹ Defenses against a conviction are true facts, public interest, a good faith expression intended to identify hatred for the purpose of removal thereof or a good faith argument of opinion based on religion. Section 320 enables a judge, who is of the opinion that certain publications kept for circulation or sale amount to hate speech, to issue search and seizure warrants. The right to privacy is therefore indirectly made subject to the protection of the dignity and equality of those suffering under hate speech.

²⁸² *R v Keegstra* 3 S.C.R 697 (1990).

CJ identified rights balancing as the most correct approach to the limiting of rights in his statement:

The large and liberal interpretation given to freedom of expression indicates that the preferable course is to weigh the various contextual values and factors in s. 1 of the Charter. This section both guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society.²⁸³

It was held that section 319(2) represents a reasonable limit on freedom of expression, relying on the harm principle, as the harm caused by hate speech is seen as a sufficiently important reason for limitation.²⁸⁴ The section was reviewed for encroachment on the spirit of freedom of expression and it was held that it ‘does not suffer from overbreadth or vagueness’ as the clear definitional limits protects all forms of expression save for those that are ‘openly hostile’ and delimited in the Act.²⁸⁵ As the limitation is directed only at the ‘harm at which the prohibition is targeted’ it is clear that the legislation does only what is intended and is within the spirit of section 13(2) of the ACHR.²⁸⁶ The Canadian cultural connection received prominence with Dickson CJ identifying it as the ‘quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy’ where complete public participation is supported.²⁸⁷ Hate propaganda was deemed to detract rather than add to these aspirations and limitation in favour of other rights was therefore deemed appropriate and necessary.

The following guidelines for effective criminalisation are therefore identified in the Canadian context:

- Clearly defined boundaries of the hate speech offence to avoid vagueness.
- Clearly identified and specifically listed forms of expression that are deemed perpetrations in order to avoid ‘overbreadth’ in legislation.
- Clearly defined punishment for the hate speech offence.

²⁸³ *Keegstra* n 282 para 1.

²⁸⁴ *Keegstra* n 282 para 4.

²⁸⁵ *Keegstra* n 282 para 6.

²⁸⁶ *Keegstra* n 282 para 6.

²⁸⁷ *Keegstra* n 282 para 9.

- Internal limits on the hate speech offence to protect the democratic ideal.²⁸⁸

The absolutist position of the USA is very different from the Canadian libertarian view. The US government is strictly prohibited from legislating against free speech and censorship of content is frowned upon.²⁸⁹ This absolutist approach has prohibited the government from restricting hate speech and limitation is effected through common law principles such as the ‘fighting words’ doctrine which was utilised to limit freedom of political expression in *Brandenburg*²⁹⁰ and *Yates*.²⁹¹ This implies that the USA does not adhere to section 13(5) of the ACHR since it refuses to legislate against hate speech as the USA does not consider hate speech to be an ‘offence punishable by law’.

Some weak forms of legislation do exist, such as Title VII of the Civil Rights Act²⁹² which incorporates the principle of *vicarious liability* for employers who allow hate speech by their employees if it contributes to harassment in a broad sense which creates antagonistic, intimidating and distasteful working environments.²⁹³ Private universities tried to soften the hate speech blow by institutionalising codes or rules against discrimination on listed grounds.²⁹⁴ The US courts have not embraced such measures, identifying them as counter-freedom in *UWM Post*.²⁹⁵ The US absolutist predisposition protects free speech up and to the last possible point where the hate incitement is transformed into constructive action. This is in line with the possibly skewed perception that self-actualisation is ultimately achieved through expression.²⁹⁶

²⁸⁸ An example of such an internal limit is found in section 13 of the Human Rights Act n 274 guarding against encroachment on freedom of press.

²⁸⁹ Adler 1996 (84) *California Law Review* 1499.

²⁹⁰ *Brandenburg v Ohio* 395 US 444 (1969). The fighting words test can be summarised as follows: If the words incite the audience to fight with immediate effect, possible limitation is in order. Fighting words are words that when uttered, inflict injury and cause harm coupled with incitement to the imminent breach of peace.

²⁹¹ *Yates v United States* 354 US 298 (1957). In this case the US Supreme Court held that radical and revolutionary speech is in fact protected and that the test for limitation is the ‘clear and present danger’ test.

²⁹² The Civil Rights Act of 1964.

²⁹³ US Equal Employment Opportunity Commission <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (Date of use 31/05/2011).

²⁹⁴ Listed grounds include race, sexual orientation, religion, disability and national origin.

²⁹⁵ *UWM Post, Inc v Board of Regents of the University of Wisconsin System* 774 F. Supp. 1163 (E.D. Wis. 1991).

²⁹⁶ Maslow http://www.abraham-maslow.com/m_motivation/Hierarchy_of_Needs.asp (Date of use 31/05/2011) para 2. Self-actualisation as envisioned by Maslow implies that the individual will have to move through the various stages of development commencing with physical needs and ending with self-actualisation. The transfer of this concept from the academic field of psychology is criticised as the idea that self-actualisation is achieved primarily through free speech, denies the previous four phases of development which members of a society have to attain before self-actualisation becomes imperative.

The US absolutist predisposition is analysed at the hand of case law as legislation is limited and made extremely cumbersome by the First Amendment.²⁹⁷ This highlights an inherent tension with the Fourteenth Amendment as it receives unequal treatment as a right superior to other rights.²⁹⁸ Heyman defines hate speech as ‘expression that abuses or degrades others on account of their racial, ethnic, or religious identity’.²⁹⁹ He identifies three approaches to the right to freedom of expression within the scope of the First Amendment: The static position, the civil-libertarian position and the rights balance position.³⁰⁰ Because of the prohibition against defining the boundaries around freedom of political expression and hate speech, a possible fourth category of formalistic absolutism is identified.³⁰¹ Formalistic absolutism and the static position should be guarded against and are deemed counter-productive in the sense that they could illegitimately encroach on the rights of others, thereby undermining the normative nature of freedom of expression as a right. Such an interpretation could ultimately lead to erosion of public acceptance of the right.³⁰² The rights balancing approach is therefore identified as the optimum position between the two extremes of staticism and civil-libertarianism.³⁰³

Initially the US courts approached freedom of expression in a civil-libertarian fashion, as is evident from *Beauharnais v Illinois* where the court found that Beauharnais’s call on a million whites to unite against Negro invasion was in fact group libel.³⁰⁴ Limitation was allowed in order to protect public order, in recognition of the fact that in certain circumstances it may be necessary to limit freedom of expression to preserve social cohesion. The US courts have moved gradually from civil-libertarianism towards the static position with the verdict in *Brandenburg v*

²⁹⁷ The Constitution of the United States of America 1787 1st Amendment.

²⁹⁸ The 14th Amendment of the USA Constitution n 297 deals with the application of the right to equality.

²⁹⁹ Heyman n 104 xx.

³⁰⁰ Heyman n 104 xx. The static position is defined as one of maximum protection of government interests as opposed to individual freedoms. The civil-libertarian position advocates the complete protection of freedom of expression up and to the point of action that could possibly constitute other forms of crimes such as assault. The rights balancing position calls for the process of vertical rights balancing in order to arrive on a neutral ground between state interests and the individual right to freedom of speech. It should not be confused with the horizontal rights balancing which takes place when the respective rights of two individuals/legal personalities come into direct competition with each other.

³⁰¹ This view embodies the idea that repression is the natural consequence of restriction and such a state is something that must be avoided at all costs.

³⁰² Heyman n 104 xxi.

³⁰³ Heyman n 104 xxi.

³⁰⁴ *Beauharnais v Illinois* 343 U.S. 250 (1952).

*Ohio*³⁰⁵ where the court limited the ‘fighting words’ doctrine severely by reversing the guilty verdict against a cross-burning Klansman who made hateful threats towards those who suppress white supremacy.³⁰⁶

The US court’s decisions became more liberal until the absolutist approach became embedded in *Collin v Smith*.³⁰⁷ The High Court nullified ordinances that prohibited the Ku Klux Klan from marching and expressing their views in Skokie, a town that housed numerous Holocaust survivors. This indicated a decisive move towards absolutism.³⁰⁸ The victims were ignored and stripped of their dignity for the sake of the perpetrators’ sublime right to free speech. This highlights some of the risks, namely rights affronts, physiological trauma and disenfranchisement of the audience among others, embedded in an absolutist orientation.³⁰⁹ The perpetrator’s rights argument developed on the basis of this decision.³¹⁰ Supporters of this argument are of the opinion that, in the interests of democracy, freedom of political expression should be protected above and beyond the listener’s pain and free speech deserves the highest audience.³¹¹ Unlike the USA, which explicitly favours the speaker, the Canadian, German and South African dispensations try to strike the important balance between the speaker and the audience. Within this obscure reality of rights hierarchy formation it remains contentious whether true freedom exists for the full spectrum of human rights.

A refreshing break in the static trend came in *Contreras v Crown Zellerbach* where rights balancing was utilised in a case dealing with the tort of outrage.³¹² The High Court held that a Mexican American employee’s claim against his employer as a result of racial insulting and

³⁰⁵ See *Brandenburg* n 290: The US allowed limitation of free expression if the expression amounted to fighting words, obscenity or ‘the imminent danger of a grave substantive evil’. See Haupt n 309 22. This approach leaves room for abuse: If for example communism is regarded as a ‘grave substantive evil’ limitation of political expression taking on propaganda for this form of governance is possible and would allow room for a government to further its own agenda.

³⁰⁶ Greenawalt *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995) 10.

³⁰⁷ *Collin v Smith* 578 F.2d 1197 (7th Cir. 1987).

³⁰⁸ *Collin* n 307. The Ku Klux Klan is a post Civil War secret fraternity advocating white supremacy of which the prerequisites for membership are being free-born, Caucasian and American. See McDougal & Littell n 35 498.

³⁰⁹ Haupt http://128.197.26.34/law/central/jd/organizations/journals/_international_/volume23n2/documents/299-336.pdf (Date of use 31/05/2011) 22.

³¹⁰ Baez *Affirmative Action, Hate Speech and Tenure: Narratives about Race, Law and the Academy* (2002) 8.

³¹¹ Within this argument it is clear that the US system indeed subscribes to a hierarchical view of civil rights with freedom of speech at the top of the food chain.

³¹² *Contreras v Crown Zellerbach, Inc.* 88 Wash. 2d 735, 565 P.2d 1173 (1977).

embarrassing words was successful.³¹³ The Court held that ‘racial epithets which were once part of common usage’ may now not simply be viewed as merely insulting and that the deeper emotional meaning along with the effect thereof should be considered.³¹⁴ The dignity right of the employee was balanced against the freedom of expression right of the employer and more weight afforded to dignity than to hurtful freedom of expression.

In *Texas v Johnson* the Supreme Court affirmed the static position and ventured to allow that which was unthinkable at that historical point, namely flag burning and disdain for the patriotic American symbol.³¹⁵ In *R.A.V. v City of St. Paul* the Supreme Court tore down the barriers against hate speech on university and college campuses.³¹⁶ The importance of the finding lies in the fact that the Supreme Court now found the idea of ‘political correctness’ absurd and allowed for the free and open display of racially charged and offensive symbolism as an aid to the liberal democratic process.³¹⁷

From the analysis in chapter 2 and the case law studied, the following defences for absolutism have been identified:

- Self-actualisation is achieved through the ability to express oneself fully.³¹⁸
- Absolute freedom of speech and the free ‘marketplace of ideas’ must be upheld to preserve democracy.³¹⁹
- The search for truth can only be successful if through unlimited expression.³²⁰

The true value of unrestricted speech is questionable and the defences for absolutism are contradictory in themselves.³²¹ I propose that self-actualisation is achieved through the

³¹³ Delgado & Stefania *Must We Defend Nazis?* (1997) 3.

³¹⁴ *Contreras* n 312 at 741, 565 and 1174. This interpretation is mirrored in the South African case *Polakow v Radio Islam* n 455 where the effect of racially charged hate speech was interpreted as causing psychological harm which cannot be ignored by the judiciary.

³¹⁵ *Texas v Johnson* 491 US (1989).

³¹⁶ *R.A.V v City of St. Paul* 505 US 377 (1992).

³¹⁷ *Baez* n 310 37.

³¹⁸ *Gates et al Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (1993) 86.

³¹⁹ *Milton* n 65.

³²⁰ *Nelson* n 24 3.

³²¹ I criticise the above-mentioned defences for absolute free speech as follows:

- If absolute free speech is allowed and the notion of group cohesion and society is completely ignored the supporters of this view run the risk of societal demise where a society can start turning on itself in the absence of, albeit limited, regulation of speech;

enjoyment of the full spectrum of human rights. Freedom of political expression is imperative but Owen's statement that this freedom should be defended 'on a matter of principle because it is what makes people feel their lives matter' cannot be unreservedly supported.³²² The negative effects that hate speech has on the society, which the democratic ideal proposes to protect, cannot be ignored by oversimplifying a static position of non-limitation as supreme. The audience's rights cannot be ignored and the numerous checks and balances built into the democratic system should be viewed in combination in order to govern truly democratically and respect the rights of all citizens in a balanced manner.

The following guidelines for criminalising legislation have been derived from the analysis of practices in the USA:

- Legislation should identify groups that are subject to discrimination and qualify for protection (i.e. listed grounds).
- Legislation should clearly stipulate the grounds for limitation.
- The construction of the legislative measures must be protective in nature.
- The construction must take cognisance of rights balancing.
- The protection must apply generally to the group against which hate speech is directed and not only to specific individuals.

-
- Self-actualisation is a complex process and by identifying expression as the definitive element in achieving this ideal one is ignoring a the full spectrum of values, activities and processes involved in achieving this state of mind which is best explored through research done in the fields of psychology and sociology. See n 64 and n 296 for a detailed explanation of Maslow's hierarchy of needs.
 - By transferring concepts from one academic field to another without fully comprehending all the elements of the doctrine one runs the risk of corrupting an ideal. At this point it is imperative to analyse the origin of the 'marketplace of ideas'. The 'marketplace of ideas' stems from Adam Smith's concept of the wealth of nations which presupposes a free trading community to be the most effective for economic advance. The free market system does not force anyone to buy the products offered; it merely removes restraints to trade should the participants wish to voluntarily trade with one another. Within the legal field this reality is not reflected: The free 'marketplace of ideas' forces people to hear messages that they would not have wanted to, had the choice been theirs. In an economic free market, if there is a supply of apples without a correlative demand, no transaction would take place. In the 'marketplace of ideas', the buyer's choice has been eradicated by the undue absolutist protection placed on the supply of ideas. The audience (representing the buyer) does not have a choice whether to hear the message as the buyer would have in a free market.
 - Equating hate speech with truth is ill-defined. Hate is a strong emotion which often makes clear thinking and ultimate truth discovery impossible.

³²² Owen in Duncan J (ed) *Between Speech and Silence: Hate Speech, Pornography and the New South Africa* (1996) 31.

3.2.4 Africa

Except for the ADRDM, all the international human rights instruments studied so far have internally modified or demarcated the right to freedom of expression. Internationally, the right to freedom of expression is therefore regarded as limitable and not absolute. The Banjul Charter on Human and Peoples' Rights (Banjul Charter) touches on the right to freedom of expression, albeit briefly.³²³ Article 9(1) grants everyone the right to receive information. Article 9(2) ensures that all individuals must be allowed the opportunity to express and disseminate their opinions, subject to local legislation. From the outset article 9(2) therefore recognises that speech is limitable and there is a need for legislation which regulates negative forms of speech. The Banjul Charter therefore does not call for the criminalisation of hate speech but recognises the possible need for limitation.

When comparing this charter with other international instruments the question that comes to mind is; why is there so little attention to the limitation of freedom of expression in the Banjul Charter, which has a communal rather than an individualistic orientation? A possible answer to this question can be found in article 27(2) of the Banjul Charter, which provides that all rights and freedoms are only to be exercised with due regard to the 'rights of others, collective security, morality and common interest'. This article serves as a general limitation clause embedded within the Banjul Charter against which all actions must be measured.³²⁴ Freedom of political expression and hate speech would therefore have to withstand the article 27 test, which would curb hate speech as it is possibly a violation of communal interest, could be regarded as immoral, possibly threatens collective security and could ultimately be an infringement of the audience's rights to dignity and equality.

³²³ The Banjul Charter on Human and Peoples' Rights (1981) 'Article 9:

(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate these opinions within the law.'

The ANC's proposed Bill of Rights attached to the Freedom Charter burdens freedom of speech, thought, expression and opinion with the imposition on the original speaker of a duty of respect towards the right of reply (i.e. audience's rights).

³²⁴ Heyns n 172 140.

The next probable reason is found in the article 29 duty clause.³²⁵ Article 29(3) imposes a duty on each individual not to compromise state security. Article 29(4) stipulates that each individual should conserve and reinforce national harmony and section 29(7) imposes the duty on each individual to protect and support African cultural values in his or her interaction with others, which implies a spirit of tolerance. In general the duty clause requires of an individual to contribute to the promotion of the moral well being of society. Hate speech practices are contra the spirit and purport of the duty clause as they often compromise state security, separate minorities rather than preserving solidarity and add no value to societal moral well-being.

The protocol to the Banjul Charter established an African Court on Human and Peoples' Rights (ACHPR) in 2004.³²⁶ To date it has not yet ruled on hate speech and Wachira is of the opinion that the delay in justice as a result of the lengthy period it has taken to establish the court, could ultimately equate to the denial of justice.³²⁷ The difficulties surrounding the establishing of a functioning court have not gone unnoticed and progress has been made in identifying the location of a court seat, drawing up procedural rules and appointing judges, with some cases heard.³²⁸ It is possible but far from optimum to turn to other international tribunals which are not necessarily uniquely African, to gain insight into hate speech limitation from an African perspective.

The International Criminal Tribunal for Rwanda (ICTR)³²⁹ has jurisdiction to try international crimes such as genocide and incitement to genocide.³³⁰ Incitement to genocide includes all the elements of hate speech but requires an exponential furthering of the hate incitement into actions

³²⁵ Banjul Charter n 323 article 29 'The individual shall also have the duty:

1. ...
2. ...
3. not to compromise the security of the State whose national or resident he is
4. to preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. ...
6. ...
7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;

³²⁶ Banjul Charter n 323 protocol 121/2003.

³²⁷ Wachira 2008 *Minority Rights Group International* 2.

³²⁸ Wachira n 327 2.

³²⁹ ICTR <http://www.unictt.org/> (Date of use 03/04/2011).

³³⁰ U.N. SCOR (1994).

with large-scale repercussions. In *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*³³¹ documents which were filled with ethnic hatred and incitement to violence against Tutsis were found to have been produced with the intent to destroy an entire ethnic group.³³² A distinction was drawn between mere ethnocentric discussions and the wilful, active promotion of ethnic hatred.³³³ The element of discussion is not what attracted a guilty verdict but rather the incitement to action. It could be deduced that if the discussion phase is not deemed limitable under genocide crimes, the same should apply to hate speech and as a result hate discussions without incitement should be treated as pure freedom of expression and not limited at all. This identifies the grave risk of escalation embedded in hate speech which is often the antecedent to genocide. Hate speech which incites harm should be regulated in order to prohibit intensification into widespread atrocities with dire consequences. The African community awaits the ACHPR's active functioning before purely African insight into the limitation of hate speech and possible need for criminalisation will be possible.

African comparatives that have recently attempted to criminalise hate speech and share South Africa's libertarian view on freedom of speech are Namibia and Kenya. Namibia failed partially in its attempt to criminalise hate speech in the Racial Discrimination Prohibition Act section 11,³³⁴ with the High Court making a finding in *Namibia v Ester Smith and Others* that the inclusion of 'any act or thing' and 'racial group' was overly broad.³³⁵ It was held that disharmony and feelings of hostility are not always extreme emotions and are quite often encountered on a daily basis.³³⁶ The legislature's failure to clearly define the hate speech element is what ultimately resulted in the legislation not meeting the constitutional requirements set out in section 21.³³⁷

In 2007 Kenya saw 1,300 people killed as a result of hate speech messages broadcast on radio in local languages which once again affirmed the dire risk embedded within hate speech and the

³³¹ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* ICTR-99-52-T paras 5 and 18.

³³² *The Prosecutor* n 331 paras 7 and 10.

³³³ *The Prosecutor* n 331 para 10.

³³⁴ The Racial Discrimination Prohibition Act 26 of 1991.

³³⁵ *Namibia v Ester Smith and Others* CC 95/96, 27 Sept. 1996.

³³⁶ *Namibia* n 335.

³³⁷ The Namibian Constitution 1982 s 21.

need for regulating hate speech stringently.³³⁸ In section 96 the Kenyan Penal Code prohibits words that incite actions causing death/injury, damage to property or violence. Section 96 of the Kenyan Penal Code equates to the section 16(2)(b) modification of the 1996 Constitution: Incitement to imminent violence.³³⁹ Kenya's criminalisation of hate speech has been somewhat effective but not without criticism. Section 13 of the National Cohesion and Integration Act criminalises hate speech directed against ethnic groups which requires the following for a positive finding of hate speech: Public advocacy of ethnic hatred, in conjunction with intent and concurrent incitement. No requirement of imminence/likely action has been written into the text.³⁴⁰ I am of the opinion that this construction is correct and that it is also reflected in section 16(2)(c) of the 1996 Constitution. Imminent action should not be a requirement for hate speech however incitement to harm, albeit psychological or physical, is required.

Kenya has made great progress in regulating hate speech since its first referendum on the matter held in 2005. The Draft Prohibition of Hate Speech and Incitement to Hatred Bill (DHSIH) identifies the continued support for curbing hate speech as a form of negative and destructive speech. The DHSIH is criticised by Article 19, an international institution defending freedom of expression and information, as an Act with sanctions disproportionate to the crime, an unclear objective and unsure procedural safeguards.³⁴¹ The National Cohesion and Integration Act prohibits hate speech against ethnic groups but other forms of hate speech, for example gender based hate speech, is still left unregulated. The DHSIH clearly encroaches on freedom of expression, extending beyond hate speech. There is a lack of clarity in definitions and the purposes of the safeguards are ambiguous which possibly makes it inoperable. It ignores the international requirement for striking the balance between freedom of speech and hate speech limitations.

³³⁸ Pflanz <http://www.csmonitor.com/World/Africa/2010/0618/Kenya-reins-in-hate-speech-ahead-of-constitution-vote> (Date of use 13/09/2011).

³³⁹ The Kenya Penal Code 1970. Section 96 correlates to the protection offered in the Riotous Assemblies Act.

³⁴⁰ National Cohesion and Integration Act 4 of 2008. The legislature included written materials, artistic displays and elements of press releases (forms of expression that are often exempt from hate speech). This is clearly a response to prevent the reoccurrence of the 2007 atrocities and is in terms of Kenya's cultural connection.

³⁴¹ Article 19 www.article19.org/pdfs/press/kenya-article-19-recommends-amendments-to-hate-speech (Date of use 15/05/2011) 1 and Mbaaro http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1796018 (Date of Use 9/10/2011) 52.

Article 19 criticises African hate speech legislation as ‘patchwork’ legislation which varies greatly between different countries, is inherently inconsistent and is vague.³⁴² What becomes evident from the African analysis is that there is still a long walk towards effective hate speech legislation. The South African analysis will follow in chapter 4.

3.3 Conclusion

An analysis of international instruments identifies a clear call for the criminalisation of hate speech, with the exception of the ADRDM and the Banjul Charter which merely acknowledges limitation through legislation. Africa’s short history with its independent rights instruments and its duty-oriented approach to human rights, have been identified as possible reasons for this exception. The duty to prohibit hate speech and the duty to punish offences cannot be severed as very little can be achieved by unenforceable rules.

The following framework for effective hate speech criminalising legislation is proposed on the basis of the international analysis in this chapter: The law must be practicable and enforceable and must clearly define what is allowed and what is prohibited. The law must include a definition of hate speech, drawn from the specific nation’s cultural tradition. The elements of the crime must be outlined and the following framework is suggested: The statements must be made publicly; with intent; must be directed towards a defined group and must inspire violence, harm or an imminent breach of the peace. In addition, the boundaries of hate speech must be clearly defined to avoid uncertainty and vagueness. Specific forms of hate speech can be listed to provide clarity. Defences must be stipulated unambiguously and the legislation must be drafted specifically and not broadly to act as a catch-all mechanism, as this will encroach on the spirit of the right to freedom of expression. The legislation should identify rights balancing as the optimum approach to managing hate speech. The legislation should be internally demarcated to ensure the protection of democracy, the marginalised and those in a weak bargaining position. Lastly, the legislation should be drafted so as to protect both the rights of the speaker and the rights of the audience.

³⁴² Maina www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/Henry_Maina.doc (Date of use 15/05/2011).

CHAPTER 4

CURRENT SOUTH AFRICAN LAW AND CASE LAW PRECEDENT ON HATE SPEECH:

Affirming a *lacuna* in hate speech regulation

4.1 Introduction

This chapter delves into current South African common law remedies and legislation that protect against the effects of hate speech in order to affirm the *lacuna* left by the modification of section 16(2) of the 1996 Constitution. It investigates current legislation governing hate speech and the need for the possible furtherance of the limitation of freedom of expression in order to answer the international call for criminalisation of hate speech.

The South African cultural connection and the judiciary's view on hate speech limitation will be ascertained. The case law study assesses the need for furtherance of limitation of hate speech within a libertarian dispensation and investigates the risks of limitation encroaching on freedom of expression.

The fact that the general limitation clause in section 36 of the 1996 Constitution does not apply to hate speech, as discussed in chapter 2, and the risk that limitation that does not have to withstand this test could encroach on the section 16(1) protection of freedom of expression, will be addressed.

The chapter concludes by suggesting the most effective manner for South Africa to limit hate speech and its negative effects.

4.2 Unprotected speech: A need for further limitation through legislation?

The apartheid government notoriously introduced criminal sanctions for matters involving governmental opposition, resulting in a history of legislation that oppressed free speech in order

to achieve governmental agendas.³⁴³ Legislation on matters of expression remains at the discretion of each sovereign state and at the same time the risk of bias and manipulation remains evident. It is the duty of each state to take great care to preserve the democratic ideals in legislation that curbs absolute free speech.³⁴⁴

The international call for criminalisation with South Africa as the signatory to both ICERD and CEDAW further highlights the need for criminalisation of hate speech. This call, along with an increase in litigation, ineffective measures of redress and modifications to the core right to freedom of expression, is indicative of a *lacuna* in the law. However, before a *lacuna* can be established common law remedies and current legislative measures need to be analysed to ascertain whether they protect effectively and sufficiently against the negative effects of hate speech.

Each country's cultural connection is definitive in their predisposition to legislate on fundamental rights issues. The South African legislature has taken a seemingly pro-legislation approach by drafting the DHSB³⁴⁵ and promulgating PEPUDA. Haigh is of the opinion that this legislative approach is ineffective and unable to fulfil that objective.³⁴⁶ He states that 'the right to dignity [is] best preserved by eliminating such legislation' and turning to the constitutional provisions to protect and preserve.

Within a libertarian view of freedom of expression Haigh's opinion should be analysed in terms of remedies found in the common law and current legislation. PEPUDA has been offering civil redress, in addition to common law remedies, since 2000. As far as the criminal element goes, if the common law remedies are sufficient to safeguard the interests of those affected by hate speech it would eliminate the need for criminal legislation. A variety of defences against 'speech

³⁴³ Haigh n 47 1.

³⁴⁴ Dugard *International Law: A South African Perspective* 2nd ed (2004) 133. Dugard's explains sovereignty as that which 'empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states'.

³⁴⁵ In its 21/01/2000 report the *Ad Hoc* Joint Committee on Promotion of Equality and Prevention of Unfair Discrimination Bill adopted a resolution requesting tabling of legislation in line with ICERD calling for the criminalisation of hate speech offences. The Draft Bill was tabled but to date it has not been promulgated or replaced by alternative legislation.

³⁴⁶ Haigh n 47 188.

that hurts' can be found in common law remedies that include *crimen iniuria*,³⁴⁷ criminal defamation³⁴⁸ and a delict of injury to another's dignity (*injuria*),³⁴⁹ of which the first two represent criminal sanctions and the latter a form of civil redress. The act of incitement is regulated and criminalised by legislation and hate speech manifestations that fall within its ambit are indirectly criminalised.³⁵⁰

The Riotous Assemblies Act criminalises incitement and defines it in the following terms:

18(2) Any person who... incites, instigates, commands or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.³⁵¹

This seeks to prohibit anyone from instigating others to commit crimes on his or her behalf.³⁵² Under the Riotous Assemblies Act, if speech provokes people to commit offences like malicious injury to property or assault, the perpetrators of the actual acts would be guilty of a crime and the speakers/instigators could be liable and incur the same penalty as those who physically committed the criminal action. This form of redress ignores the psychological harm in hate speech and cannot be transferred to 16(2)(c) as its formulation does not specifically require physical acts or violence but merely incitement to cause harm. The Riotous Assemblies Act addresses the section 16(2)(b) exclusion of incitement to imminent violence.

Crimen iniuria is defined as 'unlawful, intentional and serious violation of the dignity or privacy of another'.³⁵³ Originally *crimen iniuria*, which entered the South African law as a defence in

³⁴⁷ Snyman *Criminal Law* 4th ed (2002) 453.

³⁴⁸ Snyman n 347 459.

³⁴⁹ Neethling *et al Deliktereg* 4de uitgawe (2002) 369.

³⁵⁰ The Riotous Assemblies Act 17 of 1956 s 18(2).

³⁵¹ See n 375.

³⁵² Snyman n 347 295.

³⁵³ Snyman n 347 453.

1908 in the case of *Umfaan*,³⁵⁴ included serious, unlawful, intentional infringements of *dignitas*,³⁵⁵ *fama*³⁵⁶ and *corpus*.³⁵⁷

When the definition of *crimen iniuria* is applied to hate speech in the South African context the discrepancy soon becomes clear. Depending on the facts and circumstances, it could be straightforward to prove that hate speech is intentional and violates the dignity rights of another. When dealing with unlawfulness the matter becomes more complex. An act is unlawful if there are no grounds of justification for the act³⁵⁸ and it is a violation of a statute, constitution or legal precedent.³⁵⁹ As there is currently no statute that criminalises hate speech in South Africa and it was not constitutionally criminalised either, there can be no violation of statute or constitution. As South Africa's history and legislative precedent dealing with hate speech are relatively young and are still developing, the last ground, namely violation of legal precedent, is also unlikely. Hate speech is unlikely to infringe *fama* as it is usually geared towards a group and not an individual's reputation. Furthermore, section 16(2)(c) does not need a *corpus* violation to be present to suffice as hate speech because psychological harm is sufficient.

The application of *crimen iniuria* to hate speech now becomes less likely and the fact that South African case law on hate speech seldom if ever turns to *crimen iniuria* as a form of redress is indicative of the difficulty in its application.³⁶⁰ This strengthens the *lacuna* argument in favour of criminalisation.

³⁵⁴ *R v Umfaan* 1908 TS 62.

³⁵⁵ *Dignitas* refers to the dignity of an individual and dignity represents a feeling of self-worth and self-respect. Dictionary.com <http://dictionary.reference.com/browse/dignity> (Date of use 23/03/2011). It represents all personality rights with the exception of *fama* and bodily integrity. See Snyman n 347 453.

³⁵⁶ *Fama* represents one's reputation and a violation of this element represents an offence of criminal defamation. See Snyman n 347 454.

³⁵⁷ *Corpus* represents the physical security of a person and a violation of this element could constitute assault and is often linked to incitement to imminent violence manifesting in physical violence. See Snyman n 347 454.

³⁵⁸ Snyman n 347 ch 1.

³⁵⁹ Hill & Hill <http://legal-dictionary.the-freedictionary.com/unlawful> (Date of use 18/04/2011).

³⁶⁰ The tests employed in these remedies are both subjective and objective. This means that the person(s) affected must both feel degraded and the reasonable person must feel it is degrading as 'mental tranquility' varies from person to person and individuals have different sensitivity tolerance levels. See Snyman n 347 456.

Criminal defamation is defined as ‘unlawful and intentional publication of matter concerning another which tends seriously to injure his reputation’.³⁶¹ Forms of hate speech such as express racism could fall within the definition of this crime.³⁶² The analysis of South African case law on hate speech which follows indicates that the state does not prosecute on behalf of the injured in terms of this common law form of redress. If the hate speech consists of unlawful expressions, made publicly, with intent and likely to seriously injure the victim’s reputation it could meet the definitional elements of criminal defamation (discussion on *crimen iniuria* applies equally). Reputation is defined as a person’s honour, community standing or good name.³⁶³ Defamation of the good name is ordinarily in the form of untruths about the specific person. It is unlikely that broad-based hate speech, such as anti-Semitic statements about Jewish people in general, will suffice this criterion.

Lastly, a delict of criminal defamation or *injuria* could be utilised to protect the injured audience against hate speech.³⁶⁴ Because the burden of proof for civil liability is only a balance of probabilities and not beyond reasonable doubt as it is for crimes, it would be easier to prove ‘the subjective feelings of an individual have been wounded’.³⁶⁵ In addition to the five elements that need to be sufficed for any delict, there must be a suspicion of *animus iniuriandi* and both the subjective and the objective test for injury would have to be met.³⁶⁶ The high cost of litigation and the administrative burden placed on individuals who avert themselves to this form of redress often makes it impracticable. It is furthermore individually focused and has a marginal deterrent effect.

To suffice the requirements of the delict, the hate speech would have to be insulting and be coupled with degrading words.³⁶⁷ Hate speech will therefore more easily meet the criteria of the

³⁶¹ Snyman n 347 459.

³⁶² Definition of criminal defamation derived from *S v Modus Publications (Private) Ltd* 1998 (2) SACR 151 (ZSC) par 154 h-i.

³⁶³ Hill n 385.

³⁶⁴ The elements of this delict comprise both insult and the use of degrading words which pass the subjective dignity test and are *contra bonos mores*. See Neethling n 349 370 and 380.

³⁶⁵ *De Lange v Costa* 1989 (2) SA 857 (A) para 862.

³⁶⁶ Neethling n 349 381.

³⁶⁷ The elements of a delict are voluntary conduct, wrongfulness infringing a legally recognised interest, fault albeit intentionally or negligently, accountability of mind and causality between the action and harm caused. See Searle http://www.jgs.co.za/pages/publications/litigation/litigation_1.html (Date of use 19/04/2011).

delict of *injuria*. The common law therefore extends aid to the hate speech audience in the form of civil redress. The protection afforded in PEPUDA is similar and the *lacuna* in hate speech prohibition remains. The fact that the delict of *injuria* will apply to hate speech in an overarching manner does not negate the need for criminalising legislation, which is necessary for a young democracy in need of guidance on managing sensitive issues such as hate speech.

In *Strydom v Chiloane*³⁶⁸ the High Court acknowledged the importance and applicability of the common law remedies as forms of redress, stating that there is ‘no bar against the respondent instituting action against the appellant for redress based on a claim of *injuria*’.³⁶⁹ The High Court held that calling a person a ‘baboon’ suffices the hurtful requirement of section 10 of PEPUDA, which equates to the use of the common law remedy of *injuria*.³⁷⁰ The fact that two remedies (legislative and common law) offer the same theoretical results affirms the current gap in hate speech regulation and the need for criminalisation.

The high cost of litigation, delays in process and clear definitions minimising interpretive bias are some of the factors that would promote the use of legislation as opposed to having recourse to common law forms of redress.³⁷¹ The presumption that process is easier when clearly defined legislation is in place is debatable and it is held that common law remedies are possibly as effective as legislation. The same delays that might occur when using common law remedies can occur with legislation. The argument that clear definitions minimise interpretation bias is correct. Developing a precedent without clear guidelines can be cumbersome, lead to error and significantly expand the scope of the law if foreign law has to be used to find precedent.

The following reasons affirming the *lacuna* in the South African law regarding hate speech have been identified: Firstly, the common law remedies are not specifically tailored for use in hate speech litigation and general in nature. This makes application in hate speech cases very burdensome and time consuming. Secondly, the increasing occurrences of hate speech litigation are an indication of the importance of the right to freedom of expression but also of the injurious

³⁶⁸ *Strydom v Chiloane* 2008 (2) SA 247 (T).

³⁶⁹ *Strydom* n 368 para 12.

³⁷⁰ Kok 2009 (24) SAPR/PL 652.

³⁷¹ Janofsky 1979 (65) *ABA Journal* 1323.

effect of hate speech, for which the nation is seeking redress.³⁷² In the third place, South African society views hate speech as something negative and counter-democratic. The fourth reason is that the common law delict of *injuria* overlaps with PEPUDA and such private litigation comes at a high cost, which could cause justice to be delayed or totally denied.³⁷³ In the fifth place, South Africa is a young developing democracy in need of guidance on how to protect its subjects from the injurious effect of hate speech.³⁷⁴ A sixth reason affirming the *lacuna* is the tabling of the DHSB, which indicates that the legislature regards hate speech as a crime and that it has been identified and placed on the legislature's agenda as a subject in need of addressing. A seventh reason is the section 16(2) modification affirming that the constitutional drafters have identified hate speech as limitable beyond section 36. Lastly, the *lacuna* is affirmed by the international call for criminalisation which was discussed in detail in chapter 3.

4.3 Current South African legislation on hate speech

The criminalisation question is very delicate as a sensitive balance must be struck between defending freedoms and fundamental rights promoting the spirit and purport of the Bill of Rights on the one hand and protecting against injustice on the other. The analysis in chapter 2 affirmed that hate speech, as a form of unprotected speech, is not afforded the umbrella protection of the section 36 general limitation clause. Limitation through legislation against hate speech in its pure form would therefore not be subject to the justifiable limitation test. When legislation prohibiting hate speech is overly broad and unduly restrictive there is a risk that the legislation could be declared unconstitutional in terms of section 36. Such legislation could encroach upon the section 16(1) forms of protected speech, which automatically re-enters it into the list of categories that are subject to the general limitation clause. The ideological aspiration within hate speech prohibition, which is to eliminate discrimination while protecting dignity and equality by guarding against the negative effects of hate speech, always bears the risk that certain democratic freedoms might have to be sacrificed.³⁷⁵

³⁷² Plato in David & Mill n 120 4.

³⁷³ Janofsky n 371 1323.

³⁷⁴ This guidance should be sought, in terms of section 39, from international law (CEDAW and ICERD *et al*) which indicates a strong pro-criminalisation approach and could be sought from foreign law comparatives such as Canada and Germany, which have both taken legislative steps to criminalise hate speech.

³⁷⁵ Haigh n 47 187.

4.3.1 PEPUDA

In 2000 PEPUDA was enacted to give effect to section 9 of the 1996 Constitution. Its preamble states the following:

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

It also acknowledged its duty to promote equality under both ICERD and CEDAW, which are ‘binding treaties and customary international law’.³⁷⁶ The definitions found in section 1 do not define hate speech *per se* but the objects of the Act include the prohibition of hate speech as contemplated in section 16(2)(c) of the 1996 Constitution, as stipulated in section 2(b)(v). The purpose of the Act, as far as it relates to hate speech, is described in section 2(e) and 2(f) as being the education of the public about hate speech and the provision of remedies for hate speech infringements.

Section 10 prohibits hate speech as follows:

1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- a) be hurtful;
- b) be harmful or to incite harm;
- c) promote or propagate hatred.

2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

³⁷⁶ See n 11 preamble.

PEPUDA therefore places a civil liability on individuals guilty of hate speech and at the same time in section 10(2) affirms the importance of common law remedies. It goes on to open the door to further 'relevant legislation' which indicates room for criminalisation of hate speech, referring to the use of criminal sanctions but not extending into this sphere. Section 15 excludes hate speech from the grounds for justification of fairness in section 14 of PEPUDA. Section 21 confers powers on the equality court to try hate speech cases along with the possibility of referring the case to another court in terms of section 21(4).

Currie and De Waal criticise PEPUDA, identifying it as something that adds 'a great deal of nomenclature that is either superfluous or that considerably widens the scope of the constitutional conception of hate speech'.³⁷⁷ Exclusively, section 1(b) of PEPUDA, which contains the expression 'incite to harm' falls directly within the ambit of section 16(2) of the 1996 Constitution. The publication of statements based on a listed ground with the intention to be hurtful, harmful or promote hate decisively goes beyond the section 16(2) requirement of hatred coupled with 'incitement to cause harm'. This indicates that this is a limitation on freedom of expression as intended in the broad sense and that it would have to be reviewed under section 36 to be justifiable. The application of PEPUDA's hate speech provisions runs the risk of encroaching upon section 16(1) forms of protected speech which fall under the auspices of section 36. The use of the words 'one or more of the prohibited grounds' could be construed as a reference to the prohibited grounds in terms of section 9, which reads as follows:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

This widens the scope of hate speech considerably when compared to the 16(2) construction disallowing hate speech based on 'race, ethnicity, gender or religion'. If, however, the legislature refers to the listed grounds in section 16(2)(c) there is no scope extension. The advocacy of hatred which must be coupled with incitement and an intention to inflict harm is much narrower than the publication of words that is intended to be hurtful, harmful or promote hate.

³⁷⁷ Currie & De Waal n 12 378.

Section 16(2) incorporates two elements, namely ‘incitement’ and to ‘cause harm’ in its exclusion of hate speech from constitutional protection. In dropping these requirements PEPUDA considerably broadens the scope of hate speech as contemplated in section 16(2)(c) and indicates an unwillingness ‘to take on the language of the ICCPR’s Article 20’.³⁷⁸

Those requirements, as set out by the Constitution and ratified international treaties, should form the base requirements of limiting legislation. The aim of the legislation should be to clarify uncertainty and not to broaden the scope of the modification, except if it is necessary as described in section 36 as a limitation that is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.

When analysing section 10(1)(a) with reference to a practical example, the tension within this section becomes evident. If the NG Church of South Africa denounces the validity of gay marriage in line with Biblical dogma, this would equate to advocacy of words against a group of individuals that would undoubtedly be hurtful and would be based on a listed ground, namely that of sexual preference. The church as a juristic person would therefore incur liability if strict interpretation was followed. It is clear from the analysis that the construction of PEPUDA may be ineffective.

Section 10(1)(a) is therefore at risk of failing to withstand constitutional scrutiny due to the overly broad construction of the text.³⁷⁹ Once this is affirmed it would clearly mean that the law now no longer falls under section 16(2) but encroaches upon section 16(1). Rights balancing along with the weighting test laid down in section 36(2) will provide a definitive answer as to whether this limiting legislation is constitutional. The nature of the rights concerned, the importance and purpose of the limitation, as well as the proportionality of the limitation and purpose will need to be investigated. If there are less restrictive means to achieve what PEPUDA sets out to achieve it will not stand the test of constitutionality. The legislature therefore regulates hate speech very broadly in a catch-all manner. It is unlikely that the construction of section 10

³⁷⁸ Maina n 342.

³⁷⁹ De Vos <http://constitutionallyspeaking.co.za/kill-the-boer-the-anc-was-against-it-before-it-was-in-favour-of-it/> (Date of use 18/05/2011) para 3.

will avoid the application of section 36 as it clearly encroaches upon section 16(1). When evaluated in terms of section 16(1) there is a risk that the limitation might be declared unconstitutional based on its very wide construction.³⁸⁰

In *Jamiat-Ul-Ulama v Johncom Media Investment Ltd and Others* the High Court disallowed the publication of a cartoon depicting the prophet Mohammed with the demeaning line ‘stop, stop we ran out of virgins’ out of respect for dignity in a rights balancing approach to the limitation of freedom of expression.³⁸¹ The High Court held that:

Although freedom of expression is fundamental in our democratic society, it is not a paramount value. It must be construed in the context of other values enshrined in our Constitution, in particular the values of human dignity, freedom and equality.³⁸²

The importance of dignity, equality and freedom in line with South Africa’s cultural connection was highlighted, making it clear that freedom of expression is an important fundamental right in South Africa’s democracy but not an overriding or supreme value.³⁸³ The importance of this case for the purpose of the study can be deduced from the fact that the court did not need to utilise PEPUDA at all to arrive at its rule *nisi* verdict and solely found for the applicant based on constitutional principles. To date the CC has yet to rule on the constitutionality of PEPUDA and arguments against criminalisation could be formulated on the basis of the presumption that the 1996 Constitution offers sufficient over-arching protection against the negative effects of hate speech, as it did in *Jamiat-Ul-Ulama*.

After the promulgation of PEPUDA the *ad hoc* Joint Committee on Promotion of Equality and Prevention of Unfair Discrimination Bill adopted a resolution to further their process and criminalise hate speech and also give effect to ICERD and CEDAW. The ratification led to the drafting of the DHSB, which to date has not been promulgated.

³⁸⁰ De Vos n 379 para 3.

³⁸¹ *Jamiat-Ul-Ulama v Johncome Media Investment Ltd and Others* (2006) 1127/06 para 10.

³⁸² *Jamiat-Ul-Ulama* n 381 para 25.

³⁸³ *Jamiat-Ul-Ulama* n 381 para 24.

4.3.2 The Draft Hate Speech Bill

The DHSB recognises that the 1996 Constitution commits South Africa to societal transformation that is based on ‘social justice, human dignity, equality and the advancement of human rights and freedoms, non-racialism and non-sexism’. It affirms South Africa as a signatory to the ICERD, which requires signatories to criminalise ideas ‘based on racial superiority or hatred, incitement to racial discrimination as well as acts of violence or incitement to such acts’ in article 4(a). The preamble to the DHSB sets out the purpose of the proposed legislation as being the criminalisation of participation in or promotion of hate speech based on ‘race, ethnicity, gender or religion’ in order to achieve a discrimination-free South Africa.

Section 1 confirms the application of the proposed Act as a law of general application which should not exclude or limit the concurrent functioning of any other legislation or the common law which is inconsistent with the Act. Should conflict arise between the proposed Act and another law or common law principles, the proposed Act prevails solely over hate speech under the auspices of the 1996 Constitution.

Without a clear definition of what hate speech entails, section 2 attempts to criminalise a variety of actions which are representative of apartheid crimes as follows:

2. (1) Any person who in public advocates hatred that is based on race, ethnicity, gender or religion against any other person or group of persons that could, in the circumstances, reasonably be construed to demonstrate an intention to –
 - (a) be hurtful;
 - (b) be harmful or to incite harm;
 - (c) intimidate or threaten;
 - (d) promote or propagate racial, ethnic, gender or religious superiority;
 - (e) incite imminent violence;
 - (f) cause or perpetuate systemic disadvantage;
 - (g) undermine human dignity; or
 - (h) adversely affect the equal enjoyment of any person’s or group of person’s rights and freedoms in a serious manner, is guilty of an offence.

The section 16(2) requirement of ‘incitement to cause harm’ is excluded from most of the possibilities of hate speech listed in all the section 2 subsections, with the exception of (b) and (e). This significantly extends the scope of hate speech in the DHSB. What is required is that hate is publically advocated against one or more of the identified groups along with one of the listed elements such as intent to hurt, propagation of superiority or intimidation. Such a construction is very broad and can easily intrude on freedom of expression as contemplated in section 16(1) with section 2(h) acting as a catch-all clause, clearly extending beyond what would be allowed in terms of section 36. Section 2(g) is not at home under hate speech provisions and should instead fall under equality provisions of section 9 of the 1996 Constitution as it attempts to limit expressions that could affront dignity in a broad sense.

Within rights-based dispensations, compromise is part of the package. A study of section 2 suggests that the legislature attempted to do away with speech that could possibly affect anyone negatively, which is obviously too broad, weakening the legislative process and possibly violating the principles of fundamental justice.³⁸⁴ The notion of compromise is completely erased by this provision and this could easily result in obscurity.

By prohibiting any expression that could be hurtful one runs the risk of extending crimes as far as intimate personal relationships. Should an ex-wife, resentful because of her failed marriage, advocate hate towards the male sex and her ex-husband in particular, this could be interpreted as falling within the ambit of section 2(1)(a) as such expressions could be interpreted as hatred based on gender which sets out to be hurtful. Expressions made in an emotional state of disarray could *prima facie* constitute crimes under DHSB. The construction of section 2(1)(a) is clearly too broad and represents a conservative rather than a liberalist view which is characteristic of communist and socialist states.

Section 2(1)(c) is another example of a weak legislative attempt. It attempts to prohibit hatred that intimidates or threatens on listed grounds that include race, ethnicity, gender and religion. Such a broad formulation could be widely understood to include even the mere verbalising of

³⁸⁴ *R v Heywood* [1994] 3 S.C.R. 761. The Canadian Court of Appeal defined overbroad legislation as legislation that is too sweeping in relation to its objective.

ordinary dislike of a co-worker. Should the DHSB be promulgated it would represent a severe inroad into freedom of expression as contemplated in section 16 of the 1996 Constitution. An attempt to criminalise anything that can hurt is far from ideal and possibly a reason why the DHSB has never been promulgated. Ndungu characterised the DHBS as ‘wide and subjective and not clearly defined enough to ensure an objective test in court’.³⁸⁵ Terreblanche and Quintal affirm this interpretation of the DHSB proposing that justice cannot be served where a person could be found guilty of a crime purely based on saying something with the ‘intention to be hurtful, harmful or to intimidate’.³⁸⁶

Section 2(1)(h) ultimately serves as an overarching catch all clause for all forms of hate expression that have not specifically been identified in section 2. The application of this provision would bring with it a cumbersome interpretation process as it clearly extends the hate speech crime into the realm of section 16(1)’s forms of protected speech. The application of the section 36 limitation test would probably result in the provision being struck down as the limitation is disproportionate to the purpose. What the legislature seems to be saying here is that any other negative or hurtful expression that could affect the enjoyment of a subject’s rights could possibly be a crime. This interpretation confirms Bentley’s view that legislation criminalising hate speech will most likely be ineffective.³⁸⁷ Haigh is opposed to this legislative criminalisation approach, which he terms ‘unnecessary, unworkable, and incapable of fulfilling its object and purpose’.³⁸⁸

The DHBS must clearly define what is allowed and what is prohibited instead of using general catch-all clauses. It must define hate speech in the South African context, drawing on its unique cultural connection. The elements of the crime should be more clearly formulated to include publically advocated hate, which is directed towards a defined group, expressed with intent and inspires violence or an imminent breach of the peace. The boundaries must be cornered off to avoid ambiguity such as that created by section 2(h), which refers to infringement that adversely affects the equal enjoyment of rights. Such a construction is an equality provision rather than a

³⁸⁵ Terreblanche & Quintal www.iol.co.za (Date of use 14/12/2009) 1.

³⁸⁶ Terreblanche & Quintal n 385 2.

³⁸⁷ Bentley <http://www.informa.world.com/smpp/content~content=a745964075&db=all> (Date of use 14/12/2009).

³⁸⁸ Haigh n 47 Introduction.

hate speech provision. The important requirement that legislation should be internally protective towards democratic ideals and rights balancing is not met by the DHSB.

Freedom of expression, which was traditionally regulated under common-law,³⁸⁹ is now intended to be regulated through a rules based approach as opposed to a principle based approach.³⁹⁰ The Freedom of Expression Institute (FXI) welcomed the proposed DHSB as a reactive measure against the ‘shocking rise of incidents(sic) of race based and racially motivated crimes’ but at the same time criticised it as ‘overly broad, extensive and inherently vague’.³⁹¹ Legislation should be constructed in such a manner that it acts as a guide for what is allowed and what is not allowed. Catch-all clauses will not suffice and will be counter-democratic and against the interpretation provision of section 39(2). This construction is far too restrictive and does not promote the spirit and purport of the Bill of Rights. Section 2(e) and possibly the second part of section 2(b), which refers to advocating hatred with the intent to incite to harm, are the only two provisions that could definitely be interpreted as being in line with the spirit of the Bill of Rights as these sections are a mere replica of section 16(2).³⁹²

The DHSB is unclear as to who carries the burden of proof but the formulation implies that it rests on the person expressing the communication which possibly goes against the ‘innocent until proven guilty’ presumption and is unlikely to withstand constitutional scrutiny.³⁹³ If the DHSB is to be promulgated the burden of proof should rather rest on the State, adhering to principles of fundamental justice.

³⁸⁹ Van Wyk in O’Brien n 62 286 (contempt of court) and 287 (defamation).

³⁹⁰ A rules based approach equates to an attempt to regulate and demarcate everything that can and cannot be done within a legislative framework.

³⁹¹ FXI Alert <http://www.ifex.org/en/content/view/full/59374/> (Date of use 14/12/2009).

³⁹² The constitutional drafters made it clear that forms of expressions that incite to imminent violence or advocate hatred with incitement to cause harm are possibly not in line with the spirit of the Bill of Rights.

³⁹³ Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 261. Burchell states that the burden of proof on the defendant has shifted to the plaintiff in line with the innocence presumption as interpreted in *National Media* n 182. In *R v Ndhlovu* 1945 AD 369 at 386, Davis AJA stated that the following: ‘In all criminal cases it is for the state to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the State to prove all averments necessary to establish the guilt of the accused...’

Section 2(2) of the DHSB defines the terms private and public places.³⁹⁴ If the identified hate speech is not expressed publicly there would be no violation of section 2(2). At first glance it seems that a person exercising his right to freedom of expression is at liberty to say what he likes, at least in his own home. However, section 2(3)(b) muddles this perception by extending public places to any place which the public can have access to by ‘invitation’. The possibility of extending public places even into the sphere of private homes becomes a reality.

The exceptions to the rule are listed in section 3 and are equally controversial.³⁹⁵ Section 16(1) of the 1996 Constitution guarantees freedom of expression that extends to the press and the media, and to artistic, academic and scientific works. The inclusion of section 3 implies that the legislature is indirectly extending the section 16(1) protection to hate speech which takes an artistic, academic, scientific research or media report form. It can be argued that expressions, for example satirical political comics, stimulate political debate and should be protected. The value in hate-invested advertisements and academic research is contested, however. Both Kenya and Rwanda saw hate speech crimes as a result of media propaganda which ultimately led to fully fledged genocide in Rwanda. At this point of the analysis the DHSB has become a piece of legislation which seems to be overbroad in attempting to criminalise any form of injurious

³⁹⁴ DHSB n 30 ‘(2) Any person who is convicted of an offence referred to in subsection (1) is liable, in the case of –

- (a) A first conviction, to a fine or to imprisonment for a period not exceeding three years, or to both such a fine and such imprisonment; and
 - (b) A second or subsequent conviction, whether for the contravention of the same or some other provisions of that subsection, to a fine or to imprisonment for a period not exceeding six years, or to both such a fine or to imprisonment.
- (1) For the purpose of this section –
- (a) “in public”, without derogating from the ordinary meaning of those words, means –
 - (i) in the sight or hearing or presence of the public;
 - (ii) in a public place; or
 - (iii) in the sight or hearing of people who are in a public place; and
 - (b) “public place” includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.’

³⁹⁵ DHSB n 30 – ‘(3) Section 2(1) does not apply to any *bona fide* engagement in –

- (a) artistic creativity;
- (b) academic and scientific inquiry;
- (c) fair and accurate reporting in the public interest; or
- (d) publication of any information, advertisement or notice that is in accordance with section 16 of the Constitution of the Republic of South Africa, 1996.’

See the National Integration and Cohesion Act n 340 with Kenya specifically steering away from these kinds of exclusions as there is a very real risk that the press and even music/artistic expressions could be used to stir hatred.

speech. In section 3 it indirectly and in some cases illegitimately, extends immunity for hate speech crimes, which nullifies its purpose.

Section 4 of the Draft Bill affirms that the common law principle of vicarious liability applies to this piece of legislation. The ideal of the DHSB which is the prevention of ‘dissemination of ideas based on racial superiority or hatred’³⁹⁶ is in line with international conventions but the DHSB itself is not in line with constitutional principles and is possibly ‘unworkable’.³⁹⁷ The fact that the DHSB may well be inoperable does not mean that the need for criminalisation is erased and Teichner’s opinion that dignity cannot be protected without limiting certain forms of free speech still rings true.³⁹⁸ What is needed is for the legislature to return to the drawing board as far as hate speech provisions are concerned in order to arrive at a workable solution which combines legislative criminalisation with judicial interpretation, utilising the advantages of both systems to promote the spirit and purport of the Bill of Rights.

The DHSB could be interpreted as an attempt to expand the closed list of forms of expression that are excluded from constitutional protection in section 16(2).³⁹⁹ This extension might be necessary to include, for example, hate speech based on sexual preference or sex, including homosexuality and transgender cases. Such an extension would have to suffice the article 36 requirements in line with a rights balancing approach.

The risk of over-legislating and returning to the apartheid government’s restricted speech approach should be carefully considered when dealing with hate speech criminalisation. Freedom of expression and within that ambit, political expression, has had a colourful history in South Africa. The apartheid reality was one of strict control with Acts limiting free speech such as the Black Administration Act⁴⁰⁰ and the Internal Security Act⁴⁰¹ promulgated. These Acts were promulgated with an apartheid agenda and were not necessarily reflective of the values and

³⁹⁶ Bowler <http://www.polity.org.za/article/draft-prohibition-of-hate-speech-bill-2005-05-05> (Date of use 14/12/2009).

³⁹⁷ Haigh n 47 Introduction.

³⁹⁸ Teichner n 25.

³⁹⁹ *Islamic Unity Convention* n 83.

⁴⁰⁰ The Black Administration Act 38 of 1927.

⁴⁰¹ The Internal Security Act 74 of 1982.

norms of society.⁴⁰² The value of freedom of expression was recognised in the African National Congress's (ANC) *Freedom Charter*, which stated that:

...the law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children.⁴⁰³

The legislature should take the greatest care in the formulation of its criminalisation of hate speech to avoid the recurrence of past, counter-democratic practices. As hate speech is not a crime in South Africa it has become important to analyse the view of the courts on hate speech in order to understand how the *lacuna* in hate speech regulation can be closed.

4.3 The South African courts, commissions and tribunals on freedom of political expression and hate speech

The need for criminalising hate speech as a stand-alone crime becomes evident from the case law analysis that follows. The current position of the South African courts on hate speech and freedom of political expression will be analysed and compared with the non-binding interpretations of the SAHRC and the Broadcasting Complaints Tribunal (BCTSA) in order to clarify the exact extent of the *lacuna* in the common law and current legislation on hate speech.

4.4.1 The Constitutional Court's interpretation of hate speech and freedom of political expression

Insight can be gained into the CC's view on hate speech from the *Islamic Unity* case.⁴⁰⁴ In this case the CC affirmed the importance of freedom of expression and the need for limitation but at the same time the CC emphasised that regulations that encroach on section 16(1) forms of

⁴⁰² South African History Online <http://www.sahistory.org.za/pages/chronology/main-chronology-1920s.html> (Date of use 15/06/2009). All the recorded cases under this Act involved hostility of blacks towards whites and not *vice versa*.

⁴⁰³ Freedom Charter (1955).

⁴⁰⁴ *Islamic Unity Convention* n 83 para 1.

expression will be tested against section 36 and that a rights balancing approach will be followed. It affirmed the *lacuna* in hate speech regulation for section 16(2) forms of expression.

In this matter the CC had to decide on the application brought against Radio 786 for the responses by Dr Zaki on the legitimacy of Israel as a state as well as Holocaust denial in the sense that he downplayed the number of Jewish deaths to one million and completely denied the use of gas chambers by the Nazi regime.⁴⁰⁵ Langa DCJ identified the question as whether or not clause 2(a) of the Code of Conduct for Broadcasting Services (CCBS) was in line with section 16 of the 1996 Constitution.⁴⁰⁶ The CC quoted South African National Defence Union affirming the importance of the right to freedom of expression as follows:

freedom of expression is one of a “web of mutually supporting rights” in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18) ... The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.⁴⁰⁷

A libertarian view is evident as the court is willing to protect even contentious speech, stating that free speech is imperative even when deemed controversial.⁴⁰⁸ The CC stressed that the right to freedom of expression has always been recognised by the South African common law and established that the apartheid government’s restrictions on this freedom were not compatible with a democratic South Africa.⁴⁰⁹

The CC ignored the offence principle on limitation, reiterating that freedom of expression extends beyond those ideas that are socially acceptable, to cover even the obscene, vulgar and

⁴⁰⁵ *Islamic Unity Convention* n 83 para 1.

⁴⁰⁶ Section 2(a) of the CCBS (Code of Conduct of Broadcasting Service Licensees (1993)) provides: ‘Broadcasting licensees shall... not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or the public order or relations between sections of the population.’

⁴⁰⁷ *South African National Defence Union* n 66 para 8.

⁴⁰⁸ *South African National Defence Union* n 66 para 8.

⁴⁰⁹ See *Publications Control Board v William Heinemann, Ltd. and Others* 1965 (4) SA 137 (A) at 160 E-G and *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 416 C-G.

distasteful.⁴¹⁰ Langa DCJ stated that open-mindedness and pluralism are integral to a democratic society but warned that a society can also be destabilised by counter-productive speech which impedes the idea of democracy itself. This affirmed the use of the harm principle in South Africa.⁴¹¹ South Africa's cultural connection as reflected in the founding provisions of the 1996 Constitution's dignity-equality-freedom looking glass is clear from his words:

Section 1 of the Constitution declares that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms." Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.⁴¹²

The crux of the argument was made when the court held that the section 16(2) listed forms of speech namely; war propaganda, incitement to imminent violence and hate speech, do not have to withstand the section 36 limitation test.

The legislature is not prohibited from introducing regulative measures through legislation falling within the ambit of section 16(2) and the need for such legislation was reiterated, affirming the current *lacuna* in hate speech regulation.⁴¹³ The need for legislation and regulation specifically in broadcasting was affirmed in Langa DCJ's statement:

I have considered each submission in the light of what would be appropriate relief in the circumstances of this case. If the relevant portion of clause 2(a) were struck down in its entirety with nothing to replace it, a dangerous gap would result. Since the Constitution specifically mandates regulation in this field, it would be neither just and equitable nor in the public interest to allow such a gap to exist.⁴¹⁴

The interaction with section 36's limitation clause when legislative prohibitions encroach on section 16(1) was also affirmed. Langa DCJ's stated that the legislature can choose to regulate at

⁴¹⁰ *Handyside v The United Kingdom* (1976) 1 EHRR 737 at 754.

⁴¹¹ *Islamic Unity Convention* n 83 para 29. Pluralism is a set of ideals that view freedom of expression within the ambit of clearly and explicitly defined values which must be balanced in order to arrive at a justification for the extent of freedom allowed within speech and expression. See Nelson n 24 150.

⁴¹² *Islamic Unity Convention* n 83 para 29.

⁴¹³ *Islamic Unity Convention* n 83 para 33.

⁴¹⁴ *Islamic Unity Convention* n 83 para 56.

a minimal level or extensively going beyond section 16(2) but then subject to section 36(1).⁴¹⁵ The court then held that the prohibition of the CCBS clause 2(a) extends beyond section 16(2), as it not only limits hate speech, war propaganda and incitement to imminent violence but in addition a variety of other section 16(1) protected forms of expression.⁴¹⁶ This type of encroachment was held to be subject to section 36 with rights balancing as an effective manner in which to limit freedom of political expression effectively. The CC clearly sees limitation as being in order should the situation call for it. As a result of South Africa's past the values of dignity, equality and freedom have had a greater influence on the formation of the South African democracy and speech and activities that pose a real threat to these democratic values must and should be curbed.

The importance of the content of speech in order to categorise it as section 16(1) protected or section 16(2) unprotected was affirmed in *Laugh it off promotions CC v South African Breweries*.⁴¹⁷ The text within context test was employed to effectively distinguish and categorise speech. The fact that section 16(1) forms of expression are effectively limited by the section 36 general limitation clause was affirmed. The court dealt with the proper interface between section 16(1) and the protection of intellectual property rights embedded in trademarks. It held that the slogan 'black labour, white guilt' did not amount to hate speech as the slogan poked fun at exploitative labour practices rather than pure racism. This demonstrated the CC's commitment to freedom of expression as an integral right taking all facts and circumstances into consideration.

The fears that all race-related expressions in South Africa might be suppressed and free expression sacrificed for the sake of dignity are by no means realised in the approach of the CC. The CC confirmed that any form of expression that is not a section 16(2) form of unprotected speech enjoys the full protection of the 1996 Constitution.⁴¹⁸

⁴¹⁵ *Islamic Unity Convention* n 83 para 57.

⁴¹⁶ See n 406.

⁴¹⁷ *Laugh it off promotions CC v South African Breweries International (Finance) B.V. t/a SABMARK International and Freedom of Expression Institute* 2005 (8) BCLR 743 (CC).

⁴¹⁸ *Islamic Unity Convention* n 83 para 33.

4.4.2 Findings of the South African Human Rights Committee (SAHRC)

An analysis of the hate speech incidences investigated by the SAHRC identifies a clear liberalist view in line with that of the CC as studied above. In 1997 the SAHRC heard the *Federal Council* case relating to utterances made by ANC politicians PR Mokaba, R Kasrils and SR Maharaj about the National Party leader FW De Klerk where the complainant claimed that the words were of a hate speech nature and negatively affected the victim's dignity.⁴¹⁹ The matter concerned utterances made about De Klerk's alleged involvement in the disappearance of Charles Ndaba and Mvuso Tshabalala in 1990, members of the ANC who were allegedly involved in a plot to overthrow the government.⁴²⁰ It was implied that FW De Klerk knew that the two operatives, whose bodies were found dumped in the Tugela River, had been arrested and that he was somehow involved in their deaths. Taken in context, it is clear that hate speech is absent from the statements and that they are rather a form of political criticism which would fall within the ambit of section 16(1) protected speech.⁴²¹ The SAHRC found in favour of the defendants, stating that open democratic debate as a form of freedom of political expression is vital within the new South African dispensation and finding that the words fell into this category of protected speech.⁴²² The importance of text within context and whether or not hate speech would be found to be present by the objective reasonable person is what solidifies the importance of this interpretation.

In 1999 the SAHRC heard the *Constand Viljoen* case, where 86 dogs were killed by farmers in a black community. The subsequent statements made by Dumisani Makhaye on the police's failure to act against the farmers were alleged to be hate speech.⁴²³ The complaint by General Constand Viljoen implied that Makhaye's words amounted to hate speech against white farmers and ultimately lead to farm murders.⁴²⁴ Makhaye insinuated that farmers will have to blame

⁴¹⁹ *Federal Council of the National Party v Maharaj Kasrils and Mokaba* (SAHRC) 1997. Complaint by the Federal Council of the National Party against Maharaj Kasrils and Mokaba reported in terms of section 15 of the Human Rights Commission Act 54 of 1994.

⁴²⁰ *Federal Council* n 419.

⁴²¹ The FXI publicly announced its concern that this was an attempt to halter the freedom of political expression.

⁴²² *Federal Council* n 419.

⁴²³ SAHRC's special findings report *In re: Complaint by General Constand Viljoen* (prepared by MC Moodliar 1999).

⁴²⁴ *Constand Viljoen* n 423 2.

themselves if the dog killings lead to the African community destroying farms and killing farmers, because they felt unsafe after the killings. Three tests for positive hate speech were used in *Constand Viljoen*.⁴²⁵ The imminent test, the text within context test and the reasonable person test.

The SAHRC drew insight from both foreign and international law in terms of section 39. It investigated the USA absolutist approach in *Abrahams*, warning that the Supreme Court should be vigilant not to limit any forms of expression unless they imminently threaten death, violent action or breach of peace.⁴²⁶ It may have erred in its interpretation by extending imminence into section 16(2)(c) which would have been included textually had the constitutional drafters considered it imperative, as they did in section 16(2)(b). The SAHRC explained the imminent test as derived from the USA fighting words doctrine. Fighting words are words that when uttered, inflict injury and cause harm coupled with incitement to the imminent breach of peace.⁴²⁷ The test was applied in *Constand Viljoen* and it was held that because five months had elapsed since the statement when a farmer was killed no causal connection could be made between the two events.⁴²⁸ Imminent is defined as immediate or near and ‘may carry the implication of menace’.⁴²⁹ Five months was rightly held as not being immediate or near.

The imminent test is reminiscent of the causality test in the law of delict. If no causal connection between the hate speech uttered and the actual acts of violence can be established the imminent test will fail and the interpretation will be that the words do not amount to hate speech. The commission therefore held that the speech was neither incitement to imminent violence nor incitement to hatred as described in sections 16(2)(b) and (c). The interpretation that causality was lacking is correct if based on the principles of the law of delict, but it is possibly incorrect to imply that the constitutional drafters accidentally omitted the word imminent from section 16(2)(c). The Commission should guard against an absolutist interpretation that will bring the imminent test, which directly correlates with the fighting words doctrine, into the South African hate speech precedent.

⁴²⁵ *Constand Viljoen* n 423 2.

⁴²⁶ *Abrahams v United States* 250 U.S. 616 (1919).

⁴²⁷ *Chaplinsky v New Hampshire* 315 U.S 358 (1942).

⁴²⁸ *Constand Viljoen* n 423.

⁴²⁹ Random House Dictionary <http://dictionary.reference.com/browse/imminent> (Date of use 19/05/2011).

The text within context test implies the following: One should analyse the facts and circumstances surrounding the alleged hate speech utterances, reading the intention and meaning of the utterances within the context of the speech.⁴³⁰ When words are separated from the context of the utterance misinterpretation is sure to follow. The test has to be used in conjunction with the reasonable person test in order to arrive at the correct answer. In *Constandt Viljoen* the utterances were analysed in terms of the text within context test and the finding was that the words did not amount to hate speech.⁴³¹

The reasonable person test acts as an equalising factor to avoid over-sensitivity and emotion being decisive elements when dealing with cases involving extreme emotions such as hate speech cases. Hatred is defined as an 'intense, passionate, or active dislike' coupled with 'a disposition to injure'.⁴³² Individualism, upbringing and personal sensitivity could lead to different people's perceiving words in different ways.⁴³³ A hate speech analysis therefore needs to include the reasonable person test, which implies taking an objective view of the situation and assessing how the reasonable person would perceive the communication within the context in which it is uttered.⁴³⁴

The SAHRC dismissed hearing an enquiry into hate speech based on the text within context test in 2000 when a complaint of racism against the then DA leader Tony Leon was made based on statements made during a political rally in the Western Cape.⁴³⁵ Mr Leon insinuated that the ANC marginalised coloured people and used Mr Trevor Manuel as an example of a man of excellent political standing not even being mentioned as a candidate for higher positions such as that of deputy president or the like, implying that this was possibly because 'he is a so called

⁴³⁰ *Constandt Viljoen* n 423.

⁴³¹ *Ibid.*

⁴³² Venter *Stellenbosch* 33.

⁴³³ The commission noted that people in 'public positions' should act with greater care than the ordinary citizen when exercising their right to freedom of expression. The reasonable person test moves the bar of what is reasonable in line with the individual's education and standing and often assigns greater care to people of higher status or education.

⁴³⁴ The Legal Dictionary [http://legal-dictionary.thefreedictionary.com /Reasonable+Person](http://legal-dictionary.thefreedictionary.com/Reasonable+Person) (Date of use 19/05/2011).

⁴³⁵ This case is a good example where an over-sensitive observer experienced politically active but racially neutral statements as being racism. If and when the legislature decides on matters to legislate on, the test should be that of a reasonable person and not an over-sensitive or over-zealous citizen.

coloured’.⁴³⁶ This dismissal highlights the fact that the SAHRC holds a clear idea of matters that legitimately fall within scope of section 16(2)(c) when utilising the text within context test. At the same time it indicates that the South African courts and commissions could become overburdened with attempted cases of hate speech in a society sensitive to racial talk, further strengthening the need for legislation that clearly defines hate speech and its possible criminal consequences, with the state instituting action when needed.

In *Agri-Wes* the SAHRC heard a matter regarding utterances made by Mr Tony Ehrenreich on land reclaims and held that certain statements did not amount to hate speech in terms of section 16(2)(c) or PEPUDA.⁴³⁷ A finding that statements such as ‘we are here today to declare war’ and ‘we will take the land and give it back to the rightful owners’ do not suffice the requirements of PEPUDA in section 10 could be contested. PEPUDA’s requirements are far less stringent than those of section 16(2)(c) and possibly extend beyond it. The construction of section 10 prohibits the propagating/advocating of words based on listed grounds which could reasonably be construed to have the obvious intention to be hurtful, harmful or incite to harm without the inclusion of a need for imminent action. This indicates that the statement should possibly have been found to violate section 10.

The cautionary words of Govender J in *Freedom Front* should always be borne in mind when deciding whether any particular expression amounts to hate speech:

Any test used to assess whether expression amounts to hate speech must acknowledge the seriousness of such a classification.⁴³⁸

The finding that these statements do not amount to incitement to imminent violence in terms of section 16(2)(b) is clearly correct when the statements are analysed in context. A clear distinction should be drawn between section 16(2)(b) and 16(2)(c), where the one deals with incitement to imminent violence and the other with hateful incitement to cause harm. When

⁴³⁶ SAHRC http://www.sahrc.org.za/sahrc_cms/publish/printer_159.shtml (Date of use 18/06/2009).

⁴³⁷ *In re: Complaint lodged with the SAHRC by Agri-Wes Cape to determine whether comments/utterances made by Mr Tony Ehnreireich (COSATU) & Others amount to/constitute hate speech as alleged* (WC/26/444).

⁴³⁸ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283.

applying the text within context test it is clear that Ehrenreich's words speak of restitution rather than a malevolent intention to cause harm. The imminent test is sufficed as his words did not inspire actual action to immediately take up arms and engage in war.

In 2010 the SAHRC heard the case *Manamela v Shapiro*⁴³⁹ in a complaint lodged because of a cartoon depicting Mr Jacob Zuma with his trousers down while the tripartite alliance holds down a blindfolded girl. The cartoon was published during the time when Mr Zuma was facing rape charges. It was argued that the cartoon infringed Mr Zuma's right to dignity but the respondent held that he was exercising his right to freedom of expression and that his cartoon was intended as satirical political commentary. It was affirmed that the free 'market-place of ideas' is vitally important in a South African democracy which is still establishing itself.⁴⁴⁰ The SAHRC stated that section 16 suggests that a closed list of forms of expression 'requires a higher degree of protection'.⁴⁴¹ This implies that academic, artistic and free press communication, which seemingly takes on the form of hate speech, could deserve protection but the SAHRC did not err in its interpretation in interpreting dangerous hate speech which incites to harm into this closed list of protected forms of speech.

Academic, artistic and free press communication will only be escalated to the level of hate speech and therefore not protected if 'there is also incitement to cause harm'.⁴⁴² The importance of the SAHRC finding lies in the extension of the definition of harm to include emotional, psychological and dignity harm in a manner that is protective towards audience rights.⁴⁴³ The SAHRC finally held that despite its offensive nature, the cartoon did not constitute hate speech 'or a violation of any fundamental human right contained in the Constitution'.⁴⁴⁴ This again confirms that the South African judiciary does not easily acknowledge the offence principle in hate speech cases but rather the harm principle. This disallowance was based on the fact that incitement to cause harm could not be found to be present.

⁴³⁹ *Manamela and Others v Shapiro* (GP/2008/1037/E) MOKONYAMA

⁴⁴⁰ *Manamela* n 439 para 12.

⁴⁴¹ *Manamela* n 439 para 17.

⁴⁴² *Manamela* n 439 para 29.

⁴⁴³ *Manamela* n 439 para 31.

⁴⁴⁴ *Manamela* n 439 Conclusion & Finding.

It would appear that the SAHRC transferred the requirement of imminent action incorrectly to section 16(2)(c) in *Constand Viljoen and Agri-Wes*, which was not the intention of the constitutional drafters. Both PEPUDA and the 1996 Constitution suggest that the imminent test does not have a place in South African hate speech regulation.

4.4.3 Hate speech, political expression and the Broadcasting Complaints Tribunal of South Africa (BCTSA)

The BCTSA⁴⁴⁵ affirmed the position of the reasonable person test in *Pollak* where it held that certain anti-imperialistic statements, read from an e-mail received from Mr Fourie by Vuyo Mbuli, a talk show host on his daily 'Talk Radio' show, did not amount to hate speech nor contravene the Broadcasting Code which prohibits the promotion of violence and offensive language.⁴⁴⁶ At the same time it held that the anti-Semitic statements were not 'inflammatory ... so as to exceed the bounds of tolerance', which confirms the position of the reasonable person test within the BCTSA's adjudication of hate speech.⁴⁴⁷

Excerpts from the e-mail included statements against the US leadership, which was said to use war to exploit nations such as Iraq for their natural resources with the aid of funding supposedly obtained from Jewish interest groups. The tribunal held that the talk of pressure being put on the South African Department of Foreign Affairs to forcibly expel Iraqi diplomats did not amount to a violation of clause 35.2 of the Broadcasting Code as it was held to encompass a matter of public importance which would fall within the ambit of the Equality Act's section 12 exclusions.⁴⁴⁸

The tribunal mentioned the fact versus fiction problem within the contents of the e-mail and commented that Mr Fourie's viewpoint is not new and is shared by many. The fact versus fiction question was further not regarded as core to a hate speech analysis in South Africa in the same

⁴⁴⁵ The BCTSA is an independent judicial tribunal governing broadcasting and decision making in terms of the Broadcasting Code. In terms of the BCCSA Free-to-air Code of Conduct for Broadcasting Service Licensees 2009, hate speech is regulated under section 15 and indirectly falls within the ambit of privacy, dignity and reputation.

⁴⁴⁶ *Pollak v SABC (SAfm)* (2003) JOL 11646 (BCTSA).

⁴⁴⁷ *Pollak* n 446 mini summary.

⁴⁴⁸ *Pollak* n 446 para 7.

way as in Germany, where it is at times decisive.⁴⁴⁹ The BCTSA established that the purpose of the adjudication process is not to distinguish the facts from fiction as this would be a near-impossible task. The tribunal then turned to the CC at the hand of Kriegler J's comments in *S v Mamabolo* affirming the importance of freedom of expression and open exchange within the 'marketplace of ideas'.⁴⁵⁰ The tribunal confirmed that hate speech 'amounts to an abuse of this freedom' which is reflective of the tribunal's liberalist view.⁴⁵¹ It established the finding in *Human Rights Commission of South Africa v SABC* that the test for hate speech is an objective one.⁴⁵²

The tribunal then went on to discuss the second element of the double-barrelled hate speech question: Incitement to cause harm.⁴⁵³ When faced with an analysis of a hate speech, time has to be spent analysing the material as well as the objective content of the expression. The tribunal held that based on an objective analysis the words read by Mr Mbuli amounted to 'the free and open exchange of ideas' in exercise of the section 16(1) right to freedom of expression.⁴⁵⁴ No incitement to harm could objectively be established in the content of the e-mail. Incitement equates to provocation directed at an audience in order to inspire them to cause harm and if such negative inspiration is missing, hate speech will be absent.

In *Polakow v Radio Islam* the BCTSA heard a matter on derogatory comments made about Jews in a radio broadcast debating the Palestine-Israel crisis in the Middle East.⁴⁵⁵ The tribunal held that an analysis as to whether clause 3 of the Code has been contravened must be done by concurrently analysing whether the requirements of section 29 of the Films Act, which makes allowance for certain *bona fide* discussions if in the public interest, have been met.⁴⁵⁶ Section 29 of the Films Act is in line with 16(1)(a) of the 1996 Constitution, which guarantees the freedom of the press and media and section 12 of PEPUDA, which prohibits the broadcasting of

⁴⁴⁹ Pollak n 446 para 13.

⁴⁵⁰ *S v Mamabolo* 2001 (3) SA 409 (CC) para 37.

⁴⁵¹ Pollak n 446 para 15.

⁴⁵² *Human Rights Commission of South Africa v SABC* (2002) JOL 10185 (BCCSA).

⁴⁵³ Pollak n 446 para 21.

⁴⁵⁴ Pollak n 446 para 23.

⁴⁵⁵ *Polakow v Radio Islam* (2003) JOL 10768 (BCTSA).

⁴⁵⁶ Films and Publications Act 1996.

information that intends to unfairly discriminate, unless it amounts to fair and truthful reporting that is in public interest.

The BCTSA held that ‘there is no geographical or time limit: Hate speech is hate speech’.⁴⁵⁷ Hate speech, in the South African context, can therefore cross borders if harm is evident. At the same time the BCTSA held that proving imminent incitement across a wide geographical distance is extremely cumbersome. Based on the findings of *Human Rights Commission of South Africa* the tribunal reiterated that the harm does not necessarily imply physical harm only but can extend to psychological harm.⁴⁵⁸ Furthermore, harm must take on a real form and cannot be found to be present merely on the basis of ‘lack of tolerance or over-sensitiveness’.⁴⁵⁹

During the broadcast made on 19/08/2002 various anti-Semitic statements, including ‘Kutile al Yahoud!’, which is translated as ‘Kill the Jews’, were made. The station responded that such statements were opinion based and did not amount to hate speech. The South African view that once political expression takes on the form of hate speech it loses its constitutional protection was reaffirmed. The tribunal held that:

Although the respondent cautioned the speaker beforehand, we find that the respondent was negligent in having broadcast a live interview with a speaker that the management must have known to have controversial views on Jews. The words complained of amount to hatred based on race and amounts to a call to kill the people targeted. The harm lies in the serious invasion of the rights of personality and the right to security of Jews: the rights that, *inter alia*, protect life, body and emotional peace of mind; rights, which the Constitution protects.⁴⁶⁰

As a result of further comments made by Mr Imraan Hussain, which constituted support for suicide bombing, which usually causes the death of innocent civilians, along with insinuations of rape and justified war, the tribunal held that the comments did fall within the ambit of hate speech coupled with incitement to cause harm. The BCTSA correctly interpreted incitement to cause harm, which manifests as psychological harm, as immediate once the words have been

⁴⁵⁷ Polakow n 455 para 3.

⁴⁵⁸ *Human Rights Commission* n 452.

⁴⁵⁹ Polakow n 455 para 4.

⁴⁶⁰ Polakow n 455 para 12.

uttered. This was affirmed in *Human Rights Commission of South Africa* where injuries to the *dignitas* were deemed immediate and were deemed to take place upon the utterance of the hateful words, not incorporating the imminent test.⁴⁶¹ In view of the differences between the interpretations of the SAHRC and the BCTSA, which interpreted harm liberally as even harm having effect beyond the South African borders, the need for consistency through the use of legislation becomes evident. Speech taking on a criminal colour and causing extreme emotional, dignity or psychological harm combined with the risk of escalation into other serious crimes such as mass murder, malicious injury to property and genocide, extending beyond the reach of PEPUDA, requires regulation and the common law does not seem to offer sufficient remedies.

4.4.4 The hate speech findings of the Equality Court and the High Court

In 2009 the Equality Court for the district of Johannesburg heard the widely reported case against Mr Julius Malema concerning his commentary on the Jacob Zuma rape trial. The Sonke Gender Justice Network made a hate speech and harassment complaint based on South Africa's ratification of CEDAW.⁴⁶² The complainant held that the words amount to hate speech under section 10 of PEPUDA but the respondent submitted that his words fell within the ambit of section 12 of PEPUDA, amounting to fair comment.

The court held that words may amount to hate speech if they fall within the ambit of the section 10 definition of hate speech disallowing publication, propaganda, advocacy and communication of words on one or more of the listed grounds which the reasonable person would construe as demonstrating intention to hurt, intention to incite harm or propagate hatred.⁴⁶³ The court narrowly interpreted this section to include only words and not pictures and non-verbal communication. This is possibly not in line with the section 16 interpretation of freedom of expression as a whole, which extends beyond mere speech. This interpretation leaves room for possible abuse of the prohibitions in PEPUDA by allowing hate speech-charged nonverbal communication, pictures, photographs, comics *etc* which could be equally hurtful to fall through

⁴⁶¹ *Human Rights Commission* n 452.

⁴⁶² *Sonke Gender Justice Network v Mr. Julius Malema* (File no 02/2009). Julius Malema made the following statement which inspired the complaint: 'When a woman didn't enjoy it, she leaves early in the morning.... You don't ask for taxi money from somebody who raped you.'

⁴⁶³ *Sonke* n 462 para 12.

the cracks. In line with the finding in *Polakow*, the court held that hurt/harm extends beyond physical harm into the psychological realm of the emotive and of dignity.⁴⁶⁴

The court formulated three tests to ascertain whether words amount to hate speech:⁴⁶⁵

- Words communicated should fall within the parameters of prohibited grounds.
- A reasonable person must construe the words as intended to hurt, harm or incite hate.⁴⁶⁶
- The words should not fall within the ambit of the exclusions listed in section 12 of PEPUDA.

The Equality Court therefore correctly omitted the imminent test as imminent action is not a requirement of section 16(2)(c) for hate speech.

The court was ambiguous in its finding that words that fall within the exclusions listed in section 12 amount to hate speech but carry no liability.⁴⁶⁷ A more accurate finding would be that such words do not constitute hate speech in view of the fact that they are one of the section 12 exclusions.

The court stressed the importance of the text within context test as formulated by the SAHRC in *Federal Council* and the complainant proceeded to prove that owing to the political orientation, place and time within which the utterances were made the words taken in context did amount to hate speech.⁴⁶⁸ The complainant next rebutted the respondent's reliance on fair comment as per section 12 by disproving the notion that he was commenting on a specific case.⁴⁶⁹ The court rejected the contentions by the respondent that his comments were fair and did not amount to

⁴⁶⁴ *Polakow* n 455.

⁴⁶⁵ *Sonke* n 462 para 14.

⁴⁶⁶ The Equality Court formulated the first two considerations in alternative implying that the words can either be based on prohibited grounds or be considered hate speech by the reasonable person on the street. If the words therefore suffice either one of the tests, they could amount to hate speech, unless intent can be excluded based on section 12 of PEPUDA.

⁴⁶⁷ *Sonke* n 462 para 16.

⁴⁶⁸ *Sonke* n 462 para 17.

⁴⁶⁹ In order to rely on a fair comment defense the respondent would have to prove that his statements were all of the following:

- Comments and not facts.
- Fair within reasonability limits.
- The matter was of public interest.
- Comments were not offered on false facts.

gender generalisations and injurious comments about rape, which is a critical problem in the South African community.⁴⁷⁰ A hate speech finding under the current law is of very little deterrent value, as is evident from the numerous subsequent cases heard against the same perpetrator. The case has subsequently been settled with apologies and the imposition of a fine.

2010 saw the first series of ‘Shoot the Boer’ cases with the North Gauteng High Court ignoring the imminent test, as it did in *Polakow* and *Sonke* and in addition ignoring the text within context test, decisively stating that the reasonable person test as used in *Polak* and *Islamic Unity* is sufficient:

The true yardstick of hate speech is neither the historical significance thereof, nor the context in which the words are uttered, but the effect of the words, objectively considered upon those directly affected and targeted thereby.⁴⁷¹

It extended the objective test beyond whether the reasonable person would deem the words to be hate speech by including a harm element. The High Court stated that the objectively viewed consequence of the expression is the decisive element for a hate speech finding.⁴⁷² The High Court referred the matter to the Equality Court made a provisional finding in anticipation of the Equality Court’s pronouncement, holding that the words of the struggle song ‘Shoot the Boer’ *prima facie* suffice the requirements of PEPUDA in section 10 and making a clear finding for hate speech by granting the prohibiting interdict.⁴⁷³ This finding is in line with *Polakow*’s finding on ‘Kutile al Yahoud’: No objective differentiation between the words ‘Shoot the Boer’ and ‘Kill the Jews’ were made.⁴⁷⁴

The use of the song had previously been banned in *Freedom Front* and the complainant alleged that the song had been declared unconstitutional once before and this therefore represented a repetitive offence.⁴⁷⁵ De Vos highlights his concern regarding the basis on which the words of the song can be declared unconstitutional by accurately stating that section 16(2) removes certain

⁴⁷⁰ *Sonke* n 462 para 17(b)(x).

⁴⁷¹ *Afriforum and Another v Malema* (18172/2010) [2010] ZAGPPHC 39.

⁴⁷² *Afriforum* n 471 para 79.

⁴⁷³ *Afriforum* n 471 para 79.

⁴⁷⁴ *Polakow* n 455 para 2.

⁴⁷⁵ *Freedom Front* n 438.

forms of expression from constitutional protection but does not allow the ‘banning’ of such words.⁴⁷⁶ This fact affirms the need for regulation: If the 1996 Constitution does not protect hate speech but cannot ban certain words an alternative way to regulate the problem needs to be sought. This approach could be modelled on the manner in which the German legislature has dealt with Neo-Nazism by specifically criminalising such comments. This possibly represents a huge setback for free speech when viewed outside the cultural connection but one which is understandable and correct within the cultural connection. The unsatisfied public outcry after the outcome of the ANC’s internal disciplinary hearing against Mr Malema, which stated that he should attend anger management classes and imposed a fine of R10,000, further highlights South Africa’s sensitivity to racial speech.

In 2011 the Freedom Front Plus lodged further complaints against the singing of ‘dubula ibhunu’ by Mr Julius Malema. The Freedom Front Plus alleged that four farmers were murdered in cold blood after the singing took place at a political rally held at a Johannesburg university.⁴⁷⁷ The continued institution of hate speech cases is evidence that the South African community is in need of strict regulation of hate speech that will help pave the way for a united future for South Africa. In May 2011 the High Court of Johannesburg made a finding of positive hate speech against the struggle song ‘dubula ibhunu’ which translates as ‘Shoot the Boer’.⁴⁷⁸ It was argued that the song was directed against white males, an identifiable race group as indicated in section 16(2) and that there is a definite causal connection between the song and incitement to murder. If hate speech can be causally linked to murder and other crimes there is a dire need to criminalise this form of expression, which is socially and criminally deviant.⁴⁷⁹ In the past the struggle song was intended to inspire fear in the white oppressor and it was found that the intention of the song is still to inspire fear in white people.⁴⁸⁰ In September 2011 the Equality Court found that hate

⁴⁷⁶ De Vos http://constitutionally_speaking.co.za/on-the-curious-case-of=shooting-the-boer/ (Date of use 04/05/2010).

⁴⁷⁷ Case lodged with the Equality Court but not yet decided. Pleadings obtained from the complainant: Freedom Front Plus.

⁴⁷⁸ *Afriforum* n 471 matter referred to Equality Court for finalisation and another heard in 2011 by North Pretoria High Court, case reference not available yet. Anonymous [http://m.news24.com/news24/SouthAfrica/ Politics/ Shoot-the-boer-ruling-ANC-puzzled-20110516](http://m.news24.com/news24/SouthAfrica/Politics/Shoot-the-boer-ruling-ANC-puzzled-20110516) (Date of use 1/08/2011).

⁴⁷⁹ Anonymous <http://152.111.1.88/argief/berigte/beeld/2011/05/17/B1/1/jkANCAfriForumHof.html> (Date of use 19/05/2011).

⁴⁸⁰ Beeld n 479.

speech was present in Mr Malema use of the struggle song.⁴⁸¹ Lamont J found that the right to freedom of expression and the signing of ‘dubula ibhunu’ does not trump the dignity rights of those targeted by the lyrics.⁴⁸² Colin LJ confirmed the discrepancy left by the fact that there is ‘no immediate criminal sanction.’⁴⁸³ He went on to confirm the protective function of the courts, specifically toward minorities who are ‘vulnerable to discriminatory treatment’ implying that their special needs places a clear duty of assistance on the courts. This clearly indicates a favourable view on criminalisation indicating that this matter has perhaps reached a boiling point in South Africa’s legal sphere. Reasons for the finding have not yet been published at date of completion of this work.

The future of hate speech in South Africa is still being shaped and Kriegler J’s cautionary words against censorship in *S v Mamabolo*, namely that it could inhibit the development of the South African democracy, should be borne in mind.⁴⁸⁴ The call for legislation by the CC in *Islamic Unity*⁴⁸⁵ along with the Equality Court’s finding in *Sonke* that certain words amount to hate speech but carry no liability warns of an unsatisfactory position as there are contraventions and rights infringements without any punishment.⁴⁸⁶ The recent upsurge in possible hate speech perpetrations under the guise of political expression such as those made by ANC Youth League president Mr Malema alerts us to the fact that hate speech is not regulated sufficiently in South Africa.

4.5 Concluding on the hate speech *lacuna* in South African law

The *lacuna* in the law, highlighted by the section 16(2) modification of freedom of expression, was affirmed through an analysis of the current common law remedies that could be utilised against the negative and possible criminal effects of hate speech. On the basis of the analysis of

⁴⁸¹ Anonymous <http://www.sowetanlive.co.za/news/2011/09/13/malema-guilty-of-hate-speech> (Date of use 13/09/2011). Mr Malema was not present at the proceedings where he was found guilty and fined R50,000, which is indicative of his disregard for the deterrence of hate speech.

⁴⁸² Anonymous <http://www.beeld.com/Suid-Afrika/Nuus/Malema-skuldig-aan-haatspraak-20100315-4> (Date of use 13/09/2011).

⁴⁸³ De Vos <http://constitutionallyspeaking.co.za/category/julius-malema/> (Date of use 30/09/2011).

⁴⁸⁴ *Mamabolo* n 450 para 37.

⁴⁸⁵ *Islamic Unity Convention* n 83.

⁴⁸⁶ *Sonke* n 462.

current and proposed hate speech legislation along with case law precedent, a number of problems in South Africa's current regulation of hate speech have become evident.

Inconsistency is found in the tests that are being applied by the different courts, tribunals and commissions, which makes it difficult to establish clear and concise guidelines for interpreting and limiting hate speech. Furthermore, the courts, tribunals and commissions seem to have inconsistent interpretations of PEPUDA, which adds to the complexity of the problem.

A number of social factors such as a rise in the number and instances of hate speech cases and a public outcry in favour of hate speech criminalisation indicate a dire need for retribution and regulation. Repetitive cases brought against the same perpetrators representing recurring offences highlight the fact that the current regulation does not serve as an efficient method of deterrence.

An analysis of the current body of case law indicates insufficient segregation between the different forms of unprotected speech. The need for imminent violence as contemplated in section 16(2)(b) has at times been read into the words of the hate speech provision in section 16(2)(c), which could possibly imply an extension of the constitutional drafters' scope of the modification.

Certain courts, tribunals and forums do not regard the psychological harm caused by hate speech equally seriously, although at times it could be more detrimental than physical harm. The very real fact that racially charged hate speech can have a domino effect resulting in hate crimes and the need for the prohibition of such actions calls for criminalising legislation to close the current gap in South Africa's hate speech regulation.

CHAPTER 5

CONCLUSION:

Paving the way for hate speech regulation in South Africa

5.1 Analysing the criminalisation of hate speech

The decision whether to criminalise forms of unprotected speech demands an in-depth analysis of the advantages and disadvantages within the specific cultural context. The legislature's predisposition to criminalise negative forms of speech will be influenced by the model of freedom of expression embedded within the Constitution,⁴⁸⁷ the limitation approach as well as the nation's cultural connection and history.⁴⁸⁸

The evident *lacuna* in hate speech regulation in South Africa has been affirmed and analysed in chapter 4. Constitutional and common law remedies were found to be insufficient to regulate hate speech in the South African context and the civil liabilities imposed by PEPUDA overlap with common law remedies, doing very little to restrain perpetrators of hate speech or deter re-offending. Chapter 3 clearly highlighted international support for the criminalisation of counter-democratic hate speech and the South African legislature showed a propensity towards legislative criminalisation through the enactment of PEPUDA and the tabling of the DHSB.

Dworkin's instrumental conception of freedom of expression as an important right that assist in toppling authoritarian regimes and aids democratisation is supported in South Africa however his unwavering support for freedom of expression as a right that trumps other rights is not in line with South African libertarianism.⁴⁸⁹ Where freedom of expression exceeds its boundaries the legislature limits it, in order to arrive at a balanced position for those exercising their right to freedom of expression and those negatively affected by the speech.⁴⁹⁰

⁴⁸⁷ For example, internally modified *versus* unmodified.

⁴⁸⁸ Van der Schyff n 151 11.

⁴⁸⁹ Dworkin in Currie & De Waal n 12 361.

⁴⁹⁰ A counter-argument to this conception is the fact that the courts are open to all and should an individual feel violated by the actions of another redress can be sought by litigating on the matter. It should, however, be borne in mind that the costs of litigation for the average South African citizen makes this option an ideology as opposed to a

Emerson's analysis of the US government's encroachment on freedom of political expression through the 'Alien and Sedition Acts, passed in 1798, and the Espionage Act, [sic] effect(ed) during the First World War' serves as a warning for the South African legislature when faced with the issue of whether to criminalise hate speech.⁴⁹¹ The same danger was inherent in the apartheid government's speech-limiting legislation, which inhibited transformation and liberation. The advantages and disadvantages of criminalisation should be weighed up in order to arrive at a balanced position that guarantees freedom of expression while countering the deconstructive effects of negative speech.

5.1.1 The advantages and disadvantages of criminalising hate speech

Advantages of criminalisation of hate speech:

- Criminalisation of hate speech promotes social cohesion and the communitarian ideal.
- Criminalisation sets clear boundaries as to what speech is acceptable for stimulating self-development and what is not.⁴⁹²
- Criminalisation establishes structure in a transitional democracy in which a rules based approach is most effective.
- Criminalisation is imperative for democracies born from past atrocities and serves as a protective measure against re-occurrence.⁴⁹³

Disadvantages of criminalisation of hate speech:

- Possible encroachment on freedom of expression when viewed from an absolutist perception of democracy.⁴⁹⁴
- Inhibition of self-actualisation.⁴⁹⁵

reality. If the state, who has cumulative knowledge and more resources, instituted action on behalf of the aggrieved it could significantly alleviate the burden.

⁴⁹¹ Emerson in O'Brien n 62 4-5.

⁴⁹² Heyman n 104 is of the opinion that valueless hate speech negatively affects the democratic process in that it silences the opposition.

⁴⁹³ Rwanda serves as a good example of a country where strict legislative prohibition (along with effective implementation thereof) could possibly have avoided recurrence of genocide.

⁴⁹⁴ Delgado & Stefaniec n 313 3. He conceptualises democracy as requiring complete freedom of expression. Wellington n 61 1105, proposes that deviant expression should be punished to protect the democratic process.

- Difficulty in clearly defining hate speech, resulting in inconsistencies.⁴⁹⁶
- Risk that legislative prohibitions can be used as a tool to silence political opposition.

5.1.2 The advantages and disadvantages of not criminalising hate speech

Advantages of not criminalising hate speech:

- Non-interference promotes uninhibited truth discovery and self-actualisation.⁴⁹⁷
- Not criminalising hate speech supports an absolutist conception of the democratic ideal which is borne out of free speech.⁴⁹⁸
- By disallowing criminalisation one removes the risk that a government can use legislative measures to interfere with the democratic process.⁴⁹⁹

Disadvantages of not criminalising hate speech:

- Uninhibited free speech undermines social cohesion and promotes community segregation and in-group formation.
- Without criminalising hate speech the dignity and equality rights of the audience are ignored, offering limited protection for the violation of their rights.⁵⁰⁰
- Complete freedom ignores past atrocities and the fact that retribution, restoration and development are a continuous and sensitive process.

From the analysis it is clear that there are both advantages and disadvantages to the criminalisation of hate speech. The correct answer will depend on the history, cultural connection, juristic tradition, level of democratic development and freedom of expression model of each dispensation. For South Africa the advantages of criminalising and the disadvantages of not criminalising hate speech outweigh the opposite course of action. The research study makes

⁴⁹⁵ O'Brien n 62.

⁴⁹⁶ This problem is evident from the analysis of the DHSB in chapter 4.

⁴⁹⁷ O'Brien n 63 and Milton n 65.

⁴⁹⁸ Adler n 289.

⁴⁹⁹ This interference is never purely eliminated. Even in an absolutist dispensation which opposes legislation, by appointing a pro-government bench of judges this interference is still possible through the appointed judiciary. The abuse of declaration of states of emergency is identified as another possible point for exploitation.

⁵⁰⁰ Delgado & Stefanic n 313 conceptualise the audience as the sacrificial lamb in a freedom first formulation of expression.

it clear that it is now up to the legislature to step in and regulate the negative effects of hate speech.

5.2 Criminalisation as an effective measure against hate speech in South Africa

The research question whether freedom of expression which manifests as hate speech should be limited was answered in the affirmative in chapters 2 and 3. The fact that the constitutional drafters modified and limited freedom of expression in section 16(2) is clearly indicative of their presumption for limitation. Chapter 2 debated the reasons for and against limitation in the light of libertarianism and absolutism. It established the place of and need for limitation within South Africa as a libertarian state.

Chapter 3 revealed a pro-limitation view from the international community and foreign comparatives studied. The ICCPR identifies respect for the rights of others and the protection of social order as legitimate reasons for the limitation of hate speech. The Banjul Charter, in section 29(4), entrenches the duty of every African to preserve and strengthen national solidarity and this is incompatible with freely allowing hate speech. The enactment of PEPUDA and drafting of the DHSB clearly indicate the view of the South African legislature as being in favour of limitation. Similarly, the South African courts have shown a disposition to limit hate speech when necessary in line with the harm principle, as is evident from the High Court's finding in *Jamiat-Ul-Ulama*, the CC in *Islamic Unity* and the BCTSA in *Polakow*. The recent pronouncement of a hate speech positive finding by the Equality Court in the case against Mr. Malema on the song 'Shoot the Boer' affirms that limitation of hate speech has a rightful place in South Africa.

The question whether the limitations placed on hate speech in terms of section 16(2), common law remedies and current legislation are sufficient as forms of limitation was answered in the negative. Chapter 4 clearly outlined the shortcomings of current common-law remedies that could criminalise hate speech indirectly and civil remedies that overlap with PEPUDA. An international call for criminalisation was established in chapter 3, and it was noted that South Africa as a signatory to ICERD and CEDAW was required to give adherence to the call. Even after the promulgation of PEPUDA in 2000 the CC made it clear in 2002 in *Islamic Unity* that

there is a need for further regulation of hate speech. The clear *lacuna* in South Africa's hate speech regulation was affirmed and supported by sociological factors such as hate speech re-offences, the increase in the number of incidents of hate speech and a general social call for retribution.

The ultimate question, whether the *lacuna* in South African hate speech regulation should be filled with criminalising legislation was answered in the affirmative. A number of questions were answered in order to arrive at this finding. Chapter 3 found that the South African state has a duty to punish hate speech perpetrators in addition to its duty to prohibit hate speech. For criminalisation to be an option it must be possible to criminalise effectively. The legislature's attempts to criminalise hate speech have failed dismally so far and this poses the question of practicability. An international call for criminalisation highlights weightier considerations such as morality, along with public order and safety, as legitimate reasons why certain rights, especially freedom of expression, can and should be curbed.⁵⁰¹ Effective legislative remedies in foreign dispensations such as Kenya, Germany and Canada clearly indicate that criminalising regulation of hate speech is possible for South Africa.⁵⁰² The analysis in chapter 3 shows that it is also possible to distinguish between what is criminal and what is not criminal in the light of the cultural connection of each country, as Germany has successfully demonstrated.

Seleoane affirms that there 'is a general consensus that freedom of expression, like all other rights, is mediated by cultural factors in its application'.⁵⁰³ South Africa's apartheid past is undoubtedly a decisive influence in the legislature's choice to criminalise negative forms of expression. The dangers encapsulated in repeating apartheid-like offences in actions such as racially charged hate speech, which incites to imminent violence or harm, outweigh the value of a free 'market of ideas' as far as South Africa is concerned. At the same time there is a risk that the government could use hate speech legislation to silence the voice of those who oppose its ideologies. Within an analysis of the South African historical reality and its point of development as a democracy, the need for legislated rules is clear.⁵⁰⁴

⁵⁰¹ See as examples ICCPR n 108, ICERD n 221, CEDAW n 233 and ACHR n 270.

⁵⁰² Brugger n 239 para 3.

⁵⁰³ Seleoane 2001 (20) *Politeia* 19.

⁵⁰⁴ Mahoney n 260.

An era of non-criminalisation in South Africa has passed since democratisation and the FXI's criticism and concern for the exponential escalation of hate speech occurrences is duly noted.⁵⁰⁵ Braun's opinion that social incitement lies at the heart of democratic mobilisation does not extend to hate speech in the South African cultural connection and hate speech cannot be left unregulated.⁵⁰⁶ The apartheid past calls for protective measures embodying the harm principle to shield against counter-democratic hate speech. Criminalising hate speech is offered as the most plausible method in South Africa of enhancing and protecting the newly established infant democracy which has arisen from the atrocities of its apartheid past. Whether or not effective legislation will be promulgated remains something that only the future will tell but the immediate need for action remains evident.

5.3 Paving the way for criminalisation of hate speech

The regulation of hate speech through legislative measures has not yet come to pass in South Africa. Criticism without offering plausible solutions is of marginal value. The following elements have been identified as imperative for ensuring effective hate speech legislation and should be incorporated in future attempts to criminalise hate speech. Legislation to criminalise hate speech should:

- be practicable, enforceable and should avoid vagueness
- be clear in its definition of hate speech within South Africa's cultural connection
- unambiguously define the elements of the hate speech crime (i.e. what is allowed and what is prohibited)
- stipulate defences but at the same time it should not nullify common law defences⁵⁰⁷
- incorporate a comprehensible burden of proof
- be geared toward identifying rights balancing as the core test to be utilised in hate speech adjudication, leaving room for further judicial interpretation
- be inclusive of and clearly stipulate immunity clauses

⁵⁰⁵ See n 422.

⁵⁰⁶ Braun n 21.

⁵⁰⁷ New legislation and its interpretation will have to draw on the common law and judicial precedent in order to mobilise its implementation.

- be clear in the penalties stipulated and these penalties should not be disproportionate to the harm caused
- be internally demarcated to ensure that democracy is protected
- be drafted in such a way that it is protective in nature

The Camden Principles offer further guidance on the construction of speech-restrictive legislation in principle 11.1, which stipulates the following: Legislation should be the subject of a social need such as the current social outcry against hate speech in South Africa;⁵⁰⁸ legislation should not be constructed overbroad; the benefit of the legislation to society must outweigh the harm it does to freedom of expression; and legislation should be drafted in a manner that is least intrusive on freedom of expression in general.⁵⁰⁹ Principle 10.2 clearly stipulates that the legislation should acknowledge dissenting opinions and be supportive of different communities but at the same time supportive of marginalised groups.⁵¹⁰

⁵⁰⁸ Camden Principles (specifically principal 12) as cited in Article 19 <http://www.article19.org> (Date of use 27/12/2009) and anonymous <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (Date of use 10/07/2011).

Principle 2.2 ‘In particular, States should ensure that domestic constitutional provisions set out clearly the scope of permissible restrictions on the right to freedom of expression, including that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest recognised in the constitution, and be necessary in a democratic society to protect that interest.’

⁵⁰⁹ Camden Principles n 508. Principle 11.1 ‘States should not impose any restrictions on freedom of expression that are not in accordance with the standards set out in Principle 2.2 and, in particular, restrictions should be provided by law, serve to protect the rights or reputations of others, national security or public order, or public health or morals, and be necessary in a democratic society to protect these interests. 2 This implies, among other things, that restrictions:

- i. Are clearly and narrowly defined and respond to a pressing social need.
- ii. Are the least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression.
- iii. Are not overbroad, in the sense that they do not restrict speech in a wide or untargeted way, or go beyond the scope of harmful speech and rule out legitimate speech.
- iv. Are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.’

⁵¹⁰ Camden Principles n 508. Principle 10.2. ‘Civil society organisations should respect pluralism, and promote the rights to freedom of expression and equality in accordance with these Principles. In particular, they should promote intercultural understanding, acknowledge dissenting voices, and support the ability of members of different communities, and particularly marginalised groups, to voice their perspectives and concerns, in a way that recognises the internal diversity of communities.’

5.3.1 Clear definitions and protective in nature

The first and fundamental problem with attempted hate speech legislation such as the DHSB is the lack of a clear definition of what hate and hate speech crimes entail. A practical example will aid the analysis:⁵¹¹ If a Christian minister preaches against the practice of homosexuality on a Sunday morning in church (meeting the criteria for a public place), in accordance with his Biblical belief that homosexuality is against the will of God, this could *prima facie* in the absence of a clear hate definition, be interpreted as hate speech.⁵¹² The principles of fundamental justice and rights balancing are inherent checks built into the human rights jurisprudence to avoid inequitable occurrences such as the issue of a warrant of arrest for the perpetrating minister.⁵¹³ Once the minister's words are interpreted in context, taking all the background facts and circumstances into account, the hate element is removed as the message is theoretically one rooted in the love of God, cautioning against sexual perversion.⁵¹⁴ Webster's dictionary defines hate as a strong negative emotion coupled with enmity or malice.⁵¹⁵ An alternative definition is a strong distaste coupled with sustained ill will. What becomes clear from the definitions listed above is the fact that hate embodies an element of antagonism or hostility which manifests in a desire to cause harm. These elements will probably not be present in the sermon and as a result it will not meet the definition of a hate speech crime.

Expressions that represent dissenting opinions against identifiable groups communicated without a hateful intent cannot be interpreted as hate speech.⁵¹⁶ Identifiable groups, firstly structured around the section 16(2) list of race, ethnicity, gender and religion and then expanded, should be

⁵¹¹ *Sweden v Ake Ingemar Teodor Green B 1050-05* and WorldNetDaily <http://www.wnd.com/?pageId=33636> (Date of use 09/09/2011). Minister Ake Green was initially convicted of hate speech in lower court and later acquitted by the Swedish Supreme Court on similar facts and circumstances: 'They noted the court recognized Green's comments were made during a religious sermon and did not incite others to take harmful actions against homosexuals.'

⁵¹² The example is based on the facts of a Swedish case. Religious Tolerance.org http://www.religioustolerance.org/hom_hat8a.htm (Date of use 27/12/2009).

⁵¹³ The right to freedom of religion, opinion and expression thereof will be weighed against the right to freedom of sexual orientation, dignity and equality.

⁵¹⁴ If hate is not present in the message no criminal action can be found as it then merely becomes the free expression of an opinion as guaranteed in the 1996 Constitution. Should this message be coupled with incitement to harm homosexual people, the scenario could turn into a hate speech perpetration if the message speaks of malicious action.

⁵¹⁵ McDougal & Littell n 35 409.

⁵¹⁶ Extension is possible by drawing on the discrimination clause in section 9(3) of the 1996 Constitution.

identified and clearly defined. Defining hate is no easy task and the legislature will have to draw on various academic fields such as psychology and sociology in order to arrive at a comprehensive definition.

Based on the Camden Principles, ‘clear definitions’ implies that the elements of the hate speech crime must be outlined and the following South African framework is suggested: The statements must be made publicly, with intent and malice, it must be directed towards a defined group and inspire violence, severe harm or an imminent breach of peace. According to principle 11.1(iii), legislation must be drafted specifically and not broadly as this would encroach on the spirit of the right to freedom of expression as the DHSB did.⁵¹⁷ Acts should be drafted in such a way that they are protective in nature towards both the audience who are affected by the hate speech message and at the same time towards freedom of expression as a whole in line with principle 10.2, which supports the value of dissenting opinions.⁵¹⁸

5.3.2 Immunity clauses

Another imperative element for constructing effective hate speech legislation is identifying circumstances that disallow prosecution or allow for the legitimate expression of messages that *prima facie* seem to embody hate speech. The Canadian Criminal Code provides a good example of such instances of immunity, which include:⁵¹⁹ Expressions made during private conversations; expressions that represent scientific fact; expressions that are made in ‘good faith’ as a result of religious orientation; expressions made in the public interest; and expressions made with governmental approval.⁵²⁰

In South Africa the hate speech crime should not extend to *bona fide* artistic, scientific and academic works or to fair and truthful reporting which is in the public interest. In the DHSB the legislature was effective in extending immunity for hate speech that is needed and reasonable in

⁵¹⁷ The DHSB includes s 2(h) as a catch-all clause.

⁵¹⁸ Camden Principles n 510 principle 10.2.

⁵¹⁹ See n 63 s 319(3).

⁵²⁰ Religious Tolerance.org http://www.religioustolerance.org/hom_hat6a.htm (Date of use 29/12/2009).

certain circumstances but the inclusion of this immunity clause becomes overbroad in section 3(1)(d) when it extends hate speech immunity to the ‘publication of any information, advertisement or notice that is in accordance with section 16’ of the 1996 Constitution. Clear boundaries should be drawn between what are legal and what are illegal forms of hate speech. All forms of expression that are in line with those guaranteed under section 16(1) of the 1996 Constitution are protected under the 1996 Constitution regardless of immunity clauses.

5.3.3 Comprehensible burden of proof

The presumption of innocence is in line with the principles of fundamental justice within democratic dispensations. In order to avoid unjust convictions the burden of proof should fall on the state in criminalising legislation as the bargaining position of the accused (i.e. financial resources, time and cumulative knowledge) is substantially weaker than that of the state. If the accused is required to prove his innocence, this reverse onus could place an unjust burden on him which in turn could lead to unjust administrative action.⁵²¹

5.3.4 Rights balancing and room for judicial interpretation

The legislature will not be able to clearly define every instance of hate speech as attempted in section 2 of the DHSB as this results in overbroad legislation which is weak, ineffective and not conducive to its purpose. Rights balancing should be solidified as the central test for hate speech crimes along with the text within context and objective reasonable person tests.⁵²² Overbroad legislation is counter-democratic and attempts to usurp the function of the judiciary while contradicting principle 11.1(iv) of the Camden Principles.⁵²³ A balance must be struck between what can be clearly regulated in writing and what must be deduced and interpreted, beyond a reasonable doubt, from the facts, circumstances, content and context of the speech.

⁵²¹ *Keegstra* n 282 para 3.

⁵²² *Constand Viljoen* n 423 2.

⁵²³ Camden Principles n 509 11.1(iv).

A legislative measure which clearly defines hate speech, clarifies the exceptions to the rule, clearly stipulates the burden of proof combined with effective judicial interpretation which weighs the rights of the various parties against each other within the democratic process, is the only plausible solution to regulating the hate speech phenomenon in South Africa.

5.4 Conclusion

During the past decade hate speech has been analysed thoroughly by the South African courts, tribunals and commissions. The fact is that hate speech instances are on the increase and the social outcry for redress and protection against its negative effects is a pressing concern. Apartheid represented an era of abuse and denial of freedom of expression in South Africa. Uninhibited freedom poses a great threat to dignity and equality, two rights that suffered just as much as if not more than freedom of expression under the apartheid era.

The clear gap in hate speech regulation should possibly be filled with criminalising legislation but how the drafters go about effecting this limitation will represent either a victory or a disaster for freedom of expression and human rights jurisprudence in South Africa in the years to come. It seems as if the world has come full circle since the era of enlightenment and Voltaire's words 'I disapprove of what you say, but I will defend to the death your right to say it,' recognising that absolute freedom without balance is counterproductive and inherently destructive.⁵²⁴

⁵²⁴ Tallentyre *The Friends of Voltaire* (1906).

BIBLIOGRAPHY

ACADEMIC BLOGS AND COMMENTARY

A

Amnesty Report <http://www.internationallawbureau.com/blog/?p=1698> (Date of use 12/09/2011).

Amnesty Report “Amnesty International Report Outlines Concerns over Rwanda’s ‘genocide ideology’ and ‘sectarianism’ laws” <http://www.internationallawbureau.com/blog/?p=1698>, (Date of use 12/09/2011).

Article 19 www.article19.org/pdfs/press/kenya-article-19-recommends-amendments-to-hate-speech (Date of use 15/05/2011).

Article 19 “Kenya: ARTICLE 19 Recommends Amendments to Hate Speech Bill 2009” www.article19.org/pdfs/press/kenya-article-19-recommends-amendments-to-hate-speech (Date of use 15/05/2011).

C

CHRC http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi_qa_qr/page1-eng.aspx (Date of use 02/04/2011).

CHRC “Expanding Knowledge, Strategic Initiatives” http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi_qa_qr/page1-eng.aspx (Date of use 02/04/2011).

Canadian Human Rights Commission (CHRC) http://www.chrc-ccdp.ca/proactive_initiatives/legal_milestones-eng.aspx (Date of use 15/05/2011).

CHRC “Hate Messages and Section 13 of the Canadian Human Rights Act – Legal Milestones” 2005 <http://www.chrc-ccdp.ca/proactiveinitiatives/legalmilestones-eng.aspx> (Date of use 15/05/2011).

D

De Vos <http://constitutionallyspeaking.co.za/kill-the-boer-the-anc-was-against-it-before-it-was-in-favour-of-it/> (Date of use 18/05/2011).

De Vos P “Kill the boer: The ANC was against it before it was in favour of it” 2011 *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/kill-the-boer-the-anc-was-against-it-before-it-was-in-favour-of-it/> (Date of use 18/05/2011).

De Vos <http://constitutionallyspeaking.co.za/category/julius-malema/> (Date of use 30/09/2011).

De Vos P “Malema judgment: A re-think on hate speech needed” 2011 <http://constitutionallyspeaking.co.za/category/julius-malema/> (Date of use 30/09/2011).

De Vos <http://constitutionallyspeaking.co.za/on-the-curious-case-of-shooting-the-boer/> (Date of use 04/05/2010).

De Vos P “On the curious case of ‘shooting the boer’ ” <http://constitutionallyspeaking.co.za/on-the-curious-case-of-shooting-the-boer/> (Date of use 04/05/2010).

Dovell <http://www.worldpolicy.org/blog/2010/11/11/hate-speech-leads-genocide> (Date of use 12/09/2011).

Dovell E “Hate Speech leads to Genocide” <http://www.worldpolicy.org/blog/2010/11/11/hate-speech-leads-genocide> (Date of use 12/09/2011).

F

FXI Alert <http://www.ifex.org/en/content/view/full/59374/> (Date of use 14/12/2009).

FXI Alert <http://www.ifex.org/en/content/view/full/59374/> (Date of use 14/12/2009).

I

Icelandic Human Rights Centre <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/complaintsprocedures/> (Date of use 31/05/2011).

Icelandic Human Rights Centre “Complaints procedures of the international human rights supervisory bodies” <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/complaintsprocedures/> (Date of use 31/05/2011).

ICTR <http://www.unictr.org/> (Date of use 03/04/2011).

ICTR web <http://www.unictr.org/> (Date of use 03/04/2011).

M

Maina www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/Henry_Maina.doc (Date of use 15/05/2011).

Maina H “The prohibition of incitement to hatred in Africa: Comparative review and proposal for a threshold” 2011 *Article 19* www2.ohchr.org/english/issues/opinion/articles_1920iccpr/docs/Henry_Maina.doc (Date of use 15/05/2011).

Media Awareness Network http://www.media-awareness.ca/english/resources/legislation/canadian_law/federal/criminal_code/criminal_code_hate.cfm (Date of use 02/04/2011).

Media Awareness Network “Criminal Code of Canada: Hate Speech Provisions – Summary” http://www.mediaawareness.ca/english/resources/legislation/canadian_law/federal/criminalcode/criminalcodehate.cfm (Date of use 02/04/2011).

R

Religious Tolerance.org http://www.religioustolerance.org/hom_hat6a.htm (Date of use 29/12/2009).

Religious Tolerance.org “Hate Speech in Canada: Status of free speech in Canada. Criminal Code, sections 318 & 319” http://www.religioustolerance.org/hom_hat6a.htm (Date of use 29/12/2009).

Religious Tolerance.org http://www.religioustolerance.org/hom_hat8a.htm (Date of use 27/12/2009).

Religious Tolerance.org “Hate speech legislation in Sweden: Overview, the law is passed, reactions” http://www.religioustolerance.org/hom_hat8a.htm (Date of use 27/12/2009).

S

SAHRC http://www.sahrc.org.za/sahrc/cms/publish/printer_159.shtml (Date of use 18/06/2009).

SAHRC http://www.sahrc.org.za/sahrc_cms/publish/printer_159.shtml (Date of use 18/06/2009).

U

US Equal Employment Opportunity Commission <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (Date of use 31/05/2011).

US Equal Employment Opportunity Commission “Title VII of the Civil Rights Act of 1964” <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (Date of use 31/05/2011)

BOOKS

A

Arnold (ed) *Ideas and Ideologies: Human Rights* (1978).

Arnold C (ed) *Ideas and Ideologies: Human Rights* (Edward Arnold London 1978).

B

Baez *Affirmative Action, Hate Speech and Tenure: Narratives about Race, Law and the Academy* (2002).

Baez B *Affirmative Action, Hate Speech and Tenure: Narratives about Race, Law and the Academy* (RoutledgeFalmer New York 2002).

Baker *Limitation on Basic Human Rights – A View from the United States* (1986).

Baker CE *Limitation on Basic Human Rights – A View from the United States* (Yvon Blais Cowansville 1986).

Botha *Statutory Interpretation: An Introduction for Students* 4th ed (2005).

Botha C *Statutory Interpretation: An Introduction for Students* 4th ed (Juta Cape Town 2005).

Braun *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (2004).

Braun S *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (University of Toronto Press Toronto 2004).

Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998).

Burchell JM *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (Juta Cape Town 1998).

C

Cohen & Deng *Masses in Flight* (1998).

Cohen R & Deng FM *Masses in Flight* (Brookings Institution Press USA 1998).

Cram *Contested Words* (2006).

Cram I *Contested Words* (Ashgate London 2006).

Currie & De Waal *The Bill of Rights Handbook* (1995).

Currie I & De Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005).

D

Delgado & Stefanic *Must We Defend Nazis?* (1997).

Delgado R & Stefanic J *Must We Defend Nazis?* (New York University Press New York 1997).

De Spinoza A *Theologico-Political Treatise* (1951).

De Spinoza B *A Theologico-Political Treatise* (R.H.M Elwes translation Dover London 1951).

Domat *The Civil Law in its Natural Order* (2008).

Domat J *The Civil Law in its Natural Order* (The Lawbook Exchange New Jersey 2008).

Donisthorpe *Individualism: A System of Politics* (1889).

Donisthorpe W *Individualism: A System of Politics* (Macmillan London 1889).

Dugard *International Law: A South African Perspective* 2nd ed (2004).

Dugard J *International Law: A South African Perspective* 2nd ed (Juta Cape Town 2004).

Dworkin *Taking Rights Seriously* (1970).

Dworkin R *Taking Rights Seriously* (1970).

E

Evans & Murray (eds) *The African Charter on Human and Peoples' Rights* (2004).

Evans MD & Murray R (eds) *The African Charter on Human and Peoples' Rights* (Cambridge University Press UK 2004).

G

Gates *et al Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (1993).

Gates HL *et al Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (New York University Press New York 1993).

Gray *The Philosophy of Law: An Encyclopedia* (1998).

Gray CB *The Philosophy of Law: An Encyclopedia* (Taylor & Francis USA 1998).

Greenawalt *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995).

Greenawalt K *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press New Jersey 1995).

H

Harer & Harrell *People for and Against Restricted or Unrestricted Expression* (2002).

Harer JB & Harrell J *People for and Against Restricted or Unrestricted Expression* (Greenwood London 2002).

Heyman *Hate Speech and the Constitution* (1996).

Heyman SJ *Hate Speech and the Constitution* (Garland New York 1996).

K

Kearney *The Prohibition of Propaganda for War in International Law* (2007).

Kearney M *The Prohibition of Propaganda for War in International Law* (Oxford University Press New York 2007).

Kleyn & Viljoen *Beginnersgids vir Regstudente* 3rd ed (2002).

Kleyn D & Viljoen F *Beginnersgids vir Regstudente* 3rd ed (Juta Cape Town 2002).

L

Luttwak *Coup d'état: A Practical Handbook* (1979).

Luttwak E *Coup d'état: A Practical Handbook* (Harvard University Press USA 1979).

M

Mill *On Liberty* (1978).

Mill JS *On Liberty* (Hackett Indianapolis 1978).

Miller *Alternatives to Freedom: Arguments and Opinions* (1995).

Miller WL *Alternatives to Freedom: Arguments and Opinions* (Longman New York 1995).

Milton *Complete Prose Works of John Milton: Areopagitica* (1959).

Milton J *Complete Prose Works of John Milton: Areopagitica* (Yale University Press New Haven 1959).

Mouton *How to succeed in your Master's and Doctoral Studies: A South African Guide and Resource Book* (2001).

Mouton J *How to Succeed in Your Master's and Doctoral Studies: A South African Guide and Resource Book* (Van Schaik Pretoria 2001).

Murphy *2715 One-Line Quotations for Speakers, Writers & Raconteurs* (1996).

Murphy EF 2715 *One-Line Quotations for Speakers, Writers & Raconteurs* (Gramercy Books New York 1996).

N

Neethling *et al Deliktereg* 4de uitgawe (2002).

Neethling *et al Deliktereg* 4de uitgawe (Butterworths Durban 2002).

Nelson *Beyond the First Amendment: The Politics of Free Speech and Pluralism* (2005).

Nelson SP *Beyond the First Amendment: The Politics of Free Speech and Pluralism* (The Johns Hopkins University Press Baltimore 2005).

Nieman & Bennett *Business Management: A Value Chain Approach* (2002).

Nieman G & Bennett A *Business Management: A Value Chain Approach* (Van Schaik Cape Town 2002).

O

O'Brien *et al The Lanahan Readings in Civil Rights and Civil Liberties* (1999).

O'Brien DM *et al The Lanahan Readings in Civil Rights and Civil Liberties* (Lanahan Baltimore 1999).

P

Paine (ed) *The Rights of Man* (1906).

Paine T (ed) *The Rights of Man* (Everyman's Library London 1906).

R

Raphael *Political Theory and the Rights of Man* (1967).

Raphael DD *Political Theory and the Rights of Man* (Macmillan London 1967).

S

Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

Smith A *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen London 1776).

Smith *The Reader's Companion to U.S Women's History* (1999).

Smith B *The Reader's Companion to U.S Women's History* (Houghton Mifflin Harcourt USA 1999).

Smith *Freedom of Expression and Partisan Politics* (1989).

Smith CR *Freedom of Expression and Partisan Politics* (University of South Carolina Press USA 1989).

Smith *Textbook on International Human Rights* 2nd ed (2005).

Smith RKM *Textbook on International Human Rights* 2nd ed (Oxford University Press Oxford 2005).

Snyman *Criminal Law* 4th ed (2002).

Snyman CR *Criminal Law* 4th ed (LexisNexis Butterworths Durban 2002).

Steiner *et al International Human Rights in Context* (2008).

Steiner H *et al International Human Rights in Context* (Oxford University Press US 2008).

Sumner *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004).

Sumner LW *The Hateful and the Obscene: Studies in the Limits of Free Expression* (University of Toronto Press Toronto 2004).

T

Trager & Dickerson *Freedom of Expression in the 21st Century* (1999).

Trager R & Dickerson DL *Freedom of Expression in the 21st Century* (Pine Forge Press London 1999).

Tallentyre *The Friends of Voltaire* (1906).

Tallentyre SG *The Friends of Voltaire* (UK Evelyn Beatrice Hall 1906).

V

Van Wyk *et al Rights and Constitutionalism: The New South African Legal Order* (1994).

Van Wyk *et al Rights and Constitutionalism: The New South African Legal Order* (Juta Cape Town 1994).

Van der Schyff *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005).

Van der Schyff G *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (Wolf Legal Publishers The Netherlands 2005).

Van der Vyver *Die Beskerming van Menseregte in Suid-Afrika* (1975).

Van der Vyver JD *Die Beskerming van Menseregte in Suid-Afrika* (Juta Kaapstad 1975).

CODES OF CONDUCT

Code of Conduct of Broadcasting Service Licensees (1993).

DICTIONARIES

D

Dictionary.com <http://dictionary.reference.com/browse/dignity> (Date of use 23/03/2011).

Dictionary.com <http://dictionary.reference.com/browse/dignity> (Date of use 23/03/2011).

H

Hawkins *et al The Oxford Study Dictionary* (1992).

Hawkins MJ *et al The Oxford Study Dictionary* (Oxford University Press Oxford 1992).

Hill & Hill <http://legal-dictionary.thefreedictionary.com/unlawful> (Date of use 18/04/2011).

Hill JN & Hill KT “Unlawfulness” 2005 <http://legal-dictionary.thefreedictionary.com/unlawful> (Date of use 18/04/2011).

T

The Free Dictionary <http://legal-dictionary.thefreedictionary.com/Freedom+of+Speech> (Date of use 12/09/2011).

The Free Dictionary “Freedom of Speech” <http://legal-dictionary.thefreedictionary.com/Freedom+of+Speech> (Date of use 12/09/2011).

The Free Dictionary <http://www.thefreedictionary.com/offence> (Date of use 16/05/2011).

The Free Dictionary “Offence” <http://www.thefreedictionary.com/offence> (Date of use 16/05/2011).

The Legal Dictionary <http://legal-dictionary.thefreedictionary.com/Reasonable+Person> (Date of use 19/05/2011).

The Legal Dictionary “Reasonable Person” <http://legal-dictionary.thefreedictionary.com/Reasonable+Person> (Date of use 19/05/2011).

L

Legal definitions <http://definitions.uslegal.com/t/threat-of-harm/> (Date of use 16/04/2011).

Legal definitions <http://definitions.uslegal.com/t/threat-of-harm/> (Date of use 16/04/2011).

M

McDougal & Littell *Webster’s High School Dictionary* (1986).

McDougal & Littell *Webster’s High School Dictionary* (McDougal, Littell New York 1986).

Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/truth> (Date of use 18/04/2011).

Merriam-Webster Dictionary “Truth” <http://www.merriam-webster.com/dictionary/truth> (Date of use 18/04/2011).

R

Random House Dictionary <http://dictionary.reference.com/browse/imminent> (Date of use 19/05/2011).

Random House Dictionary 2011 <http://dictionary.reference.com/browse/imminent> (Date of use 19/05/2011).

JOURNAL ARTICLES

A

Adler 1996 (84) *California Law Review*.

Adler A “What’s left? Hate speech, pornography, and the problem for artistic expression” 1996 (84) *California Law Review*.

Anonymous 1967-1968 (66) *Michigan Law Review*.

Anonymous “Constitutional law – freedom of speech – desecration of national symbols as protected political expression” 1967-1968 (66) *Michigan Law Review*.

B

Bloustein 1981 *Rutgers Law Review*.

Bloustein EJ “The origin, validity, and interrelationships of the political values served by freedom of expression” 1981 *Rutgers Law Review*.

Brugger <http://www.germanlawjournal.com/article.php?id=212> (Date of use 21/06/2009).

Brugger W “The treatment of hate speech in German constitutional law” *German Law Journal* <http://www.germanlawjournal.com/article.php?id=212> (Date of use 21/06/2009).

D

Delgado 1982 (17) *Harvard Civil Rights-Civil Liberties Law Review*.

Delgado R “Words that wound: A tort action for racial insults, epithets, and name-calling” 1982 (17) *Harvard Civil Rights-Civil Liberties Law Review*.

G

Goolam 2006 *CILSA*.

Goolam NMI “*The Cartoon Controversy: A Note on Freedom of Expression, Hate Speech and Blasphemy*” 2006 (XXXIX) *CILSA*.

H

Haigh 2006 (5) *Washington University Global Studies Law Review*.

Haigh RF “South Africa’s criminalization of ‘hurtful’ comments: When the protection of human dignity and equality transforms into the destruction of freedom of expression” 2006 (5) *Washington University Global Studies Law Review*.

J

Janofsky 1979 (65) *ABA Journal*.

Janofsky LS “A.B.A attacks delay and the high cost of litigation” 1979 (65) *ABA Journal*.

K

Kahn 2006 (83) *U. Det. Mercy L. Rev.*

Kahn RA “Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany” 2006 (83) *U. Det. Mercy L. Rev.* 163.

Koji 2001 (12) *Ejil*.

Koji T “Emerging hierarchy in human rights and beyond: From the perspective of non-derogable rights” 2001 (12) *Ejil*.

Kok 2009 (24) *SAPR/PL*.

Kok A “Which is the appropriate forum when hate speech occurs in the workplace: The equality court or the labour court?” 2009 (24) *SAPR/PL*.

Krotoszynski 2004 (78) *Tulane Law Review*.

Krotoszynski RJ “A comparative perspective on the First Amendment: Free speech, militant democracy, and the primacy of dignity as preferred constitutional value in Germany” 2004 (78) *Tulane Law Review* 1549.

M

Mahoney 1996 (789) *U. III. L. Rev.*

Mahoney KE “Hate speech: Affirmation or contradiction of freedom of expression” 1996 *U. III. L. Rev.*

N

Napier <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=11605> (Date of use 13/06/2011).

Napier C “The origins and implementation of the Constitution” 1995 <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=11605> (Date of use 13/06/2011).

O

Olsen 2011 (44) *British Journal of Aesthetics*.

Olsen SH “Modes of interpretation and interpretative constraints” 2011 (44) *British Journal of Aesthetics*.

Owen in Duncan J (ed) *Between Speech and Silence: Hate Speech, Pornography and the New South Africa* (1996).

Owen U “Hate speech and pornography: Current challenges” in Duncan J (ed) *Between Speech and Silence: Hate Speech, Pornography and the New South Africa* 1996 Joint Publication from The Freedom of Expression Institute and the Institute for Democracy in South Africa.

Oosthuizen & Russo 2001 *South African Journal of Education*

Oosthuizen IJ & Russo CJ “A Constitutionalised perspective on freedom of artistic expression” 2001(21) *South African Journal of Education*

P

Pinto 2011 (31) *Oxford Journal on Legal Studies*.

Pinto M “What are offences to feelings really about? New regulative principle for the multicultural era” 2011 (31) *Oxford Journal on Legal Studies*.

S

Seleoane M “Freedom of expression: A comparative analysis” conference article for presentation at a South African National Editors’ Forum (Sanet), the South African Human Rights Commission (SAHRC) and AR conference.

Seleoane 2001 (20) *Politeia* 19.

Seleoane M “Towards an African theory of freedom of expression” 2001 (20) *Politeia*.

Smolla 1990 *Law and Contemporary Problems*.

Smolla RA “Academic freedom, hate speech and the idea of a university” 1990 (53) *Law and Contemporary Problems*.

Spector 2002 (10) *Miami Int'l & Comp L Rev*.

Spector J “Spreading Angst or promoting free expression: Regulating hate speech on the internet” 2002 (10) *Miami Int'l & Comp. L. Rev*.

Stradella 2008 *German Law Journal*

Stradella E “Hate speech in the background of the security dilemma” 2008 *German Law Journal*.

T

Teichner 2003 (19) *SAJHR*.

Teichner S “The hate speech provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The good, the bad and the ugly” 2003 (19) *SAJHR*.

Terreblanche & Quintal www.iol.co.za (Date of use 14/12/2009).

Terreblanche C & Quintal A “SA hate speech bill compared to Zim law” 2004 *The Mercury* www.iol.co.za (Date of use 14/12/2009).

U

USAID Policy 1991 *Directorate for U.S. Agency for International Development Washington, D.C.*

USAID Policy “Democracy & Governance” 1991 *Directorate for U.S. Agency for International Development Washington, D.C.* 20523.

V

Venter *Stellenbosch* 33.

Venter L “Exploring the assessment of hate speech and other complaints by the BCCSA” 2006 conference paper for South African Communication Association *Stellenbosch*.

W

Wachira 2008 *Minority Rights Group International*.

Wachira GM “African Court on Human and Peoples’ Rights: Ten years on and still no justice” 2008 *Minority Rights Group International*.

Wellington 1979 (88) *Yale Law Journal*.

Wellington HH “On Freedom of Expression” 1979 (88) *Yale Law Journal*.

Wilson 1993 (1033-2) *University of Tulsa*.

Wilson G “Why hate speech should be protected” <http://www.garretwilson.com/essays/law/freespeakmind.html> 1993 (1033-2) *University of Tulsa* (Date of use 12/09/2011).

LIST OF CASES

Canada

Canadian Human Rights Commission v Taylor (1990) 13 C.H.R.R. D/435 (S.C.C.).

R v Heywood [1994] 3 S.C.R. 761.

R v Keegstra 3 S.C.R. 697 (1990).

R v Oakes (1986) 1 SCR 103.

Germany

Irving v Lipstadt BVerfGE 90, 241, 247, Decision of 13 April 1994, Auschwitz Lie Case at 625.

Mephisto BVerfGE 173 (1971).

International

Jersild v Denmark 36/1993/431/510 (1994).

Malcolm Ross v Canada CCPR/C/70/D/736/1997 (2001) U.N. Doc.

Robert Faurisson v France CCPR/C/58/D/550/1993(1996) U.N. Doc.

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze ICTR-99-52-T.

Yates v United States 354 US 298 (1957).

Zana v Turkey 69/1996/688/880 (1997).

Namibia

Namibia v Ester Smith and Others CC 95/96, 27 Sept. 1996.

South Africa

Afriforum and Another v Malema (18172/2010) [2010] ZAGPPHC 39.

Chetty v Durban University of Technology (1/2007) [2008] ZAKZHC 15.

De Lange v Costa 1989 (2) SA 857 (A).

De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) 2003 (3) SA 345 (CC).

Federal Council of the National Party v Maharaj Kasrils and Mokaba (SAHRC) 1997.

Freedom Front v South African Human Rights Commission 2003 (11) BCLR 1283.

Human Rights Commission of South Africa v SABC (2002) JOL 10185 (BCCSA).

In re: Complaint by General Constand Viljoen (prepared by MC Moodliar 1999).

In re: Complaint lodged with the SAHRC by Agri-Wes Cape to determine whether comments/utterances made by Mr Tony Ehnreireich (COSATU) & Others amount to/constitute hate speech as alleged (WC/26/444).

Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC).

Jamiat-Ul-Ulama v Johncome Media Investment Ltd and Others (2006) 1127/06.

Laugh it off promotions CC v South African Breweries International (Finance) B.V. t/a SABMARK International and Freedom of Expression Institute 2005 (8) BCLR 743 (CC).

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (8) BCLR 872 (CC).

Manamela and Others v Shapiro (GP/2008/1037/E) MOKONYAMA.

National Media Ltd v Bogoshi 1998 (4) SA 1196.

Polakow v Radio Islam (2003) JOL 10768 (BCTSA).

Pollak v SABC (SAfm) (2003) JOL 11646 (BCTSA).

Prosecutor v Dario Kordic & Mario Cerkez (2001) ICTY 3.

Publications Control Board v William Heinemann, Ltd. and Others 1965 (4) SA 137 (A).

R v Umfaan 1908 TS 62.

S v Mamabolo 2001 (3) SA 409 (CC).

S v Modus Publications (Private) Ltd 1998 (2) SACR 151 (ZSC).

Sonke Gender Justice Network v Mr. Julius Malema (File no 02/2009).

South African National Defence Union v Minister of Defence and Another 1999 (6) BCLR 615 (CC).

Strydom v Chiloane 2008 (2) SA 247 (T).

Transnet Limited v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA).

United Democratic Front and Another v Acting Chief Magistrate, Johannesburg 1987 (1) SA 413 (W).

Sweden

Sweden v Ake Ingemar Teodor Green B 1050-05.

United Kingdom

Handyside v The United Kingdom (1976) 1 EHRR 737 at 754 as quoted by the CC.

United States of America

Abrahams v United States 250 U.S. 616 (1919).

Beauharnais v Illinois 343 U.S. 250 (1952).

Brandenburg v Ohio 395 US 444 (1969).

Chaplinsky v New Hampshire 315 U.S 358 (1942).

Collin v Smith 578 F.2d 1197 (7th Cir. 1987).

Contreras v Crown Zellerbach, Inc. 88 Wash. 2d 735, 565 P.2d 1173 (1977).

R.A.V v City of St. Paul 505 US 377 (1992).

Reno v American Civil Liberties Union 117 S. Ct. 2320 (1997).

Texas v Johnson 491 US (1989).

UWM Post, Inc v Board of Regents of the University of Wisconsin System 774 F. Supp. 1163 (E.D. Wis. 1991).

LIST OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

American Declaration of the Rights and Duties of Man (1948).

Convention on the Elimination of all Forms of Discrimination Against Women (1979).

Declaration of Human Duties and Responsibilities (1998).

Freedom Charter (1955).

International Covenant on Civil and Political Rights (1966).

International Convention on the Elimination of all forms of Racial Discrimination (1965).

The American Convention on Human Rights (1969).

Universal Declaration of Human Rights (1948).

LIST OF STATUTES

Canada

The Canadian Charter of Rights and Freedoms 1982.

The Canadian Criminal Code R.S.C. 1985 c. C-46.

The Canadian Human Rights Act R.S. 1985 c. H-6.

Germany

Basic Law for the Federal Republic of Germany (as amended by the Unification Treaty of 31/08/1990 and Federal Statute 23/09/1990).

The *Strafgesetzbuch* is the German Criminal Code - Strafgesetzbuch, StGB 1998.

Kenya

National Accord and Reconciliation Act 4 of 2008.

The Kenya Penal Code 1970.

Namibia

The Namibian Constitution 1982.

South Africa

Black Administration Act 38 of 1927.

Constitution of the Republic of South Africa 1996.

Internal Security Act 74 of 1982.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Racial Discrimination Prohibition Act 26 of 1991.

Riotous Assemblies Act 17 of 1956.

United Kingdom

Civil Rights Act 1964.

Public Order Act 1986.

United States of America

Alien and Sedition Acts 1798.

Constitution of the United States of America 1787.

Espionage Act 1917.

NEWSPAPER ARTICLES

A

Anonymous <http://152.111.1.88/argief/berigte/beeld/2011/05/17/B1/1/jkANCAfriForumHof.html> (Date of use 19/05/2011).

Anonymous “Hof se doel steeds om wit mense te laat vrees” 2011 *Beeld*
<http://152.111.1.88/argief/berigte/beeld/2011/05/17/B1/1/jkANCAfriForumHof.html>
(Date of use 19/05/2011).

Anonymous <http://www.sowetanlive.co.za/news/2011/09/13/malema-guilty-of-hate-speech>
(Date of use 13/09/2011).

Anonymous “Malema guilty of hate speech” 2011 *Sowetan*
<http://www.sowetanlive.co.za/news/2011/09/13/malema-guilty-of-hate-speech> (Date of use 13/09/2011).

Anonymous <http://www.beeld.com/Suid-Afrika/Nuus/Malema-skuldig-aan-haatspraak-20100315-4> (Date of use 13/09/2011).

Anonymous “Malema skuldig aan haatspraak” 2011 *Beeld* <http://www.beeld.com/Suid-Afrika/Nuus/Malema-skuldig-aan-haatspraak-20100315-4> (Date of use 13/09/2011).

Anonymous <http://www.guardian.co.uk/media/2006/feb/05/religion.news> (Date of use 08/06/2009).

Anonymous “Religion News” 2006 *The Guardian* <http://www.guardian.co.uk/media/2006/feb/05/religion.news> (Date of use 08/06/2009).

Anonymous <http://m.news24.com/news24/SouthAfrica/Politics/Shoot-the-boer-ruling-ANC-puzzled-20110516> (Date of use 1/08/2011).

Anonymous “Shoot the boer ruling: ANC Puzzled” 2011 *News 24* <http://m.news24.com/news24/SouthAfrica/Politics/Shoot-the-boer-ruling-ANC-puzzled-20110516> (Date of use 1/08/2011).

P

Pflanz <http://www.csmonitor.com/World/Africa/2010/0618/Kenya-reins-in-hate-speech-ahead-of-constitution-vote> (Date of use 13/09/2011).

Pflanz M “Kenya reins in hate speech ahead of constitutional vote” 2010 <http://www.csmonitor.com/World/Africa/2010/0618/Kenya-reins-in-hate-speech-ahead-of-constitution-vote> (Date of use 13/09/2011).

W

WorldNetDaily <http://www.wnd.com/?pageId=33636> (Date of use 09/09/2011).

WorldNetDaily <http://www.wnd.com/?pageId=33636> (Date of use 09/09/2011).

UN REGULATIONS

UN <http://www.ohchr.org/EN/ABOUTUS/Pages/DiscriminationAgainstWomen.aspx> (Date of use 07/05/2011).

UN “Combating Discrimination against Women” 2009 <http://www.ohchr.org/EN/ABOUTUS/Pages/DiscriminationAgainstWomen.aspx> (Date of use 07/05/2011).

U.N. SCOR (1994).

U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

WORLD WIDE WEB

A

Anonymous <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (Date of use 10/07/2011).

Camden Principles “The Camden Principles on Freedom of Expression and Equality”
<http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (Date of use 10/07/2011).

Article 19 <http://www.article19.org> (Date of use 27/12/2009).

Article 19 Global campaign for free expression “Comment on Prohibition of Hate Speech Bill, 2007 Kenya” 2009 <http://www.article19.org> (Date of use 27/12/2009).

B

Banisar http://wbi.worldbank.org/wbi/Data/wbi/wbicms_/files/drupal-acquia/wbi/Right%20to%20Information%20and%20Privacy.pdf (Date of use 17/04/2011).

Banisar D “The Right to Information and Privacy: Balancing Rights and Managing Conflicts” 2011 <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Right%20to%20Information%20and%20Privacy.pdf> (Date of use 17/04/2011).

Bently <http://www.informaworld.com/smpp/content=ant~content=a745964075&db=all> (Date of use 14/12/2009).

Bently KA, “If baboons could talk: J.S. Mill on freedom of speech and the limits of racial discourse” 2006 Democracy and Governance Programme, Human Sciences Research Council <http://www.informaworld.com/smpp/content=ant~content=a745964075&db=all> (Date of use 14/12/2009).

Bowler <http://www.polity.org.za/article/draft-prohibition-of-hate-speech-bill-2005-05-05> (Date of use 14/12/2009).

Bowler V “Draft Prohibition of Hate Speech Bill” 2004 <http://www.polity.org.za/article/draft-prohibition-of-hate-speech-bill-2005-05-05> (Date of use 14/12/2009).

Broecker http://works.bepress.com/christen_broecker/2 (Date of use 15/05/2011).

Broecker C “The Clash of Obligations: Exercising Extraterritorial Jurisdiction in Conformance with Transitional Justice” 2008 http://works.bepress.com/christen_broecker/2 (Date of use 15/05/2011).

D

David & Mill <http://plato.stanford.edu/entries/freedom-speech/> (Date of use 15/06/2009).

David & Mill *Stanford Encyclopedia of Philosophy: Freedom of Speech* <http://plato.stanford.edu/entries/freedom-speech/> (Date of use 15/06/2009).

H

Haupt http://128.197.26.34/law/central/jd/organizations/journals/_international/_volume23n2/documents/299-336.pdf (Date of use 31/05/2011).

Haupt CE “Regulating hate speech – damned if you do and damned if you don’t: Lessons learnt from comparing the German and U.S. approaches” <http://128.197.26.34/law/central/jd/organizations/journals/international/volume23n2/documents/299-336.pdf> (Date of use 31/05/2011).

K

Koskenniemi <http://www.humanityjournal.org/humanity-volume-1-issue-1/human-rights-main-streaming-strategy-institutional-power> (Date of use 12/09/2011).

Koskenniemi M “Human rights mainstreaming as a strategy for institutional power” 2010 *Humanity* <http://www.humanityjournal.org/humanity-volume-1-issue-1/human-rights-main-streaming-strategy-institutional-power> (Date of use 12/09/2011).

L

Leventhal <http://www2.iath.virginia.edu/holocaust/basicist.html> (Date of use 12/09/2011).

Leventhal RS “The Nazi Genocide of the Jews, 1933-45: A Brief Introduction to the Holocaust” 1995 <http://www2.iath.virginia.edu/holocaust/basichist.html> (Date of use 12/09/2011).

M

Maslow http://www.abraham-maslow.com/m_motivation/Hierarchy_of_Needs.asp (Date of use 31/05/2011).

Maslow AH “Maslow’s Hierarchy of Needs” http://www.abraham-maslow.com/motivation/Hierarchy_of_Needs.asp (Date of use 31/05/2011).

Mbaaro http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1796018 (Date of Use 9/10/2011).

Mbaaro ST “Freedom of Expression and Public Order: Exploring the Need for Hate Speech Legislation in Kenya” 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1796018 (Date of Use 9/10/2011).

Mendel <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf> (Date of use 26/03/2011).

Mendel T “Hate speech rules under international law” 2010 <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf> (Date of use 26/03/2011).

R

Roshan Cultural Heritage Institute <http://www.roshan-institute.org/474552> (Date of use 16/04/2011).

Roshan Cultural Heritage Institute “Definition of Culture” <http://www.roshan-institute.org/474552> (Date of use 16/04/2011).

S

Searle http://www.jgs.co.za/pages/publications/litigation/litigation_1.html (Date of use 19/04/2011).

Searle JG “Litigation Publications: Basic elements of a delict explained” *JGS* [http://www.jgs.co.za /pages/publications/litigation/litigation_1.html](http://www.jgs.co.za/pages/publications/litigation/litigation_1.html) (Date of use 19/04/2011).

South African History Online <http://www.sahistory.org.za/pages/chronology/main-chronology-1920s.html> (Date of use 15/06/2009).

South African History Online, Chronology: 1900s <http://www.sahistory.org.za/pages/chronology/main-chronology-1920s.html> (Date of use 15/06/2009).

T

Thornberry www2.ohchr.org/english/issues/opinion/articles_1920_iccpr/docs/expert_papers/Thornberry.doc (Date of use 15/05/2011).

Thornberry P “Forms of hate speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)” 2008 www2.ohchr.org/english/issues/opinion/articles_1920_iccpr/docs/expert_papers/Thornberry.doc (Date of use 15/05/2011).

U

University of Virginia Library <http://etext.virginia.edu/jefferson/quotations/jeff1500.htm> (Date of use 06/06/2009).

University of Virginia Library “A guide to the University of Virginia's collections related to Thomas Jefferson, with additional links to texts and information resources about Jefferson” 1798 <http://etext.virginia.edu/jefferson/quotations/jeff1500.htm> (Date of use 06/06/2009).