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HATE SPEECH IN SOUTH AFRICA

WHAT OUR CONSTUTITION DEMANDS?

In part fulfillment of the requirement of LLM (Human Rights Law) University of Johannesburg

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SOUTH AFRICA

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DEMANDS?

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Chapter I: Overview

The right to freedom of expression[1] is one of the most important rights known to humankind. From a South African perspective, this right was systematically trampled upon by the previous apartheid regime,[2] backed up by a plethora of racially charged laws.[3]

Censorship in South Africa came to the fore after the Nationalist Party government came into power in 1948. Over the next 37 years (prior to the imposition of a state of emergency on the 5th July 1985) press freedom was severely curtailed by the publication of over one hundred laws restricting the flow of information.[4] In short, any opposition to the ruling party was vehemently opposed, culminating on the 19 October 1977 when the government banned 17 black consciousness organisations, two newspapers and detained journalists without trial.[5] It is against this background that the drafters of the Constitution faced the daunting task of drafting a right to freedom of expression.

In term of section 16(1) of the Constitution:

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

It should be noted that in South Africa the right to freedom of expression is subject to an internal limitation clause enunciated in section 16(2) of the Constitution and states the following:[6]

> (2) the right in subsection (1) does not extend to-
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or

[1] This right is constitutionally recognised in terms of section 16(1) of the Final Constitution (hereinafter referred to as the "Constitution").
[2] The system of apartheid was entrenched in South Africa from 1948 until 1994.
[3] For example the Black Administration Act 38 of 1927 and also the Internal Security Act 74 of 1982.
[4] http//www.sahistory.org.za/article/criticism-and-censorship-South Africa at 3.
[5] Ibid at 4.
[6] The approach adopted in South Africa is similar to that in Germany in which the right to freedom of expression is also subject to an internal limitation. See Article 5(1) and (2) of the German Basic Law (GG). By contrast the U.S.A Constitution does not have any internal limitations to the right to free speech. See First amendment of the U.S.A Constitution 1787.

(d) advocacy of hatred that is based on race, ethnicity, gender or religion

The fundamental question to be addressed in this dissertation is to determine the approach adopted by South Africa towards hate speech. I shall contend it adopts what I term a 'balancing of rights' approach. A balancing of rights approach means that various entrenched rights in Chapter 2 of the Constitution will be weighed up against each other, cognisance previously been given to the specific facts of the case on hand. From a hate speech perspective the right to dignity, equality and freedom of expression usually comes to the fore in a balancing of rights of exercise. Allied to this, I will demonstrate that the legislature has in an effort to curtail hate speech imposed overbroad legislation which has the effect of intruding unnecessarily into the right to freedom of expression.[7] To this end, the contents of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) relating to hate speech, will be looked at closely and compared to the hate speech provision contained in section 16 (2). The draft Hate Speech Bill (DHSB) which has not been promulgated will also be critically discussed.

In order to demonstrate the approach adopted by South Africa, judgements of the Equality Court, the High Court and the Constitutional Court relating to hate speech will be critically analysed.[8]

It should be noted that considerable attention will be given to section 36(1) of the Constitution (the general limitation clause) as speech which is not prohibited by section 16 (2) may still be impermissible when tested against the general limitations clause.[9] The hate speech provisions contained in PEPUDA will be weighed up against the contents of the general limitation clause. I conclude that the provisions of section 10 (1)a and section 10 (1) b of the Act are unconstitutional and should be amended.

In order to demonstrate further that South Africa is adopting a balancing of rights approach to hate speech, comparative jurisprudence and legislation in foreign and international law will be examined. [10] This approach is mandatory as the relevant portion of section 39 of the Constitution states the following:

[7] In Section 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act were drafted with the object of controlling hate speech. These contents are however far broader than Section 16 (2) constitutional provision dealing with hate speech. See discussion in Chapter 3.
[8] See for example *Islamic Unity Convention v Independent Broadcasting Authority 2012 (4) SA 294 (CC)* and also the *Jamail – Ul- Ulama v Johncome Media Investment Ltd and Others (20026 1127/06.*
[9] Supra (n8) *Islamic Unity Convention at paragraph 30.*
[10] For example Canada, Germany and U.S.A. have been selected. Canada is a useful comparator as it has a general limitation clause similar to south Africa, and adopts a balancing of rights approach to freedom of

'when interpreting the Bill of Rights a court, tribunal or forum

(a) …

(b) must consider international law, and

(c) may consider foreign law.'

I conclude that the approach adopted by South Africa is similar in many aspects to the approach adopted in Canada, despite the different contextual setting. [11] There are also similarities the approach adopted in Germany[12], but Germany places even more emphasis on the role of dignity than South Africa. I will further demonstrate that a libertarian approach to hate speech as followed by the U.S.A. is not possible given the South African contextual and philosophical setting.[13]

It is submitted that a balancing of rights approach to hate speech is the most apposite for South Africa.[14] Furthermore, I submit that the general limitations clause in section 36 of the Constitution sufficiently prohibits undesirable speech, which may not fall within the ambit of section 16 (2). In conclusion and given the above controls against hate speech, any further specific legislation drafted with the intent of curtailing hates speech, should not be overbroad in nature.
The Draft Hate Speech Bill (DHSB) which has not been promulgated will also be critically discussed in light of these conclusions.

It will be shown that the majority of Western democracies are adopting a balancing of rights approach when determining whether or not hate speech is permissible.[15] In the U.S.A for example a libertarian approach to speech is vigorously followed, which given South Africa's historical past is not possible.[16]

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expression. Germany has an internal limitation to the right to free speech in the Constitution. By contrast U.S.A. adopts a liberal approach to freedom of expression and this right is subject to very few limitations for example obscenity, pornography, fighting words and clear and present danger.

[11] Canada adopts balancing of rights approach to hate speech. See *R v Keegstro 3 S.C.R. 697 (1990)* where the violation of the right to freedom of expression was balanced against the right to equality and dignity. Canada also has a general limitation clause in section 1 of the Canadian Charter.

[12] In Germany the Constitution contains an internal limitation clause in Article 5 (2) and also in terms of Article 1 the right to dignity is an inviolable right.

[13] South Africa has a history of part racial intolerance and inequality. Like Germany the right to dignity is of prime importance and often trumps the right to freedom of expression in a balancing of rights approach.

[14] Given the South African past history of racial intolerance and inequality a libertarian approach to hate speech is not feasible.

[15] For example Canada has a general limitation clause in section 1 of the Charter. See *R v Keegstra* 3 S.C.R 697(1990) where the violation of the right to freedom of expression was balanced against the rights to equality and dignity. In Germany the Constitution contains an internal limitation clause and the right to dignity is an inviolable right. Furthermore in both Canada and Germany certain hate speech is criminalized, see for example section 130 of the German Criminal Code and section 319 of the Canadian Criminal Code respectively.

[16] Supra (n13).

I will demonstrate that the DHSB should not be promulgated as it is too broad in content and impacts severely on the right to freedom of expression.[17] The same can be said for the PEPUDA which restricts freedom of expression more than section 16 (2) of the constitution.[18] It is recommended that PEPUDA be amended (as relates to hate speech) to bring it into line with section 16(2) of the constitution.[19]

In summation, it is submitted that a balancing of rights approach to hate speech is the most apposite in South Africa.[20] Furthermore, I submit that the general limitation clause in section 36 sufficiently prohibits undesirable speech, which may however not fall within the ambit of section 16(2).

[17] For example section 2(1) of the Draft Hate Speech Bill which attempts to criminalize speech which has an intention to be hurtful.

[18] For example section 10(1)a prohibits speech that demonstrates a clear intention to be hurtful on one of the listed grounds is far broader than section 16(2) of the Constitution.

[19] As the provisions of the PEPUDA are overbroad it may encroach upon section 16(1) protected speech and may not be saved by the limitation clause in section 36 of the Constitution. This will be looked at closely in Chapter 3.

[20] Given the South African past history of racial intolerance and inequality a libertarian approach to hate speech is not feasible.

Chapter II: Hate Speech Provisions in Foreign Law and International Law

2.1. General

South Africa has a past in which racial intolerance was rife and in some aspects encouraged by the apartheid regime. Legislation passed was in fact aimed at curbing any speech aimed at ending oppression suffered by Black people.[21] It was only with the advent of the Interim Constitution that the Government made a genuine effort to control hate speech. However, the Interim Constitution did not contain a hate speech clause. This was rectified by the insertion of such clause in the Final Constitution. [22]

As such, South Africa has extremely limited jurisprudence to draw on in interpreting key phrases in the 'hate speech clause' such as the following terms:

(a) advocacy of hatred based on race, ethnicity, gender or religion.

(b) the meaning of the term hatred.

(c) incitement to cause harm

(d) harm.

Countries such as Germany and the United States have by comparison a wealth of hate speech jurisprudence which will assist South Africa in interpreting certain controversial issues.[23] Furthermore, Canada and Germany have both resorted to the criminalization of hate speech in certain instances. The above illustrates that a comparative analysis of foreign law must be undertaken, in order to best understand the approach that South Africa should adopt in dealing with hate speech. This approach is also constitutionally sound as section 39 (1) c of the Constitution states that:

'In interpreting the Bill of Rights, South African courts may consider foreign law.'

2.2. Hate speech provisions in Canada

2.2.1. Introduction

In looking at the hate speech provisions adopted in Canada, I will look at the key elements of the approaches adopted by the Canadian courts. I will thereafter show that the decision by the courts in

[21] See the Native Administrative Act of 1927.
[22] See section 16 (2) of the Constitution.
[23] U.S.A. jurisprudence on hate speech dates back as far as 1919 in *Schenck v United States U.S 47. 53 (1919)* when the original 'clear and present danger' test was formulated.

Ernst Zundel v The Queen[24] is inconsistent with other judgments and the minority judgment should be preferred. Thereafter I will analyse its relevance to interpreting the South African hate speech clause.

2.2.2. Definition of hatred

A difficulty in the hate speech arena concerns providing a precise definition of hate speech or hatred. The Canadian courts have grappled with this problem in some depth in two leading hate speech cases.[25]

In *Taylor*'s case, the majority defined "hatred and contempt" as "unusually strong and deep felt emotions of detestation, calumny and vilification".[26] This definition was criticised by the minority as subjective and overbroad.[27] In essence, the minority is saying that the judge ends up deciding whether something is "hate" based upon their own subjective viewpoint.[28] Over-broadness is also linked to subjectivity and is an inevitable result of the alleged subjective nature of the assessment.[29] It submitted that unpopularity cannot be the defining feature of hate speech, but the majority recognises that it has to reach a certain level of depravity before it loses constitutional protection.

In the *Whatcott* case, the court narrowed the definition of hatred by removing the notion of "calumny" which it finds unnecessary to protect vulnerable groups.[30] The judgment seems to indicate that the harm in the hate speech seems to be in the incitement of people to hate vulnerable groups.[31] The judgement in *Whatcott* focused more on the effect of hate speech rather than its intellectual merits, realising full well that hate is often produced by emotions.

This notion of focusing on the mode of expression and the effects of that mode in producing hatred rather than on the ideas communicated echoes Waldron's observation that much hate speech regulation:

[24] (1992) 2 S.C.R.R. 731.
[25] See *Saskatchewan Human Rights Commission v Whatcott* [2013] SCJ No 11, 276 C.R.R. (2d) 270 (S.C.C) and also *Canada Human Rights Commision v Taylor* [1990] J.C.J No 129, [1990]3 S.C.R 892 (S.C.C.) (hereinafter referred to as Taylor).
[26] Taylor, supra (n25) at 928.
[27] Mark J Freiman "Hate Speech and The Reasonable Supreme Court of Canada" at 300.
[28] Ibid.
[29] Ibid.
[30] Ibid at 301.
[31] This must be contrasted with the U.S.A approach which looks mainly at the harm caused to the target group.

> 'Permits the racist [the homophobe] and the Islamophobe to speak, to mount challenges they want to mount, they just have to take care with the mode and manner in which their challenge is captured.'[32]

The Whatcott case looks at the reasonable person test as the objective basis for determining whether a given communication has as its probable effect the incitement of hatred.[33]

2.2.3. Harm caused by hate speech

There are two kinds of harm caused by hate speech. The first kind of harm is that suffered by the target group. This may be in a form of fear, intimidation and emotional trauma.[34] This is the type of harm that the U.S.A provisions focus on. The second type of harm is the spread of hateful views in the community or the instilling of a hateful attitude about members of a minority group in the minds of members of the general public.[35] Canadian cases focus on the spread of hateful views in the community[36] (although it also recognises harm suffered by the target group but focuses on the later.)

In *R v Keegstra*[37]*,* Chief Justice Dickson in writing for the majority describes the harms caused by hate propaganda.[38] He firstly refers to the emotional or psychological injury experienced by the target group.[39] He states the following in his judgment.[40]

It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. The hostility, derision and abuse encouraged by the hate propaganda has a severely negative impact on an individual target group member because her 'sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the group to which she belongs. Because the identity of an individual is partly constituted by his association and interaction with others, he experiences attacks on the groups to which he belongs personally and sometimes very deeply. Because an individual's sense of self is shaped in important

[32] J. Waldron "The harm in hate speech" (Cambridge: MA Harvard University press 2012) at 199.
[33] Supra (n27) at 304.
[34] Richard Moon "Hate Speech Regulation in Canada" at 79.
[35] Supra (n11) and also supra (n25).
[36] Ibid.
[37] Supra (n11).
[38] Supra (n11) at 744, 745.
[39] Ibid at 746.
[40] Ibid at 746,747.

ways by the views and actions of others attacks on her most important associations will cause injury to self-worth and dignity' (judgment from *R v Keegstra* adopted).

Once again in terms of *Whatcott* the court lays down an objective test in determining harm. The court rejects any requirement for scientific proof as unreasonable.[41] Instead, it reaffirms "reasonable apprehension of harm" test as the appropriate standard in cases where "it has been suggested though not proven the very nature of the expression in question undermines the position of groups or individuals as equal participants in society."[42] It is submitted that great reliance will be placed on common sense in determining whether or not there is a "reasonable apprehension of harm." The court has made it clear that dry and sterile analytical techniques that effectively predetermine the issue will not be imported into Canada.[43]

2.2.4. The Right to Freedom of Expression

Freedom of expression is a separate constitutional right in Canada. In terms of section 2(2)b of the Charter the right to freedom of expression reads as follows:

> Everyone has the following fundamental freedom:
> (a) ……..
> (b) Freedom of thought, belief, opinion and expression, including the freedom of press and other media communication.

According to the Supreme Court of Canada, section 2(2)b protects any activity that "conveys or attempts to convey a meaning." In a variety of decisions,[44] the Supreme Court has held that human acts intend to carry a message and so are protected under section 2(2)b, including advertising, picketing, defamation and soliciting for the purpose of prostitution and pornography.[45]

Hate speech jurisprudence in Canada has invariably involved anti-hate speech legislation (both Canadian criminal and human rights) which has been constitutionally tested against the right to freedom of expression. In most instances, it has been found that the legislation violates the right to freedom of expression. The legislation is thereafter tested against the limitation clause enunciated in section 1 of the Constitution.

[41] Supra (n27) at 306.
[42] *Thompson Newspapers Co v Canada (Attorney General*), [1998] I.S.C.R 877 (S.C.C.) at para 115.
[43] Supra (n11) at 740-744.
[44] Supra (n11) at 697,729.
[45] Ibid at 729.

2.2.5. Limitation Clause in the Charter and the Balancing of Rights Approach

Canada has a limitation clause similar in content to its counterpart in South Africa.[46] The Canadian Courts have adopted a strict approach to protecting the right to freedom of expression. Apart from rare cases where expression is communicated in a physically violent form, courts view the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee."[47] The approach of the Canadian courts has been rather to regard the legislation as violating the right to freedom of expression and thereafter to evaluate the legislation against the content of the limitations clause. [48] The limitation clause enunciated in section 1 of the Charter reads as follows:

> 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

The tests to be applied in determining whether or not the limitation clause may limit Charter rights was set out in *R v Oakes*[49] as follows:

> 1) 'Does the limitation address a pressing and substantial objective?
> 2) Is the limitation of rights rationally connected to its goal?
> 3) Does the limitation minimally impair upon Charter rights?
> 4) Is the limitation proportional in impact? (for example the benefits of limitation outweigh the social costs of limiting the right).'[50]

The application of the limitation clause will now be addressed in the *locus classicus* case of *R v Keegstra*,[51]

2.2.6. Application of the Limitation Clause in *R v Keegstra*

In *Keegstra*, the accused, James Keegstra a high school teacher used his class room time to communicate anti-semitic teachings to his students. He was convicted at the trial of the offence of

[46] Sec 1 of the Canadian Charter and section 36 of the Constitution respectively.
[47] Supra (n 11) at 729.
[48] Supra (n 25) at 729
[49] (1986) 103, 136. This case is the *locus classicus* in dealing with the Charter general limitation clause.
[50] Supra (n27) at 297.
[51] Supra (n11).

the public, wilful promotion of group hatred in terms of section 319 of the Canadian Criminal Code.[52] He challenged the Constitutionality of section 319 of the Code. The Supreme Court held that the public wilful promotion of group hatred is a category that falls within the protection of section 2(b) and the criminal prohibition infringed Keegstra's right of freedom of expression.[53] The court then considered whether the infringement under section 1 was a reasonable limit demonstrably justifiable in a free and democratic society.[54] The court in determining that the limitation was pressing and substantial focused on the harm caused by extremist speech. Dickson CJ stressed the harm caused to the target group and the community at large. The court stressed the importance of the Canadian commitment to the values of equality and multiculturalism reflected in section 15[55] and 27 of the Charter.[56]

The majority situated multiculturalism in an equality context, stating that attacks on groups need to be protected because group discrimination can adversely affect its individual members.[57] According to the court, in restricting hate propaganda, Parliament seeks to bolster the notion of the mutual respect necessary in a nation which venerates equality of all persons. Furthermore, section 22 states that this section shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[58] The court held that this provision was extremely important when courts are required to balance the right to freedom of expression of hate propagandists against the right to multiculturalism and equality.

Lastly, the court looked at Canada's international human rights obligations in determining that hate propaganda laws relate to a pressing and substantial concern.[59] The court held that when values such as equality and freedom from racism enjoy status as international human rights, they are elevated to a higher degree of importance under section 1.[60]

[52] Section 319 states that everyone who, by communicating statements, other than in private conversation wilfully promotes hatred against (a) an identifiable group is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years, or (b) an offence punishable on summary conviction.
[53] Kathleen Mahoney "The Canadian Constitution Approach to Freedom of Expression in Hate Propaganda" (Law and Propaganda Contemporary problem vol 55. no 1).
[54] Ibid.
[55] Supra (n11) 744-49.
[56] Supra (n53) at 85.
[57] Supra (n11) at 746.
[58] See section 27 of the Canadian Charter.
[59] See article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (New York Aug 24 1965), entered into force for Canada, Jan 4, 1969. This Convention requires Canada to suppress hate propaganda criminally to protect identifiable and vulnerable groups.
[60] Supra (n11) at 750.

The court held that the provisions of section 319 of the Criminal Code were rationally connected to the goal of limiting rights. This was based on the premise that the restrictions on freedom of expression in the Criminal Code are narrow and will encapsulate only the most extreme forms of expression.[61]

In determining whether or not the legislation minimally impairs Charter rights, the court adopted a deferential and extremely pragmatic approach. The legislature is afforded a margin of appreciation in the sense that as long as the option chosen falls within a range of reasonable supportable alternatives then the minimal impairment test is met.[62] In applying the proportionality test, the majority held that hate speech is only tenuously linked to the values underlying the right to expression in the Charter.[63]

In the proportionality test, the court also looked at the right to equality. The court found that hate speech undermines the value of protecting and fostering a vibrant democracy because it denies its citizens equality and meaningful participation in the political process and its contribution to self-fulfilment and human flourishing is negligible.[64]

The court highlighted the link between hate speech and racial discrimination, and that hate speech indirectly amounts to a violation of the equality clause. The court held further that the equality clause of the Charter[65] is an integral part to the section 1 analyses.[66] This serves to demonstrate that just as Charter rights can be used to challenge legislation; they can also be used to uphold existing legislation. In conclusion the Supreme Court held that the provisions of section 319 of the Canadian Criminal Code were constitutional.[67]

2.2.7. Social Equality/ Group Rights Approach

The Canadian jurisprudence recognises that there is a causal link between hate speech and discrimination. As such hate speech represents a violation of the equality clause in the Charter. [68] The court also takes cognisance of the fact that group discrimination will impact on the rights of the

[61] Ibid at 746, 747.
[62] Supra (n27) at 310.
[63] Supra (n11) at 746.
[64] Ibid 763-765.
[65] Section 15 of the Canadian Charter.
[66] Supra (n53) at 87.
[67] A similar analysis was conducted by the Supreme Court in both the *Taylor* and *Whatcott* case.
[68] Section 15 of the Canadian Charter.

individuals of the group. The Canadian approach gives equal status to the rights of the speaker and the audience.[69]

The connections the Canadian Supreme Court makes between institutional arrangements, collective and individual harms and equality are very important in its equality approach to freedom of expression.[70] The centrality of equality to the enjoyment of individual and group rights emphasizes that one of the main considerations surrounding extremist speech is the harm it causes to equality interests.[71]

2.2.8. The *Zundel* Case – a Deviation for Canadian Jurisprudence?

In *Ernst Zundel v The Queen*[72] the applicant had been charged with spreading false news contrary to section 181 of the Canadian Criminal Code. This section states the following:

> When an accused:-
> i) 'Wilfully publishes a statement, tale or news
> ii) Knowing it to be false
> iii) Which causes or is likely to cause injury or mischief to a public interest, then he is guilty of an indictable offence and liable to imprisonment.'

The accused had been charged with publication of a pamphlet entitled "Did six million really die?" The pamphlet was part of a genre of literature known as 'revisionist history' which suggested it had not been established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetuated by a worldwide Jewish conspiracy. The appeal related to whether or not section 181 of the Canadian Criminal Code infringes the guarantee of freedom of expression in section 2(2)b of the Charter.

The majority judgement delivered by McLauchlin JJ had considerable regard to the right to freedom of expression and adopted an almost absolutist approach thereto. The majority held that all communication which conveys or attempts to convey meaning is protected by section 2(2)b of the Charter and the content of the communication is irrelevant.[73] The court held that the provisions of section 181 of the Code violated the right to freedom of expression. When looking at the limitation

[69] Supra (n53) at 82.
[70] Supra (n53) at 87.
[71] Ibid.
[72] (1992) 2 S.C.R.R. 731.
[73] Ibid at 752.

clause in section 1 of the Charter, the court held that section 181 was anachronistic and it could not be said that the goal of such provision was to protect a 'pressing and substantial' objective.

The phrase "injury to public interest" was found to be overbroad. Public interest was not defined in the code and the majority felt that it was capable of almost infinite extension.[74] They felt that the words "public interest" could not be equated with certain Charter rights such as equality[75] and multiculturalism[76]. Furthermore, the court held that the phrase "statement, tale or news" could result in persons been reluctant to express themselves in fear of prosecution. This has a chilling effect on the right to freedom of expression. The court held that section 181 is particularly invasive as it applied the most draconian of sanctions (the criminal law) to affect its ends. The fact that a broad range of expression is caught by section 181 extending to virtually all controversial statements of apparent facts which might be argued to be false coupled with the serious consequences of criminality and imprisonment makes it impossible to say that section 181 minimally impairs Charter Rights.[77]

The court held that when one balanced the importance of the objective of section 181 against the potentially invasive reason of its provision, one had to conclude that it overshoots the mark. [78] The court held that the objective of section 181 falls short of constituting a countervailing interest of the most compelling nature. [79] The majority concluded that section 181 was not demonstrably justifiable in a free and democratic society.

The minority however approached the case from a totally different perspective. The minority held that section 181 cannot be said to be vague in that it provides clear guidelines of conduct. In order to fall foul of the section, the accused must wilfully publish a false statement knowing it to be false.[80] Furthermore the publication must injure or be likely to injure the public interest.[81] The minority held that where such a publication injures a group identifiable under the equality clause such act would tear the fabric of society.[82]

[74] At 717.
[75] Section 15 of the Canadian Charter.
[76] Section 27 of the Canadian Charter.
[77] See supra (n 74).
[78] Ibid
[79] Ibid
[80] Ibid at 734.
[81] Ibid.
[82] At 745

The minority held that there is a pressing and substantial interest in ensuring that groups identifiable under the equality clause are protected. By prohibiting calculated falsehoods which undermine the equality of the group member, section 181 enhances the goals of section 15 of the Charter.

In applying the proportionality test, the minority criticised the role played by the hate speech in promoting freedom of expression principles[83]. The minority held that it is appropriate to limit expression where such expression threatens the dignity of members of the target group and promotes discrimination which excludes them from full participation in society. The minority held that this type of expression targeted by section 181 is only tenuously connected to the rules underlying freedom of expression. Section 181 therefore limits only expression which is peripheral to the core right protected by section 2 (b) of the Charter.

The minority held that as the State had to show that there was a wilful promotion of statements known to be false, there was a heavy onus placed on the State. As the aim of section 181 was to promote a pressing and substantial interest it could be said that the criminalization of such speech was justified. As such section 181 is narrowly defined as it therefore minimally impairs Charter Rights.

I submit that the majority judgment must be criticised in the sense that it merely payed lip service to the harm that racism and social intolerance can cause. I further submit that the minority judgement is more in keeping with a balancing of rights approach in that the rights to dignity, equality and multi-culturalism are weighed up against the right to freedom of expression.

The minority it is submitted were therefore correct in holding that section 181 of the Canadian Criminal Code was demonstrably justifiable in a free and democratic society.

2.2.9. Summary

The Canadian approach identifies that there are two kinds of harm caused by hate speech.[84] The first harm identified is that suffered by the target group.[85] The second kind of harm is the spread of hateful views in the community.[86] It should be noted that the stance taken in Canada is different to that taken in the United States which focuses on the harm caused to the target group alone.

[83] At 760.
[84] Supra (n24) at 79.
[85] Ibid.
[86] Ibid.

The courts have attempted to reconcile the regulation of hate speech with the right to freedom of expression by requiring that it be shown that the restricted speech causes harm and by also limiting the scope of the restriction to a narrow category of extreme or hateful speech.[87] The problem arises as to where to draw the line between permissible speech and unprotected speech.[88] The courts tend to look at the effect that hate speech has rather than the repugnance of the message.[89] The courts recognise that hate speech is a systemic problem. It is clear that the Canadian approach takes full cognisance of the context in which the speech is made. Furthermore, it is clear that the right to dignity, equality and multiculturalism take central stage in the limitations analysis in determining whether the relevant criminal legislation is constitutional.

Canada is attempting to accord equal rights to both the speaker and the audience. In summation, it is obvious that Canada is applying a balancing of rights approach to controlling hate speech. This is for example well illustrated in Keegstra supra where the deprivation of freedom of expression was weighed up against rights to dignity, equality and multi-culturarism. In closing, the connection the Canadian Supreme Court makes between institutional arrangements, collective and individual harms, human relations and equality are very important elements in its approach to freedom of expression.[90]

2.3. Hate Speech Provisions in the United States

2.3.1. Introduction

The United States adopts a completely different approach to hate speech in comparison to Germany, Canada and South Africa [91] Nevertheless, the U.S.A. serves as useful comparator for South Africa as there is a wealth of jurisprudence on hate speech in the U.S.A. Furthermore, South Africa has a freedom of expression guarantee offering substantial protection to this right and thus the U.S.A. may serve as a useful comparator. Lastly, the United States shares a history with South Africa in that the black population was exploited by the whites in both places. The U.S.A. jurisprudence on hate speech also abounds with racist rhetoric emanating from the extreme racist white cult, namely, the Ku Klux Klan.

[87] Ibid at 83.
[88] See minority judgment of *McLachlin J in R v Keegstra* supra (n11).
[89] Supra (n25) referring to *Whatcott*.
[90] See supra (n11) at *Keegstra* and also supra (n27) at 87.
[91] U.S.A. adopts a libertarian approach to hate speech whereas South Africa like Canada adopts a balancing of rights approach.

In looking at the hate speech provisions adopted in the United States, I will firstly analyse the wording adopted in the First Amendment to the United States constitution. I will note that the right to freedom of expression is of paramount importance and generally trumps other rights.[92] Thereafter, I will look at the exceptions to the First Amendment, where speech is not permissible. This will be done by looking at tests laid down by the United States judiciary in prohibiting certain undesirable speech, such as the:

I) clear and present danger test[93]

II) the fighting words doctrine[94]

III) the incitement to imminent lawless action test[95]

IV) the true threat test[96]

In conclusion I will discuss whether the Unites States approach to hate speech may be incorporated or be of value in interpreting the South African hate speech clause.

2.3.2. The First Amendment to the United States Constitution and the Approach to Hate Speech

The First Amendment reads as follows:

'congress shall make no law abridging the freedom of speech'

It is apparent that the First Amendment is drafted in peremptory terms which would seem to imply that all speech is permissible and that the United States is adopting an absolutist approach to freedom of speech. This is however not true as the courts have laid down that certain undesirable speech is constitutionally unprotected.[97] Nevertheless, it is apparent that the United States adopts a much more liberal approach to freedom of expression than Canada or its European counterparts.[98]

The U.S.A. approach to hate speech focuses on the harm caused in the form of fear, intimidation and emotional trauma. In other words, the focus is on the harm suffered by the target group.[99] By contrast in Germany and Europe the approach is to focus on the harm caused by the spread of

[92] The United States adopt a libertarian approach to freedom of expression and only certain limited categories of speech for example obscenity, group defamation and fighting words are excluded.
[93] *Schenck v United States*, 249 U.S. 47, 52 (1919).
[94] *Chaplinsky v New Hampshire* 315 U.S. 568, 572 (1942).
[95] *Brandenburg v Ohio* 395 U.S. 444 (1969) (per curiam).
[96] See *Virginia v Black* 538 U.S. 343,359 (2003).
[97] For example speech that is profane, obscene or constitutes fighting words or incitement is not permissible.
[98] For example in Canada and Germany certain hate speech is criminalized and in terms of the ECHR there is a limitation clause which restricts undesirable speech.
[99] Supra (n34).

hateful views in the community at large.[100] As such, the focus in Germany and the rest of Europe is broader as it extends beyond harm caused to the target group alone.

At the core of understanding the U.S.A. approach to free speech is the Lockean principle of individualism.[101] Fundamental rights are inalienable and precede and transcend civil society.[102] The United States Constitution thus provides a set of negative liberties in a catalogue of enumerated rights that are not to be infringed upon by the government.

The notion is that any speech even if racist or outlandish helps to preserve an atmosphere of robust public debate.[103]

2.3.3. Exceptions to First Amendment Free Speech

2.3.3.1. General

From a hate speech perspective the courts have laid down various tests to determine whether or not speech is to be protected.

2.3.3.2. The Fighting words Doctrine

The fighting words doctrine enunciated in *Chaplinsky v New Hampshire*[104] is an exception to the free speech doctrine. In this case the court affirmed the conviction of a Jehovah's witness for calling a city marshal a damned fascist (which was in violation of a state regulation) and held as follows:

> 'There are certain well-defined and narrowly listed classes of speech, the prevention and punishment of which has never been thought to raise a constitutional problem. These include the lewd and obscene, the profane, the libellous and the insulting or "fighting" word those which by their very utterance inflict injury or tend to incite an immediate breach of the peace....such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'[105]

[100] Supra (n35).
[101] Claudia E Haupt "Regulating Hate Speech Damned If You Do and Damned If You Don't: Lessons Learned From Comparing the German and U.S.A Approaches." Boston University International Law Journal [vol 23:299] at 313.
[102] Ibid.
[103] Meera Chandramouli "Protecting Both Sides of the Conversation Towards a Clear international Standard for Hate Speech Regulation" Journal of International Law [vol 34, issue 4] at 831.
[104] 315 U.S. 563 (1942).
[105] Ibid at 571-572. The Language Used in This Quote is Very Similar to the Opinion of Chief Judge Dickson *Keegstra* supra (n11).

From, the above it is clear that the 'fighting words' doctrine as originally formulated in New Hampshire comprises two elements:

1) the speech inflicts injury or
2) tends to incite an immediate breach of the peace.

In *Beauharmais v Illinois*[106], the United Supreme Court upheld the constitutionality of an Illinois group defamation law. Under that law,[107] the petitioner had been convicted for distributing leaflets of the White Circle league, a white circle supremacist organization.[108] The leaflets contained inter alia statements such as the following: -

If persuasion and the need to prevent the White race from becoming mongrelized will not unite the aggressions… rapes, robberies, knives, guns and marijuana of the Negros surely will.[109]

The State Court construed the Statute as a criminal libel law.[110] The Supreme Court reasoned that if libel was punishable when directed at individuals, then the same libellous comments when directed at a group surely also could be punishable.[111] The Court placed reliance on historical evidence of racist violence in Chicago to support this conclusion.[112] The Court reasoned that the Illinois Legislature was justified as in Illinois, racial intolerance had already resulted in violent rioting.

Since *Beauharmais,* the courts have routinely applied the fighting words doctrine to interpret local and state laws that restricted speech on the premise of preventing violence.[113] By contrast however since the Supreme Court's articulation of the doctrine, no conviction in cases in which a defendant was prosecuted under a 'fighting words' statute have been upheld. Instead in a long line of cases dealing with the fighting words doctrine, the courts has used a myriad of rationales[114] to uphold some statutes as permissible restrictions on conduct and to strike down other similar laws as

[106] 343 U.S. 250 (1952).
[107] Ibid at 266.
[108] It is doubtful whether Beauharmais remains good law as the doctrine of "fighting words" has been watered down especially after *RAV v City of St.Paul* 112 s.c.t. 2538(1992).
[109] 343 U.S. 250 (1952).
[110] Ibid at 253.
[111] Ibid at 258.
[112] Ibid at 258.
[113] Aviva O Wertheimer "The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence" Fordham Law Review Vol 63 at 795.
[114] Ibid.

unconstitutional infringements on free speech rights.[115]A comparison of the *RAV* case[116] with *Mitchell* case[117] will illustrate that the courts have made an arbitrary distinction between speech and conduct in First Amendment law.

In *RAV v City of St. Paul*[118] the defendant Robert Iktora, along with several teenagers had burnt a cross on an African-American family's lawn under its bias-motivated crime ordinance (bias motivated crime ordinance is an ordinance which is directed towards preventing speech or conduct which stems from a particular racial or political viewpoint)[119] (this would for example include symbols of racial or religious intolerance such as a swastika or burning cross). The majority held that content based regulations are presumptively invalid.[120] This was so even though the St. Paul ordinance was directed at prohibiting fighting words. The majority held that the ordinance was unconstitutional and did not consider the merits of the case, even though they conceded that St. Paul had a compelling interest in preventing the harmful effects of bias-related crimes, such as cross burning.[121]

The decision in *RAV* must be criticised in that the court ignored the fact that in the case of the St Paul Ordinance which prohibited "fighting words" based on race, colour, creed, religion or gender, the identities of the speaker and the addressee are and should be, relevant factors in determining whether speech violates the Ordinance.[122] It is submitted that even under a general "fighting words" ordinance, these factors should be relevant in determining if the challenged expression constituted fighting words.[123] This is so as the identities of the speaker and the addressee will help determine whether speech inflicts injury and whether or not it will incite an immediate breach of the peace___ the two components of the fighting words doctrine. If the "fighting words" is based on the disfavoured topics listed in the ordinance and they cause distinct harm, there seems little reason to prohibit the ordinance from listing those subjects, especially if it is the interest in protecting that target group. The *RAV* judgment in summation undermines the applicability of the "fighting words" doctrine.

[115] Ibid.
[116] *RAV v City of St. Paul* at supra (n108).
[117] *Mitchell v Wisconsin* 113 s.ct 2194 (1993).
[118] Supra (n108).
[119] The St. Paul bias motivated crime ordinance provides: "Whoever places in public or private a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi Swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanour."
[120] Supra (n108) at 2542.
[121] Supra (n113) at 822.
[122] Supra (n 113).
[123] Ibid.

By contrast, the Supreme Court took a different approach in *Mitchell v Wisconsin*.[124] In this case a black teenager was convicted of aggravated battery. His penalty (sentence) was increased because his beating of a white boy was motivated by bias. The issue before the Supreme Court was whether the increased penalty imposed in terms of a penalty enhancement statute violated the First Amendment.[125]

The United States Supreme Court held that the penalty enhancement provision was constitutional as it punished the 'conduct' of selecting the victim.[126] According to the court the Statute restricted 'conduct' and not 'speech' and was therefore subject to a lower level of scrutiny than the strict scrutiny applied in First Amendment analysis.[127] The court agreed that there was a compelling interest in addressing 'the greater individual and societal harm' inflicted by bias-inspired crimes and was rationally related to the penalty enforcement provision.[128] The court in this case ignored the fact that the statute might suffer from some form of 'under breadth'.[129]

I submit that the decision in *RAV* and *Mitchell* are not reconcilable. Both cases involved some form of conduct namely: cross-burning and aggravated assault. Both cases involved some form of political message: one a symbol which was anti-black and the other violence against a person on the basis of race. It is therefore difficult to understand why the Supreme Court decisions differed in the two cases which are analogous. Admittedly, the *Mitchell* case involved actual physical harm whereas RAV case was more an emotional or symbolic harm. However a close inspection of the *Mitchell* case will show that the primary issue in *Mitchell* was not the physical assault. The primary purpose in *Mitchell* was not to commit an assault but was to express anger, about the treatment of Black people by White men as depicted in the movie. Based upon the decision in RAV it may be argued that the 'fighting word doctrine' has become superfluous. The court did not specifically overrule the doctrine but merely imposed the rule of content neutrality.[130]

[124] Supra (n113) at 825.
[125] Supra (n117).
[126] Supra (n117) at 2201.
[127] Ibid.
[128] Supra (n117) at 827.
[129] In *RAV* Justice White had argued that the Court's rule against content- based restrictions could protect hate speech that traditionally has fallen outside the scope of First Amendment protection under the Court's new analysis, a statute that prohibited only a subset of "fighting words" would be considered unconstitutionally " underbroad" because its purpose could have been accomplished by banning a wider category of speech.
[130] Justice Scalia made the shocking pronouncement that fighting words may engender some protection under the First Amendment.

In summation there are several cases based upon the 'fighting word doctrine' which are not reconcilable even though the facts are analogous.[131] Wertheimer argues that the 'fighting words' doctrine is coherent, if it is recognised that it focuses on conduct rather than speech.[132] According to Wertheimer, when a person's speech directed to another group of persons is of a quality that is likely to engender violent conduct, then although the communication is verbal, the speech is more akin in nature to conduct, because it is more likely to provoke conduct rather than dialogue. It may then be classified as a form of 'fighting words'.

This philosophy is, however, inconsistent with the *Chaplinsky* case (which was when the doctrine was introduced) which indicated clearly that the purpose of the doctrine was not to allow First Amendment protection to this form of undesirable speech. In its inception, the doctrine was never directed towards imputing certain speech to be conduct. I therefore submit that Wertheimer's above analysis is questionable.

2.3.3.3. The Clear and Present Danger test

Another test applied by the courts in determining whether undesirable speech is protected is the clear and present danger test. This test was developed in *Schenck v United States*[133] as a means of placing some albeit minimal, constraints on the free market place of ideas.[134] Justice Holmes stated the following:[135]

> 'The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that will bring about the substantive evils that congress has a right to prevent.[136] It is difficult to see how the distribution of leaflets with anti-war sentiment constitutes a clear and present danger, however undoubtedly this decision was influenced by the political climate at the time. Nevertheless, the court felt that the speech in instigating resistance to conscription posed a clear danger. The clear and present

[131] Supra (n113) at 816-819. For example *Terminielo v Chicago* 337 U.A. (1949) and *Feiner v New York*. In both cases charges related to politically charged issues before large crowds. In *Terminiello* the statutory offence was held to be unconstitutional, but in *Feiner* the courts confirmed the conviction and held that the statute was constitutional. Furthermore in *Cohen v California* 403 U.S. 15 (1971) and *Texas v Johnson* 491 U.S. 397, 409 (1989) the defendants activities were considered expressive conduct and thus protected by the First Amendment. However in *United States v O'Brien* 391 U.S. 367(1968) the defendant was similarly exercising his speech rights, the court found the activity was primarily conduct that could be restricted.

[132] Supra (n113) at 794.

[133] U.S. 47.53 (1919) (upholding petitioners conviction for publishing anti-war statements during World War I).

[134] Sianaith Doughclas Scott" The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" William & Mary Bill of Rights Journal February 1999 Vol 7 (issue 2) at 305. n

[135] Supra (n133) at 52.

[136] Alexandra Tsesis "Inflammatory Speech: Offence Versus Incitement" Minnesota Law Review Vol 97:1145 at 1157.

> danger test allows for limitation on speech when there was a high probability that it would cause grave harm.'[137]

Judges were thereby empowered to balance concerns for self-expression against those of public safety. In *Dennis v United States*[138] the court found that communist propaganda calling for the violent overthrow of the existing government was found to fall within the ambit of the clear and present danger test.[139] The court rejected the 'contention that success or probability of success' of the petitioner's implicit plot to overthrow the government is a necessary criterion for invoking the clear and present danger doctrine.[140] Despite the absence of any direct evidence of an actual plan to overthrow the government, the court held that as adherence to Marxist-Leninist doctrine advocates violent revolution as a means of toppling capitalist governments, there was a clear and present danger. The clear and present danger test assumes that, at some point, speech transforms into an act and at that moment the speech becomes punishable.[141] Dow contends that the clear and present danger test is in violation of the speech protection afforded in the First Amendment.[142] The wording of the First Amendment unequivocally and unambiguously protects all speech. He contends that the test assumes that certain speech may be punished because that speech will undermine democracy. It is therefore akin to the argument that holds that the Constitution may be violated when the cost of adhering thereto would result in the destruction of the constitution itself.[143]

The clear and present danger test was transformed into the incitement to imminent 'lawless action' test with the advent of *Brandenburg v Ohio*.[144] This modern day 'clear and present danger test' will now be discussed.

2.3.3.4. The Imminent Lawless Action Test

The 'clear and present danger test' was revamped in *Brandenburg v Ohio*.[145] In this case, the Supreme Court held that the guarantees associated with the free speech allow for expression that

[137] Ibid at 1158.
[138] 341 U.S. 494 (1951).
[139] Friedrich Kubler "How Much Freedom For Racist Speech: Transnational Aspects of a Conflict of Human Rights" Hoftra Law Review vol. 27 Issue 2 at 348.
[140] Supra (n134) at 315.
[141] Prof David R. Dow "The Moral Failure of the Clear and Present Danger Test" William & Mary Bill of Rights Journal Vol 6 Issue 3 at 733. It is submitted that Dennis supra goes too far and it should be noted has for all intense and purposes been subsequently overturned by the United States Supreme Court. It should also be noted that this case was decided in the Mcarthy era, which was characterised by its anti-communist rhetoric.
[142] Ibid at 740.
[143] Nevertheless it should be noted that hate speech enjoys far more protection in the United States than either Canada or Germany.
[144] Supra (n95).
[145] Supra (n95).

advocates the use of force and except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[146] This test clearly narrows the scope of the old 'clear and present danger test'. In order to invoke this exception to free speech three things must be present, namely:

1) intention
2) imminence
3) likelihood of the threat coming to fruition[147].

The test developed in *Brandenburg* was again applied in *Collin v Smith*.[148] The court held that under the First Amendment standard, there was no reason to prevent a Neo-Nazi march in the village of Illinois. It should be noted that several residents of the village were Holocaust survivors. The court acknowledged that such a march would cause severe emotional trauma to those residence; however, the court held that this did not suffice to ban the march. The ordinance invoked by the town to prohibit the march was invalidated because of its over-breadth.[149]

The court held that while content legislation is not per se invalid, the only limited exceptions to free speech were obscenity, fighting words and under *Brandenburg*, the imminent danger of a grave substantive evil.[150] The court found that none of these exceptions existed. The court held that the asserted falseness of Nazi dogma does not justify its suppression.[151] The court further made it perfectly clear that a state may not make criminal the peaceful expression of unpopular…[and] mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms. [152]

The *Collin* case clearly seems to contradict the holding in <u>*Dennis*</u> supra. In *Collin* despite the odious history of the Nazi regime, this threat was not seen to present the danger that communism presented in *Dennis*. It is submitted that for all intense and purposes the *Collin* case has overruled

[146] Roger Kiska "Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence" Regent University Law Review vol. 25:107.
[147] Ibid.
[148] 578 F.zd 1197 (7th cir 1978) cert denied 439 U.S. 916 (1978).
[149] Supra (n101) at 318.
[150] Supra (n146) at 1202.
[151] Ibid at 1203.
[152] Ibid at 1205.

the judgement in *Dennis*. The Collin case clearly demonstrates that free speech in the U.S.A is extremely well protected and there now very few First Amendment exceptions.[153]

By contrast in *Virginia v Black*[154] the court held that the state of Virginia could proscribe cross burning if the actor intended to intimidate because cross burning is a particular vicious from of intimidation.[155] It is submitted that this comment is difficult to reconcile with the decision reached in *Collin*. This may only be done if the cross burning action was done in such a manner that the threat was likely to cause imminent lawless action. This analysis is supported by further comments made in cases in which the courts outline the instances in which speech may be unprotected on the basis of content

According to *RAV*[156] and *Black, t*he government may proscribe hate speech based on its content only when it (1) falls into a previous unprotected category under the First Amendment and (2) represents a particularly virulent strain on the kind of speech in that unprotected category.[157] Given that the court has not deemed many categories of speech as unprotected under the First Amendment, this foundation makes speech very protective.[158]

In a very recent case, namely *Snyder v Phelps*[159] the Supreme Court took a very similar approach to *Brandenburg* and *Collin* with respect to the narrowness of the lawless action test. The case arose from a funeral protest by the pastor and parishioners of the Westbora Baptist Church. Participants displayed signs with messages, such as "God hates the U.S.A" "Thank God for 9/11" and "God hates fags" in protest of the United States' tolerance of homosexuals.[160] After *Westbora* picketed at a deceased soldier's funeral, his father Albert Snyder filed a lawsuit in which he claimed their antics caused him to suffer "severe and lasting emotional injury".[161] As in *Collin* and *Brandenburg,* the court held that Westbora were at liberty to express a political viewpoint irrespective how unpopular or upsetting it may be. It should be noted that the contextual setting in which the speech took place

[153] Undoubtedly *Collin v Smith* would have been differently decided in Canada or Germany where cognisance is given of harm spreading to the general community as well as the target group of the hate speech.
[154] 538 U.S. 343,359 (2002)
[155] Meera Chandramouli " Protecting Both Side of the Conversation Towards a Clear International Standards for Hate speech Regulation" Journal of international Law (34, issue 4) at 831.
[156] Ibid at 840.
[157] It should be noted that in *Virginia v Black* took a different stance to RAV in terms of content based regulation of cross burning. This case will again be discussed in terms of the true threat test infra.
[158] Supra (n155) at 840.
[159] *Snyder v Phelps* 131 STC 1207, 1218/19 (2011)
[160] Ibid at 1213.
[161] Ibid at 1150.

was imperative.[162] As there was no intentional threat to cause imminent lawless action, the speech was protected by the First Amendment. Based upon the above jurisprudence, it seems that the fighting words doctrine, clear and present danger test and the imminent lawless action test now have limited application. As far as hate speech is concerned, the U.S.A. is moving towards a situation of holding all speech to be protected in terms of the First Amendment. It should be noted that certain speech such as that, that relates to true threats, obscenity and child pornography still remains unprotected.

2.3.3.5. The True Threat Test

In terms of this test, "true threats" do not even enjoy First Amendment protection even if they fail to meet the elements of the Brandenburg test.[163] A "true threat" is a statement communicating a serious intent to commit an act of unlawful violence.[164] The element of imminence is not necessary. Furthermore, this threat is deprived of protection as long as the statement establishes intimidating speech.[165] This test may be contrasted from Brandenburg in that incitement requires intent to place another person in imminent fear of harm, while true threats require only the intention to threaten a specific and identifiable person or group.[166] This test could be useful in dealing with hate speech perpetrators over the internet website. In this instance, the fighting words doctrine and the imminent lawless action test have little relevance. Material may remain on a website for a considerable period of time. There may be no danger of imminent violence but speech may have long-term negative connotations. The detailed discussion of hate speech perpetrated over the internet falls however outside the scope of this work.

2.3.3.6. Summary

In the U.S.A, the approach to hate speech is to focus on the harm caused to the target group. The First Amendment offers immense protection to free speech and is couched in unambiguous and unequivocal terms. Nevertheless, the U.S.A does not subscribe to an absolutist approach and certain

[162] The plaintiff was not even aware of the speech been made and it took place at a private forum.
[163] Supra (n146).
[164] Ibid.
[165] Supra (n154) at 359-60.
[166] Supra (n136) at 1173-1176. In *Brandenburg* there was a private meeting of Klan members with no prospect of imminent violence. By contrast in *Black* the court faced a situation in which intimidation was aimed at persons outside the Klan. The intimidation in *Black* was overt, whilst in Brandenburg the burning cross was a symbol of group unity.

speech is not protected such as the lewd, the obscene, child pornography, fighting words and that which meets the requirements of the clear and present danger test.

The fighting words doctrine has, however, almost become redundant with the advent of *RAV v City of St Paul*. Furthermore, the Supreme Court decisions relating to this doctrine were often irreconcilable and they struggle to distinguish speech from conduct.[167]

The new "clear and present danger test" namely in the *Brandenburg* test holds that speech must lead to imminent lawless action before it is denied First Amendment protection. Certainly, there is a thread running between *Brandenburg*, *Collin* and *RAV* which suggests that very little speech will now not attract First Amendment protection. This approach has been subsequently endorsed in a more recent case, namely *Snyder v Phelps*.

In summation, it is patently clear that the U.S.A is adopting a libertarian approach to hate speech which contrasts totally with the balance of rights approach adopted in Canada, Germany and the rest of Europe.

[167] For example in *United States v O'Brien* supra (n131) the defendant burnt his draft card in front of a public crowd. The court held that this action was conduct and did not enjoy First Amendment protection. In *Cohen v California* 403 U.S. 15(1971) the defendant walked through the courthouse displaying a jacket bearing the message "fuck the draft". This message was held to be hate speech. It is arguable that in both instances there was a political message relating to anti-Vietnam war sentiment.

2.4. Hate Speech Provisions in Germany

2.4.1. Introduction

In looking at the hate speech provisions in Germany, I will first look closely at the constitutional rights affected by the balancing of rights approach to hate speech, adopted by Germany.[168] I will establish that in Germany the right to dignity and personality rights hold centre stage.[169]

Thereafter, I will discuss in some depth the hate speech provisions in the German Criminal Code.[170] These criminal sanctions will then be weighed up against a possible violation of the right to freedom of expression.[171] I will then show how the German courts embark upon a proportionality exercise to determine whether or not there is a violation of the German Constitution.

It should be noted that in Germany, cases involving the bare Holocaust denial or qualified Holocaust denial have in almost all instances resulted in the decision that Article 5 is not violated. The *Irving v Lipstadt* (Holocaust Denial Case)[172] case and the *Soldiers are Murders*[173] case will be discussed in some depth as the two leading hate speech cases in Germany. According to German academics it is difficult to reconcile the difference in approach taken by the courts in these two cases. I will endeavour to show that the difference in approach is reconcilable. Thereafter, I will conclude that although Germany has made massive strides in ensuring that hate speech is curtailed the approach of the courts is at times unclear and contradictory.

2.4.2. Constitutional provisions concerning Hate Speech and the German Approach to Dignity

Article 5 of German Constitution (GC) is the central freedom of speech provision for Germany.[174] It reads as follows:

> (1) 'Every person shall have the right to freely express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and the in right to personal honour.

[168] For example Article 5, 1(1) a and 2(1) of the German Basic Law.
[169] This approach is different to the U.S.A where the right to freedom of expression is of paramount importance. See discussion at supra 2.3.
[170] In particular sections 86, 130 and 185-187 of the Code.
[171] Article 5 of the German Basic Law and in particular Article 5(1).
[172] Bverf GE 90. Decision of 13 April 1994, Auschwitz Lie case (to be referred to as the Holocaust denial case.
[173] Bverf GE 93, 266,295 decision October 1995, Soldiers are Murders (*Tucholsky* case).
[174] Supra (n101) at 321.

(3) Art and scholarship, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the Constitution.'

Section 5(1) constructs its definition of expression to include more than mere speech extending it to written and pictorial representations.[175] The inclusion of the prohibition against censorship affirms the importance of freedom of information and promotes vigorous political debate, as government may not silence its critics.[176]

The boundaries of freedom of expression are however demonstrated by Article 5(2). The rights are limited by:

a) the provisions of the general laws

b) the provisions of law for the protection of youth

c) the right to inviolability of personal dignity

These mechanisms for restricting rights within Article 5 itself is put into effect by the provisions of the Criminal Code.[177] Most importantly, the German Basic Law aims to create a value system based on the dignity of human beings with a clear affirmation of human personhood. Article 1 of the Constitution states the following:

"the dignity of men shall be inviolable, to respect and protect it shall be the duty of all state authority"[178]

The German Constitutional Court has declared its commitment to dignity by stating the following in a 1975 case:

> 'The Basic Law has erected a value-orientated order which places the individual human being and his dignity at the centre of all determinations this value-judgement of the Constitution informs the organisation and interpretation of the entire legal order'.[179]

The importance of dignity in the German Constitution may be better understood according to Brugger by dividing the concept of honour into three levels.[180]

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[175] This approach correlates with section 16(1) of the South African Constitution.

[176] However in Germany speech which is directed to denying the Holocaust is outlawed and criminalised, see discussion at 2.4.3. infra.

[177] See supra (n101) and discussion at 2.4.3.

[178] Supra (n134) at 321-322.

[179] Bunderverfassungsgericht (BVerfG) BVerfGE 39, 1 (67).

[180] Winfried Brugger "The Treatment of Hate Speech in German Constitutional Law" (Part II) German Law Journal [vol 04 No 01] at 23.

a) 'In its most basic sense, honour describes the status of a person who enjoys equal rights and who is entitled to respect as a member of the human community irrespective of individual accomplishments (article 1(1) of the Basic Law).[181]

b) A second level of honour is concerned with the preservation of minimum standards of mutual respect in public. This honour is provided for in the form of the constitutional protection of personality rights.[182]

c) A third level of honour covers defamation. This makes factual assertions which tend to lower the reputation of another in the community proscribable. These violations of honour are protected in terms of Article 2(1) and Article 5(2) of the German Basic Law.'[183]

In conclusion, it is argued that these constitutional rights to dignity are not conferred only for the benefit of the individual but also in the public interests, and that the democratic political order must be protected against their misuse[184]. In Thomas Mann's phrase the German Republic is a "militant democracy" that is a democracy willing to defend itself ("Wehrharfte Demokratie').[185]

2.4.3. German Criminal Code provisions relating to hate speech in Germany

The German Criminal Code contains several provisions which outlaw hate speech. Certain of these provisions are far-reaching and outlaw political activities and organizations as well as public speech and writing hostile to the German Constitution. Undoubtedly, the German Nazi history earlier in the 20th century which led to the Holocaust is the reason for the existence of this legislation.

Section 130 of the Code states as follows:

> (1) 'Whosoever, in a manner liable to disturb the public peace,
> (i) (a) incites hatred against parts of the population or invites violence or arbitrary acts against them,
> (b) attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population, shall be punished by imprisonment of not less than three months and not exceeding five years.
> (2) Imprisonment, not exceeding five years, or a fine will be the punishment for whosoever
> (a) distributes,
> (b) makes available to the public,
> (c) makes available to persons of less than 18 years,

[181] Ibid.
[182] Article 2(1) of the Basic Law.
[183] Ibid. See also s186 and s187 of the Penal Code which protects individuals and groups from defamation.
[184] Supra (n134) at 322.
[185] Ibid.

(d) produces or stores or offers for the use as mentioned in letters (a) to (c) documents inciting hatred against part of the population or against groups determined by nationality race, religion or ethnic origin, or inviting to violent or arbitrary acts against those parts or groups or attacking the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population or such group or distributes a message of the kind described in (1) by broadcast.

(3) Imprisonment, not exceeding five years or fine will be the punishment for whoever in public or in an assembly approves, denies or minimizes an act described in section 209 paragraph 1 committed under the regime of National-socialism in a manner which is liable to disturb the public peace.'

The underlying purpose behind section 130 is to pre-empt the creation of a climate conductive to hate crimes that can be created by collective verbal attacks. Incitement of others to hatred and violence against minority groups becomes punishable well before the conduct would be considered concrete incitement to the specific criminal act.[186] Incitement of racial hatred is viewed by the legislation as heightening the general danger or disruption of the public peace, including the violation of the dignity and honour of minority groups and the occurrence of hate crimes.[187] It is evident that in order for section 130 to be applicable there must be a threat to public peace, but an attack on human dignity is not a prerequisite.[188] Para (2) broadens the scope of proscribed racist speech by including the production and distribution of racist material by the electronic media.[189] Para (3) covers the simple Holocaust lie.[190] In terms of para (3) a threat to public peace is still required, but not an attack on human dignity. The scope of section 130 is however broadened by also including speech which also approves or minimizes the Holocaust.[191] From the above it is clear that the provisions of section 130 are extremely far reaching.

Section 185 to 200 of part 14 of the Federal Penal Code contains provisions punishing individual and collective defamation or insult. According to section 185 of the Criminal code, insult will be punishable by imprisonment not exceeding one year or by fine. This provision is applicable to cases in which disparaging value judgments amounting to an "insult" are levelled against a person in front of others.[192] If the insult furthermore relates to defamatory assertions of facts which attack the honour of a person, then an important factor is whether the recipient of the abuse was insulted in private or in the presence of third parties. In the first instance, section 185 is operative, while in the

[186] Supra (n180) at 28. This should be contrasted with the U.S.A situation where hate speech becomes outlawed only where there is a clear and present danger or constitutes 'fighting words'.
[187] Ibid.
[188] Supra (n139) at 345.
[189] Section 130(2) of the German Criminal Code.
[190] Section 130(3) of the German Criminal Code.
[191] Supra (n139) at 346.
[192] Supra (n180) at 15.

latter case section 186 or 187 come into force.[193] Section 187 relates particularly to purposively disseminating untrue facts against an individual. The objective of the provision is to protect the right to one's reputation or external honour and also the right to be respected as a human being (one's internal worth or integrity).[194]In addition, there are provisions in the Criminal Code which protect the collective good in cases that exceed both individual and collective defamation.[195]

The penal code's section on "Threats to Democratic Constitutional state" contains provisions forbidding the dissemination and use of propaganda by unconstitutional National socialist organisations.[196] The display of National socialist flags, badges, passwords and salutes are forbidden.[197]

2.4.4. A Balancing Proportionality Exercise

It has been shown that freedom of expression enjoys considerable recognition in the German constitution. However, it has also been noted that the Criminal Code provisions against hate crimes are extensive. A potential violation of a constitutional right is subject to a multilevel analysis with three stages of inquiry:

1) Is the subject matter subject to the definitional coverage of the right? (Schutzbereich)
2) Is there a possible limit posed by a criminal regulation or prohibition? (Schronken)
3) Is the limitation proportional?

The definitional coverage of the right is determined by the activity or sphere of life that it addresses. If the definitional coverage extends to the activity in question then in principle the activity is protected.[198] The activity may however be subject to regulation. This regulation must be an encroachment on the right which is allowed under an explicit or implicit limitation clause to the right.[199] If the state action is covered by such a limitation clause then the limitation to the right must be proportional.[200]

[193] Ibid.
[194] Ibid.
[195] See section 84 to 91 of the German Criminal Code.
[196] Supra (n179) at 16.
[197] See supra sections 86 and 86(a) of the German Criminal Code.
[198] Supra (n101) at 321.
[199] In the case of hate speech the explicit limitation would be Article 5(2) which limits rights in terms of the provisions of general words, protection of young persons and in the right to personal honour.
[200] Supra (n101) at 322.

The proportionality test comprises of three components:

1) the suitability of the means used to further a legitimate end

2) the absence of an equally effective yet less restrictive action

3) the presence of an appropriate relationship between the goal to be achieved and the extent of the intrusion upon the protected right.[201]

Unlike the U.S.A, viewpoint discrimination is not proscribed in terms of the Criminal Code. Furthermore the right to dignity is given centre stage and the right to freedom of expression is often routinely overlooked in favour of the right to human dignity. These above factors will constitute a weighty consideration in the proportionality test.

2.4.5. Opinions versus facts in German hate speech law

In terms of Article 5(1) of the German Constitution, opinions enjoy considerable protection, irrespective of whether or not the utterance thereof is valuable or worthless.[202] Opinions may however be interwoven with stated "facts" that may be true or false or whose truth may be disputed.[203] The German jurisprudence occupies a unique position with regard to how much protection will be given to assertions of fact. This unique position was discussed in some detail in the Holocaust Denial case.[204]

Factual assertions are not, strictly speaking, expressions of opinion. Unlike such expressions, most prominent in factual assertions is the objective relationship between the utterance and reality. To this extent their truth or falsity also can be reviewed. But this does not mean that they fall outside the protective scope of article 5(1). Since opinions usually rest on factual assumptions or comment on factual relationships, the basic right protects them in any event to the extent that they are a prerequisite for the formation of opinion, which Article 5 as a whole guarantees. Consequently, protection of factual assertions ends only when such representation cannot contribute anything to the constitutionally presupposed formation of opinion. Viewed from this angle, incorrect information is not an interest that merits protection. The Federal Constitutional court has

[201] Ibid.
[202] This constitutional right may however be in conflict with the addressee's right to dignity or equality.
[203] Supra (n180) at 12.
[204] Supra (n172) at 625.

consistently ruled, therefore, that protection of freedom of expression does not encompass a factual assertion that the utterer knows is or that has been proven to be, untrue.

Holocaust denial undoubtedly falls under this category.[205] Clearly this is a false assertion which may be proven to be untrue by numerous eyewitness accounts and documents, court findings in several criminal cases and historical research.[206] The court held that in such instance untrue facts do not enjoy the protection of freedom of expression.

In the case of the qualified Holocaust Denial (statement that the Jews are using the assertion of genocide so as to claim reparations from Germany) ,this statement will enjoy constitutional protection under Article 5(1) as it amounts to an opinion.[207]

2.4.6. Leading German Jurisprudence on Hate Speech

In the *Soldiers Are Murderers*[208] decision the Constitutional Court dealt with the statements "soldiers are murderers or potential murders". The case dealt with a statement being displayed on a bumper sticker at the time of the Gulf War.

The court held that in the case of defamation as far as personal dignity in Article 1 is concerned freedom of expression must yield to personal dignity. However the court went on to hold that defamation must be narrowly defined in favour of the presumption of protected speech.[209] The court held that the primary intent behind the statement was to address the question of whether war and military service and the resultant killing of people is morally justifiable. Furthermore, the struggle between military defence and pacifism was held by the court to be a question that significantly concerns public discourse. A presumption thus applies in favour of free speech.[210] The court again held that as far as the crime of group defamation is concerned the following requirements are necessary:[211]

1) 'the attack has to be targeted at a small group
2) the characteristics of the target group have to differ from those of the general public

[205] Supra (n180) at 13.
[206] Supra (n172) at 627.
[207] In this instance the right to dignity would override the statement or the general laws limitation under Article 5(2).
[208] Supra (n173).
[209] Supra (n101) at 332.
[210] Supra (n173) at 303-304.
[211] See sections 185-187 of the German Criminal Code.

3) all members of the group rather than individual ones must have had their dignity assaulted

4) immutable characteristics such as ethnic, racial, physical or characteristics attributed by society must be the subject of the derogatory remarks.'

Clearly factors 2 and 4 and possibly 3 were not present, and the court ruled that there was a violation of freedom of expression. The Federal Constitutional Court held that the accusations did constitute an attack on human dignity, but even more so rather represented a harsh and severe form of criticism regarding a matter of public interest. [212] The Court acknowledged that although the personal honour of soldiers had been severely dented, it was not clear whether 'every German solider, only certain German soldiers or every soldier in the World was a target group.'[213]The Constitutional Court stated the following:

> 'The decisive thing is neither the subjective intention of the utterer nor the subjective understanding of those affected by the utterance, but the meaning it has for the understanding for the unbiased reasonable audience.'[214]

In summation, the Court held that if the wording of the circumstances allows an interpretation that does not affect honour then a penal judgement that has overlooked this violates freedom of speech.[215]

The Holocaust Denial Case dealt with a demonstration held by the National Democratic Party (NDP) of which David Irving, a known Holocaust and revisionist historian was to be the feature speaker. Local authorities in Munich demanded that appropriate measures be taken to ensure that the Holocaust was not denied, and threatened the NPD with criminal charges if they failed to comply. The Federal Administrative Court upheld the restrictions, and the NPD appealed the decision to the Constitutional Court. The Constitutional Court held that Article 5 of the German Basic law was not violated where demonstrably false facts are presented by the speaker. The court held that section 130 and section 185 of the Criminal Code are constitutional and as such can function as legitimate limits in terms of Article 5(2) of the German Constitution.[216]

The court held that the denial of the Holocaust was a violation of the human dignity of all Jews. This case reaffirmed the German court's stance that the freedom from personal or collective insult and

[212] Supra (n 190) at 28.
[213] Ibid at 28.
[214] BVerf G E93, 266, 295. Decession of 10 October , 1995, *Soldiers are Murderers* (Tucholsky Case) = Decisions 659, at 681, supra (n173).
[215] Ibid at 682.
[216] Supra (n101) at 329.

freedom from incitement to hatred each deserve more protection than freedom of opinion.[217] Furthermore the court held that young people are to be protected from being misguided by the falsification of history or by fallacious racial ideologies.[218] The court held that individual Jews and German Jews must be able to rely on their dignity as human beings as well as on their personality rights. The Constitutional Court stated the following:

> 'The historical facts alone that human beings were singled out according to the criteria of the "Nuremberg Acts" and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special relationship vis-à-vis their fellow citizens, the past is still present in this relationship today. It is part of their personal self-perception and their dignity that they are comprehended as belonging to a group of people who stand out by virtue of their fate, and in-relation to whom all others have a special moral responsibility. Indeed, respect for this self-perception is for each of them one of the guarantees against a repetition of such discrimination, and it forms a basic condition for their life in the Federal Republic. Whoever seeks to deny these events denies to each one of them the personal worth to which they are entitled. For the person affected this means the continuation of the discrimination against the group to which he belongs as well as against himself[219]…[Nor is anything changed] when one considers that Germany's attitude to its Nazi past and the political consequence thereof…is a question of essential concern to the public. It is true that in that case a presumption exists in favour of free speech. But this presumption does not apply if the utterance constitutes a formal criminal insult or vilification of, if the offensive utterance is based on factual assertions that have been proven untrue.'[220]

In summation, this means that every person who denies, minimizes or approves the Holocaust assaults the dignity and violates the honour of all German Jews.[221]

2.4.7. Analysis of German Jurisprudence

According to Brugger, the rationale for refusing to regard the bare Holocaust lie as an opinion is not convincing. According to him, statements such as these are not individual facts, but are usually based in selective interpretation of many data. As such they will fall within the ambit of protected speech under Article 5(1).[222]

[217] Supra (n180) at 34.
[218] Ibid.
[219] Supra (n173) at 628.
[220] Ibid at 630.
[221] Supra (n180) at 37.
[222] Ibid at 33.

Brugger states further it is also possible to criticise the criminalization of the simple Holocaust denial in the sense that it does support the goals served by free speech.[223] From the U.S.A. approach, public denial of the Holocaust would certainly meet loud rejection in Germany. A public discussion would establish the truth and the terrible atrocities of World War II would not sink into a historical oblivion. Brugger further adds that by criminalizing the Holocaust lie, it is arguable that there is a denial of the right to free speech. Further, he adds that the proportionality exercise suggests that less restrictive means than criminal law should be use to protect the dignity of the Jews in Germany and preserving the memory of the Holocaust. In consequence, he concludes that it is difficult to reconcile the Holocaust Denial Case with the Soldiers are Murderers Case.

I submit that the Holocaust Denial speech would be simply outlawed in the balancing of rights approach. The violation of the right to dignity and equality would easily outweigh the right to freedom of expression. Furthermore, the 'Soldiers are Murderers Case' expression was a plea for pacifism and is 'speech plus' in the sense that engagement here deals with constructive issues of public importance. By contrast the 'Holocaust Denial rhetoric' dealt with essentially harming a group or denying their history. The 'Holocaust Denial speech' is 'low speech' which offers no positive contribution to the right to freedom of expression.

The Holocaust Denial speech I submit would though be simply outlawed in a balancing of rights approach. The violation of the right to dignity and equality would easily outweigh the right to speech.[224]According to Brugger, by criminalizing the Holocaust lie there are constitutional issues at stake. The proportionality exercise suggests that less restrictive means (than criminal law) should be used to protect the dignity of the Jews in Germany and preserving the memory of the Holocaust.

According to Brugger it is difficult to reconcile the *Holocaust Denial* case with the '*Soldiers are Murderers'* case. It is submitted that in the latter case the words used also represents an attack on the honour of all soldiers. However in the *Soldiers are Murders* case the court made use of a presumption in favour of free speech.[225]Based upon the above it seems apparent that certain

[223] Ibid.
[224] See also Fraudulent Asylum seeker Bayerisches Oberstes Landesgericht (BayobhG), decision of 31 January 1994, where the courts held that the right to dignity had been violated even although certain expression made could be viewed as matters of public concern.
[225] See also the *Luth* case [Bverf GE] [Federal Constitutional Court] Jan 15 1958 where the court also held that free speech overrode any dignity considerations.

decisions of the court are motivated by policy considerations. For example in the Luth[226] case, the views of the speaker would be supported by government, whereas in the Holocaust Denial the repulsive rhetoric of Neo-Nazi activists would be rejected. Unlike U.S.A, viewpoint discrimination is present in Germany. In summation one must look at the context in which the speeches were made. Given the singularity of the Holocaust as a historical event it is easy to support the views taken by the German Constitutional Court.

2.4.8. Summary

In Germany dignity holds centre stage in determining free speech considerations. Article 5(1) affords freedom of expression immense protection. However where free speech rights collide with dignity violations, the violation of dignity will render the expression unprotected.[227] Germany (like Canada) adopts a balancing of rights approach to hate speech.[228] Furthermore the German Constitution has an internal limitation clause in the form of article 5(1). This limitation clause is given flesh by a plethora of provisions in the Criminal Code which outlaw and criminalise undesirable speech. An understanding of German hate speech provisions can only be understood by giving close consideration to history and contextual setting. It is these considerations that explain the courts endorsement of viewpoint discrimination. Given the similar racist history of the South African apartheid regime, the German experience will prove invaluable to South African courts in monitoring and controlling racist speech.

2.5. Hate speech provisions in Europe

2.5.1. Overview

With the advent of the Constitution, South Africa became a constitutional state and all legislation and common law in conflict therewith may be declared invalid.[229] International law concepts relating to hate speech have now become of vital importance in the South African legal landscape and thus the Constitution states that "when interpreting the Bill of Rights, a court, tribunal or forum must

[226] In this case Eric Luth publicly called for the boycott of a movie "Immortal Beloved" directed by Viet Harlan, a notorious anti-semite and former Nazi propagandist. The court held that the right to freedom of expression prevailed.
[227] However *Luth* supra n225 and also the *Soldiers are Murders* case (n173) were the right to freedom of expression was given preference over the right to dignity.
[228] However in Germany the right to dignity is much stronger in weighting and in term of Article 1 is an inviolable right.
[229] Section 2 of the Constitution.

consider international law.'[230]Although numerous references are made to 'international law' in the text of the Final Constitution no definition of the concept is afforded. A useful guideline in determining what constitutes international law can be gleaned from the judgment by Chaskalson J in *S v Makwanyane*.[231]

> 'Public international law would include non-binding as well as binding law. These may both be used as tools of interpretation. International agreements and customary international law accordingly provide a framework within which (the Bill of Rights) can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee of Human Rights, the Inter-American Commission of Human Rights, the European Commission on Human rights and the European Court of Human Rights, and in appropriate cases reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of a particular provision of Chapter 3.'

Apart from international law treaties there are a plethora of treaties[232] based on agreements concluded by states in the same region. In addition, courts have been set up to deal with human rights on a regional basis.[233] From an international law hate speech perspective, it is only the European region which has made massive strides in determining what is and what is not permissible hate speech. In consequence, I will focus only on the provisions of the European Convention on Human Rights and the decisions of the European Court of Human Rights.

2.5.2. Hate Speech Provisions of the European Convention on Human Rights

The European Court on Human Rights serves as the regional human rights enforcement mechanism for the 47 signatories to the European Convention on Human Rights. Article 10 of the Convention protects freedom of expression, subject to permissible restrictions and reads as follows:

> (1) 'Everyone has a right to freedom of expression. This right shall include freedom to hold opinions and 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.
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the

[230] Section 39(1)b of the Constitution.
[231] 1995(3) SA 931 (CC) at para 26.
[232] Such as the International Covenant on Civil and Political Rights (ICCPR). See Article 19(3) and Article 20 which deals with the limitations placed on undesirable speech.
[233] For example the Inter-American Court, the African Peoples Court and the European Court of Human Rights.

> interest of national security, for the prevention of disorder or crime, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.'

From the above, it is clear that the right to freedom of expression is not unlimited but is subject to certain restrictions enumerated in Article 10(2).[234] Invariably, a proportionality exercise is involved in determining whether or not the violation of freedom of expression is justifiable in terms of Article 10(2).

2.5.3. Problems Associated with a Hate Speech definition

One of the major problems in determining whether or not speech will be protected lies in the fact that there is no definition of hate speech in the ECHR. The Fundamental Rights Agency of the European Union (FRA) stated that hate speech refers to "the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of particular characteristics."[235] However, thereafter the FRA completely re-defines 'hate speech' in another document and states:
"The term 'hate speech', includes a broad spectrum of verbal acts including disrespectful public discourse."

This serves to indicate the inconsistency in defining hate speech.[236] It is ironic that the European Court of Human Rights which endorses the concept of legal certainly as a parameter in upholding convention rights and legitimate interference therewith sometimes upholds vague domestic hate speech laws criminalising certain forms of expression; this creates a morass of confusion as is well illustrated in *Vejeland v Sweden*.[237] In this case, the court held that while the particular speech in question "did not directly recommend individuals to commit hateful acts" the comments were "serious and prejudicial allegations". Up until this case, the European Court of Human Rights held that the right to freedom of expression protected to both offensive and inoffensive speech.

[234] It is clear from the provisions that a balancing of rights approach to hate speech is envisaged.
[235] Kiska op cit (n146) referring to European Union agency for Fundamental Rights Hate Speech and Hate Crimes Against LGBT persons (2009), available at http://fra.europe.eu/fra website.
[236] The confusion arising thereof is illustrated in comparing *Handyside v United Kingdom* 24 Eur.ct.HR at 23 (1976 with *Vejeland v Sweden* App No 1813/07 54 (Eur.ct.HR Feb 9, 2012). See discussion infra.
[237] Ibid.

In *Handyside v United Kingdom*[238] the European Court of Human Rights held that protection could be afforded to speech that "offends and shocks". It is undoubtedly extremely difficult to reconcile the idea that speech that "offends and shocks" is protected, but speech that is "serious and prejudicial" remains unprotected. In attempting to reconcile this discrepancy between the two judgments the following should be note *Vejeland* supra. In *Vejeland,* the European Court of Human Rights took into consideration that the leaflets criticising 'homosexual behaviour' were left in the lockers of young people who were at an impressionable and sensitive age and who had no chance to decline to accept them.[239] The ECHR also noted 'that the distribution of leaflets took place at a school where none of the applicants attended and which they did not have free access.'[240]

According to Kiska in holding that the content of the expression was unworthy of protection, as the European Court of Human Rights did this has done a disservice to freedom of expression as enshrined in the Convention. Kiska is correct in stating that the above rhetoric amounts to content or viewpoint discrimination. From a U.S.A perspective I submit he is technically correct. However, the European Court of Human Rights has not categorically said that viewpoint discrimination is proscribable. Viewpoint discrimination is per-se endorsed in Germany, and leading cases broad before the European Court of Human Rights, show a reluctance to display tolerance for hate speech concerning homophobia.

I submit that in *Vejeland,* the ECHR should have dismissed the applicant's case on the basis of the circumstances which where unique to the case, rather than refer to the content of the applicants hate speech.

2.5.4. The Approach Taken by the European Court of Human Rights in Limiting the Right to Freedom of Speech

On numerous occasions, the European Court of Human Rights has held that freedom of expression constitutes one of the essential foundations of democracy, the hallmarks of which are pluralism, broadmindedness and tolerance.[241] Protection for freedom of expression pertains to all views and

[238] Supra (n146).
[239] Supra (236) at 56.
[240] Ibid.
[241] Ibid.

opinions and all forms of media.[242] In determining where speech has violated the European Convention on Human rights a three pronged test is adopted, namely:

a) Was the state interference prescribed by law?

b) Does the interference pursue a legitimate aim?

c) Is the interference with the fundamental right to freedom of expression necessary in a democratic society?

These three tests will now be discussed in more detail.

2.5.4.1. Prescribed by Law

High contracting parties are given a large margin of appreciation vis-à-vis domestic law in this test. The European Court of Human Rights contends that national authorities are in the best position to determine whether restrictions on the right to freedom of expression are necessary. Nevertheless, this is not an unfettered discretion and the European Court of Human Rights adopts a certain level of scrutiny when analysing interference.[243]

By law, the European Court of Human Rights is referring to law in the substantive sense and not the formal one. Law would include both legislation and common law. The law must be accessible and foreseeable.[244] This has become a complex problem as states are increasingly adopting loosely-worded legislation, which may unnecessarily retard the right to freedom of expression. It is only when the four elements of precision, access, clarity and foreseeability are met that the law will be regarded as being prescribed by law.[245]

2.5.4.2. Legitimate aims

The second test addresses whether the interference in question pursues a legitimate aim. Once again, it is the national authorities that must determine whether restrictions pursue a legitimate aim (a pressing social need for the nation). The European Court of Human Rights once again adopts a review function, but a certain margin of appreciation is left for domestic states. Article 10(2)

[242] See *Goodwin v United Kingdom* 1996 E.U.R ct at 500. See also *Aiston v Turkey* App No 23 462/94 at 45,50.
[243] See Roger Kiskha op cit (n146) at 122 referring to *Handyside v United Kingdom* supra (n222).
[244] Supra (n146) whereas in *Vejeland v Sweden* the law was vague and not foreseeable.
[245] Supra (n236) at 124 referring to *Vejeland v Sweden*.

provides a comprehensive list of circumstances in which a person's rights to freedom of expression may be justifiably limited. They are the following:

1) In the interests of national security, territorial integrity or public safety[246]
2) For the prevention of disorder or crime
3) For the protection of health or morals[247]
4) For maintaining the authority and impartiality of the judiciary[248].

2.5.4.3. Necessary for a democratic society

The ECHR has stated that the typical features of a democratic society are pluralism, tolerance and broadmindedness.[249] For an interference to be necessary in a democratic society it must meet a 'pressing social need' while at the same time remaining 'proportionate to the legitimate aim pursued'. In *Zana v Turkey*[250], it was held that any interference must be based on just reasons that are both 'relevant and sufficient'. The judgment in *Zana v Turkey* is instructive in determining what a pressing social need is. The court held as follows:

> 'It must look at the impugned interference in the right of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular it must determine whether the interference in issue was proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities applied standards, which were in conformity with the principle embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.'

Like Germany, the court is not willing to show tolerance to academic freedom when reviewing cases of Holocaust denial.[251] In *Garaudy*, the European Court of Human rights upheld the conviction of an individual who had authored a book denying the Holocaust. Although his right to freedom of expression was violated, the court held that this was necessary in a democratic society. The court may, however, show more deference to freedom of press, in cases where the defendant is charged with disseminating hatred instead of expressing it.[252] In *Jersild*, a journalist was convicted for

[246] *Zana vTurkey* 1997 EUR ct. HR 2533, 2540 and 2547 and also *Ergin v Turkey* 206 EUR ct. HR at 9-11, 25-27 (1995).
[247] See *Handyside v United Kingdom* supra (n236) where the ECHR upheld the seizure of books containing obscene materials intended for school children as pursuing a legitimate aim. In *Wingrove v United Kingdom* 1996 EUR ct. HR, 1937,1942-43, the ECHR upheld protection of public morals as a legitimate aim where the British Board of Film classification refused to distribute a film depicting Saint Theresa having an erotic fantasy involving the crucified figure of Christ.
[248] Supra (n146) at 28.
[249] Ibid at 22.
[250] 1997 EUR ct.HR at 2533.
[251] See *Garuady v France* 2003- IX EU ct. HR.
[252] *Jersild v Denmark*, App. No 15890/89, 19 EUR H.R. Rep.1 (1995).

conducting and broadcasting an interview with three members of a racist youth group. The interviewees made racist statements about immigrants and ethnic groups. The court held that one had to determine whether the applicant had the intent to propagate racist views.[253] This they found in the negative. As such, the conviction would have had a chilling effect on freedom of expression given the importance of the role of the press. The court therefore concluded that the government interference with the journalist's right to freedom of expression was not "necessary in a democratic society."[254]

2.5.5. Article 17/ Equality clause

The European Convention on Human Rights has a further provision in terms of Article 17 which may assist in restricting hate speech. In doing so, the EHCR is not placing reliance on Article 10 (2). Article 17 states the following:

> 'Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

In *Glimmerveen v Netherlands*[255], two members of a white supremacy group argued that their right to freedom of speech had been violated by being convicted for distributing leaflets containing racist messages. The Dutch court had held that these messages incited racial hatred. The European Court of Human Rights used the provisions of Article 17 and held that the defendants were using the right to freedom of expression to engage in activities which were contrary to the tenor and the spirit of the European Convention.[256] Therefore, in this case, the court did not use Article 10(2) to restrict the hate speech.

2.5.6. Summary/ Analysis of European Provisions

The above discussions of Article 10 and 17 of the Convention and the jurisprudence of the European Court of Human Rights indicates clearly that the right to freedom of expression is not unlimited. The

[253] Ibid at 16.
[254] At 28.
[255] 18 Eur Comm'n H. R. Dec & Rep and 194-95 (finding that Article 17 describes the "duties and responsibilities" undertaken by one who exercises his freedom of expression.
[256] A similar approach was adopted by the European Court of Human Rights (invoking Article 17) in *Communist Party of Germany v Federal Republic of Germany*.

Convention and the European Court of Human Rights clearly favour a balancing of rights approach to hate speech.

Contextually, Europe is of importance as a comparator of South Africa, as the Convention and the European Court of Human Rights were principally set up to ensure that crimes against humanity committed in World War II never occur again. It was regarded as being instrumental in ensuring that democracy prevailed in Europe.

The jurisprudence of European Court of Human Rights shows that the courts will exercise considerable deference in upholding legislation enacted against Holocaust denial, [257] xenophobia[258]and homophobia.[259] Given the extent of extreme right wing groups in Europe (Neo-Nazi and anti-gay extremists), it is submitted that this approach is apposite.

The European experience has, however, demonstrated that, on occasions states have resorted to extremely vague open-ended legislation in order to silence harmful hate speech. Furthermore, the European Court of Human Rights has on occasions given judgments which are vague and contradictory which do not assist with attaining legal certainty.[260]

In summation, the European experience should indicate to South Africa that:

1) hate speech should be restricted;

2) legislation enacted against hate speech should be clear, precise and easily accessible;

3) legislation should not be overbroad as this may have a chilling effect of making severe inroads into the right to freedom of expression. Furthermore, overbroad legislation can lead to the state dictating methodology which can result in totalitarianism. Given South Africa's questionable human rights history, this phenomenon should be avoided at all costs.

2.5.7. Conclusion on Foreign and International Law

A fairly detailed exposition of foreign and international law relating to hate speech has been dealt with in this chapter. The following conclusion can be drawn:

[257] Supra (n251).
[258] Supra (n252).
[259] Surpa (n236) *Vejeland v Sweden*.
[260] Ibid.

Canada follows a balancing of rights approach to hate speech. The violation of the right to freedom of expression is balanced through the use of the limitation clause in the Constitution. It is apparent from case law that only the most offensive speech is proscribed. The approach taken by Canada is of invaluable importance in interpreting the South African hate speech provisions as South Africa contains a general limitation clause similar in content to the Canadian general limitation clause. The Canadian approach identifies that there are two kinds of harm caused by hate speech. Firstly, there is the harm that is suffered by the target group. Secondly, Canada recognises that harm also takes place by the spread of hateful views in the community.

In the United States, the First Amendment offers immense protection to all forms of speech including hate speech. It is couched in peremptory terms. Nevertheless, the United States does not follow an absolutist approach to freedom of expression. Exceptions such as the fighting words doctrine, incitement to imminent lawless action and obscenity do not enjoy First Amendment protection. However, contemporary case law such *as Collin v Smith* and *RAV* have reduced the extent of these exceptions.

The United States adopts a libertarian approach to hate speech. One must take cognisance of the different contextual and philosophical backgrounds when comparing hate speech provisions in the United States to South Africa. The U.S.A focuses mainly on the harm caused to the target group. In terms of section 16(2)b of the South African Constitution, incitement of imminent violence is not protected as speech in South Africa. The similar wording in *Brandenburg v Ohio* may be of use in South Africa when determining the interpretation of section 16(2)b. In *Brandenburg*, the United States Supreme Court held that in order to be precluded from First Amendment protection, the advocacy of the speech must be directed to inciting or producing imminent lawless action which is likely to incite or produce such action. However, in South Africa, the equivalent provision In section 16 (2) b does not require the incitement to be likely to lead to violence. As such, this comparison may be of limited value.

Germany adopts a balancing of rights approach to hate speech. Furthermore, the emphasis is on the violation of the right to dignity when weighing one right up against another. The German experience will be of considerable comparative value for South Africa, as dignity is a key component of the South African constitutional values. In addition, South Africa has had a similar history of racial intolerance towards other races (like Germany). Germany has criminalised hate speech and, in

particular, Nazi rhetoric relating to this dark period of extreme racial intolerance. South Africa may consider following a similar path.

The European Convention and the European Court of Human Rights adopt a balancing of rights approach to hate speech. This serves as a useful comparator to South Africa from a contextual perspective.

At times, the legislation and case law of both Germany and the rest of Europe have been vague and anomalous. This is a lesson that South Africa should clearly endeavour to avoid by:

1) Drafting clear legislation relating to hate speech (the vagueness of PEPUDA will be discussed in some depth in the subsequent chapter).

2) Judicial decisions by the Constitutional Court and the Equality Court, High Court and the Equality Court should be as clear as possible.

In closing is should be remembered that whilst foreign law may be considered in interpreting the Bill of rights, regard must be had to local conditions and it is unlikely that a complete transplant of foreign law provisions will be apposite without some changes, as was cautioned by the Constitutional Court in *S v Makwanyane*.[261]

[261] Supra (n231).

Chapter III: Hate Speech Provisions in South Africa

3.1. General

This chapter looks at hate speech provisions in South Africa in some depth. The underlying purpose of this chapter is to demonstrate that South Africa is adopting a balancing of rights approach to hate speech. This in essence means that for a particular case, the right to freedom of expression is weighed up against the right to dignity or equality or any other entrenched rights which may be affected.

To this end the right to dignity and equality in the Final Constitution are looked at closely. In addition I will show that as dignity and equality are constitutional values (in addition to being constitutional rights) they will command important consideration in a balancing of rights approach to hate speech.[262] Thereafter, the right to freedom of expression is analysed. The exclusions to freedom of expression are analysed in some depth.[263] I will demonstrate that certain terms used in section 16(2)c are not clear and should have been defined in order to avoid certain ambiguities and anomalies.

In order to provide some more detail as to what hate speech is, the promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) incorporated sections relating to hate speech (in particular section 10 and 12 of PEPUDA). Similarly, with a view to criminalizing hate speech, a Draft Hate Speech Bill was formulated. I will, however, demonstrate clearly that in both instances these provisions did not clarify possible interpretative problems with section 16(2) but have provided further confusion. I will demonstrate that the relevant provisions of PEPUDA and the contents of the Draft Hate Speech Bill, are vague and overbroad and have a chilling effect on the right to freedom of expression.

A further question arises in that, given the broadness of the hate speech provisions in both PEPUDA and the Draft Hate Speech Bill, the question of unconstitutionality arises. This issue will be addressed in some detail by comparing the legislation with the provisions of section 16(2) of the Constitution. The legislation will then be analysed in terms of the general limitation clause in order to try and

[262] In terms of section 1 of the Final Constitution the values of dignity and equality are core constitutional values. Furthermore in addition to been a constitutional value dignity and equality are entrenched constitutional rights in terms of section 10 and 9 respectively.

[263] See section 16(2)a to (c) and in particular section 16(2)c which is known as the 'hate speech clause'.

establish whether the violations of the right to freedom of expression are a reasonable and justifiable limitation in terms of a democratic society.[264]

I will thereafter analyse the approach adopted by the courts and Human Rights Commission in leading hate speech cases.[265] I will examine some of the tests that have been used to demonstrate the presence or absence of hate speech.

3.2. Historical Background

The South African experience during the Apartheid years was one of very rigid control of hate speech.[266] The first laws passed aimed at criminalizing statements that could lead to racial hostility were enacted in 1927.[267] In reality, however, these laws passed were aimed at curbing any speech aimed at ending oppression, made by black people.[268] Furthermore, these laws aimed to forcibly remove, fine and imprison the Black population that spoke out against the apartheid system. In essence, the laws had little to do with protecting victims from the harm caused by hate speech. The final apartheid-based law used to oppress the indigenous populations limitations on speech was the Internal Security Act of 1987. In terms of this law:

> 'Any person who, with the intent to achieve the object of bringing about or promoting any constitutional ,political ,industrial ,social or economic change in the Republic causes ,encourages or foments feelings of hostility between different population groups or attempts to do so, shall be guilty of the offence of subversion.'

It is clear that the contents of this Act were vague and overbroad and would have a chilling effect on freedom of expression. Furthermore, the Act provided for the detention without trial, arrest without a warrant, exclusion of legal representation and the administrative infringement of basic human rights that could not be reviewed by the courts.[269]

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[264] See section 36 of the Constitution. The various proponents of the limitation clause will be discussed with regard to section 10 and section 12 of the PEPUDA legislation.

[265] For example in *Freedom Front v South African Human Rights Commission* supra (n321) and also *Afri Forum and Another v Malema and Others* supra (n417).

[266] Lene Johannessen, "A Critical View Of The Constitutional Hate Speech Provisions." South Africa Journal on Human Rights at 136.

[267] Haigh, "South Africa's Crimininalization Of Hurtful Comments" Washington University Global Studies Law Review [vol 5:187] at 191.

[268] See for example the Native Administrative Act of 1927.

[269] Haigh op cit (n267) referring to Stephan de la Harpe & Thoiren Van Der Walt 'Can Security Legislation Stand Up to the Challenge of Ensuring the Protection of Human Rights and Freedoms?' A South African Perspective New Thinking (summer 2003).

In 1955, the ANC established the Freedom Charter. This document embodied the conflict between the right to dignity and freedom of speech. The charter guaranteed the 'right to speak' and also provided that the "preaching and practice of national, or colour discrimination shall be punishable as a crime".[270]

In the process of ensuring the termination of the apartheid system, the draft ANC Bill of Rights contained very extensive provisions for the control of hate speech.[271] However, the Interim Constitution adopted in 1995 did not contain a hate speech clause. According to Johannessen, the issue of racial equality was considered adequately addressed by the relative primacy of equality over expressional rights in the statements of the interim constitution's general purposes, the limitation clause on fundamental rights and the setting forth of rules of interpretation.[272]

When the Final Constitution was adopted a 'hate speech clause' was introduced in the freedom of expression provision.[273] In the ANC's preliminary submission to Theme Committee 4, who were granted the mandate of drafting a freedom of expression clause, the ANC motivated for a hate speech clause as follows:[274]

> 'The right to freedom of expression is closely related to free political activity. It is one of the foremost fundamental civil and political human rights universally accepted. It is advisable that the right should be reformulated to provide constitutional protection from racist, sexist or hate speech calculated to cause hostility and acrimony and racial, ethnic or even religious antagonism and division.'

3.3. The Role and Importance of Dignity in the South African Constitution

In order to understand the approach taken by the courts to hate speech in South Africa, it is imperative to understand how the concept of dignity plays a pivotal role in the South African[275] Constitution.[276]

[270] Supra (n267) at 193.
[271] Supra (n266) at 137.
[272] Ibid.
[273] See section 16(2) of the Constitution.
[274] Supra (n266) at 138.
[275] Dignity is both a fundamental value and a right in the Constitution. See section 1 and section 10 respectively.
[276] Ryan E. Haigh supra (n267) at 194.

The meaning of the concept of dignity is not altogether clear. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[277] Ackermann J conceded that dignity is a difficult concept to capture in precise terms.[278] Furthermore in *Dawood & Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs & Another,* the Constitutional Court held that the right to human dignity protects the intrinsic worth of the bearers of the right. This means that no one may be treated as a mere object.[279] In *S v Dodd*[280] the Constitutional Court affirmed that "human beings are creatures of inherent worth and infinite worth, they ought to be treated as ends in themselves never as merely as means to an end." In the South African Constitution, dignity is a foundational value.[281] The Constitutional Court in Dawood's case held the following:[282]

> 'The value of dignity in our constitutional framework cannot be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of human beings. Human dignity therefore informs constitutional adjudication and the interpretation at a range of levels.'

In addition dignity also serves as an independent human right within the South African constitution.[283] Section 10 of the Constitution confers on a person a legal entitlement to something that can be enforced against another person.[284] According to Cowen, the legal purpose served by dignity as a value imposes a legal duty on the judiciary to be guided by the quest for dignity in its decision-making process about the meaning of rights and the justification of the limitation of rights.[285]

From a hate speech perspective, the right to human dignity often collides with the right to freedom of expression (although there is an overlap between the two as well).[286] As a foundational value,

[277] 1999(1) SA 6 (CC).
[278] Karmini Pillay "The Cartoon Wars: Free Speech or Hate Speech?" at 470.
[279] Supra (n278) at 471.
[280] 2001 (3) SA 382 (cc) at para 53.
[281] See section 1 of the Constitution.
[282] *Dawood & Another v Minister of Home Affairs & Others*; *Thomas & Another v Minister of Home Affairs & Other* 2000 (3) SA 936 (cc) at para 35. See also *S v Makwanyane* supra (n231) at para 328 in which O'Regan J stressed that the importance of dignity as a founding value of South Africa's constitutional dispensation cannot be over-emphasised.
[283] See also section 10.
[284] S Cowen "Can Dignity Guide South Africa's Equality Jurisprudence?" (2001) 17 SAJHR 34 at 42.
[285] Ibid at 47.
[286] Supra (n8).

South African jurisprudence has invariably seen the right to dignity as being of more cardinal importance than the right to freedom of expression.[287]

3.4. The Role of Equality in the South African Constitution

Equality like human dignity is one of the core values in the South African Constitution.[288] In addition, equality is an important independent right in the Constitution.[289] On a simple construction, equality means that everyone is equal before the law and is entitled to equal protection and benefit of the law.[290] In terms of the South African Constitution recognition is not only given to formal equality but also substantive equality. Substantive equality recognises inequality that has arisen from periods of past discrimination and attempts to address the living conditions of individuals.[291] There is therefore a clear link between human dignity and equality. Equality of rights necessarily entails an equality of dignity.[292] Dignity is a crucial concept utilised by the Constitutional Court in giving effect to the right to equality.[293] From a hate speech perspective, the right to equality is important and often clashes with the right to freedom of expression.[294] As in the cases of human dignity, equality rights will generally trump the right to freedom of expression as equality is a core value in the Constitution.[295]

3.5. The right to Freedom of Expression

Given the South African past which systematically trampled and banned large amounts of speech which aimed at criticising the apartheid regime, it is not surprising that the Constitution contains a muscular freedom of expression clause.[296] The guarantee includes providing for the freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity and freedom of scientific research.[297] The kind of speech protected under section 16 (1) is

[287] This correlates strongly with the approach taken in German jurisprudence where dignity is seeing as an inviolable right, supra (n180).
[288] See section 1 of the Constitution.
[289] Section 9 of the Constitution.
[290] Section 9 (1).
[291] Section 9(2).
[292] Supra (n278) at 472.
[293] Ibid.
[294] See *R v Keegstra* supra (n11) where reference was made to the equal rights of the speaker and the target group.
[295] The fact that hate speech provisions have been incorporated in PEPUDA indicates the link between equality and hate speech.
[296] Pierre de Vos on "Shoot the Boer" hate speech and the banning of struggle songs at 7.
[297] Section 16(1) of the Constitution.

not limited to 'information or ideas' that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb.[298]

According to Van Wyk,[299] one of the goals of freedom of expression is therefore to assist in democratic decision-making and to aid the process of stability and change in society. This is of vital importance in South Africa where democracy is relatively new and where there is a commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours".[300]

Despite this constitutional commitment to freedom of expression, this right like any fundamental right in chapter 2 of the Constitution is not absolute. The right to freedom of expression is subject to the internal limitation addressed in section 16(2) which defines the boundaries beyond which the right to freedom of expression[301] does not extend. Furthermore, the right may also be limited by complying with the general limitations clause enumerated in section 36 of the Constitution. The internal limitations clause in section 16(2) (sometimes referred to as the 'hate speech clause') will now be discussed in some depth.

3.6. Internal Limitation to the Right to Freedom of Expression – The prohibition of Hate Speech

3.6.1. Overview

Section 16 of the Constitution is essentially divided into 2 components which must be read in conjunction with one another in order to understand the scope of the right to freedom of expression.[302]

In essence speech is not protected if it amounts to:

a) propaganda for war.

b) incitement of imminent violence.

c) advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

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[298] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 5 BCLR 433 (CC) para 28, supra (n8) quoting from the European Court of Human Rights decision in *Handyside v The United Kingdom*, supra (n236).
[299] Christa Van Wyk "The Constitutional Freedom of Hate Speech in South Africa" at 2.
[300] See *S v Mamabolo* (ETV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) SA 409 (cc) at para 37.
[301] Supra (n299) at 3.
[302] Supra (n267) at 196.

There is no violation of the right to freedom of expression in these cases as section 16(1) and (2) collectively have defined the scope of the right. As such, any legislation aimed at combatting hate speech which falls within the ambit of one of the sub-sections of section 16(2) will not be susceptible to a constitutional attack as there is no violation of the right to freedom of expression. Where, however, such legislation falls outside the section 16(2) components then there is an encroachment on the right to freedom of expression.[303] The speech may, however, still be tested against the justification criteria of the limitations clause in section 36.

According to Johannessen, the internal limitation clause in section 16(2) fundamentally changes the limitation analysis.[304] The presence of the internal limitation analysis may result in speech been declared as hate speech and not subject to freedom of expression protection.[305] The enquiry would then stop there and there would be no need, in this instance, to refer to the general limitation clause. The internal limitation clause effectively removes certain speech from the ambit of the right to freedom of expression.[306]

The 3 sub-sections in section 16(2) prohibiting certain speech from constitutional protection will now be discussed.

3.6.2. Section 16(2)a

In terms of this sub-section, the right to freedom of expression does not extend to propaganda for war. This exclusion is taken directly from the International Convenant on Civil and Political Rights (ICCPR) which states that 'any propaganda for war shall be prohibited by law'.[307] According to Currie & de Waal, the word 'war' refers to acts of external aggression and not violent resistance offered against the government of the day.[308] It is unclear whether 'propaganda' is confined to statements inciting a war or extends to favourable reports on a war which has already commenced.

3.6.3. Section 16(2)b

Section 16(2)b seems to stem from the U.S.A. First Amendment jurisprudence. In the U.S.A., in the early 20th century, as we have seen, the Supreme Court developed the 'clear and present danger test'[309] to determine the legitimacy of restrictions on freedom of expression. This test was revamped

[303] See supra (n8) at 22. The legislation may however be saved in terms of the general limitations clause.
[304] Supra (n266) at 139.
[305] Ibid.
[306] Ibid.
[307] Stuart Woolman et al "Constitutional Law in South Africa" (4th ed) at 42-69.
[308] Ian Currie & Johan de Waal 'The Bill of Rights Handbook" (5th ed) at 373.
[309] See *Schenck v United States*, supra (n93).

in *Brandenburg v Ohio*.[310] The extent of the protection of free speech in Brandenburg is considerable and may best be understood by reference to a statement of the Supreme Court in the case:

> 'The mere abstract teaching of the moral propensity or even moral necessity for a resort to violence is not the same as preparing a group for violent action and steering it to such action.'[311]

The South African provision does not require the incitement to be 'likely' to lead to violence. The context within which the statement is made is of course of great importance.[312] For the purposes of section 16(2)b 'incitement' includes actively encouraging, calling for or pressuring others to engage in acts of violence where the threat of the violence occurring is imminent.[313]

It is submitted that the provisions of section 16(2)b require both an objective and subjective test. Firstly, the speaker must subjectively intend to incite imminent violence and, secondly, one must objectively ascertain that such a result is likely to transpire from the expression.[314] Both the context of the publication and surrounding circumstances will be vital in determining whether the expression falls within the ambit of section 16(2)b. It should be noted that as of yet there is no case law in South Africa dealing with section 16(2)b. This interpretation is therefore based upon the writings of local academics and foreign case law precedent.

3.6.4. Section 16(2)c

This element of section 16(2) is commonly referred to as the 'hate speech clause'. Like Canada, Germany and the rest of Europe, South Africa subscribes to a balanced approach to hate speech by balancing the violation of the right to freedom of expression against the protection of the rights to dignity and equality. South Africa has, however, attempted to clarify which speech is prohibited by stipulating in section 16(2)c that freedom of expression does not extend to advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. The effect of this is that a component of speech is removed from constitutional protection.[315] As Langa DCJ succinctly put it in the *Islamic Unity* case:

> 'Section 16(2) defines the boundaries beyond which the right to freedom of expression does not extend.'[316]

[310] Supra (n95).
[311] Currie et al op cit (n308) referring to *Brandenburg v Ohio* para 448 at 374 supra (n95).
[312] Ibid at 375.
[313] Supra (n307) at 42,72.
[314] Ibid.
[315] Ibid at 42-79.
[316] Supra (n8) at para 32.

This approach is, however, not without criticism. According to Johannessen, it is jurisprudentially unsound to exclude a portion of expression from constitutional protection.[317] He further submits that there was no need to exclude hate speech from section 16 as legislation drafted to prohibit egregious hate speech would be saved by the limitation clause in section 36.[318] Nevertheless, despite the attempt to remove a component of odious speech ,the provisions of section 16(2)c are not entirely clear and require interpretation. The interpretation of the various phrases in section 16(2)c will now be discussed.

3.6.4.1. Advocacy of hatred based on race, ethnicity, gender or religion

'Advocacy of hatred' implies that the speaker must actively 'advocate' hatred.[319] In other words he must propose or call for the hatred.[320] In *Freedom Front v South African Human Rights Commission*[321], an appeals committee of the Human Rights Commission (SAHRC) held that the political slogan 'kill the farmer kill the boer' was advocacy of hatred. Professor Govender in his judgement remarked that 'calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly indicates otherwise'.[322] It was held that the slogan was clear advocacy of hatred based upon race or ethnicity. Similarly, in *Human Rights Commission of South Africa v SABC*[323], the commission held that derogatory and inflammatory statements made about Indians in a Zulu song constituted advocacy of hatred. The song indicated that the Indians are the cause of poverty amongst Zulus, have dispossessed them, suppressed them and play the fool with them (Ama Ndiya).[324] The court held that there was advocacy of hatred based upon race in this song.

3.6.4.2. Hatred

Hatred is an extreme emotion. Case law does, however, provide some insight as to what is considered to be hatred for the purposes of section 16(2)c. In *R v Andrews*, Cory JA stated the following:

[317] Supra (n266) at 138-142.
[318] Supra (n307) at 42-79.
[319] Ibid at 42-80.
[320] Supra (n308) at 375.
[321] *Freedom Front v South African Human Rights Commission* supra (n321).
[322] At 1290-1291.
[323] *Human rights Commission South Africa v SABC* 2003 (1) BCLR 92 (BCCSA).
[324] Ibid at para 35.

> 'Hatred is not a word of causal connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another and clearly an expression must go a long way before it qualifies.'[325]

In another Canadian case *R v Keegstra*, Dickson CJC uttered the following:

> 'Hatred is predicated on destruction, and hatred against indefinable groups and therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.'[326]

The Constitutional Court in *National Coalition Gay & Lesbians Equality v Minister of Justice* held the expression in relation to the requirement of hatred, must be analysed from the perspective of the vulnerable group.[327]

An issue which must be considered with regard to the issue of 'advocacy of hatred' is whether there was an intention to promote hatred of the target group. In *Human Rights v SABC*[328]*,* the BCCSA found that the test for hate speech is an objective one in broadcasting, and therefore the intentions of the person writing the song and the broadcaster do not form part of the enquiry into hate speech. Pillay argues that even though this was a case relating to the broadcasting context, there are no compelling reasons not to extend this test to any other form of media.[329] Pillay argues further that a better approach would be to consider whether the speech has the effect of causing hatred and harm.

3.6.4.3. Listed grounds

Section 16(2) refers to advocacy of hatred based upon race, ethnicity, gender or religion. According to Currie et al, these grounds are a numerous clausus[330] and will not extend to analogous forms of expression such as homophobic and xenophobic speech.[331] The authors place reliance for this submission on the constitutional principle that exceptions to the protections rights afford (such as those enumerated in section 16(2)) must be restrictively imposed. Furthermore, this view is supported by the judgment in *Islamic Unity Convention v The Independent Broadcasting Authority*

[325] *R v Andrews* (1988) 65 OR [2d] 161, 179.
[326] Supra (n11).
[327] Supra (n277) at para 29. In this case the Constitutional Court adjudicated on the common law criminalisation of sodomy and its violation of the right to human dignity.
[328] Supra (n323).
[329] Supra (n278) at 479.
[330] Supra (n299) at 5.
[331] This issue is of considerable importance when comparing the provisions of section 16(2) with section 10 of PEPUDA as this will assist in determining whether or not the provisions in PEPUDA are Constitutional.

and Others in which it was held that the four criteria mentioned in section 16(2)c are a numerous *clausus*.[332]

If 'race' is given a meaning in accordance with the definition of "racial discrimination" contained in article 1(1) of the ICERD namely "colour, descent or national or ethnic origin", it is clear that race is not confined to biological criteria but includes elements of a social and cultural nature. If this definition is accepted as correct, it could then be argued that 'language groups' and groups of a specific 'national origin' would be included under the category of "race".[333]

"Ethnicity" is defined in terms of dictionaries to relate to races or large groups of people that share common traits and customs. Acceptance of this definition means that "common traits and customs" would probably include language and national groups.[334]

Another issue is whether the term "gender" would include the grounds of sexual orientation as well? Burns argues that "the concept of gender will include sexual preference or sexual orientation."

Although she admits that the equality clause in the constitution names both gender, sex and sexual orientation as prohibited grounds of unfair discrimination, indicating that the drafters of the constitution could have adopted a similar approach in section 16 if they so desired.[335] She relies on the judicial approach to the interpretation of the Constitution which requires a "generous and purposive interpretation."[336] She, in consequence, submits that a purposive approach to section 16 means that hate speech directed at gays and lesbians will also be prohibited. I submit that in view of the Constitutional Court decision in Islamic Unity Convention, the restrictive viewpoint of Currie et al should be preferred.

3.6.4.4. Incitement to cause harm

Even if the speech is viewed as amounting to advocacy of hatred, it does not on its own amount to hate speech unless incitement to cause harm is also present. According to Currie et al, incitement for the purpose of section 16(2)c must be taken to mean 'directed at' or perhaps 'intended'.[337] Woolman et al disagree with this contention and indicate that by equating incitement with intention

[332] Supra (n8).
[333] Supra (n299) at 6.
[334] Ibid.
[335] Ibid.
[336] See *S v Zuma* 1995 (2) SA 622 (cc) and also *S v Mhlungu* 1995 (3) SA 391 (cc). In both cases the Constitutional Court held that a generous and purposive interpretation should be applied in interpreting the Bill of Rights.
[337] Supra (n308) at 377.

is an unduly strained reading of section 16(2)c.[338] They argue that this interpretation is supported by two further textual factors namely:

1) 'incitement is coupled with the phrase "to cause harm in section 16(2)c"[339]

2) incitement when used in the context of section 16(2)b which refers to "incitement to imminent violence".'[340]

In conclusion, Woolman et al indicate that 'incitement' for the purpose of section 16(2) should bear its ordinary meaning. In other words, does the speech encourage or call for others to cause harm? In summary, Woolman et al argues that one should rather look to the impact caused by the speech.

The next important issue to consider is whether the 'harm' envisaged in section 16(2)c is confined to physical harm or whether it extends also to psychological or emotional harm. This issue came before the *Human Rights Commission in Freedom Front v South African Human Rights Commission*.[341] The SAHRC had not found a causal link between attacks on farmers and the chanting of the slogan 'kill the farmer kill the boer'. The appeals Committee of the SAHRC held that harm in section 16(2)c extended to both emotional and psychological harm.[342] The SAHRC held that confining harm to mere physical violence would render the provisions of section 16(2)b superfluous as this provision deals specifically with incitement to imminent violence.[343] Further, the SAHRC held that an interpretation of harm which incorporated both emotional and psychological harm would better serve the constitutional objectives of building a non-racial and non-sexist society and giving cognisance to the important right and core value of human dignity.[344]

3.6.4.5. Summary and analysis of interpreting the constitutional hate speech clause

The above discussion has shown that the South African Constitution has embarked upon an approach which excludes certain speech from constitutional protection. It is, however, apparent that there is at times a lack of certainty as to which speech will fall within the parameters of section 16(2)c and will be construed to be impermissible hate speech.

3.6.4.6. Approach to assessing the constitutionality of hate speech legislation

[338] Supra (n307) at 42-83.
[339] Ibid.
[340] Ibid.
[341] Supra (n321).
[342] This approach is similar to that adopted in *R v Keegstra* supra (n11) and in fact the decision in SAHRC placed reliance on Keegstra.
[343] Supra (n321) at 1292.
[344] Ibid at 1290-1295.

In order to assess the constitutionality of any hate speech legislation, the first step that must be taken is to determine whether the legislation falls within the ambit of section 16(2) of the Constitution and, in particular, section 16(2)(c) thereof. If it does so, then the legislation will pass constitutional muster and the enquiry ends there.

If the legislation does not fall within the criteria of section 16(2)c then the legislation is encroaching upon the terrain of freedom of expression. The next step then is to determine whether the legislation may still be constitutionally sound by weighing up the violation of the right to freedom of expression against the stated purpose for the legislation in terms of section 36. In the case of hate speech, this involves weighing up an infringement of a right to freedom of expression, against the rights of dignity and equality.

A general prohibition on hate speech was enacted in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000[345] (to be referred to as PEPUDA). The relevant provisions of PEPUDA (Equality Act) and possible constitutional problems attaching to this legislation will now be discussed in some depth.

3.7. The Constitutionality of the Hate Speech Provisions in PEPUDA (Equality Act)

3.7.1. Introduction

The adoption of PEPUDA fulfilled the requirement that further legislation be enacted to prevent unfair discrimination in terms of the equality clause of the Constitution.[346] In terms of section 2(b) of the Equality Act, the goal of the Act is to give effect to the spirit of the Constitution through the prevention of unfair discrimination and the protection of human dignity. In its preamble the Act sets out as one of its objectives:

> 'The facilitation of the transition to a democratic society, united in 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. In furtherance of this goal the Act recognises that it is necessary to prohibit certain forms of expression.'[347]

The Equality Act specifically refers to South Africa's international obligations relating to various human rights conventions.[348] The provisions of the Equality Act relating to hate speech are not

[345] Supra (n310) at 377.
[346] Supra (n268) at 197.
[347] Shaun Teichner 'The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000: The Good The Bad and the Ugly' (2003) 19 SAJHR.
[348] The Equality Act specifically mentions the Convention of the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women.

without controversy. I will attempt to analyse them in some detail and compare then to the reciprocal hate speech clause in the constitution. It will be shown that the provisions of the Equality Act are vague, unclear and it is submitted on occasions susceptible to a constitutional attack.

3.7.2. Content of PEPUDA hate speech provisions

The hate speech provisions are contained in section 10 and section 12 of the Equality act and read as follows:

'PROHIBITED' HATE SPEECH

10(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.'

10(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.'

PROHIBITION OF DISSEMINATION AND PUBLICATION OF INFORMATION THAT UNFAIRLY DISCRIMINATES.

(12) 'No person may_

(a) disseminate or broadcast any information
(b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the constitution, is not precluded by this section.'

3.7.3. A comparison of section 10 and 12 of the Equality Act and section 16(2) of the Constitution

Section 1 of the Equality Act defines prohibited grounds as follows:

> 'Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or any other ground where discrimination causes or perpetuates systemic disadvantage or undermined human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground.'

Certain academics such as Currie et al argue that hate speech in the Constitution is restricted to four categories numerated in section 16(2) namely race, religion, ethnicity and gender. In summation the grounds of exclusion are extended significantly under the Equality Act.

In addition to the grounds, section 10 of the Equality Act is significantly broader than its section 16(2) counterpart. The phrase 'that could reasonably be construed or reasonably be understood to demonstrate a clear intention' is such that the test does not require a reasonable person to interpret the conduct as demonstrating a clear intention.[349] This is much broader than section 16(2)c which requires actual incitement to take place.

Moreover, the Equality Act prohibits what has been termed as harmful conduct "in the air".[350] For example, the language does not have to impact on the person to whom it is directed; if a passer-by construes the language to be harmful, then the speaker has committed hate speech.[351]

Another troubling aspect of section 10 is the reference to both 'hurtful' and 'harmful'. From the judgments in *Freedom Front,* it seems that harm could include emotional and psychological harm. This would then presumably be included in the term 'hurtful' in section 10. If harm in section 16(2)c is construed to be physical harm, it will fall within the space covered by incitement to imminent violence.[352] Furthermore, if the term 'hurtful' is interpreted literally, this would prohibit a wide range of speech such as robust opinions on racial issues or insensitive jokes. This it is submitted will then include a very subjective element in deciding on prohibited speech. This would certainly prove to be a severe and extensive restriction on the right to freedom of expression.

From the above, it seems apparent that the provisions of section 10 of the Equality Act are prima facie more extensive than the boundaries of section 16(2)c and thus infringe upon the right to freedom of expression. It would then have to be shown that such a limitation to freedom of expression is reasonable and justifiable in terms of the limitation clause to the Constitution.[353]

[349] Supra (n347) at 354.
[350] Supra (n267) at 201.
[351] Ibid.
[352] Ibid at 202.
[353] See section 36 of the Constitution.

When looking at section 12 of the Equality Act, it becomes apparent that it is itself vague. While the exclusion of 'fair and accurate reporting in the public interest' is commendable, phrases such as 'bona fide engagement in artistic creativity' are uncertain, as notions of art are subjective and changeable over time.[354] The term 'any information, advertisement or notice in accordance with section 16 of the Constitution' which is an exclusion, is also unclear. The section 12 proviso states that 'bona fide engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution is not precluded.'[355]

Teichner suggests that the first part of the exclusion up to the words 'public interest', could be equated to an expanded version of 16(1)(a), (c) and (d) protected freedom of expression.[356] He further suggests that the second part of the exclusion (from 'public interest' onwards) relates to section 16(1)b and protects the freedom to 'receive or impart information or ideas.' This proviso explicitly subjects the categories to section 16. This has the effect (according to Teichner) that if these categories under section 12 do not fall within the boundaries of section 16(2) 'hate speech', then speech is not prohibited in terms of section 10 of PEPUDA. Such an interpretation has the effect of narrowing down the ambit of the hate speech provisions in terms of PEPUDA, to the extent that they only apply to the unprotected categories of the speech mentioned under section 16(2).

I submit that one cannot equate the entire proviso in section 12 with the broad protection of freedom of expression provided by section 16(1). Furthermore, there is still a large volume of freedom of expression (that which does not relate to section 16(1)a to (d)) which is not then protected by section 12. As such, the analysis becomes deceptive.

What does however remain crystal clear is that section 12 and its proviso are vague in construction and their contents difficult to interpret.

3.7.4. Conclusion

The broadness of the prohibitions in the Equality Act means that the provisions do not fall squarely within the hate speech clause and would demand application of the general limitation clause in section 36 of the Constitution.[357] The necessity of comparing various sections of the Equality Act with the Constitution virtually ensures that the average person will not be able to determine whether or not he or she is engaging in prohibited speech. Should he or she land up being over-

[354] Supra (n307) at 42-88.
[355] Supra (n347) at 358.
[356] Ibid.
[357] Supra (n267) at 203.

cautious in exercising freedom of speech rights as a result of the confusion, this will only serve to limit freedom of expression still further. Further clarity is thus needed as to what constitutes permissible and impermissible speech.

3.8. The Application Of The Limitations Clause To Hate Speech Provisions in terms of the Equality Act (PEPUDA)

3.8.1. Overview

It has been noted that should the hate speech not fall within the ambit of section 16(2) the next step is to determine whether the limitation of the speech may still be reasonable and justifiable in terms of section 36 of the Constitution.

No constitutional rights are absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values. In the South African context, the general limitation clause sets out the specific criteria for the justification and restriction of the rights in the Bill of Rights. In the next paragraph I consider and discuss the specific criteria which form part of the limitation clause. I will consider all criteria in the context of the PEPUDA legislation.

3.8.2. Content of the limitation clause

The provisions of section 36 of the constitution reads as follows:[358]

> (1) 'The rights in the Bill of Rights may be limited only in terms of a 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
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

The reason for limiting a right needs to be exceptionally strong. This means that the limitation must serve a purpose that most people would regard as compellingly important.[359] In addition to a legitimate purpose, there must be a good reason for believing that the restriction of the right will

[358] Supra (n308) at 163.
[359] Ibid at 164.

achieve the purpose it is designed to achieve and the benefits of the limitation must be proportional to the harms caused to the rights.

3.8.2.1. The nature of the right

This factor is crucial as it indicates the importance of the right in the Constitution sphere, thereby determining the strenuousness with which we will be required to apply the specific criteria to justify any limitation.[360] In the case of hate speech, the right to freedom of expression is often weighed up against the claims to equality and dignity. This is well illustrated in *Khumalo and Others v Holomisa*.[361] This case related to whether or not a defendant in a defamation case had to show that a defamatory statement is true. The court held that when considering the constitutionality of the law of defamation, one needs to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.[362] For the purposes of this enquiry the *Khumalo* case is authoritative as it demonstrates the importance the courts attach to the right to freedom of expression. Although the right to freedom of expression is not a core value, 'freedom' is a core value. It is further submitted that freedom as a value would encompass freedom of expression. This illustrates that the right to freedom of expression occupies considerable importance.

3.8.2.2. Importance of the purpose of the limitation

In this criterion, one must determine the purpose of the limitation and whether such purpose is desirable in an open and democratic society.

In the case of hate speech, the purpose of the limitation is to restrict the negative effects of hate speech. This would include the harm to society and the target group of the speech.[363] This is especially the case in a fledging young democracy like South Africa where parts of society have been marginalised owing to past intolerance and prejudice. As such, one of the purposes of limiting hate speech is in order to create more social cohesion. It is apparent that in South Africa this harm is identified as more than just physical harm but extends also to emotional and psychological harm.[364] The importance of the limitation is that it is fundamental to achieving the society envisaged in the Constitution, which is based on equality and human dignity. In conclusion, although PEPUDA limits the right to freedom of expression by encroaching on section 16(1) expression, it is submitted that

[360] Supra (n347) at 359.
[361] (CCT 53/01) [2002] ZA CC 12; 2002 (5) SA 401.
[362] Ibid at para 28.
[363] See *R v Keegstra*, supra (n11).
[364] Supra (n321).

the purpose of this limitation is clear and important - that is to try and eradicate the harmful effects of hate speech.

3.8.2.3. Nature and extent of limitation

The more a right is limited, then the stronger the reason (purpose) must be for intruding on that right. Albertyn[365] submits that in the case of section 10 of the Equality Act, the use of the words 'hurt' constitutes a significant limitation on the right to freedom of expression. Certainly a literal interpretation of the word 'hurt' alone results in a severe limitation of the right. For example, insensitive jokes and subtle sarcasm could be caught in the web of the Equality Act.[366] Without a doubt, the Equality Act tramples significantly on the right to freedom of expression and to justify this infringement a cogent and powerful argument must be presented in favour of such a hate speech restriction.

3.8.2.4. Relationship between purpose and limitation

To be a legitimate limitation of a right, a law that infringes the right must be reasonable and justifiable. There must be a compellingly good reason for limiting the right.[367] In the case of hate speech, the reason for limiting the right is in order to curtail the harm caused by hate speech. This harm would include emotional, psychological and physical harm and also the harm caused to society in general owing to the marginalisation of the target group of the hate speech. The litmus test to be addressed in this component of the limitation clause, is do the provisions of PEPUDA achieve the purpose it sets out to achieve? The answer to this question is categorically yes, but it is submitted of equal relevance is that it achieves more than is necessary as well.

3.8.2.5. Less restrictive means to achieve the purpose

To be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the cost of the limitation.[368] If other measures may be employed which are less invasive of the right, but are equally effective the limitation is not proportionate.[369] If an alternative methods exists to achieve the same purpose of the limitation, which is less restrictive of the rights, then that less

[365] Supra (n284) at 96.
[366] Supra (n347) at 366.
[367] Supra (n308) at 183.
[368] Ibid.
[369] See *S v Makwanyane,* supra (n231), at para 123,128.

restrictive method must be preferred. According to the Currie et al, it is factor (e) (less restrictive means) on which most limitation arguments will stand or fall.[370]

In the case of hate speech, for example education, counter-speech and community-building may be important measures to consider as alternatives to legislation.[371] At the same time, it is not clear that they can achieve the same purpose in as effective a manner.

According to Matsuda, in order to ensure that only the most offensive speech is limited, the legislation should focus on the following:[372]

1) speech that conveys a message of racial inferiority
2) speech that is directed against a historically oppressed group
3) the message is prosecutorial, hateful and degrading

Matsuda further argues for a contextual approach encompassing the target group's past experience of racial discrimination.

From a South African experience, this approach may be correct to ensure that only severe hate speech is prohibited. This will ensure, at the same time, that there are limited government restrictions on speech and that free speech rights are not systematically undermined.

It is clear that the PEPUDA legislation relating to hate speech is far too invasive of the right to freedom of expression. It is submitted that in terms of this factor alone, the PEPUDA legislation is unconstitutional and should be redrafted so as not to have such a chilling effect on freedom of expression. In closing the PEPUDA legislation is too broad (with reference to the 'less restrictive means' enquiry) in the particular following areas:

i) section 10(1)a "clear intention to be hurtful."

ii) section 10(1)b "clear intention to be harmful or to incite harm."

Lastly, having considered all five factors listed in section 36 one must determine whether overarchingly the legislation is proportionate. Clearly, based upon the above analysis it is overly broad that is not proportionate.

[370] Supra (n308).
[371] Supra (n347) at 376.
[372] Ibid at 377.

3.9. The Draft Hate Speech Bill

South Africa's Draft Prohibition of Hate Speech Bill (DHSB) 2004, is the result of the request made to the Minister for Justice and Constitutional Development by the Ad Hoc Joint Committee of the Promotion of Equality and Prevention of Unfair Discrimination Bill (DHSB).

The DHSB recognises that the 1996 Constitution commits South Africa to societal transformation that is based on 'social justice, human dignity, equality and advancement of human rights and freedoms, non-racism and non-sexism'. It affirms South Africa as a signatory of ICERD, which in terms of section 4(a) of the ICERD requires signatories to criminalise ideas 'based on racial superiority or hatred or incitement to racial discrimination as well as acts of violence or incitement to such acts'.[373]

Essentially, the DHSB definition of hate speech is based on grounds of race, ethnicity, gender or religion only without a clear definition of what hate speech entails. Section 2 attempts to criminalise a variety of actions and reads 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 incite harm;
> c) intimidate or threaten;
> d) promote or propagate racial, ethnic, gender or religious superiority;
> e) incite imminent violence;
> f) cause or perpetuate systematic disadvantage;
> g) undermine human dignity; or
> h) adversely affect the equal enjoyment of any person's rights and freedoms in a serious manner, is guilty of an offence'.

The requirement of 'incitement to cause harm' as adumbrated in section 16(2) is excluded from most of the listed hate speech items, with the exception of (b). Section 2(1)(c) is a further example of weak legislative drafting. This sub-section attempts to prohibit hatred that intimidates or threatens on any of the broad listed grounds stated in PEPUDA. Such a broad formulation could incorporate even the mere verbalising of ordinary dislike of a co-worker. This significantly extends the scope of hate speech in the DHSB. This has the effect of making deep inroads into the right to freedom of expression. Furthermore (h) acts as a catch-all phrase and would be susceptible to a constitutional attack as it is too wide and, as a result, it is unlikely that it would be saved by the limitation clause.

[373] Ibid.

Once again, as in the Equality Act, the term 'hurtful' is used, and again it is not defined. By prohibiting any expression perceived to be hurtful, the risk of extending crimes into the domain of intimate personal relationships is a reality. For example, should an ex-wife advocate hatred towards her male ex-husband, this could be construed as hatred based on gender which can be construed to be hurtful. Clearly the drafting of section 2(1)b is far too broad. Section 2(1)h serves as a catch all clause, for all hate speech that cannot be read into the other sub-sections. This clearly extends the hate speech crime into the realm of section 16(1) protected speech and it is unlikely that it would be saved by section 36 due to its breadth.[374]

Furthermore, section 2(3)a of the Draft Bill applies to those who make statements "in public" without derogating from the ordinary meaning of those words.[375] The term 'in public' is then defined as in the sight or hearing or presence of the public which is followed by the definition of "in a public place". If all public places are included by the second definition, it means that the first includes private places that are in reach of the public.[376]

In addition, section 4 states that the common law principles of vicarious liability are operative. If this section is read in conjunction with section 2(1)a, it means that an individual (employer) may be held criminally liable for say an employee's insensitive jokes.[377]

In summation, it is patently clear that the provisions of the Draft Hate Speech Bill are vague and overbroad which may be reason why they were never promulgated. This highlights the danger of over-legislating and the risk of censorship which was prevalent in the apartheid era.

Lastly, as far as the Draft Hate Speech Bill is concerned all the points raised in the PEPUDA analysis are of equal relevance.

3.10. Capita Selectia Jurisprudence on Hate Speech

3.10.1. Overview

In this section, I will attempt to analyse critically the approach taken by the Human Rights Tribunal, the Broadcasting Tribunal, the Equality Court and the Constitutional Court with regard to hate speech cases.

3.10.2. Case law of the Human Rights Commission and the Broadcasting Tribunal

[374] See *Case v Minister of Safety and Security* 1996 (3) SA 617(CC) which dealt with the constitutionality of the Indecent and Obscene Photographic Matter Act No 37 of 1967.
[375] Supra (n267) at 204.
[376] Ibid.
[377] Ibid.

One of the first cases to deal with hate speech was *Federal Council of the National Party v Maharaj Kasrils and Mokaba* (SAHRC) 1997. The case concerned utterances made against F.W. De Klerk inferring that he was involved in the disappearance of Charles Mokaba and Mvuso Tshabalala in 1990, who were allegedly involved in a plot to overthrow the government.[378] The complainant claimed that the words were of a hate speech character and negatively affected the complainant's dignity.

The SAHRC found in favour of the defendants stating that this speech amounted to an open democratic debate as a form of freedom of political expression which is vital within the new South African disposition. The case is important as it introduced the tests of text within context and also the objective reasonable person test.

In terms of the text within context test, the speech is looked at in terms of the context in which it is made.[379] The court held that, in this instance, there was no hate speech present, but rather the statements where a form of political criticism which fell within the ambit of protected speech.

The reasonable person test concerns whether a reasonable person of average intelligence will construe the words to be hate speech. The reasonable person test acts as an equalising factor to avoid over-sensitivity and being a decisive element when dealing with cases involving extreme emotions such as hate speech cases.

In 2010, the SAHRC, heard the *Manamela v Shapiro*[380] case. This case concerned a complaint lodged because of a cartoon depicting Mr Zuma with his trousers down while the tripartite alliance holds down a blind folded girl. At the time of publication, Mr Zuma was facing rape charges.

This case is important as it confirms the constitutional commitment to free speech. The SAHRC held that academic, artistic and press communication will only be elevated to the position of hate speech where there is an incitement to cause harm. The SAHRC once again found that the definition of harm extended to emotional, psychological and harm to dignity. The SAHRC found that section 16 suggests that a closed list of forms of expression 'requires a higher degree of protection'.[381] This seems to imply that academic, artistic and free press communication, which takes on a form of hate speech, could deserve further protection. Academic, artistic and free press communication will only be

[378] *Federal Council of the National Party v Maharaj Kasrils and Mokaba* (SAHRC) 1997 at 419.
[379] The text within the context test implies one should analyze the facts and circumstances surrounding the speech, reading the intention and meaning of utterances within the context of speech. When words are separated from the context of the utterance misinterpretation is sure to follow.
[380] *Manamela and Others v Shapiro* (Gp/2008/1037/E) Nokan Yoma.
[381] Supra (n380) at para 17.

escalated to the level of hate speech and therefore not protected if 'there is also incitement to cause harm'.

In the *Pollak* case[382], BCTSA affirmed the reasonable person test.[383] The case concerned 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. Excerpts from the email included statements against the US leadership, which were set to use war to exploit nations such as Iraq for the natural resources with the aid of funding supposedly obtained from Jewish interest groups. In determining that these statements and that certain anti-semitic statements were not 'inflammatory so as to exceed the bounds of tolerance' the BCTSA applied the reasonable person test.[384] The BCTSA also held that the subject matter encompassed a matter of public concern and was not hate speech for the purposes of PEPUDA as it fell within a section 12 exemption in terms of the Equality Act,.[385] Of importance, is that BCTSA held that the distinction between fact and opinion is not important in a hate speech analysis. This position must be contrasted to Germany where at times this analysis is decisive.[386]

The BCTSA in analysing the incitement to cause harm component spent time analysing the objective content of the expression and held that no incitement to harm could objectively be established.[387] This case once again confirms South Africa's commitment to a free and open exchange of ideas and the right to freedom of expression. I submit however that the approach adopted in this case is unfortunate, as it is paying lip service to the emotional and psychological harm caused to the target group, at which the speech was directed.

In *Polokow v Radio Islam*[388] a broadcast that went out containing various anti-semitic statements, including 'kutile al yahoud' which means 'kill the Jews'. The Tribunal held that the remarks constituted hate speech. The tribunal stated the following:

> 'Although the respondent cautioned the speaker beforehand, we find that the respondent was negligent in having broadcast a live interview with a speaker that management must have known to have controversial views on Jews. The words complained of amounted 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

[382] *Pollak v SABC* (SA Fm) (2003) 11646 (BCTSA).
[383] The BCTSA is an independent judicial tribunal governing broadcasting and decision making in terms of the Broadcasting Code.
[384] Supra (n382).
[385] Ibid.
[386] At 13. See by contrast the Holocaust Denial case Bverf GE 90.
[387] Ibid at 23.
[388] *Polokow v Radio Islam* (2003) JOL 10768 (BCTSA).

> 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.'[389]

The BCTSA held that there was incitement to cause harm and furthermore the BCTSA reaffirmed 'harm' may include psychological harm and this harm manifests itself immediately once the words have been uttered.[390]

3.10.3. Case law of the Equality Court, High Court and Constitutional Court

One of the leading hate speech cases is *Islamic Unity Convention v The Independent Broadcasting Authority and Others*.[391] The applicant Islamic Unity Convention ran a community radio station known as 786 under a broadcasting license issued to it by the first respondent, the Independent Broadcasting Authority.[392] In 1998, the station broadcasted a programme called "Zion and Israel: an in-depth analysis".[393] An interview was conducted with Dr Zaki. He expressed his views and questioned the legitimacy of the state of Israel and Zionism as a political ideology. He stated that Jewish people had not been gassed in World War II, but died of infectious diseases, in particular typhus.[394] He mentioned that only one million Jews had died in the War. The South African Jewish Board lodged a complaint claiming that the material broadcast contravened clause 2(a) of the Broadcasting Code in that it was 'likely to prejudice relations between sections of the population'.[395]

The Constitutional Court had to deal with an application stating that clause 2(a) of the Code of Conduct for broadcasting services was unconstitutional as it was inconsistent with the right to freedom of expression.[396] The applicant claimed that the clause was vague and overbroad.The court held that the phrase 'section of the population' was less specific than the grounds enumerated in section 16(2), namely race, gender, ethnicity or religion.[397] The court therefore held that the legislation fell outside the scope of the prohibited speech laid down in section 16(2).The court thereafter conducted a justification enquiry in terms of section 36. The court acknowledged the important role of broadcasting in the context of freedom of expression. The court also accepted that it was in the public interest that reasonable limitations are applied and the radio services be regulated in order to promote and protect human dignity, equality and freedom.[398] The court

[389] Ibid at 12.
[390] This position confirms the stance taken in the *Freedom Front v SAHRC* case supra (n321).
[391] Supra (n8).
[392] Ibid at para 1.
[393] Ibid.
[394] Ibid at para1.
[395] Ibid at para 2.
[396] Ibid at para 2.
[397] Ibid at para 33.
[398] Supra (n299) at 11.

identified that expressions that advocate hatred and stereotyping of people on the basis of immutable characteristics reinforce and perpetuate patterns of discrimination and inequality.[399] However, where these were inroads into the right to freedom of expression protected in terms of section 16(1), these inroads had to be consistent with the limitation clause. The court found that no grounds for justification had been advanced by the IBA.

Importantly, the Constitutional Court held that the respondent had not shown that the need to protect dignity, equality and the development of national unity could not be served by less restrictive means.[400] For example, there could be legislation which is not so overbroad but which is appropriately tailored and more narrowly focused.

It is interesting to note that in the judgement, no reference was made to the Equality Act. This is undoubtedly because the broadcasting took place in 1998, whereas the Equality Act was drafted in 2000. It is interesting to note that if the broadcast had been seen as a violation of the Equality Act (which it is submitted it would have been) then the constitutionality of the Equality Act would have been tested. It is submitted that the Equality Act would then have been held to be unconstitutional in certain respects. This is because, as I have already submitted, section 10(1)a and section 10(1)b are not a reasonable infringements of the right to freedom of expression.

The judgment must be praised in that it displays the Constitutional Court's commitment to freedom of expression, albeit that the content of the broadcast was extremely offensive in nature.

Another important case which dealt with hate speech and came before the High Court was *Jamial-Ul-Ulama of Transvaal v Johncom Media Investment Ltd*.[401] The facts of this case were as follows. On 3 February 2006, the Jamial-Ul-Ulama learnt that the Sunday Times newspaper was considering publishing the cartoon which had first appeared in Jyllands Postem providing an ostensible depiction of the Prophet Mohammed. Jamial-Ul-Ulama, a voluntary Muslim association, sought an undertaking from the Sunday Times that it would not publish the cartoons in question. When the Sunday Times refused to give such an undertaking, the Jamial-Ul-Ulama sought an urgent interim order in the Johannesburg High Court prohibiting the publishers and printers of the newspaper from publishing and disseminating any cartoons, caricatures or drawings of the Prophet Mohammad.[402] During the

[399] Ibid.
[400] Supra (n8) at para 48.
[401] (Unreported judgment no 1127/06) 2006 69 THRHR 684.
[402] Ibid at para 2.

course of the hearing, the applicants argued that the cartoons were an infringement on their constitutional right to freedom of religion.[403]

The applicants asserted that the cartoons were blasphemous and they overstepped the 'bounds of a simple reproductive drawing' in that they were characterised by 'insulting messages and innuendos that mock at and ridicule both Islam and its founder.[404] The application was defended on the basis that the press had the right to decide whether or not to publish the controversial cartoons. The respondents contended that the matter could be dealt with by the court on the basis that is would in fact publish the caricatures.[405]

In the judgment, the court emphasised the role played by the media in developing democracies. Furthermore, it recognised that they were an 'extremely powerful institution'.[406] It held that they were therefore under a constitutional duty to act responsibly.[407] The court held that, nevertheless, the constitutional right to freedom of expression is not a paramount value in the new constitutional order. The court held further that freedom of expression must be construed in the context of other constitutionally enshrined values and in particular in the context of human dignity, especially as human dignity is a foundational value in South Africa's new constitutional order.[408]The court explained that the cartoons did overstep the boundaries of simple reproductive drawing. They contained an insulting message which ridiculed Islam and its founder. The cartoons were not only demeaning, the court concluded, but also undignified.[409]

Having found that the dignity of Muslims was infringed by the cartoons, the court went on to balance the right to the freedom of expression against the interests of human dignity. The court held that the cartoons of Prophet Mohammed would be a justifiable limitation on the right to freedom of expression. The court held that such a prohibition would not only promote the interests of human dignity but would also 'foster national unity'. The court in consequence granted an interim order prohibiting the respondents from publishing in any newspaper, magazine or other publication any cartoons, caricatures or drawings of the Prophet Mohammad. The judgment of the case may be criticised for a range of reasons.

From the outset, the court was required to look at the applicant's allegation that the right to human dignity was violated. The court was thus required to determine the scope and ambit of dignity as

[403] At para 5.
[404] Ibid at 5.
[405] Ibid.
[406] Ibid.
[407] Ibid.
[408] Ibid at 6.
[409] Ibid at 8.

both a right and a value.[410] This was not done. Furthermore, the court held that the limitation on freedom of expression is justifiable in the interests of human dignity which is a core value in the constitution.[411] The court did not, however, determine the scope of the right to dignity but seems to assert, that the right to freedom of expression is limited by dignity as a value. In other words, the limitation of rights was prematurely raised.[412] The limitation of rights should only have been raised after an enquiry has been done as to whether or not the expression fell within the ambit of section 16(2). It is arguable that the cartoons did not constitute 'advocacy of hatred' and the cartoons would not have fallen into the ambit of section 16(2)c. Furthermore, based upon the *Handyside* case there is foreign jurisprudence for holding that, speech which 'offends and shocks' should be protected.[413] I submit that the court did not give full regard to the scope and ambit of the right to freedom of expression and the balancing of rights approach.

It seems that the court appears to be balancing a right against a value (the right to freedom of expression against the value of dignity). The correct approach would have been to balance a right against a right. Lastly, in the judgement, the court makes the statement 'although freedom of expression is fundamental in our democratic society it is not a paramount value.'[414] This is yet another indication of a collapsing of rights and values in the courts. What the court must have meant is that freedom of expression is not a paramount right in South Africa's democratic society.[415]

The court also did not in any way engage with section 16(2) as an internal limitation to the right to freedom of expression. The court therefore did not indicate whether the offending cartoons were hate speech.[416]

One of the leading cases dealing with hate speech was decided by the *Equality Court in Afri-Forum and Another v Malema and Others*.[417]

The complainants at the trial complained that ANC Youth League President Julius Malema while addressing various public meetings had recited and sung or chanted certain words Awudubula ibhunu ('shoot the boer'). The objectionable utterances were:

[410] Supra (n278) at 473.
[411] The court seems to indicate here that freedom of expression is limited by dignity as a value. This with respect seems to be incorrect. The court should have initially established the scope of the right relied upon by the applicant. The right to dignity should then have been weighed against the right to freedom of expression in the true balancing of rights approach. This was not properly applied in this case.
[412] Ibid.
[413] Supra (n236).
[414] Supra (n278) at 476.
[415] Ibid at 477.
[416] Ibid at 488.
[417] (20968/2010) [2011] ZAEQC 2;2011.

1) "Awudubula ibunu"

2) "Dubula amabhunu baya roba" (this translated means 'they are scared, they are cowards you should "shoot the Boer" the farmer. They rob these dogs')

Malema claimed the right to sing the words as the words are contained within a liberation song which is sung with or without all or some of the particular words depending on the occasion, context and setting.[418] The respondent asserted that he had the right to sing the song and that in the context of the song, the words were intended to symbolise the destruction of white oppression rather than to indicate the literal intention to shoot "ibhunu" (the farmers and Boers). The ANC who joined in the defence held that the song forms part of the South African heritage and should be retained in the interest of the preservation of a complete history.[419]

The court held that the public at large, even those who did not attend the rallies, must be treated as being part of the audience of political rallies. The court held further that when looking at the context in which the song was sung, it conveyed a message of destroying the regime and 'shoot the Boer'.[420] In determining the meaning of the words, the court again used the reasonable listener test, seeking to ascertain what would be understood by the offending content by those having common knowledge and skill attributed to an ordinary member of society. The court held that the reasonable listener would interpret the message of the song having regard to the context in which it was sung. The reasonable listener would have regard to the gestures made accompanying the singing of the song. Based upon this test, the court held that there is an exhortation to violence in the song against the Boer or white Afrikaans speaking section of society.

The court held that the words of the song undermined the dignity of white Afrikaners and were both discriminating and harmful. The court further held that there was no justification for allowing the words of the song to be sung. The court therefore held that hate speech was present and the respondent was interdicted from continuing to sing the song.

3.11. Analysis of jurisprudence

The courts and Human Rights Commission have shown a commitment to uphold freedom of expression.[421] By the same token, the High Court and the Equality court have shown that they will not tolerate harmful hate speech.[422] The courts have also made a useful contribution in determining

[418] Ibid at 53.
[419] Ibid at 54.
[420] The word 'Boer' in the song was held to mean specifically white Afrikaans farmers or whites generally.
[421] See supra (n382) *Pollak v BCTSA* and also Islamic Unity Convention supra (n8).
[422] See *Jamail-Ul-Ulama* supra (n401) and also the *Malema* case supra (n417).

what constitutes harm for the purposes of the Equality Act.[423] It seems clear now that harm is not limited to physical harm but extends to both psychological and emotional harm.

Another important test developed by the court in determining whether hate speech is present is that of the objective reasonable person.[424] In addition, the courts have placed emphasis on the context in which the speech took place.[425]

The courts have also emphasised the role of dignity in determining whether the speech is hate speech, or whether or not the legislation is a justifiable infringement of the right to freedom of expression, in terms of the limitation clause.[426] Unfortunately, at times the courts have not distinguished between the role of dignity as a constitutional value and the role of dignity as a constitutional right.[427] This has led to the courts engaging in a premature proportionality enquiry prior to looking at the internal limitation clause in section 16(2). In hate speech cases, the courts have not been clear as to what exactly constitutes a violation of dignity. In *Jamial-Ul-Ulama,* the court failed to examine the scope of the right to human dignity and also failed to distinguish between the concept of dignity as a value and dignity as a right. Furthermore, in the *Malema* case the court held that there was a clear violation of the dignity of white Afrikaners; however, it failed to expound on the scope and meaning of the right to dignity.

The courts have on occasions been reluctant to engage and debate key conceptual issues in section 16(2) such as 'incitement to cause harm' or what constitutes the 'advocacy of hatred'. This is unfortunate as this approach does not give insight into the boundaries of the right to freedom of expression.[428]

Lastly, in the *Malema* case, the courts based their decision principally upon a violation of dignity. The court did not engage in the meaning of any of the controversial terms listed in section 10 of the Equality Act such as 'hurtful', 'harmful', 'could be reasonably be construed to display a clear intention'. As has been mentioned, it seems likely that the hate speech provision of PEPUDA will be seen to be unconstitutional.[429] As such, the Equality Court missed a golden opportunity to give an indication as to whether or not these provisions were vague and overbroad.

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[423] See for example *Freedom Front* case supra (n321) and also *Islamic Unity Convention* supra (n8). Both judgments drew heavily from the leading Canadian case *R v Keegstra* supra (n11).
[424] See for example the *Malema* case supra (n417) and also the *Pollak* case supra (n382).
[425] See *Malema* supra (n417) and also *Federal Council of National Party* case supra (n378).
[426] See the *Malema* supra (n417) and also *Jamial-Ul-Ulama* supra (n401).
[427] *Jamial-Ul-Ulama* supra (n401).
[428] Ibid. The court did not engage in a section 16(2) analysis but incorrectly proceeded straight to a section 36 balancing exercise.
[429] See especially section 10(1)(a) and (b) of the Equality Act.

3.12. Conclusion of South African Hate Speech Approach

In South Africa, it is clear that the right to dignity plays an important role in the constitutional scheme. Furthermore dignity is one of the core values in the Constitution. This is not surprising given South Africa's past in which the vast majority of the population were deprived of their dignity.

Equality is also a value and a right of immense importance. The commitment to equality is easy to ascertain from the provisions of section 9 of the Constitution and also the drafting of the Equality Act.

Given the above, it is not surprising that South Africa follows a balancing of rights approach to hate speech. Freedom of expression is not a core value of the Constitution, but is nevertheless an important right. Furthermore it is arguably included within the notion of 'freedom' which is a core value in the South African Constitution. The commitment to freedom of expression was clearly demonstrated in the *Islamic Unity Convention* case where the courts held that broadly defined legislation was unconstitutional, as it intruded on the right to freedom of expression.

South Africa follows a similar approach to Canada and Germany. This is a balancing of rights approach; however in Germany the right to dignity is dominant and is an inviolable right in terms of section 1 of the German Basic Law. The approach in South Africa more closely resembles that adopted in Canada where the rights are weighed on a case-specific basis. Although dignity is a non-derogable right in terms section 37 of the Constitution, there have been instances where the right to freedom of expression has overridden the right to dignity.[430]

South Africa is different to other Western countries in the sense that it has an internal modifier to the right to freedom of expression in the form of section 16(2). From a pragmatic perspective certain of the terms embedded in section 16(2) require more clarity such as:

1) Incitement to cause harm
2) Advocacy of hatred
3) Harm
4) Hatred
5) The listed grounds[431]

[430] See for example *Islamic Unity Convention* supra (n8) and also *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 (8) BCLR 743 (cc).
[431] See the discussion on section 16(2) in which certain authors hold that a purpose interpretation of the four criteria may extend the number of listed grounds.

Nevertheless, this internal modifier is useful in the sense that it defines the scope and the boundaries of the right to freedom of expression.

The drafting of the Equality Act demonstrates in part a commitment not to tolerate undesirable speech. Unfortunately, the provisions of section 10 and 12 (hate speech proviso) are unclear and at times overbroad. This impacts severely on the right to freedom of expression. Furthermore, the Draft Hate Speech Bill was meant to provide more clarity on the provisions of the Equality Act and to criminalize hate speech; yet, it has added even more vague and overbroad provisions.

According to Haig, South Africa is already compliant with the provisions of ICERD and does not require further legislation specifically aimed at criminalizing hate speech. I submit that legislation criminalizing hate speech will serve as a deterrent in a country where hate speech, and especially speech with racial connotations, is still rife. Such legislation should not be overbroad and should reflect the position taken in section 16(2) of the Constitution. In addition, the provisions of PEPUDA should be amended especially in section 10(1)(a) & (b) which are probably unconstitutional. In addition, the exception clause in section 12 should be redrafted as the present wording is unclear.

In terms of section 39 of the Constitution, when interpreting the Bill of Rights a court, tribunal or forum must consider international law and may consider foreign law. South African courts have certainly followed this approach. Jurisprudence abounds with reference to foreign law with particular reference to Canadian law and *R v Keegstra* which has been cited on several occasions as providing a balanced approach to hate speech. Furthermore, *R v Keegstra* has been used in several cases as providing guidance for how to interpret hate and harm.

In addition, the courts from an international law perspective have made copious reference to the *Handyside* case to demonstrate their commitment to freedom of expression. The *Malema* case contains extensive reference to international law treaties such as ICERD and the Universal Declaration of Human Rights.

The courts have also emphasised the importance of the role of dignity in adopting a balancing of rights approach to hate speech.[432] Furthermore they have given cognisance to the South African contextual and historical setting.[433] Unfortunately though, on occasions, the courts have merely paid lip service to interpreting the provisions of section 16(2).[434]

[432] See *Malema* case supra (n417).
[433] Ibid.
[434] Supra (n401) see Jamial-Ul-Ulama of Transvaal.

In conclusion, I have sought to demonstrate that South Africa adopts a particular version of the balancing of rights approach towards hate speech and needs to ensure that its legislation conforms to achieving a proper balance between the competing rights at play in hate speech cases.

Chapter IV: Conclusion and Recommendation

It is clear that South Africa is adopting a balancing of rights approach to hate speech and that the rights to dignity and equality hold centre stage in the proportionality exercise.

Canada has adopted a similar approach to South Africa vis-à-vis hate speech. In addition, Canada has a similar limitations clause to South Africa. In *R v Keegstra,* it showed considerable regard for the rights to equality and human dignity. Furthermore, in *R v Keegstra* supra the court held that hate speech contributed very little to the values of free speech. In short, Canadian jurisprudence and the limitation clause have offered valuable insight to South Africa in how to deal with hate speech. As has already been stated, extracts from *Keegstra* have often been cited by South African courts with approval.

By contrast, the U.S.A regards the right to freedom of expression as having paramount importance. This stems largely from the wording of the First Amendment to the Constitution. In fact, based upon the RAV case and the Collins case, the USA appears to be almost approaching an absolutist approach to freedom of expression. It should be noted that in terms of section 16(2)b of the Constitution, speech that amounts to incitement of imminent violence is unprotected. This wording undoubtedly stems from the U.S.A 'clear and present danger test' to hate speech. It should be noted that with the advent of *Brandenburg v Ohio*, the incitement must be directed to imminent lawless action before the speech loses constitutional protection. South Africa should not adopt such a narrow approach to hate speech. The context within which the statement is made is of course of great importance. Clearly, the different approach to hate speech adopted stems from the different contextual and historical setting.

Germany also adopts a balancing of rights approach to hate speech, with the right to dignity being given paramount importance. South Africa has an analogous historical background in respect of racial intolerance and certainly can learn from the German approach. It is submitted that the German approach of criminalizing certain hate speech should be followed by South Africa. However, the German legislation relating to hate speech is extensive and this extensive and intrusive legislation should not be followed by South Africa.

South Africa should rather follow an approach to criminalizing similar to that prevailing in Canada. For example, there should be exclusions for private conversations and a strict *means rea* requirement should be put in place. The Draft Hate Speech Bill demonstrates that attempts to criminalize hate speech may lead to overbroad legislation that may adversely impact on the right to freedom of expression and lead to the government censorship of opposing opinions. This is a real

danger in South Africa.In conclusion, it has been shown that the provisions of both the Equality Act and the Draft Hate Speech Bill are overbroad and vague and impact too severely on the right to freedom of expression. South Africa has a right to freedom of expression that defines its boundaries, by virtue of its internal limitation clause. Undoubtedly, certain terms in section 16(2) are capable of different interpretations and these terms should be given a clear meaning by the courts.`

Nevertheless given the internal limitation clause and also the fact that South Africa has a general limitation clause (which may suppress undesirable speech), it is submitted that hate speech is properly controlled. The PEPUDA legislation is too broad and should be re-drated to bring it into line with the section 16(2) internal limitation clause. New legislation criminalising hate speech should not be overbroad but be similar in content to the provisions of section 319 of the Canadian Criminal Code.

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