

**THE CONSTITUTIONALITY OF CATEGORICAL  
AND CONDITIONAL RESTRICTIONS ON HARMFUL  
EXPRESSION RELATED TO GROUP IDENTITY**

**Thesis submitted in January 2014 by MARIA ELIZABETH MARAIS in  
accordance with the requirements for the degree of DOCTOR LEGUM in  
the Department of Constitutional Law and Philosophy of Law, Faculty of  
Law, University of the Free State**

**PROMOTER: PROFESSOR JL PRETORIUS**

## **DECLARATION**

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Signed at Bloemfontein on the 14<sup>th</sup> day of January 2014.

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Maria Elizabeth Marais

## DEDICATION

*I dedicate this thesis to the memory of my sister, Helmien, who informed my understanding of human dignity.*

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*My promoter, Professor Loot Pretorius, not only is a distinguished academic, he is a remarkable person. His comprehensive knowledge and understanding of the foundational values of our Constitution is enhanced by his sincere empathy with victims of unfair discrimination. It was a privilege to be exposed to his intellect, logic and guidance for the past seven years. I wish him and his family only happiness.*

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## LIST OF ABBREVIATIONS/ACRONYMS

|                |   |
|----------------|---|
| <b>AIP:</b>    | Association of Independent Publishers   |
| <b>ANC:</b>    | African National Congress   |
| <b>ASA:</b>    | Advertising Standards Authority of South Africa                                   |
| <b>ASC:</b>    | Advertising Standards Canada  |
| <b>AU:</b>     | African Union   |
| <b>BCCSA:</b>  | Broadcasting Complaints Commission of South Africa                                |
| <b>BMCC:</b>   | Broadcasting Monitoring and Complaints Committee                                  |
| <b>CAB:</b>    | Canadian Association of Broadcasters  |
| <b>CANLII:</b> | Canadian Legal Information Institute  |
| <b>CBC:</b>    | Canadian Broadcasting Corporation   |
| <b>CBSC:</b>   | Canadian Broadcast Standards Council  |
| <b>CCC:</b>    | Complaints and Compliance Committee   |
| <b>CCPA:</b>   | <i>Child Pornography Prevention Act of 1996 (US)</i>                              |
| <b>CEDAW:</b>  | <i>Convention on the Elimination of All Forms of Discrimination against Women</i> |
| <b>CERD:</b>   | Committee on the Elimination of Racial Discrimination                             |
| <b>CHRA:</b>   | <i>Canadian Human Rights Act</i>  |
| <b>CHRT:</b>   | Canadian Human Rights Tribunal  |
| <b>COSATU:</b> | Congress of South African Trade Unions  |
| <b>CRTC:</b>   | Canadian Radio-television and Telecommunications Commission                       |
| <b>ECHR:</b>   | European Court of Human Rights  |
| <b>ECJ:</b>    | Court of Justice of the European Union  |
| <b>ECRI:</b>   | European Commission against Racism and Intolerance                                |
| <b>EEA:</b>    | <i>Employment Equity Act</i>  |
| <b>EFF:</b>    | Economic Freedom Fighters   |
| <b>EU:</b>     | European Union  |
| <b>FCC:</b>    | Federal Communications Commission   |
| <b>FCJ:</b>    | Forum of Community Journalists  |
| <b>IBA:</b>    | Independent Broadcasting Authority  |

|                |  |
|----------------|--|
| <b>ICASA:</b>  | Independent Communications Authority of South Africa                                     |
| <b>ICCPR:</b>  | <i>International Covenant on Civil and Political Rights</i>                              |
| <b>ICERD:</b>  | <i>International Convention on the Elimination of All Forms of Racial Discrimination</i> |
| <b>ICTY:</b>   | International Criminal Tribunal for the former Yugoslavia                                |
| <b>MPASA:</b>  | Magazine Publishers Association of South Africa  |
| <b>NAB:</b>    | National Association of Broadcasters   |
| <b>NASA:</b>   | Newspaper Association of South Africa  |
| <b>NEDLAC:</b> | National Economic Development and Labour Council   |
| <b>OAS:</b>    | Organisation of American States  |
| <b>OAU:</b>    | Organisation of African Unity  |
| <b>OHCHR:</b>  | Office of the High Commissioner for Human Rights   |
| <b>PAJA:</b>   | <i>Promotion of Administrative Justice Act</i>   |
| <b>PCSA:</b>   | Press Council of South Africa  |
| <b>PMSA:</b>   | Print Media South Africa   |
| <b>RTNDA:</b>  | Association of Electronic Journalists  |
| <b>SABC:</b>   | South African Broadcasting Corporation   |
| <b>SACC:</b>   | South African Council of Churches  |
| <b>SANEF:</b>  | South African National Editors' Forum  |
| <b>SAPAP:</b>  | South African Press Appeals Panel  |
| <b>SATRA:</b>  | South African Telecommunications Regulatory Authority                                    |
| <b>TBN:</b>    | Trinity Broadcasting Network   |
| <b>TVWF:</b>   | <i>"Television without Frontiers"</i>  |
| <b>UDHR:</b>   | <i>Universal Declaration of Human Rights</i>   |
| <b>UK:</b>     | United Kingdom   |
| <b>UN:</b>     | United Nations   |
| <b>UNDAW:</b>  | United Nations Division for the Advancement of Women                                     |
| <b>UNHRC:</b>  | United Nations Human Rights Committee  |
| <b>US:</b>     | United States  |
| <b>USA:</b>    | United States of America   |

# CHAPTER I

## INTRODUCTION

*A truthful witness gives honest testimony, but a false witness tells lies. Reckless words pierce like a sword, but the tongue of the wise brings healing. Truthful lips endure forever, but a lying tongue lasts only a moment.*

*Proverbs 12: 17-19*

### 1. RELEVANCE OF THE STUDY

At present, the issue that is generally referred to as “hate speech”<sup>1</sup> is alive in international as well as in local political and juridical discourse. No one will deny the historical fact that thousands of people have been “killed on the basis of highly violent hate ideologies, accompanied and propelled by extreme hate speech”<sup>2</sup>, or that utterances of detestation have, over longer and shorter periods and in different contexts, marginalised vulnerable groups, violated human dignity and demolished human potential. It is apparent that these outcomes are in stark contrast with the aims of the South African and other value-based constitutions.<sup>3</sup> Moreover, the increasing availability of means of communication, as well as the impact range of communication, continuously increases the potential threat that expression of this nature poses to constitutionally protected human rights. The fact that major human rights atrocities have inspired international agreements to regulate “hate speech” specifically, in addition to the general regulation of unfair discrimination, reflects recognition of the particular capacity of discriminatory expression to violate, or incite the violation of, human rights.<sup>4</sup>

On the other hand, already in the 18<sup>th</sup> century, the founders of the American Constitution recognised freedom of expression as the primary right in the American constitutional

---

<sup>1</sup> The present study examines “harmful expression related to group identity”, which can be described as “hate speech”. Different definitions of the concept “hate speech” will however be discussed.

<sup>2</sup> Holmes in Herz & Molnar 2012: 345.

<sup>3</sup> *Constitution of the Republic of South Africa Act 200/1993* (interim Constitution): Preamble, section 1 and section 7.

<sup>4</sup> See the discussion in Chapter III of the study.

system.<sup>5</sup> The South African Constitution regards freedom, which includes freedom of expression, as a foundational constitutional value together with human dignity and equality. Furthermore, from an instrumental perspective, it is apparent that, while words can be “used as weapons to ambush, terrorize, wound, humiliate and degrade”<sup>6</sup>, they also have the power to inspire and unite people and to promote good. Categorical restrictions of expression have the potential to deprive members of society of the autonomy to express or communicate their ideas, receive information, provoke a response in order to test their convictions against those of others, and convince others.<sup>7</sup> The chilling effect of restrictive measures may even extend this deprivation outside the definitional boundaries of the limitation. Categorical restrictions may also minimise the outcry against stereotypes and ideologies infusing hatred. The statement that “truth is most likely to emerge from the clash of ideas”<sup>8</sup> is relevant in this regard. Moreover, any restriction of expression may jeopardise the perceived integrity of the constitutional democracy, which, ultimately, is instrumental to the protection of all the constitutional rights. These consequences are elucidated in the discussion of the theories underlying the constitutional protection of freedom of expression in Chapter II of the study.

It is apparent that the regulation of expression with the above-mentioned violative potential is a relevant and prominent consideration, especially in a relatively young democracy like South Africa with a history of humiliation based on group identity, which entails an enhanced sensitivity to group-related demeaning nuances or epithets. It is also apparent that such regulation should take cognisance of the complexities involved in arriving at an outcome that promotes rather than jeopardises constitutional values. It is in this regard that the thesis endeavours to make a contribution, firstly by interpreting the relevant provisions of the Constitution and related legislation, and, secondly, by considering and commenting on the constitutionality of existing legislation and other forms of regulation of harmful expression related to group identity.

## **2. RESEARCH OBJECTIVES**

The following research objectives constitute the structure that is employed to achieve the aforementioned aims.

---

<sup>5</sup> Schauer 2005: 18; Milo 2008: 53.

<sup>6</sup> Webb 2011: 445.

<sup>7</sup> Van Wyk, Dugard, De Villiers & Davis 1994: 267-268.

<sup>8</sup> Chemerinsky 2006: 927.

The South African Constitution, in terms of section 16(2)(c), categorically excludes certain forms of hateful expression from constitutional protection. The first objective is to determine the reasons informing these exclusions, and their scope. This requires an understanding of the constitutional values informing the protection of freedom of expression, as well as a consideration of obligations in terms of international agreements.

Sections 9(3) and (4) of the Constitution obligate the state to enact legislation to prevent or prohibit unfair discrimination. Section 16(2)(c) is particularly narrowly defined and certainly does not cover all unfairly discriminatory expression. The second objective is to understand the considerations that should apply in a fairness analysis pertaining to discriminatory expression. The tension inherent in and amongst different interrelated constitutional values in this context again requires a thorough understanding, in particular, of the interrelated values of human dignity and equality. Furthermore, relevant international obligations are significant considerations in the analysis.

“Hate speech” provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) 4/2000*, the *Films and Publications Act 65/1996* and the *Draft Prohibition of Hate Speech Bill 2004* are intended to give effect to the implied obligation in terms of section 16(2)(c) of the Constitution to prohibit “hate speech”. Moreover, in accordance with obligations in terms of international agreements, and within the context of the constitutional prohibition of unfair discrimination, these provisions also regulate “hate speech” outside the ambit of section 16(2)(c). The provisions evidently categorically prohibit the discriminatory expression within their ambit on the basis that the expression inevitably promotes inequality. Differently perceived, the expression is apparently regarded as categorically constitutive of unfair discrimination in the broad societal context, and therefore unconstitutional. The element of disadvantage is the promotion of inequality. Simultaneously, the provisions give guidance with respect to discriminatory expression that should be generally tolerated. Accordingly, it is an important objective of the study to conceptually as well as contextually interpret these provisions and determine their scope. The analyses in the previous chapters of the theories underlying the protection of freedom of expression, the assessment of comparative law, and observations regarding South Africa’s compliance with its international obligations are relevant considerations in achieving this aim. The further objective, namely to consider the constitutionality of these provisions, is

interrelated. Most significantly, a conclusion is reached that the suggested interpretation of the relevant provisions of the *Equality Act* can arguably, with minor exceptions, be reconciled with the constitutional structure with reference to the categorical and conditional standards of the Constitution with respect to limitations and infringements of the right to freedom of expression. In particular, with respect to sections 10 and 12 of the *Equality Act*, this conclusion is in contrast to severe criticism of these sections expressed by academic commentators based on their respective interpretations.<sup>9</sup>

The common law crimes of criminal defamation, *crimen iniuria* and incitement to commit a crime involve freedom of expression and are discussed on the same basis as the above-mentioned legislation.

It is considered whether there is a need for the criminalisation of specific forms of “hate speech”. The *Draft Prohibition of Hate Speech Bill 2004* is assessed in this context. The aspect of criminalisation is a highlighted theme in international law. Observations in this context are taken into account.

The media is society’s most prominent marketplace of ideas. The regulation of “hate speech” in the media is therefore specifically addressed in the final chapter of the study. A prominent focus of the chapter will be to employ incidents of alleged “hate speech” in the media as relevant scenarios to illustrate and apply the principles and views that have been analysed in previous chapters.

The Constitution specifically requires that national legislation must establish an independent authority to regulate broadcasting in the public interest.<sup>10</sup> This inspires a specific focus on the regulation of “hate speech” in broadcasting. Such focus is specifically relevant in a developing country like South Africa where broadcasting has the potential to open the marketplace of ideas to a huge percentage of citizens who have no other access to information or means to communicate their ideas.<sup>11</sup> At the same time, it exposes these same citizens to the extensive hurt that can potentially be afflicted by media expression. Those who are humiliated often have little power to reduce, by means of response, the detrimental effect

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<sup>9</sup> See Chapter V: 4.7.1.

<sup>10</sup> Constitution 1996: section 192.

<sup>11</sup> See Lloyd, Duncan, Minnie & Bussiek 2010: 23-24.

of media stereotyping. It is hence a specific objective of the study to scrutinise and comment on, in particular, the codes and decisions of the Broadcasting Complaints Commission of South Africa. It is observed that the absence of provision in the applicable codes for the disallowance of unfairly discriminatory expression on a broader basis than the “hate speech” definition in terms of section 16(2)(c) of the Constitution, has the effect that expression that constitutes unfair discrimination outside the scope of section 16(2)(c) may escape scrutiny. In order to avoid this unconstitutional consequence, provisions not intended for this purpose have been employed to proscribe expression of this nature. The study ultimately suggests that the codes should include guidelines in accordance with the “hate speech” prohibitions of the *Equality Act*.

### **3. RESEARCH METHODOLOGY**

The research methodology which is followed involves a study of relevant academic literature, including textbooks, articles and conference papers and reports; international human rights instruments, including international charters, conventions, treaties, general comments, codes, directives and recommendations; constitutions; primary and secondary legislation; international, foreign and South African case law; and decisions of relevant tribunals.

Much emphasis is placed on contextual and conceptual interpretation. In the latter instance, inter alia, acknowledged dictionaries as well as comparative interpretations in foreign case law are consulted.

The content of the research relevant to the second and fourth chapters is directly related to the conceptual interpretations, especially in Chapter IV, but also in Chapters V and VI. For this reason, extensive use is made of cross-referencing.

### **4. OUTLINE OF CHAPTERS**

#### **Chapter II**

In Chapter II, different theories that have been invoked to support the protection of a right to freedom of expression, based on the inherent and the instrumental value of freedom of expression in a democratic society, are considered. The relevant theories are the truth and the

marketplace of ideas theory, the democracy theory and the human dignity theory. The theories are interrelated and the focus and level of their application differ in accordance with the respective constitutional structures in the context of which they are applied. The chapter illustrates these differences by means of brief references to the American, German and Canadian approaches, which are discussed in more detail in Chapter IV. It is furthermore indicated that the respective theories in their own terms, which, again, may be differently construed in different constitutional contexts, also require boundaries to the scope of protection of free expression that they support. Most significantly, it emerges that there is an inherent tension in the appeal of each of the respective values and interests with respect to the scope to be afforded the constitutional protection of freedom of expression. Freedom of expression may be crucial for knowledge, but, in given circumstances, may jeopardise truth and knowledge. Freedom of expression may be essential for the maintenance of democracy, but may also be instrumental in the destruction of democracy. Freedom of expression may be an inherent component of human dignity and central in the development of human personality, but may also demolish human dignity and privacy to the extent that human beings will experience inferiority, frustration and marginalisation so that they will be deprived of the opportunities to gain knowledge, to participate in the democratic process, to develop their personalities, and to be truly free. Throughout the course of the study, the theories and values that inform the protection of free expression constitute a golden thread, whether invoked in the interpretation of the scope of constitutional protection afforded freedom of expression, in the weight to be accorded the right to freedom of expression relative to other constitutional rights, or in justification or fairness analyses.

### **Chapter III**

This chapter scrutinises the regulation of harmful expression related to group identity in international law. The “hate speech” clause of the South African Constitution to a material extent resembles article 20 of the *International Covenant on Civil and Political Rights (ICCPR)*. The *Equality Act* acknowledges the obligation to facilitate further compliance with the *ICCPR* and other treaties, in particular the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. A thorough study of these treaties is therefore essential for the correct interpretation of the relevant provisions of the Act.



In the aftermath of World War II, the shocking and disillusioning reality of humanity's capacity for cruelty, and of the vulnerability of democratic arrangements and universally recognised foundational human values, induced the international community to commit to mutually recognised, non-negotiable norms. However, as far as freedom of expression is concerned, the inherent tension referred to above complicated the exercise. What eventually emerged was an articulated focus on inherent human dignity leading to restrictions of freedom of expression, but with the condition of necessity, which requires a proportionality analysis giving due recognition to the fact that freedom of expression not only serves to threaten, but also to preserve and promote inherent human dignity, especially in the context of equality. The controversy with respect to the question of whether the obligation to restrict expression under article 4 of the *ICERD* is mandatory or not, is specifically addressed.

It is observed that the "hate speech" regulation and jurisprudence in international law as well as in Germany and Canada initially focused on one or more of the grounds of nationality, race, ethnicity and religion. Since the *CEDAW* had entered into force in 1980, the "hate speech" clause of the South African Constitution stipulated the grounds of race, ethnicity, religion and gender. In 2004, the definition in terms of the Canadian *Criminal Code* of "identifiable group" as "any section of the public distinguished by colour, race, religion or ethnic origin" was extended to include sexual orientation, thereby extending the scope of section 319(2) of the Code, which criminalises the "hate speech" defined by it. This is an indication that even fundamental human rights appeals may take time and require specific circumstances, for example international awareness and commitments, to attain recognition and acknowledgment. The effective exposure in the media of serious abuse, and the efforts of passionate humanists and their organisations, may enhance such recognition. In the South African context, this approach informs the extension of "hate speech" regulation to include more grounds.

It is a significant guideline that an overwhelming majority of international law institutions, jurists and commentators has expressed the conviction that the criminalisation of "hate speech" should be restricted to intentional and exceptionally serious violations of human dignity and equality. Article 20 of the *ICCPR*, which is similar to the "hate speech" clause of the South African Constitution, requires incitement to harm. However, it is observed that this does not mean that discriminatory expression should not be restricted in other ways to the extent that it is necessary in order to uphold equally valued rights.

The discussion of decisions of international human rights committees and courts furthermore enhances sensitivity with respect to the relation between acceptable freedom-of-expression regulation and the different realities of different countries.

## **Chapter IV**

The South African Constitutional Court has in various judgments consulted and considered the constitutional approaches to different aspects of freedom of expression in the United States of America, Canada and Germany.<sup>12</sup> The chapter discusses the constitutional approach to freedom of expression in each of these jurisdictions. Noteworthy comparative perspectives, articulated in terms of legislation and jurisprudence, are highlighted.

The principle of content-neutrality is paramount in the American approach to the protection of freedom of expression. The principle is an important focus in determining the constitutionality of limitations on the right to freedom of expression, including “hate speech” limitations, in all constitutional democracies. The authority of the principle, however, differs. American law allows for limited categorical restrictions on free speech. These limitations are related to the low value of the speech in a given context. Furthermore, even content-based expression can be restricted, but subject to strict scrutiny. “Hate speech” in American law is defended as “the price society has determined it must pay to assure a system of free expression”.<sup>13</sup> The distinct approach to the regulation of free speech in German, Canadian and South African law can be related to the considerations that determine this price. Of these, the prominent focus in these jurisdictions on inherent human dignity and substantive equality, interrelated in the context of freedom of expression, is the most important.

## **Chapter V**

This chapter discusses the protection and regulation of the right to freedom of expression in terms of the South African Constitution and the *Equality Act*. Sections 16(1) and 16(2)(c) of the Constitution respectively protect the right to freedom of expression and categorically exclude “hate speech” from such protection. Section 16(2)(c) defines the expression within

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<sup>12</sup> See Chapter IV: 1.

<sup>13</sup> Louw in Duncan 1996: 27-28.

its ambit as the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. As “hate speech” is a form of discrimination, section 16 is discussed in conjunction with section 9 of the Constitution, in particular sections 9(3) and (4), which provide that national legislation must be enacted to prevent or prohibit unfair discrimination.

A thorough analysis of the definitional elements of section 16(2)(c) is crucial to the discussion. This includes a consideration of the basis for the categorical exclusion from constitutional protection on the particular selection of grounds listed in terms of the section.

The main contribution of the chapter is the interpretation and evaluation of sections 10, 11 and 12 of the *Equality Act*. The premise of the discussion is the aims of the Act to prevent unfair discrimination, to promote equality, and to comply with relevant international commitments.

The definitional elements of these sections are likewise analysed and interpreted. In particular, the proviso in terms of section 12 of the Act, which excludes bona fide engagement in certain forms of expression from the application of sections 10 and 12, is interpreted in the context of the respective prohibitions. Each of the different forms of expression noted in the proviso, including artistic creativity, fair and accurate reporting in the public interest, and publication of any information, is discussed.

The interpretation of the relevant provisions of the Act confronts the complexity of dealing with freedom of expression in the context of a fairness analysis. It becomes apparent that provisions categorically prohibiting “hate speech” have to be extremely narrowly designed and interpreted in order not to jeopardise but rather promote the basic purposes of the Act. The chapter proposes a viable interpretation of the relevant provisions that gives due regard to the constitutional values that inform the scope of protection to be afforded freedom of expression, and to international obligations.

## **Chapter VI**

This chapter extends the discussion in Chapter V to relevant provisions of the *Films and Publications Act*. In addition, the extent to which common law offences potentially apply to

“hate speech” is discussed. The focus then shifts to the question to what extent, if at all, “hate speech” should be criminalised. The *Draft Prohibition of Hate Speech Bill* is assessed in the light of this discussion. The conclusion is reached that the criminalisation of discriminatory expression in terms of the Bill is unacceptably broad. There is, however, a need for the creation of a consolidating criminal offence that captures, and requires proof of, the essential elements of expression contemplated in terms of section 16(2)(c) of the Constitution. Lastly, it is contended that, arguably, there exists a compelling need that will justify the inclusion in the definition of such offence of the grounds of sexual orientation and nationality.

## **Chapter VII**

Section 16 of the South African Constitution specifically mentions freedom of the media as a category of protected expression. Section 192 of the Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. This explains the distinct focus throughout the study on the regulation of expression in the media, in particular broadcasting. Previous chapters have scrutinised relevant comparative legislation in this regard. In this chapter, the study highlights that South African legislation to a great extent allows the media to be self-regulatory. The chapter proceeds to discuss self-regulatory media bodies, their codes and decisions. Decisions in terms of these codes, in particular those of the Tribunal of the Broadcasting Complaints Commission, are employed to illustrate the application of the principles that have been identified in the course of the study. The point is made that, in particular, the broadcasting codes do not pay due regard to the standards set in terms of the Constitution and the *Equality Act* with respect to harmful discriminatory expression. Reference to relevant provisions of broadcasting codes and related decisions of broadcasting tribunals in Canada illustrates this point. The principles that are applied also show a remarkable resemblance to the principles that were accentuated in Chapter V in the interpretation of sections 10 and 12 of the *Equality Act*.

## **Chapter VIII**

The conclusions highlighted in the final chapter focus on the most important outcomes of the relevant issues and objectives indicated above.

## **5. CONCLUDING REMARK**

This introduction has to be concluded with the remark that the starting point of the study is that freedom of expression is first and foremost about freedom, and, as expressed by Nelson Mandela, “to be free is not merely to cast off one’s chains, but to live in a way that respects and enhances the freedom of others”.<sup>14</sup>

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<sup>14</sup> Crwys-Williams 2004: 38.

## CHAPTER II

# THEORIES UNDERLYING THE PROTECTION OF FREEDOM OF EXPRESSION

*... the theory of freedom of expression involves more than a technique for arriving at better social judgements through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, scepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant.*

*Emerson T. 1963. Toward a General Theory of the First Amendment. 72 Yale Law Journal*  
877: 886

### 1. INTRODUCTION

The main theories generally employed to explain the importance of freedom of expression<sup>1</sup> are the truth and the marketplace of ideas theory, the democracy theory, and the human-dignity theory.<sup>2</sup> Milo contends that each of these theories has its roots in the same classic

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<sup>1</sup> “Freedom of expression” essentially means freedom to communicate. This implies that expressive conduct is included. Section 16 of the South African Constitution, as well as article 2(b) of the Canadian Charter and article 5(1) of the German Basic Law protect freedom of “expression”. The *First Amendment* of the United States (US) Constitution however protects “freedom of speech” and of “the press”. The US Supreme Court has emphasised that the *First Amendment* does not “afford the same kind of freedom” to “communicative conduct” as that which it extends to “pure speech”. When the American approach is discussed in Chapter IV, it will, however, appear that the Court has held that the *First Amendment* protects expressive conduct such as flag-burning and marches. Hence, while the *First Amendment* “invites argument about whether certain forms of conduct count as speech or not”, the South African formulation does not warrant a narrow reading. See Currie & De Waal 2005: 362.

<sup>2</sup> Milo 2008: 55-79; Milo, Penfold & Stein in Woolman & Bishop 2008: 42-14-42-30; Burchell 1998: 1-4; Devenish 1999: 189-190; Neisser 1994: 344-345.

libertarian tradition, with the result that they are all interlinked in many ways.<sup>3</sup> The following extract from Canadian jurisprudence summarises the general approach represented by these theories:

(1) [S]eeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.<sup>4</sup>

It is evident that the theories in concert acknowledge the intrinsic as well as the instrumental value of freedom of expression.

There is no general consensus on the scope of freedom in general – and freedom of expression in particular – deserving of constitutional protection. The South African Constitutional Court has endorsed the view of the European Court of Human Rights that freedom of expression applies “not only 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”.<sup>5</sup> However, even this approach does not necessarily entail that all expression enjoys constitutional protection.<sup>6</sup>

In *Ferreira v Levin NO and Others*<sup>7</sup>, Justice Ackermann, in his discussion of the scope of the freedom right protected in terms of section 11(1) of the interim Constitution<sup>8</sup>, remarked:

Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an

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<sup>3</sup> Milo 2008: 55.

<sup>4</sup> *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927: par C.b.

<sup>5</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333: par 49; *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433: par 28 quoting *Handyside v United Kingdom* [1976] ECHR 5; (1976) 1 EHRR 737: 754.

<sup>6</sup> See the discussion of the application of section 36 of the Constitution in Chapter V: 4.10.1.

<sup>7</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

<sup>8</sup> *Constitution of the Republic of South Africa Act 200/1993*. Section 11(1) reads as follows: “Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.” See section 12 of the Constitution.

individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.<sup>9</sup>

Justice President Chaskalson in his judgment in *Ferreira v Levin NO and Others*, while concurring that the application of section 11(1) should not be confined to the protection of physical integrity, restricted the broader application to “otherwise unprotected freedom”, which “should at least be fundamental and of a character appropriate to the strict scrutiny to which all limitations of section 11 are subjected”.<sup>10</sup> The implication is that some freedoms may not possess these characteristics. In *Bernstein and Others v Bester NO and Others*<sup>11</sup>, in response to the freedom analysis in *Ferreira v Levin NO and Others*, it was stated that the interpretation of the rights in the Bill of Rights must be in sympathy with the undertaking to “develop a new society in which all citizens can exercise their fundamental rights and freedoms”.<sup>12</sup>

A perspective that freedom of expression has intrinsic value, not restricted in terms of its communicative nature or overall value to society, “suggests a paradox in rendering any form of expression valueless”.<sup>13</sup> On the other hand, Justice McLachlin, in her dissenting judgment in *R v Keegstra*, expressed the view that, on its own, the intrinsic value of free expression with respect to the self-realisation of both speaker and listener as justification for its protection, is “too broad and amorphous to found constitutional principle”.<sup>14</sup>

The fact is that the South African Constitution categorically excludes certain specified forms of expression from the protected right to freedom of expression. The relevant question in the South African context accordingly appears to be whether or not all expression outside the ambit of the categorical exclusions necessarily enjoys prima facie constitutional protection.

It will emerge in the course of the study that, even where all expression enjoys prima facie protection, for example in Canada, and also where certain categories of expression are

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<sup>9</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*: par 49-52.

<sup>10</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*: par 184.

<sup>11</sup> *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751.

<sup>12</sup> *Bernstein and Others v Bester NO and Others*: par 151; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*: par 139-151. See also *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 77: par 22; Currie & De Waal 2005: 292, 293, 297.

<sup>13</sup> Salzman 1999: 441; *Irwin Toy Ltd v Quebec (Attorney General)*: par B; *R v Keegstra* [1990] 3 SCR 697: par VI.

<sup>14</sup> *R v Keegstra* (McLachlin dissenting): par I.A.



regarded as of no value and hence not deserving of constitutional protection, as in the United States of America, certain categories of expression are regarded as low-value expression, so that, in effect, it enjoys a lesser level of protection and will more readily be required to yield to other interests. This evaluation is directly related to the reasons for the protection of freedom of expression discussed in this chapter. Hence these reasons are not only relevant in distinguishing between constitutionally protected and unprotected expression, but also in the very specific sense of limiting protected expression in order to accommodate competing rights and interests. The approach of the Supreme Court of Canada in *Ford v Quebec (Attorney General)*<sup>15</sup> illustrates this point. The Court, instead of attempting to identify and define the values which justify the constitutional protection of freedom of expression in general, focused on whether the particular form of expression was within the ambit of the interests protected by the value of freedom of expression and, in the final analysis, “deserve[d] protection from interference under the structure of the Canadian Charter and the Quebec Charter”.<sup>16</sup> It was held that, over and above its intrinsic value as expression, commercial expression plays a significant role in enabling individuals to make informed economic choices, which is an important aspect of individual self-fulfilment and personal autonomy. On this basis, the Court rejected the argument that commercial expression serves no individual or societal value in a free and democratic society, and, for this reason, is undeserving of any constitutional protection.<sup>17</sup>

What is generally accepted is that the interest that governments may have in silencing expression creates an obvious risk.<sup>18</sup> Schauer points out that, “throughout history, attempts to restrict expression have accounted for a disproportionate share of governmental blunders – from the condemnation of Galileo for suggesting the earth is round to the suppression as ‘obscene’ of many great works of art”. Thus, in his view, rather than evaluating expression to determine why it might be worthy of protection, the reasons why a government might attempt to limit expression should be cautiously evaluated.<sup>19</sup>

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<sup>15</sup> *Ford v Quebec (Attorney General)* (1989) 84 DLR (4<sup>th</sup>) 577; [1988] 2 SCR 712.

<sup>16</sup> *Ford v Quebec (Attorney General)*: par 57.

<sup>17</sup> *Ford v Quebec (Attorney General)*: par 59.

<sup>18</sup> Meyerson 1997: 85-86.

<sup>19</sup> Schauer 1982: 86; *R v Keegstra* (McLachlin dissenting): par I.A2.

## 2. THE DISCOVERY OF TRUTH AND THE ADVANCEMENT OF KNOWLEDGE THEORY

### 2.1 The tenets of the theory

The first theory regards freedom of expression as valuable because it leads to the discovery of truth and the advancement of knowledge. The argument is that “the expression of any idea or emotion, whether true, contentious or false, represents a potential contribution to humankind’s ongoing search for the truth and its desire to understand the world”. Even blatantly false statements can stimulate new discoveries in response to, and rebuttal of, the untruthful information.<sup>20</sup> Chemerinsky articulates the argument as being that “truth is most likely to emerge from the clash of ideas”.<sup>21</sup> Mill writes that “the peculiar evil of silencing the expression of an opinion is that it robs the human race of the opportunity of exchanging error for truth”. This applies even more to those who dissent from the opinion than to those who hold it. He cautions that, “if any opinion is compelled to silence, that opinion may for aught we can certainly know, be true. To deny this is to assume our own infallibility.”<sup>22</sup>

### 2.2 The application of the theory

#### 2.2.1 *American jurisprudence*

The theory of truth was captured in 1919 in a famous dissenting judgment of Justice Holmes in *Abrams v United States*.<sup>23</sup> He stated that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”. Accordingly, any restriction of the expression of opinions, including those that we loathe, should be opposed, unless they “so imminently threaten immediate interference with the lawful and pressing purposes of the law, that an immediate restraint is required to save the country”.<sup>24</sup>

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<sup>20</sup> Van Wyk, Dugard, De Villiers & Davis 1994: 267-268.

<sup>21</sup> Chemerinsky 2011: 955.

<sup>22</sup> Mill 2012: 10, 14; Dworkin 1996: 200; Ducat 2004: 775; Sullivan & Gunther 2001: 959-960; Milo 2008: 56; Van Wyk *et al* 1994: 267-268; Hogg 2007: 272.

<sup>23</sup> *Abrams v United States* 250 US 616 (1919).

<sup>24</sup> *Abrams v United States*: 630-631.

The strong reliance of the US Supreme Court on the theory of truth is evident from the judgments in *Whitney v California*<sup>25</sup>, where Justice Brandeis stated that those who won American independence believed that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”, and *Gertz v Robert Welch Inc*<sup>26</sup>, where Justice Powell stated that, under the *First Amendment*, there is no such thing as a false idea. His statement that, “however pernicious an opinion may seem, we depend for its correction ... on the competition of other ideas”, summarises the approach.<sup>27</sup>

### 2.2.2 Canadian jurisprudence

Canadian jurisprudence has affirmed that the protection afforded freedom of expression must be wide enough to permit persons to put forward new and different ideas, no matter how upsetting those ideas may be to identifiable groups.<sup>28</sup> In *Irwin Toy Ltd v Quebec (Attorney General)*, the Supreme Court stated that, in a free, pluralistic and democratic society, the protection of a diversity of ideas and opinions for their inherent value is “fundamental” both to the community and to the individual. The Court held that the reason why freedom of expression was entrenched in the Constitution and guaranteed in the Quebec Charter “was to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream”.<sup>29</sup> While the interaction amongst the different theories is clear, the statement contains a marked recognition of the theory of the discovery of truth and the advancement of knowledge.

### 2.2.3 German jurisprudence

In the *Lüth* decision<sup>30</sup>, the German Constitutional Court considered “the whole point of an expression of opinion” as being “to have ‘an effect on the environment of ideas’”. This, according to the Court, was the *ratio* for the constitutional protection of “value-judgements,

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<sup>25</sup> *Whitney v California* 274 US 357 (1927): 375.

<sup>26</sup> *Gertz v Robert Welch Inc* 418 US 323 (1974).

<sup>27</sup> *Gertz v Robert Welch Inc*: 399-400.

<sup>28</sup> *R v Andrews* [1990] 3 SCR 870.

<sup>29</sup> *Irwin Toy Ltd v Quebec (Attorney General)*: 968 par VI B. See Hogg 2007: 272.

<sup>30</sup> *Lüth* decision BVerfGE 7, 198 (15 January 1958): University of Texas School of Law: Foreign Law Translations:

<[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=1477](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1477)>

(accessed on 29-03-2013).

which always have an intellectual aim, namely to persuade others”.<sup>31</sup> Eberle indicates that the “marketplace of ideas” metaphor, phrased by the German Constitutional Court as “an intellectual struggle of opinions”, serves mainly to facilitate the structure of public discourse, especially for the achievement of a political will.<sup>32</sup> This approach reflects the value-ordering of basic rights, including communication rights. Speech is valued “according to its utility in promoting desirable ends, most highly so to the extent it aids democratic self-government”.<sup>33</sup> The approach is reflected in the *Fifth Broadcasting* decision<sup>34</sup>, where the Federal Constitutional Court of Germany held that freedom of broadcasting serves the same goal as all the other guarantees of article 5(1) of the Basic Law, namely to ensure free individual and public formation of opinion.<sup>35</sup>

#### ***2.2.4 South African jurisprudence***

The South African Constitutional Court affirmed the concept of an open marketplace of ideas in *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)*.<sup>36</sup> The Court described freedom of expression as “the free and open exchange of ideas” and stated that the public interest in the open marketplace of ideas is all the more important in South Africa, because the democracy is not yet firmly established, and thought control, censorship and enforced conformity to governmental theories prevailed in the recent past.<sup>37</sup>

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<sup>31</sup> *Lüth* decision: Foreign Law Translations: par 2. It has to be noted that article 5 of the German Basic Law specifically refers to the freedom to express and to disseminate an opinion.

<sup>32</sup> Eberle 1996-1997: 823-824, 824 fn 113.

<sup>33</sup> Eberle 1996-1997: 805; *Lüth* decision: Foreign Law Translations: par 2.

<sup>34</sup> *Fifth Broadcasting* decision BVerfGE 57, 295, 319 (16 June 1981): University of Texas School of Law: Foreign Law Translations: <[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=635](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=635)> (accessed on 29-03-2013).

<sup>35</sup> *Fifth Broadcasting* decision: Foreign Law Translations: par CI. 39.

<sup>36</sup> *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* [2001] ZACC 17; 2001 (5) BCLR 449 (CC); 2001 (3) SA 409(CC).

<sup>37</sup> *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)*: par 37. See also *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 24; *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC): par 7.

### 2.3 Criticism of the theory

Critics point out that it is not self-evident that, in the competition between truth and falsehood, truth will always prevail.<sup>38</sup> Schauer criticises Mill for seemingly ignoring the negative consequences of non-suppression of false expression,<sup>39</sup> and for confiding in human rationality to distinguish truth from falsity.<sup>40</sup> He contends that to allow false expression may increase the number of people who hold false beliefs. This in itself constitutes a reduction of knowledge. It may also increase the frequency with which false beliefs may produce action with unfortunate circumstances.<sup>41</sup>

Burchell, in this regard, highlights the lack of access to the media of disfavoured or impoverished groups, and the fact that social change affects notions of truth more than the marketplace of ideas does. Moreover, history shows that people may be swayed more by emotion than by reason.<sup>42</sup> Barendt similarly contends that subjective perspectives and desires often distort the understanding of information and ideas. The success of an idea in the marketplace therefore does not necessarily confirm its truth, but rather its popularity.<sup>43</sup> Furthermore, opinion or comment, unlike assertions of fact, cannot be subjected to the truthfulness test.<sup>44</sup>

Weinberg corroborates these contentions when he assesses the American public debate as being to a large extent dominated, and thus constrained, by the huge disparities in economic resources available to various speakers and to proponents of different views. As a result, in his view, it is doubtful that the marketplace of ideas meaningfully exposes all ideas to scrutiny. Moreover, individuals' reactions to speech are largely determined by experience, psychological propensities, societal roles, prejudices and socialisation. The implication is that "the packaging and frequency of messages may be more persuasive than the rational force of their arguments".<sup>45</sup>

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<sup>38</sup> Barendt 2005: 8-13; Chemerinsky 2011: 956.

<sup>39</sup> Schauer in Herz & Molnar 2012: 135.

<sup>40</sup> Schauer in Herz & Molnar 2012: 140.

<sup>41</sup> Schauer in Herz & Molnar 2012: 138.

<sup>42</sup> Burchell 1998: 10-11.

<sup>43</sup> Barendt 1994: 156.

<sup>44</sup> Burchell 1998: 10-11. See also Milo *et al* in Woolman & Bishop 2008: 42-18-42-21; Sullivan & Gunther 2001: 960.

<sup>45</sup> Weinberg 1993: 1108-1109, 1141-1164. See also Webb 2011: 469.

Milo's distinction between the idea of the search for truth and the theory of the marketplace of ideas is noteworthy in this regard. He reasons that the marketplace is but instrumental in the search for truth, and, as such, is generally preferable to allowing the government of the day to make decisions on the regulation of expression.<sup>46</sup>

Weinrib takes this approach further. In the context of the Canadian Constitution, he contends that the marketplace-of-ideas rationale conflicts with the larger purpose of the Charter framework, which requires the rights-based constitutional state to ensure that majorities respect the fundamental interests of all individuals. Government neutrality would entrust both the meaning and realisation of fundamental norms to a majoritarian determination, which is the very arrangement that the Charter was to overcome. Accordingly, since there can be no assurance that the popular conclusions generated by the marketplace of ideas will accord with the state's duty to realise Charter values in Canadian society, the determination of truth through the operation of a marketplace of ideas cannot be a purpose that underlies freedom of expression.<sup>47</sup>

The dissenting judgment of Justice Thomas in the American case of *Virginia v Black*<sup>48</sup> highlights the reality that social and economic inequalities entail a threat of the marketplace being skewed. The dissent implies that flooding the marketplace with negative speech, or "hate speech" about race, has kept truth and equality from prevailing and has played a tremendous part in the subjugation of blacks.<sup>49</sup> The same risk exists in the South African context.<sup>50</sup> It is significant, in this regard, that the South African Constitution, in terms of section 192, and specifically with respect to broadcasting, obligates the state to regulate in the public interest, and to ensure fairness and a diversity of views broadly representative of South African society.<sup>51</sup>

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<sup>46</sup> Milo *et al* in Woolman & Bishop 2008: 42-20.

<sup>47</sup> Weinrib 2009: 175-176.

<sup>48</sup> *Virginia v Black* 538 US 343 (2003): 388.

<sup>49</sup> Kupenda & Paige 2009: 70; *Virginia v Black*: 392. See the discussion of *Virginia v Black* in Chapter IV: 2.5.2.

<sup>50</sup> Milo *et al* in Woolman & Bishop 2008: 42-20.

<sup>51</sup> Delaney 2009: 154 notes that it was contended and acknowledged by Parliament that, given South Africa's political history, the provision for an independent regulator for broadcasting was intended to give meaning to certain rights of political priority such as freedom of expression, the right of access to information, and language rights. It was speculated that the drafters of the Constitution had assumed that broadcasting was the sole means of giving effect to these rights. On the basis of the disappearance in practice of the differentiation within the electronic media owing to technological developments, Parliament's Constitutional Review Committee had submitted that section 192 of the Constitution should be amended by substituting the word "electronic communications" for the word "broadcasting". In 2007, Parliament's ad hoc Committee on the

## 2.4 Exclusions from the marketplace

### 2.4.1 American jurisprudence

American jurisprudence has categorised certain speech, such as incitement of illegal activity, obscenity, so-called “fighting words” and defamation, as unworthy or less worthy of protection in terms of the *First Amendment*.<sup>52</sup> Moreover, the Court of Appeal of the State of California, in *Catsouras et al v State of California Highway Patrol et al*<sup>53</sup>, which involved a civil-liability claim for invasion of privacy through the media, described the expression at stake as a “morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern”, rather than expression “giving information to which the public is entitled”.<sup>54</sup> It was held that there was no indication that any issue of public interest or freedom of the press was at stake.<sup>55</sup> The aforementioned categories of speech, and the basis for their exclusion from the protective ambit of the *First Amendment*, will be discussed in Chapter IV.

### 2.4.2 German jurisprudence

German jurisprudence categorically excludes “incorrect information”, in particular the so-called Holocaust denial<sup>56</sup>, from the protection of freedom of speech, “because it would lack the expressive value that a message should possess to be protected”.<sup>57</sup> In the *Auschwitz Lie*

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Review of Chapter 9 and Associated Institutions considered the submission, but concluded that, “for political and legal reasons”, such an amendment was “unnecessary at the time”. Parliament has since acknowledged that, given South Africa’s political history, the provision for an independent regulator for broadcasting in section 192 was intended to give meaning to certain rights such as freedom of expression, the right of access to information, and language rights. Delaney finds this conclusion “curious” and probably a result of political compromise, given that Parliament’s Constitutional Review Committee, the Department of Communications, and at least one set of academics were unanimous in their view that section 192 should be amended for both legal and policy reasons.

<sup>52</sup> Meiklejohn in Hall 2000: 671 fn 174.

<sup>53</sup> *Catsouras et al v State of California Highway Patrol et al*: G039916, G040330 Cal.App.4<sup>th</sup>. The matter concerned the publication of pictures taken at an accident scene of the body of a girl by members of the California Highway Patrol (CHP) who had recovered her body and the car. A couple of CHP officers forwarded these pictures to civilians. Eventually, the pictures were displayed on the Internet. The deceased girl’s family sued for invasion of privacy.

<sup>54</sup> See the discussion of formal and substantive autonomy in Chapter IV: 2.1.

<sup>55</sup> See also *Snyders v Phelps et al* US 09-751 (2011): par B.

<sup>56</sup> For a discussion of the claims described as “Holocaust denial”, see Altman: Freedom of Expression and Human Rights Law: The Case of Holocaust Denial in Herz & Molnar 2012: 25-29.

<sup>57</sup> Stradella 2008: 71.

decision<sup>58</sup>, it was stated that incorrect information is not an interest worthy of protection.<sup>59</sup> The Court held that article 5(1), sentence 1, of the Constitution protects opinions, in contrast to statements of fact. The reasoning was that opinions cannot be proved true or untrue, and are protected regardless of whether they are “well founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless”. Assertions of fact, on the other hand, can be known or proved to be true or false, and are only protected insofar as they serve to substantiate the formation of opinions.<sup>60</sup> Protection of assertions of fact ends at the point where they cease to contribute anything to the formation of opinion. An assertion of fact known or proved to be untrue is thus not covered by the protection afforded freedom of opinion.<sup>61</sup> The Court, however, in order to ensure that freedom of opinion will not be threatened because of the fear of sanctions, took care to make it clear that a division of the factual and evaluating components is permissible only if the sense of the statement is not thereby falsified. Where that is not possible, the statement must as a whole be regarded as an expression of opinion and be included within the protected area of freedom of opinion. The Court moreover stated that protection of the basic right also extends to the form of a statement of opinion, in the sense that the statement does not lose the basic right to protection by being formulated sharply or hurtfully.<sup>62</sup>

Rosenfeld remarks that the German Constitutional Court’s firm conviction that, in terms of the constitutional order of objective values, established falsehoods can be safely denied protection without hindrance to the pursuit of truth “paves the way for content-based restrictions on freedom of speech which would be unacceptable under American free speech

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<sup>58</sup> *Auschwitz Lie* decision BVerfGE 90, 241-255 (13 April 1994): University of Texas School of Law: Foreign Law Translations: [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=621](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=621) (accessed on 29-03-2013):

The complainant was a district association of the National Democratic Party of Germany (NPD). It invited the historian David Irving, widely seen as a revisionist of the extreme right wing, to a lecturing event. Pursuant to article 5 no 4 of the *Meetings Act*, the competent authority imposed on the complainant the condition that it ensured, by appropriate measures, that nothing was said at the meeting about the persecution of the Jews in the Third Reich that would deny or call into question that persecution. The criminality of such spoken contributions was to be pointed out at the beginning of the event, and possible relevant spoken contributions were to be immediately prevented. If necessary, the meeting was to be interrupted or brought to an end, by using the [appropriate] rights of the person in possession of the premises. The authority regarded itself as obliged to take such measures because grounds existed for the assumption that there would be criminal acts in the sense of articles 130, 185, 189 and 194 *StGB (Criminal Code)* at the planned event. Kommers & Miller 2012: 493-497.

<sup>59</sup> *Auschwitz Lie* decision: par II.1.

<sup>60</sup> *Auschwitz Lie* decision: par II.1.

<sup>61</sup> *Auschwitz Lie* decision: par II.1.

<sup>62</sup> *Auschwitz Lie* decision: par II.1. See also Rosenfeld 2002-2003: 1551-1552; Brugger 2003: 12-14.



jurisprudence”. These values include respect for inherent human dignity and commitment to militant democracy.<sup>63</sup> However, the German Constitutional Court is increasingly steering away from this conviction.<sup>64</sup> The fact is that the sensitivity of Holocaust denial in particular reflects the historical association of the Holocaust with the violation of the inherent dignity of the individual, as well as the dignity of humanity. The German commitment to constitute a democracy that accepts the responsibility to ensure that similar violations will never again take place undoubtedly played a role in the readiness of the Court to exclude Holocaust denial from constitutional protection. Recognising this particular historical background, later decisions in different contexts drew a far less clear line between protected opinion and unprotected factual assertions, and adopted a rather inclusive perspective of opinion. These include the *Book about War Guilt* decision<sup>65</sup>, where the Constitutional Court held that a book’s claim that Germany was not to be blamed for the outbreak of World War II, as the war was forced upon it by its enemies, amounted to an opinion. Also included is the *Soldiers are Murderers* decision<sup>66</sup>, where the Constitutional Court concluded that the slogan “Soldiers are murderers” and other similar quotes that were displayed should in the circumstances not be construed literally, that they constituted an opinion, and were protected by the Constitution.<sup>67</sup> Recently, the Constitutional Court in the *Wunsiedel* decision<sup>68</sup> decided on the constitutionality of the amended section 130(4) of the *Criminal Code*, which makes the approval, glorification or justification of National Socialist rule, with additional elements, a punishable crime. A distinction between statements of fact and opinion was not even considered in the reasoning of the court.<sup>69</sup>

Schauer contends that Holocaust denial is a “type of hate” as well as a “type of falsity”. The issue of “hate-based falsity”, in his view, requires consideration not only of the harms of hate,

<sup>63</sup> Rosenfeld 2002-2003: 1549-1550.

<sup>64</sup> See the discussion of the *Wunsiedel* decision in Chapter IV: 3.5.1.1.

<sup>65</sup> *Book about War Guilt* decision BVerfGE 90, 1-22 (11 January 1994): University of Texas School of Law: Foreign Law Translations: [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=623](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=623) (accessed on 29-03-2013).

<sup>66</sup> *Soldiers are Murderers* decision BVerfGE 93, 266-312I (10 October 1995): University of Texas School of Law: Foreign Law Translations: [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=620#top](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=620#top) (accessed on 29-03-2013).

<sup>67</sup> See Rosenfeld 2002-2003: 1552-1554.

<sup>68</sup> *Wunsiedel* decision BVerfG 1 BvR 2150/08 (4 November 2009): par 71-79: BUNDESVERFASSUNGSGERICHT: [http://www.bundesverfassungsgericht.de/entscheidungen/rs20091104\\_1bvr215008.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20091104_1bvr215008.html) (accessed on 29-03-2013).

<sup>69</sup> See the discussion of the *Wunsiedel* decision in Chapter IV: 3.5.1.1.

but also of the harms of falsity, as well as of the arguments for tolerating them in the name of freedom of expression.<sup>70</sup>

### ***2.4.3 Canadian jurisprudence***

Canadian law, by contrast, in principle and without exception follows the approach that, when an activity conveys or attempts to convey a meaning through a non-violent form of expression, it has expressive content and thus necessarily falls within the scope of “expression” in the constitutional guarantee of the right to freedom of expression. Section 2(b) of the Charter<sup>71</sup> protects all content of expression, regardless of the type of meaning conveyed. Even threats of violence and communications which wilfully promote hatred against an identifiable group are included.<sup>72</sup> In *R v Zundel*<sup>73</sup>, Justice McLachlin pointed out that the principle of content-neutrality contradicts the argument that lies or false statements can never have any value and therefore should not be protected in terms of the right to freedom of expression. Furthermore, what is “false” cannot be defined with enough precision “to make falsity a fair criterion for denial of constitutional protection”.<sup>74</sup>

### ***2.4.4 South African jurisprudence***

The theory of truth, which, as mentioned above, has been explicitly valued by the South African Constitutional Court, has not saved the forms of expression within the ambit of section 16(2) from categorical exclusion. Section 16(2) can be viewed as itself constituting powerful expression with respect to the constitutional conception of a society based on the values of freedom, dignity and equality.<sup>75</sup> It makes an explicit inroad into the protection of an activity which otherwise enjoys entrenched constitutional protection.

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<sup>70</sup> Schauer in Herz & Molnar 2012: 143.

<sup>71</sup> Section 2(b) reads as follows: “Everyone has the following fundamental freedoms: ...freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

<sup>72</sup> *R v Keegstra*: part VI.

<sup>73</sup> *R v Zundel* [1992] 2 SCR 731.

<sup>74</sup> *R v Zundel* “Analysis”: 2. See the discussion of the *Keegstra* and *Zundel* cases in Chapter IV: 4.3.1.3 and 4.3.1.6.

<sup>75</sup> See the discussion by Johannessen of the considerations that led to the inclusion of section 16(2) in the Constitution: Johannessen 1997: 136-138. The Charter of the United Nations, in its Preamble, calls upon member states “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.

## 2.5 Concluding remarks

Expression contributes to truth and knowledge in the broad sense of these concepts, even if only to expose the evil mind or suspect motives or intentions of the speaker, or to stimulate promotion of the opposite view.<sup>76</sup> Moreover, while the dissemination of false ideas may have social costs, such costs can generally be argued to be presumptively outweighed by the risk that the price paid may be even higher overall if the state is afforded the power to determine which opinions are false and should accordingly be suppressed, and which are worthy of protection. Owing to the state's vested interest in suppressing unpopular views, its judgments about such matters are even more unreliable than those of private individuals.<sup>77</sup>

However, constitutional protection exists within a constitutional context and structure. A particular constitutional structure and its founding values may require the setting of boundaries to the marketplace. Boundaries of this nature will be indicated in the subsequent discussion of the interrelated theories of democracy and human dignity.

## 3. THE DEMOCRACY THEORY

### 3.1 The tenets of the theory

Kant's famous essay, *Perpetual Peace: A Philosophical Sketch*, according to Tesón, suggests the idea of a constitutional democracy as a participating political process limited by respect for rights. The "republican state" is defined by a constitution based on the principles of freedom, due process and equality.<sup>78</sup> This is in contrast to the idea of a despotic government, whether by a majority or a minority, enforcing decisions that violate the rights of those who disagree with those decisions.<sup>79</sup>

In line with this approach, the democracy theory views democracy as an "exercise in collective self-governance", which implies that citizens should enjoy immunity in relation to public discussion. Freedom of expression is instrumental to the establishment and

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<sup>76</sup> Salzman 1999: 441.

<sup>77</sup> Meyerson 1997: 77-79.

<sup>78</sup> Kant 1795.

<sup>79</sup> Burchill 2006: 219-220.

maintenance of a “representative democracy”.<sup>80</sup> It enlightens the relevant issues with which voters have to deal. It enables the voting public to expose injustices and unfulfilled promises, to articulate individual and collective needs, and to challenge or pressurise performance in order that government can be held accountable, if necessary by being substituted through the mechanisms of the democratic processes.<sup>81</sup> In *New York Times v Sullivan*<sup>82</sup>, the American Supreme Court affirmed that a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents. This happens whenever the constituent can be restrained in any manner from speaking, writing or publishing opinions on any public measure or conduct.<sup>83</sup> In *RWDSU v Dolphin Delivery Ltd*<sup>84</sup>, the Canadian Supreme Court pointed out that freedom of expression had not been created by the Charter of Rights and Freedoms, but was a fundamental concept which had formed the basis of the historical development of Western society. The Court stated that representative democracy depends upon the maintenance and protection of free expression.<sup>85</sup> The German Constitutional Court likewise regarded the basic right to freedom of expression as essential to a free and democratic state, “for it alone permits that constant spiritual interaction, the conflict of opinion, which is its vital element”.<sup>86</sup> In the words of Eberle: “German courts view communication through the prism of its contribution to ‘public’ dialogue.”<sup>87</sup> The South African Constitutional Court, in *Holomisa v Argus Newspapers Ltd*<sup>88</sup>, stated that, “without freedom of expression, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled”.<sup>89</sup>

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<sup>80</sup> See the discussion of the concept “representative democracy” by Roux in Woolman & Bishop 2008: 10-08–10-11.

<sup>81</sup> Milo 2008: 62; Dworkin 1996: 200; *Jersild v Denmark* 15890/89 (1993) (ECHR): <[http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le\\_europeo/jersild%20v.%20denmark.htm](http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/jersild%20v.%20denmark.htm)>: par 31 (accessed on 30-03-2013); Sullivan & Gunther 2001: 961-962; Hogg 2007: 271-272.

<sup>82</sup> *New York Times v Sullivan* 376 US 254 (1964).

<sup>83</sup> *New York Times v Sullivan*: 297.

<sup>84</sup> *RWDSU v Dolphin Delivery Ltd* 1986 33 DLR (4<sup>th</sup>) 174 (SCC).

<sup>85</sup> *RWDSU v Dolphin Delivery Ltd*: par 12. See also *R v Kopyto* [1987] 24 OAC 81 “Issues to be considered”: 2; Van Wyk *et al* 1994: 269.

<sup>86</sup> BVerfGE 7, 198 (15 January 1958): par B.1.2: <<http://www.iuscomp.org/gla/judgements/tgcm/v580115.htm>> (accessed on 30-03-2013).

<sup>87</sup> Eberle 1996-1997: 805-806.

<sup>88</sup> *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771. See also *National Media Ltd and Others v Bogoshi* (579/96) [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A) (29 September 1998): par 24 and 42; *South African National Defence Union v Minister of Defence and Another*: par 7; *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)*: par 37; and *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 25-30.

<sup>89</sup> *Khumalo and Others v Holomisa*: par 21.

Criticism of the democracy theory as underlying the right to freedom of expression is predominantly based on views that the democracy argument merely concerns an instrumental interest. Baker, for example, contends that liberty, not democracy, is fundamental to the protection of freedom of speech. He argues that a democratic process might best be understood as an attempt to embody liberty, that is, self-choice, in a realm where collective decision-making is necessary if people are to engage in self-determination.<sup>90</sup>

From the same perspective which substantiated his criticism of the marketplace-of-ideas rationale, and in line with the approach followed by Baker, Weinrib contends that the democratic rationale is at variance with the constitutional state's duty to ensure that the political system operates in fidelity to constitutional values. The Canadian Charter requires the state to respect and protect the dignity of rights-holding persons as ends in themselves, rather than as a means in the production of truth or the maintenance of the political system. The Charter further requires that all political activity conform to the democratic values intrinsic to the constitutional order. Within the Charter framework, democracy is not an open-ended activity that determines its own purposes, but the mode of lawgiving through which a free people gives itself laws that bring society into closer conformity with "substantive goals".<sup>91</sup>

Barendt likewise integrates the value of equality and the idea of democracy as underlying the protection of freedom of speech, more specifically political speech. He contends that the difference between the majoritarian and constitutional conceptions of democracy is that, while, in the former, majorities are allowed to determine the limits of rights, in the latter, political institutions must respect the right of all citizens to be treated with equal respect and concern with regard to their participation in public discourse and debate. From this perspective, it is not the commitment to democracy that underlies freedom of expression, but the equal rights of everyone to participate in society through the exercise of free-speech rights that underpin the commitment to democratic government.<sup>92</sup>

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<sup>90</sup> Baker 2003: 25.

<sup>91</sup> Weinrib 2009: 176-177.

<sup>92</sup> The relation between this perspective and the "search for truth" theory is apparent. Minorities may have better ideas than those of the elected authority. The right to equal respect and concern for one's status as a participant in political discourse is also closely linked with human dignity as the basis for the protection of freedom of expression, which will subsequently be discussed. Barendt 2005: 20. See also Webb 2011: 469-470.

The approach that, in a constitutional-rights democracy, the commitment to freedom of expression is not confined to serving an instrumental purpose, but is a commitment to the preservation of the foundational values of the particular constitution, was endorsed by the South African Constitutional Court. When the Court, in *South African National Defence Union v Minister of Defence and Another*, stated that freedom of expression “lies at the heart” of a democracy, it significantly added that it was part of a “web of mutually supporting rights” in the Constitution, including freedom of religion, belief and opinion, the right to dignity, as well as the right to freedom of association, the right to vote and to stand for public office, and the right to assembly. It was “valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally”.<sup>93</sup>

Roux points out that, in order to maintain these values, rights that are constitutive of the democracy may even be enforced against the will of the majority.<sup>94</sup> In *S v Makwanyane and Another*<sup>95</sup>, Justice President Chaskalson stated, in this regard, that the Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public. He illustrated his view with reference to the following comment of Justice Jackson in *West Virginia State Board of Education v Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>96</sup>

Justice Madala similarly stated that the death penalty should be declared unconstitutional and of no force and effect, not on account of public opinion, but for the reasons that it “does not belong to the society envisaged in the Constitution, is clearly in conflict with the Constitution

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<sup>93</sup> *South African National Defence Union v Minister of Defence and Another*: par 7-8. See also *Case and another v Minister of Safety and Security and others*; *Curtis v Minister of Safety and Security and others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC): par 27.

<sup>94</sup> Roux in Woolman & Bishop 2008: 10-33.

<sup>95</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

<sup>96</sup> *S v Makwanyane and Another*: par 87.

generally”, “runs counter to the concept of ubuntu”, and “violates the provisions of Section 11(2) of the Constitution”.<sup>97</sup>

Accordingly, when the foundational values of a constitution in concert engage the freedom to participate by means of expression, the conservation of freedom of expression is not only instrumental in its function as a “guarantor of democracy”, but also has a “constitutive function” essential to the character of the constitutional democracy and the rights and “moral agency” of its citizens.<sup>98</sup> This perspective applies in the realm of politics, religion, literature, art, science or any other area of human learning and knowledge.<sup>99</sup> In its constitutive dimension, freedom of expression entails the right to participate in the building of the culture envisaged by the constitution, and facilitates the search for truth by individuals and society generally.<sup>100</sup> It “promotes a culture in which citizens are regarded as being capable of forming their own opinions, and in which their right to make political choices and engage in public debate is thereby indirectly respected”.<sup>101</sup>

### **3.2 The exclusion of expression that is irreconcilable with democracy**

In accordance with the above discussion, the protection afforded freedom of expression in a constitutional rights-based democracy will not include within its scope expression which is neither instrumental in the sense described above, nor finds a place within the constitutional culture. The determination of this scope is, however, problematic. A democracy protecting itself against anti-democratic ideas could lose its democratic character. Moreover, there may be conflicting claims for the protection and limitation of freedom of expression in order to protect the constitutional culture.<sup>102</sup> The fact is that there is an apparent discrepancy between the maintenance of democracy as the foundation of free speech, and arguing in favour of the regulation or even suppression of speech by a democracy acting through its elected

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<sup>97</sup> *S v Makwanyane and Another*: par 249-250.

<sup>98</sup> Roux in Woolman & Bishop 2008: 10-48.

<sup>99</sup> See Ducat 2004: 775; Chemerinsky 2011: 954-955. The democracy theory has been criticised for being too broad and open to abuse. It has been argued, for example, that pornography degrading to women diminishes women’s voice and role in politics. On the other hand, the theory has been criticised for being too restrictive. It has been argued that, in modern society, there are major forms of communication which may not have any connection with democratic government. See Burchell 1998: 12-13.

<sup>100</sup> *South African National Defence Union v Minister of Defence and Another*: par 7. See also *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 24 and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 59.

<sup>101</sup> Roux in Woolman & Bishop 2008: 10-48. *Khumalo and Others v Holomisa*: par 24.

<sup>102</sup> Stradella 2008: 63-64.

representatives.<sup>103</sup> It has been reasoned that defamatory attacks on public officials, “hate speech” and extremist speech challenging the legitimacy of existing institutions must all be tolerated, because the state is not free to determine the boundaries of public discourse. Karpen, in this regard, notes that to differentiate between valuable and worthless opinions contradicts the values of a state that is democratic and pluralistic. In his view, for the state instead of the people to do so, denotes censorship, and a state that claims to distinguish between good and bad political statements is on its way to a totalitarian system.<sup>104</sup>

However, tolerating all expression on the basis that the state cannot be trusted not to abuse its powers is not a principled approach. State conduct which abuses the power to determine the boundaries of acceptable expression is manifestly “wrong”. Rather, the state should be expected to refrain from the “wrong” conduct while meeting its constitutional responsibilities. This will require a distinction between restriction of freedom of expression in accordance with the principles of democracy, and restriction which violates democracy. Weinrib, in this regard, points out that, in a constitutional democracy, fundamental rights, such as freedom of expression, are not placed in the hands of those that may benefit from their violation. The judiciary is the guardian of the constitutional order, and the legislative and executive branches of government are not in a position to act as judges in a self-interested cause.<sup>105</sup>

A line can be drawn with reference to government’s obligation and mandate to prevent “neutral harm”, being harm which “all reasonable persons”, whatever their individual conceptions of the good, “would seek to avoid” on the basis that it should not be tolerated in a democratic society with the values embodied in its constitution.<sup>106</sup> It is, for example, generally accepted as self-evident that a democratic government bears the responsibility to protect its citizens against violence and violations of the law, and that this may require restrictions on expression. It has to be reiterated that constitutional rights will not be violated

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<sup>103</sup> Stradella 2008: 64; Van Aardt 2004: 54.

<sup>104</sup> Karpen 1989: 396.

<sup>105</sup> Weinrib 2009: 183.

<sup>106</sup> Meyerson 1997: 14, 57, 88-89. The interest in the protection of children can, for example, be expressed in neutral terms. It concerns the universally recognised danger that children may be exploited and demeaned by manufacturers and distributors who benefit from the distribution of child pornography, which can be distinguished from the non-neutral interest that will be served by the categorical prohibition of pornography. On the other hand, the claim that pornography in general may be prohibited because it caters to sexual fantasies, which cause many women to feel degraded, is problematic, because the harm of degradation is tied to the acceptance of a disputed background view about the good, and to deeper views about sexuality and gender.



by being debated, questioned or challenged, even when the very existence, content, merit, legitimacy or application of these rights is the subject of communication. Meyerson therefore cautions that, should the state suppress expression because it strikes at the core of constitutional values, and not because of any real risk that it will persuade people to violate the law, it will be clear that the motivation is fear that the expression will convince people that the basic norms of society need to be changed. In a democratic society, all constitutional provisions are subject to constitutional amendment and the exclusion from the realm of public debate of any value, even those values expressed in the constitution, will be illegitimate.<sup>107</sup> She concludes that, in the absence of a real risk that people will be persuaded to violate the law, the state, by suppressing free expression, will not act as a guardian of democracy, but in violation of a constitutional right. There has to be a threat of probable and imminent unlawful behaviour, otherwise the state's aim is non-neutral.<sup>108</sup>

Brugger observes that constitutional courts, in the process of judicial review, perceive different forms of speech differently. Political speech is strongly favoured and courts will tend to opt for a wide definitional coverage, a low threshold for the acknowledgment of an intrusion, and a strict scrutiny test for proportionality. When weighing arguments for non-favoured kinds of speech, courts may opt for a very narrow definitional coverage, for example by not counting the communication as expression in the constitutional sense at all, or the Court could consider the communication as expression, but apply a more accommodating proportionality test to the government's actions to limit it.<sup>109</sup>

Furthermore, the conception of a particular democracy will determine the approach to freedom of expression. The discussion in Chapter IV will indicate that the American constitutional focus is on the prevention of government interference with rights, in contrast to the German, Canadian and South African approaches to democracy, which set forth both rights and duties in order to protect and promote constitutional values.

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<sup>107</sup> Meyerson 1997: 80.

<sup>108</sup> Meyerson 1997: 120.

<sup>109</sup> Brugger 2003: 10.

### 3.2.1 American jurisprudence

The American tradition of classic liberalism embodies the right of the individual to be free from interference by others.<sup>110</sup> “Civil liberty” requires that individuals be left free from state control, except where necessary for the public good. The *Fourteenth Amendment* guarantees protection of citizens by government from threats to the enjoyment of their “absolute rights” to life, liberty and property.<sup>111</sup> The Preamble<sup>112</sup> of the US Constitution embodies the idea of self-governance<sup>113</sup>, which requires that voters “acquire the intelligence, integrity, sensitivity and generous devotion to the general welfare that, in theory, casting a ballot is presumed to express”. It furthermore requires free speech to “check the abuse of power by public officials”.<sup>114</sup>

The scrutiny of case law in Chapter IV will indicate that the primary concern in American *First Amendment* “hate speech” jurisprudence is that the state “would be undermining its own democratic legitimacy were it to discriminate against certain viewpoints”.<sup>115</sup> US courts are prepared to limit free speech in narrowly defined circumstances strictly in terms of the government’s responsibility to protect life, liberty and property. The Supreme Court has held that the social interest in order and morality and the maintenance of peace justifies some limitations of speech.<sup>116</sup> The advocacy of the use of force or of a violation of law may be prohibited where the “advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>117</sup> Furthermore, defamation statutes, zoning regulations and obscenity laws regulate freedom of speech where it undermines other individuals’ legitimate interests. Limited “hate speech” restrictions primarily prevent harassment.<sup>118</sup>

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<sup>110</sup> Eberle 1997: 969.

<sup>111</sup> Chemerinsky 2006: 546-547.

<sup>112</sup> The Preamble reads as follows:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

<sup>113</sup> Heyman 1991: 546. For an evaluation of the idea of a social contract, see Bilchitz 2010: 2.2. See also Sergienko 1996: 1268-1272.

<sup>114</sup> Chemerinsky 2006: 926.

<sup>115</sup> Suk: Denying Experience ... Holocaust Denial and the Free-Speech Theory of the State, in Herz & Molnar 2012: 145.

<sup>116</sup> Tsesis 2009: 497-498.

<sup>117</sup> Milo *et al* in Woolman & Bishop 2008: 42-71.

<sup>118</sup> Tsesis 2009: 508-509.

### 3.2.2 German jurisprudence

The German Basic Law<sup>119</sup>, adopted after the human rights horrors of World War II, explicitly obligates the state to realise a set of what Eberle describes as “objectively ordered principles, rooted in justice and equality, designed to restore the centrality of humanity to the social order”, thereby securing a stable democratic society on this basis.<sup>120</sup>

The seriousness of the commitment to safeguarding democracy appears from the fact that, although freedom of expression itself is an important constitutional value, article 18 of the Basic Law provides that whoever abuses freedom of opinion, in particular freedom of the press, as well as other stipulated rights, in order to attack the free, democratic basic order categorically forfeits these basic rights. Similarly, the general protection of freedom of assembly in terms of article 9 does not extend to those associations with “purposes or activities ... directed against the constitutional order”. Finally the so-called “militant democracy” provision, article 21(2), obligates the state to resist any threats to the basic democratic order. The article provides that parties which, by reason of their aims or the behaviour of their adherents, seek to impair or destroy the free, democratic basic order or to endanger the existence of the Federal Republic of Germany, will be unconstitutional. The implication, according to Rosenfeld, is that the German justification for the protection of freedom of expression based on the democracy theory “does not encompass extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets”.<sup>121</sup> Brugger remarks that this provision reflects disillusionment with the ability of free democracy to sustain itself without having to restrict the very fundamental freedoms that define it, including freedom of expression, especially of political views.<sup>122</sup>

Article 1 of the Basic Law provides as follows: “The dignity of man is inviolable. To respect and protect it is the duty of all state authority.” Ullrich contends that the human-dignity

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<sup>119</sup> Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944): <[http://www.gesetze-im-internet.de/englisch\\_gg/print\\_englisch\\_gg.html](http://www.gesetze-im-internet.de/englisch_gg/print_englisch_gg.html)> (accessed on 17-03-2013).

<sup>120</sup> Eberle 1997: 967. See also Krotoszynski 2004: 1556.

<sup>121</sup> Rosenfeld 2002-2003: 1549; Krotoszynski 2004: 1590.

<sup>122</sup> Brugger 2003: 5. Radical political parties have been banned twice in the history of the Federal Republic of Germany, namely the extreme right-wing Socialist Empire Party in 1952 and the extreme left-wing Communist Party of Germany in 1956.

guarantee has a dual nature. With respect to the state, it appears as an objective legal norm and supreme value within the constitutional value system, and, as regards the individual, it manifests itself as a subjective right, that is, as an enforceable claim against the state to be protected in one's dignity.<sup>123</sup> It establishes a comprehensive duty of the state not only to refrain from violations of human dignity, but also to actively assure its protection, also from violations by private parties.<sup>124</sup> Accordingly, the state as a value-based democracy is required to restrict expression if necessary in order to safeguard democracy or to comply with the human-dignity guarantee. Extensive legislation regulating or criminalising speech purports to serve this purpose.<sup>125</sup>

Restrictions on expression which does not forfeit protection are conditional on compliance with applicable limitation clauses as well as the proportionality standard applied by the German Constitutional Court. The duty of the democratic state to protect constitutional values is a determinative factor in the relevant assessments. According to Brugger, most prominent among the constitutional values to be protected by the state are the rights to dignity, personality, equality and honour. There is a specific focus on the protection of the youth.<sup>126</sup> These aspects will be discussed in Chapter IV.

### *3.2.3 Canadian jurisprudence*

Canadian jurisprudence construes the democracy theory as informing against the definitional restriction of the constitutional guarantee afforded freedom of expression. The right to freedom of expression in terms of section 2(b) of the Canadian Charter of Rights and Freedoms<sup>127</sup> is broadly interpreted to cover, "prima facie", all human activity with expressive content in the sense that it conveys or attempts to convey a meaning, with the exception of acts of violence.<sup>128</sup> This broad interpretation was related to "the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'", the assurance that thoughts and feelings can be conveyed in non-violent ways "without fear of censure", and the

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<sup>123</sup> Ullrich 2003: 80.

<sup>124</sup> Ullrich 2003: 82, 83, 86.

<sup>125</sup> See Chapter IV: 3.6.1.

<sup>126</sup> Brugger 2003: 20.

<sup>127</sup> *Constitution Act* 1982. Part 1 Canadian Charter of Rights: Government of Canada. Justice Laws Website: <<http://laws.justice.gc.ca/en/Charter/1.html>> (accessed on 1-04-2013).

<sup>128</sup> *RWDSU v Dolphin Delivery Ltd.*: par 12-20; *Irwin Toy Ltd v Quebec (Attorney General)*: par VI B; *R v Keegstra*: par VI.

“‘deontological approach’ to freedom of expression as one in which ‘the protected sphere of liberty is delineated by interpreting an understanding of the democratic commitment’”.<sup>129</sup>

The determination of whether or not expression is prima facie protected in terms of section 2(b) is exercised in two steps. The first step is to apply the aforementioned definition of expression. In the second step, a distinction is drawn between government action with the purpose of restricting expression, and government action not with such purpose, but with the effect of restricting freedom of expression.<sup>130</sup> Chief Justice Dickson formulated the relevant enquiry as follows:

[D]oes the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.” In the latter instance, in order to substantiate a claim that freedom of expression was restricted, “the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing.”<sup>131</sup>

Accordingly, when the restriction of “activity with expressive content” is the indirect result of state action with a content-neutral purpose, there is scope for a finding that the activity concerned does not warrant constitutional protection in terms of section 2(b).

In *R v Keegstra*, Chief Justice Dickson distinguished hate propaganda from violence on the basis that the repugnance of the meaning that it conveys stems from the content of the message and not from its form. While expressing the view that “expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values”, he nonetheless held that sections 15 and 27 of the Charter, which respectively deal with equality and multiculturalism, and the international agreements signed by Canada on the prohibition of racist statements, should not be used to interpret the scope of section 2(b). It was

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<sup>129</sup> *Irwin Toy Ltd v Quebec (Attorney General)*: par VI B.

<sup>130</sup> *Irwin Toy Ltd v Quebec (Attorney General)*: par VI B; *R v Keegstra*: par VI.

<sup>131</sup> *Irwin Toy Ltd v Quebec (Attorney General)*: par VI C. The following examples were offered in illustration:

A rule against handing out pamphlets is a restriction on a manner of expression and is “tied to content”, even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails restricting its content. By contrast, a rule against littering is not a restriction “tied to content”. It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a “manner of expression” need not lead inexorably to restricting a content.

reasoned that, in the light of the “large and liberal interpretation given to freedom of expression”, it would be “inappropriate to attenuate the section 2(b) freedom on the grounds that a particular context so requires”. Rather, the various contextual values and factors in section 1 of the Charter should be weighed.<sup>132</sup> Arguments in terms of the democracy theory therefore only have relevance in the section 1 analysis, where the values underlying the right to freedom of expression will be “sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature”.<sup>133</sup>

### 3.2.4 South African jurisprudence

The categorical exclusion from constitutional protection of the forms of expression stipulated in section 16(2) of the South African Constitution has been criticised on the basis that it is jurisprudentially unsound to exclude a portion of expression from the ambit of constitutional scrutiny while legitimate and necessary prohibitions of unacceptable speech would in any event have been saved by section 36.<sup>134</sup> The constitutional impact of the foundational values of the South African Constitution as embodied in section 1<sup>135</sup> of the Constitution should, however, be considered. Roux observes that “it is not conceptually possible for a right in the Bill of Rights to conflict with the democratic values of human dignity, equality and freedom, because all the rights are only enforceable to the extent they affirm these values”. The categorical exclusion of human activity on the basis that the activity is irreconcilable with the foundational values of the democratic state envisaged by the Constitution will, accordingly, also not infringe upon any constitutional right, including the right to freedom of expression.<sup>136</sup> In *Brisley v Drotzky*<sup>137</sup>, Acting Justice Cameron made the following pertinent statement: “In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.”<sup>138</sup>

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<sup>132</sup> *R v Keegstra*: par VI.

<sup>133</sup> *R v Keegstra*: par VII.

<sup>134</sup> Johannessen 1997: 136-137; Milo *et al* in Woolman & Bishop 2008: 42-79.

<sup>135</sup> In terms of section 1, the Republic of South Africa is a sovereign, democratic state founded, inter alia, on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, as well as non-racialism and non-sexism.

<sup>136</sup> Roux in Woolman & Bishop 2008: 10-36; *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* (CCT19/94, CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631: par 46.

<sup>137</sup> *Brisley v Drotzky* (432/2000) [2002] ZASCA 35 (28 March 2002).

<sup>138</sup> *Brisley v Drotzky* (judgment by Cameron AJ): par 4.

In *Islamic Unity Convention v Independent Broadcasting Authority and Others*, the Court stated that the pluralism and broadmindedness that is central to an open and democratic society can be undermined by speech which seriously threatens the foundational constitutional values and thus democratic pluralism itself.<sup>139</sup>

Sections 7<sup>140</sup>, 39 and 36<sup>141</sup> of the Constitution require the state to promote the constitutionally mandated objective of building a non-racial and non-sexist society based on human dignity and the achievement of equality. They furthermore place a duty on the courts to be guided by the founding values of the Constitution in their decision-making about the legal meaning of rights, as well as the justification of their limitation.<sup>142</sup> Section 7(2) explicitly states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The Constitutional Court has confirmed that the state has a general duty to protect members of the public from violations of their constitutional rights.<sup>143</sup> In *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*<sup>144</sup>, the Court pointed out that, in many cases, constitutional rights can only be honoured effectively if relevant legislation is enacted.<sup>145</sup> Section 9(4) of the Constitution explicitly requires the state to enact national legislation to prevent or prohibit unfair discrimination. By implication, expression that constitutes unfair discrimination is categorically unconstitutional.<sup>146</sup> Section 192, significantly included in Chapter 9 which concerns “state institutions supporting constitutional democracy”,<sup>147</sup> requires regulation of broadcasting “in the public interest”.

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<sup>139</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 27.

<sup>140</sup> Section 7(1) provides that the Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>141</sup> Section 39(1)(a) provides that, when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and section 39(2) provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

<sup>142</sup> Cowen 2001: 47. Roux in Woolman & Bishop 2008: 10-33 observes that the rights in the Bill of Rights lie at the very heart of the Constitution’s vision for South African democracy. Section 7(1) implies that the purpose underlying the commitment to democracy is the “promotion of a value-laden system of government based on human dignity, equality and freedom”.

<sup>143</sup> *F v Minister of Safety and Security and Another* (CCT 30/11) [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC): par 53.

<sup>144</sup> *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154.

<sup>145</sup> Bill of Rights Compendium 1996: 1A23; *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*: par 14.

<sup>146</sup> See the discussion of the application of section 36 in Chapter V: 4.10.1.

<sup>147</sup> It falls outside the scope of the study to further explore the issue of whether the Independent Communications Authority of South Africa (ICASA) constitutes a so-called section 9 institution. In this regard, see Delaney 2009: 154-159.

It appears that the founders of the Constitution regarded the forms of expression explicitly excluded from protection as demonstrably – and without any possible exception – not reconcilable with the foundational constitutional values. The categorical exclusion in terms of section 16(2) thus, by implication, obligates the state to prohibit the relevant forms of expression.<sup>148</sup>

In *Islamic Unity Convention v Independent Broadcasting Authority and Others*, the South African Constitutional Court restricted the categorical limitation of the constitutional guarantee to freedom of expression to the forms of expression excluded in terms of section 16(2). However, there is a strong basis to reason that each of the respective exclusions in terms of section 16(2) is related to historical experience. This suggests that other examples of forms of expression similarly irreconcilable with the democratic society envisaged in terms of the Constitution may emerge. The Court related the exclusion to the foundational values of the Constitution, stating that “the pluralism and broadmindedness that is central to an open and democratic society ... can be undermined by speech which seriously threatens democratic pluralism itself”. Thus “reasonable proscription of activity and expression that pose a real and substantial threat to the founding values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and to the constitutional order itself”, is permitted.<sup>149</sup>

Harm in this context should be strictly construed as “neutral harm” to foundational constitutional values and the constitutional order, with “neutral harm” being understood as harm which cannot, in any circumstances, reasonably be contemplated to be justifiable in terms of the constitutional standard.<sup>150</sup> The aforementioned history-related focus significantly addresses a proven threat to these values.<sup>151</sup>

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<sup>148</sup> *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997): par 25. The following *dictum* from *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 31 applies: “There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality... .”

<sup>149</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 27.

<sup>150</sup> See Meyerson 1997: 57.

<sup>151</sup> Baker believes that insufficient empirical evidence is available to prove a rational connection between “hate speech” and the harms associated with a failure to outlaw it. He concedes that, in the light of the horrendous nature of the harm, caution suggests that the risks should not be taken. However, in his opinion, the attempt to prohibit hate speech is more likely to exacerbate the risk of unacceptable outcomes than to generate the benign opposite. He contends that, if cycles of oppression and societal violence are to be broken, a society



### ***3.2.5 International jurisprudence***

All major international human rights treaties and conventions presuppose or create positive legal duties that states are bound to comply with so as to protect individuals against human rights abuses. Provision is made for the regulation of expression in order to meet these duties and responsibilities. The conventions, and the standards they set in relation to the protection of freedom of expression, will be discussed in Chapter III.

## **4. THE HUMAN-DIGNITY THEORY**

### **4.1 The concept of human dignity**

The third theory regards free speech as inherently valuable and “integral to an individual’s need for self-fulfilment and development”.<sup>152</sup> Kant’s view of human dignity is often quoted as doctrinal inspiration for this theory. He states:

But suppose there were something whose existence in itself had absolute value, something which as an end in itself could support determinate laws. That would be a basis – indeed the only basis – for a possible categorical imperative, i.e. of a practical law. There is such a thing! It is a human being! I maintain that man – and in general every rational being – exists as an end in himself and not merely as a means to be used by this or that will at its discretion. Whenever he acts in ways directed towards himself or towards other rational beings, a person serves as a means to whatever end his action aims at; but he must always be regarded as also an end.<sup>153</sup>

Kant’s theory comprises the idea that human dignity is the worth that the capacity to act morally confers on the rational human being. Hence human dignity is manifested in the free choice of the individual.<sup>154</sup> However, free choice is not the only essential element or the exclusive focus of Kant’s notion of dignity. Treating persons as ends in themselves has also

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desperately needs to create a culture of open expression where all views, especially the most extreme views, are openly expressed and debated. The practical implication, also with respect to the application of the other theories, is obvious. See Baker 2008: 14-18; Meyerson 1997: 100.

<sup>152</sup> Milo 2008: 77; Hogg 2007: 272-273.

<sup>153</sup> Kant 1795: Chapter 2: 28.

<sup>154</sup> O’Connell 2008: 273.

been connected to the “bases of social respect”, that is, with “how an individual feels valued in his or her community”.<sup>155</sup>

An application of the Kantian idea to both political and psychological situations reveals more implications than the obligation to respect individual autonomy. It appears that while in the political context respect for the dignity and worth of all persons leads to a strong emphasis on the will and consent of those governed, in the psychological context it is pertinent that nothing is so clearly violative of the dignity of persons as treatment that demeans or humiliates them. This includes not only attacks on personal beliefs and ways of life, but also attacks on the groups and communities with which individuals are affiliated. Statements that demean and humiliate individuals or groups because of their origins, status or beliefs, and the vilification or derision of beliefs that people hold in reverence, are examples of such attacks.<sup>156</sup>

Woolman identifies five dimensions of human dignity, all reflecting variations of Kant’s “categorical imperative” that one may never treat another human being solely as a means. These are, firstly, respect for the intrinsic worth of every person, which sets a minimum standard below which ethical and legal behaviour may not fall; secondly, an entitlement to equal concern and respect; thirdly, self-actualisation, which concerns an individual’s capacity to create meaning and entitlement to respect for the unique set of ends or vision of the good life that he or she pursues; fourthly, self-governance, which implies regard for the interests of vulnerable minorities; and, lastly, a recognition of the interests of the collective in the sense that the political community as a whole must provide the civil and political rights which each member of the community requires to exercise some basic level of agency.<sup>157</sup>

The dualistic impact of human dignity as a fundamental constitutional value can be defined by its subjective and objective sides. “Subjectively it secures the individual rights of personal liberty that the state may not invade, objectively it sets the boundary to liberties flowing from the rights of personal autonomy, and the state is required to see that this line is not overstepped.”<sup>158</sup>

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<sup>155</sup> O’Connell 2008: 273-274.

<sup>156</sup> Schachter 1983: 849-852. See also Chaskalson 2000: 196 and Devenish 1999: 82.

<sup>157</sup> Woolman in Woolman & Bishop 2008: 36-2, 36-6–36-17. See also Botha 2009: 188.

<sup>158</sup> Kommers 1997: 312-313, 359; Kommers & Miller 2012: 372-373.

Eberle distinguishes between the American and German constitutions as respectively “value-neutral based on an idea of liberty rooted in personal choice” and “value-ordered around the norm of dignity”.<sup>159</sup> In America, personal autonomy is the right to choose, which is a value itself. In Germany, by contrast, personal autonomy is an aspect of human dignity. Personal autonomy is acknowledged as relevant to shaping one’s character and personality, “but that shaping is to occur, not in isolation, but within a social and moral community”.<sup>160</sup> In Rao’s view, the implication is that dignity requires respect and recognition among individuals within the broader community.<sup>161</sup> In contrast to “the dignity as autonomy claim to be left alone”, dignity in this sense claims acceptance by the political, social and moral community. It demands constitutional protection for the free development of personality,<sup>162</sup> with recognition of subjective harms caused by stigma, insult and marginalisation.<sup>163</sup> Heyman, drawing both on the natural rights tradition<sup>164</sup> and on modern understandings of rights<sup>165</sup>, contends that the right to recognition as a human being and a member of the community is the most basic right of all. The premise for his view is that “rights represent what it means for people to be free in various areas of life, not only in relation to the external world, but also in their inner lives, in the social and political realm, and in ‘the sphere of intellect and spirit’”.<sup>166</sup>

In summary, it can be stated that the broader concept of human dignity, apart from being construed as personal autonomy, refers to the self-esteem of every human being as well as to

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<sup>159</sup> Eberle 2007: 3. See also Carmi 2008: 283-309; Kommers & Miller 2012: 57-58.

<sup>160</sup> Eberle 1997: 1034. Kommers 1997: 312 points out that the German Constitutional Court in the *War Criminal* decision defined the concept of human dignity “in personalistic and communal terms”. The concept “reveals itself in the experience of the community”, and its meaning will often be determined by an “intuitive understanding” of what is humane in particular circumstances.

<sup>161</sup> Rao 2011: 248.

<sup>162</sup> Rao 2011: 249-250.

<sup>163</sup> Rao 2011: 188, 251, 259. Examples referred to include the ban in some French cities of the spectacle of dwarf-throwing as detrimental to public morality and dignity, despite the willingness of some dwarves to earn their living this way. A further example is the French ban on the *burqa*, defended by the French government on the grounds that such a ban furthers the dignity of Muslim women, despite the fact that some Muslim women choose to wear it as an expression of their faith. It likewise informs regulation of hate speech, because hate speech expresses the idea that some groups are unworthy of equal citizenship.

<sup>164</sup> See Zalta 2012: Tuckness: “Locke’s Political Philosophy”.

<sup>165</sup> The Preamble to the *Universal Declaration of Human Rights* identifies “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world”.

<sup>166</sup> Heyman 2008: 2-4. The view is described as a liberal humanist theory of the *First Amendment*. It is liberal in its emphasis on the protection of individual rights, and humanist in holding that those rights are founded on respect for the intrinsic worth of human beings and are meant to enable them to develop their nature to the fullest extent. The belief is expressed that a theory of this sort offers the best hope of reconciling competing commitments to human dignity and freedom of speech, even within the context of American constitutional history.

the esteem of others, which requires mutual respect for all human beings and their ends. These different dimensions “sometimes pull in different directions and create significant doctrinal tension”.<sup>167</sup> This inherent tension is paramount in all determinations involving the protection or regulation of freedom of expression.

## 4.2 The tenets of the theory

Dignity as autonomy warrants human beings the opportunity to influence and be influenced by the exchange and promotion of ideas, opinions and knowledge, and to act or refrain from action in accordance with their evaluation of such ideas, opinions and information.<sup>168</sup> Burchell contends that the dignity theory is sufficiently broad to include the strengths of the other two justifications for freedom of expression, but not to fall prey to their weaknesses. It is neither restricted to the “elusive pursuit of truth” nor to the political sphere.<sup>169</sup> Democratic decision-making serves to provide the aforementioned opportunity. As articulated by Baker, it is instrumental in giving every person the same potential say in results. This “say” will properly represent the person’s autonomous choice.<sup>170</sup>

The American approach to freedom of speech in this context reflects Dworkin’s description of free speech as an essential and “constitutive” feature of a just political society that treats its adult members as responsible agents who retain their dignity as individuals.<sup>171</sup> This requires that no one be denied the choice to say what he or she wants to say<sup>172</sup>, nor does any official or majority have the right to withhold an opinion from anyone on the ground that he or she is not fit to be exposed to it.<sup>173</sup> Baker contends that “the central justification for the

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<sup>167</sup> Woolman in Woolman & Bishop 2008: 36-2, 36-6–36-19; Burchell 1998: 31, 34; Tsesis 2009: 497-498, 508-509.

<sup>168</sup> Milo 2008: 77-79; Van Wyk *et al* 1994: 269. See also the discussion of the theories in Burchell 1998: 9-17.

<sup>169</sup> Burchell 1998: 16.

<sup>170</sup> Baker 1989: 49-50.

<sup>171</sup> Dworkin 1996: 200-201.

<sup>172</sup> Baker 2004: 228-229.

<sup>173</sup> Dworkin 1996: 200-201. See also *Whitney v California* where Justice Brandeis applied this notion when he stated that “those who won our independence believed that the final end of the State was to make men free to develop their faculties”, and *Cohen v California* 403 US 15 (1971): 24 where the following was stated:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

constitutional status of freedom of speech” as inviolable and not to be “suppressed on the basis of an instrumental balancing analysis” relates to a need for the law to respect individual autonomy in the formal sense of protecting a person’s choice of what to say or her or his choice to listen to a willing speaker.<sup>174</sup> He emphasises that not all speech must be regarded as enjoying protection in terms of the Constitution.<sup>175</sup> Moreover, a distinction should be drawn between formal and substantive autonomy. Baker describes the latter as “meaningful” or “effective” autonomy.<sup>176</sup> According to him, in contrast to formal autonomy, substantive autonomy is not concerned with having maximum abstract freedom of choice, but with having opportunities to make those choices one actually wants to make. Unlike formal autonomy, which can be generally maintained for everyone, “enhancing effective autonomy for one person will often impair it for another”.<sup>177</sup> Hence conflicts are inevitable, with the result that policy decisions based on balancing of different interests will be inevitable.<sup>178</sup> In illustration of this approach, he points out that, while the protection of informational privacy by means of restricting speech is not permitted, the law may leave individuals unable to communicate certain information by denying them access to it. One permissible reason for such denial is precisely to prevent the communication of certain information. The state could, for example, legitimately reject requests by the public or the press for certain information if the purpose of non-disclosure is to achieve state aims of informational privacy. However, once such information is acquired, the state interest in preventing speech on the subject will not justify restricting the speech of those who now have knowledge.<sup>179</sup> Similarly, a state can choose not to disclose the name of a rape victim or a juvenile defendant in order to protect privacy. Nevertheless, the Court rejected restrictions on the publication of information of this nature that the press had legally acquired.<sup>180</sup>

The German approach gives recognition to the notion that, in order to achieve self-realisation, the mind must be free. Suppression of belief, opinion or other expression has been held to negate an individual’s essential nature, and thus to constitute an affront to human dignity. The

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<sup>174</sup> Baker 2004: 228-229.

<sup>175</sup> See the discussion in Chapter IV: 2.4.

<sup>176</sup> Baker 2004: 255.

<sup>177</sup> Baker 2004: 220.

<sup>178</sup> Baker 2004: 228.

<sup>179</sup> Baker 2004: 234-235.

<sup>180</sup> Baker 2004: 235.

realisation of a person's character and potentialities as a human being has been described as "the proper end of man".<sup>181</sup>

In the Canadian case of *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*<sup>182</sup>, the Supreme Court of Canada stated that freedom of expression protects human dignity as autonomy by promoting self-fulfilment through participation in social and political decision-making, the communal exchange of ideas, and the right to think and reflect freely on one's circumstances and conditions. It allows a person to advocate change in an attempt to improve his or her life as well as the wider social, political, and economic environment.<sup>183</sup> In *R v Sharpe*<sup>184</sup>, the Court held that the possession of child pornography is a form of expression protected by section 2(b) of the Charter. The Court acknowledged that child pornography as defined in the *Criminal Code* did not make any contribution to democratic government or to the search for truth. It nevertheless held that the possession of such material is an instrument of personal fulfilment, in the sense that it is integrally related to the development of thought, opinion, belief and expression, as it "allows us to understand the thought of others and consolidate our own thought".<sup>185</sup>

To illustrate the point that, in Canadian law, all the values generally adopted in justification of the protection of freedom of expression have been associated with human dignity, Ullrich refers to the following *dictum* of Chief Justice Dickson in *R v Keegstra*:

... Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all

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<sup>181</sup> See Ducat 2004: 775.

<sup>182</sup> *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156: par 32. The Supreme Court of Canada, in this case, recognised the constitutionality of secondary picketing.

<sup>183</sup> *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*: par 32. This approach corresponds with Meyerson's perspective that respect for the values of dignity, equality and freedom in an open and democratic society requires that, for constitutional purposes, all conceptions of the good life should be treated as equally valid. See Meyerson 1997: 56.

<sup>184</sup> *R v Sharpe* [2001] 1 SCR 45.

<sup>185</sup> *R v Sharpe*: par 24. See Hogg 2007: 273-274. In terms of the justification analysis, the Court concluded that, apart from two problematic aspects, the limitation imposed on free expression by the relevant prohibition, section 163.1(4) of the *Criminal Code*, was justified under article 1 of the Charter. In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 50 the South African Constitutional Court likewise held that the criminalisation of the creation, production, importation, distribution and possession of "child pornography" limits the right to freedom of expression.

persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity.<sup>186</sup>

Weinrib takes this approach even further by contending that, of the traditional rationales for freedom of expression, the dignity rationale alone relates the broader purposes of the Charter framework to the realm of expressive activity. In response to the objection that the dignity rationale is too narrow to protect core expression, such as political speech, he defends his view on the basis that political speech is protected because it is a precondition of lawgiving that is expressive of the dignity of its speakers.<sup>187</sup>

The above-mentioned perspectives will be further explored in Chapter IV during the discussion of the American, German and Canadian approaches to freedom of expression.

Justice O'Regan, in the South African Constitutional Court case of *NM and Others v Smith and Others*<sup>188</sup>, agreed that freedom of expression is important, inter alia, because it enhances human dignity and autonomy by enabling individuals to form and share opinions.<sup>189</sup> The connection between human dignity and freedom was also articulated by Justice Ackermann in *Ferreira v Levin NO and Others* where he stated: "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. To deny people their freedom is to deny them their dignity...".<sup>190</sup>

The focus on the protection of freedom of expression informed by dignity as autonomy was even more strongly accentuated in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*. It was specifically stated that, with regard to the right to be exposed to the expression of others, the consideration that freedom of expression is a *sine qua non* for every person's right to realise his or her full potential as a human being, is of more relevance than the "marketplace" conception of the role of free speech. It does not merely have instrumental value in the sense that it enables the

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<sup>186</sup> Ullrich 2003: 33-35.

<sup>187</sup> See Weinrib 2009: 178 in relation to the Canadian Charter. See also *Fifth Broadcasting* decision: par C 1.

<sup>188</sup> *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC).

<sup>189</sup> *NM and Others v Smith and Others*: par 45. See also *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and others*: par 27 where the Court recognised both the instrumental and intrinsic value of communicative interaction.

<sup>190</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*: par 49.

addressee to exercise the right to freedom of expression, but is foundational to each individual's empowerment to autonomous self-development.<sup>191</sup>

### **4.3 The exclusion of expression that is irreconcilable with the value of human dignity in the sense of autonomy**

While dignity as autonomy primarily informs the protection of freedom of expression, it does in certain instances also require its restriction. These restrictions will be addressed next. Thereafter, the effect of the broader conception of human dignity will be explored.

#### **4.3.1 Human dignity as autonomy related to privacy**

While section 14 of the South African Constitution explicitly protects a general right to privacy,<sup>192</sup> the Canadian Charter and German Basic Law do not in express terms entrench a similar right.<sup>193</sup> In the United States of America, the *Fourteenth Amendment* has been interpreted to include a general right to privacy.<sup>194</sup>

In the context of freedom of expression, the American approach that there is a sphere of privacy with regard to which publicity is no longer regarded as free speech worthy of protection, was mentioned above.<sup>195</sup> It is, however, significant to distinguish the approach to privacy where prima facie protected speech is concerned. The distinction between formal and substantive autonomy indicated above,<sup>196</sup> has relevance. Baker contends that formal autonomy limits the ways that the law can protect privacy. It provides a constitutional “trump” when privacy considerations are considered.<sup>197</sup> Privacy considerations generally have conflicting effects with respect to the substantive or “meaningful autonomy” of

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<sup>191</sup> *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: par 26.

<sup>192</sup> Section 14 provides as follows: “Everyone has the right to privacy, which includes the right not to have  
a. their person or home searched;  
b. their property searched;  
c. their possessions seized; or  
d. the privacy of their communications infringed.”

<sup>193</sup> Article 10 of the German Basic Law does specifically protect the privacy of correspondence, posts and telecommunications.

<sup>194</sup> Currie & De Waal 2005: 315 fn 1.

<sup>195</sup> See 2.4.1 above.

<sup>196</sup> See 4.2 above.

<sup>197</sup> Baker 2004: 265.



opposing parties.<sup>198</sup> Individual autonomy, in the formal sense in the context of freedom of speech, entails no similar conflict.<sup>199</sup> Hence, great caution should be exercised before compromising freedom of speech by way of pro-privacy policies.<sup>200</sup>

In *Bernstein and Others v Bester NO and Others*<sup>201</sup>, the South African Constitutional Court stated that the German, European and American approaches seem to agree that “the nature of privacy implicated by the right to privacy relates only to the most personal aspects of a person’s existence, and not to every aspect within his/her personal knowledge and experience”.<sup>202</sup>

The Court referred with approval to the development on a case-by-case basis of the protection of privacy by the German Federal Constitutional Court. It was held by the German Court that the constitutional obligation to respect the sphere of intimacy of individuals is based on the right to the unfettered development of personality embodied in article 2(1) of the Basic Law. In determining the content and ambit of this fundamental right, regard must be had to the inviolability of dignity in terms of article 1(1), which must be respected and protected by the judicial system.<sup>203</sup> This most intimate core is narrowly construed and is left behind once an individual enters into relationships with persons outside this intimate sphere. The individual’s activities then acquire a social dimension and the right to privacy becomes subject to limitation.<sup>204</sup>

With respect to the right to privacy in terms of section 14 of the South African Constitution, the South African Constitutional Court stated that, already at definitional level, “the content of the right is crystallized by mutual limitation. Its scope is already delimited by the rights of the community as a whole (including its members).”<sup>205</sup>

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<sup>198</sup> Baker 2004: 228.

<sup>199</sup> Baker 2004: 228.

<sup>200</sup> Baker 2004: 265.

<sup>201</sup> *Bernstein and Others v Bester NO and Others*: par 79.

<sup>202</sup> *Bernstein and Others v Bester NO and Others*: par 79.

<sup>203</sup> See Chapter IV: 3.3.

<sup>204</sup> *Bernstein and Others v Bester NO and Others*: par 67 and 77; *NM and Others v Smith and Others*: par 33.

<sup>205</sup> *Bernstein and Others v Bester NO and Others*: par 79.

In *NM and Others v Smith and Others*, the Constitutional Court stated that “privacy encompasses the right of a person to live his or her life as he or she pleases”.<sup>206</sup> Private facts were defined as those matters in respect of which there is a will to keep them private, and the disclosure of which in the same circumstances will cause mental distress and injury to anyone with ordinary feelings and intelligence.<sup>207</sup> In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, it was stated that the right to privacy recognises that every person has a right to a sphere of private intimacy and autonomy which allows him or her to live and to establish and nurture human relationships without interference from the outside community.<sup>208</sup> The case concerned the criminalisation of sodomy. It was held that “the way in which people give expression to their sexuality is at the core of the private intimacy that is protected in terms of the right to privacy”, and that “invasion of that precinct will be a breach of our privacy”. Significantly, though, the Court made it clear that the violation could not be confined to an infringement of the right to privacy. The offence at the same time violated the constitutional rights to human dignity and equality.<sup>209</sup>

The Constitutional Court judgment in *NM and Others v Smith and Others* illustrates the substantive interrelationship in terms of the South African Constitution of equally protected constitutional rights, *in casu* the rights to freedom of expression, dignity and privacy.<sup>210</sup> The determination of the scope of each of the rights may, in the first instance, require a determination of the effect of the other constitutional values which are involved. In *NM and Others v Smith and Others*, in considering whether the publication by the respondents of the HIV status of the applicants constituted wrongful publication of a private fact and breached the applicants’ right to privacy, the Court stated that, on the basis that “the lack of respect for private medical information and its subsequent disclosure may result in fear jeopardising an individual’s right to make certain fundamental choices that he/she has a right to make”, there is “a strong privacy interest in maintaining confidentiality”.<sup>211</sup> The Court emphasised that being HIV-positive does not in itself impair a person’s dignity, and that courts must be

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<sup>206</sup> *NM and Others v Smith and Others*: par 33.

<sup>207</sup> *NM and Others v Smith and Others*: par 34; *National Media Ltd and Another v Jooste* [1996] ZASCA 24; 1996 (3) SA 262 (A): par 12.

<sup>208</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998): par 32.

<sup>209</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 32.

<sup>210</sup> See *NM and Others v Smith and Others*: par 145.

<sup>211</sup> *NM and Others v Smith and Others*: par 41.

careful not to stigmatise the disease.<sup>212</sup> The Court nevertheless stated that “the disclosure of an individual’s HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has, as well as the potential intolerance and discrimination that result from its disclosure”. Under the dignity analysis, it was reiterated that “HIV is a disease like any other”, but that “the social construction and stigma associated with the disease make fear, ignorance and discrimination the key pillars that continue to hinder progress in its prevention and treatment” and “persist to fuel prejudice towards people living with HIV/AIDS”. It was accordingly held to be an affront to the infected person’s dignity for another person to disclose details about that other person’s HIV status or any other private medical information without his or her consent.<sup>213</sup>

In the second instance, the right to autonomy has to be regarded as informing both the rights to freedom of expression and privacy. When these rights compete, a balancing exercise will be required.<sup>214</sup> This approach is in clear contrast to the American application of the principle of formal autonomy as articulated by Baker and referred to above.<sup>215</sup>

It is conceivable that, in accordance with the South African approach, discriminatory expression, in particular “hate speech”, may be construed to violate the privacy rights of members of the target group. The scope of protection afforded the expression concerned in terms of the right to freedom of expression as informed by the right to human dignity as autonomy may, at the threshold level, be limited based on the fact that the autonomous choice not to make available the sensitive private facts concerned was jeopardised. Moreover, in a constitutional structure where both the rights to equality and privacy enjoy constitutional protection, even if the expression survives threshold scrutiny, a balancing exercise may be required, weighing up the rights to freedom of expression and equality as well as privacy. Discriminatory remarks directed at a homosexual individual including references to the personal sexual relations of the target may pose an example.

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<sup>212</sup> *NM and Others v Smith and Others*: par 92.

<sup>213</sup> *NM and Others v Smith and Others*: par 48 and 52.

<sup>214</sup> See *NM and Others v Smith and Others*: par 149.

<sup>215</sup> See 4.2 above.

### ***4.3.2 Human dignity as autonomy related to a collective goal to preserve humanity***

The quest for dignity is often presented as a commitment and guarantee that gross dignity violations that were perpetrated by a previous regime will not be possible under a new constitutional arrangement. Honouring this commitment can be regarded as a manifestation of the character and self-fulfilment of the nation. In the words of De Chickera, “dignity challenges society to strive collectively, whether through battling poverty, opposing violence or resisting elements of tabloid and reality TV culture which subject individuals to public humiliation”.<sup>216</sup>

A good illustration of this perspective is provided by the German Basic Law, where the inscription of dignity was generally understood as a solemn promise of the constitution-makers to the future generations of West Germans, as well as to the rest of the world, that the kind of crimes and dehumanisation committed by the Nazi regime would not happen again. A similar kind of promise is to be found in all the European states that adopted a new constitution after a dictatorship and enshrined the protection of human dignity in a prominent position in their founding law.<sup>217</sup>

The relation between past tragedy and the affirmation of dignity from the perspective of the preservation of humanity was elaborated on as follows by the South African Constitutional Court in *S v Makwanyane and Another*:

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity ... The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.<sup>218</sup>

In this context, the restriction of freedom of expression in itself constitutes expression in the form of demonstration – even if symbolic – in furtherance of the said commitment. Elman contends that, although using the criminal process to deter racism is fraught with problems, there is important symbolic value in having a law prohibiting the dissemination of hate

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<sup>216</sup> De Chickera 2009: 42.

<sup>217</sup> Dupré 2007: 17-18.

<sup>218</sup> *S v Makwanyane and Another*: par 329.

propaganda. It constitutes a clear societal statement that the values of equality, the protection of minorities, and the preservation of multiculturalism are deemed to be of central importance.<sup>219</sup> Kahn, in the American context, affirms this view from the perspective of what he refers to as the “reputation of the nation”. He contends that, when hateful behaviour strikes a sensitive chord in the national history, the court will try very hard to find a compromise that balances the competing interests of freedom of speech and the presentation of the United States as a tolerant nation aware of its past. “Hate speech”, according to him, becomes most threatening, and most sanctionable, when the reputation of the nation as a liberal, tolerant society is on the line.<sup>220</sup>

#### ***4.3.3 Human dignity as autonomy related to society’s character as manifested in the treatment of others***

The above principle likewise applies with respect to the claim of a constitutional community that the state, being responsible for the protection and promotion of the constitutional character of that community, should develop a “caring society” by introducing regulations to restrict the exercise of freedom which interferes with the dignity of any of the individuals or groups that constitute the community.<sup>221</sup> Liebenberg contends that human dignity involves a complex notion of the individual which not only focuses on individual autonomy and responsibility, but also embraces a recognition that the individual is a part of larger collectivities. In the latter context, the individual’s sense of self-worth is inextricably bound up with the treatment of others. She finds support for this idea in the following statement by Justice Mokgoro in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole...<sup>222</sup>

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<sup>219</sup> Elman 1990-1991: 88.

<sup>220</sup> Kahn 2005-2006: 169-170.

<sup>221</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC): par 65.

<sup>222</sup> See Liebenberg 2005: 3 with reference to *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development*: par 65 and 74.

In *S v Makwanyane and Another*, it was held that the refusal of respect and dignity to black people diminished the dignity of all South Africans.<sup>223</sup>

The tolerance rationale for the protection of freedom of expression is related to this, in the sense that it is also concerned with the shaping of the “intellectual character of the society”. The reasoning is that tolerance is a desirable, if not essential, value, and that protecting unpopular or distasteful speech is itself an act of tolerance.<sup>224</sup> Milo contends that this rationale has a particular appeal in post-apartheid South Africa, given the heterogeneous character of our society and our past of racial, religious, cultural and other intolerance.<sup>225</sup> In *Minister of Home Affairs and Another v Fourie and Another*<sup>226</sup>, the Court stated that “the test for tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting”.<sup>227</sup> A positive effect of tolerance might be that expression provides a “valve” to dispose of aggressive views which, if suppressed, might explode in harmful action.<sup>228</sup> Critics, however, question why tolerance should be regarded as a basic value, and argue that society should rather prevent unacceptable harms than being tolerant of those who argue for them.<sup>229</sup> Moreover, as far as the “safety valve” argument is concerned, Milo contends that there is no empirical evidence to support it.<sup>230</sup>

#### **4.4 The exclusion of expression that is irreconcilable with the value of human dignity in the sense of self-esteem and the esteem of other human beings**

The recognition of a broader concept of human dignity as including self-esteem and respect for the esteem of others inevitably creates tension in the determination of the scope of protection to be afforded expression based on human dignity.

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<sup>223</sup> *S v Makwanyane and Another*: par 329.

<sup>224</sup> Chemerinsky 2011: 954-955.

<sup>225</sup> Milo *et al* in Woolman & Bishop 2008: 42-28.

<sup>226</sup> *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

<sup>227</sup> *Minister of Home Affairs and Another v Fourie and Another*: par 107.

<sup>228</sup> Milo *et al* in Woolman & Bishop 2008: 42-29.

<sup>229</sup> Chemerinsky 2011: 958.

<sup>230</sup> Milo *et al* in Woolman & Bishop 2008: 42-29.

When articles 1 and 5 of the German Basic Law, which respectively protect human dignity and freedom of speech, are discussed in Chapter IV, it will become apparent that elements of dignity and personal honour constitute both external and internal limitations of freedom of expression. Article 1 affects the interpretation of article 5, and article 5 itself specifically mentions the right to personal honour, amongst other things, as a limit to the right to free speech.<sup>231</sup> Article 79(3) relates the value of human dignity to the constitutional order and to the right to resist abolition of this order. In this light, Krotoszynski contends that the Basic Law attempts to enshrine, permanently, the balance struck, favouring dignity and the preservation of democracy over the exercise of free speech.<sup>232</sup>

The Supreme Court of Canada, in at least two contexts, has viewed human dignity as a definitional element of a right, namely the right to security of the person under section 7 of the Charter, and the equality right under section 15 of the Charter.<sup>233</sup> As was mentioned above, the Court in *R v Keegstra* was not prepared to restrict the right to freedom of expression in terms of other constitutional principles, in particular the principle of equality. However, Ullrich contends that human dignity, although it is not explicitly referred to in the Charter, is decisively recognised as a fundamental value underlying the Charter, with the implication that it is a principal interpretive aid in the application of the express rights and freedoms guaranteed by the Charter.<sup>234</sup> This contention is based on the oft-quoted *dictum* of Chief Justice Dickson in *R v Oakes*, providing guidance for the application of section 1 of the Charter:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

Significantly so, the concluding remark that “the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right and freedom must be shown despite

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<sup>231</sup> Carmi 2008: 326.

<sup>232</sup> Krotoszynski 2004: 1556-1557.

<sup>233</sup> Ullrich 2003: 26.

<sup>234</sup> Ullrich 2003: 25-26.

its effect, to be reasonable and demonstrably justified”, was also quoted above in the discussion of the democracy theory.<sup>235</sup> It will be indicated in Chapter IV that the Court in *R v Keegstra* did in fact assess the value, and the consequent worthiness of protection, of the expression concerned in relation to the theories and values that inform the constitutional protection of expression.<sup>236</sup>

The South African Constitution expressly acknowledges dignity both as a foundational value and as an independent right in terms of section 10 of the Constitution, which provides that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>237</sup> Woolman states that human dignity has operated in South African jurisprudence as a first-order rule when the Court could identify no other specific right that would protect the dignity interests concerned; as a second-order rule determining how a first-order rule disposes of a matter; as a correlative right, for example where legislative or common law provisions were found to violate another right as well as human dignity; and, most often, as a value, and sometimes all in a single case.<sup>238</sup> This was confirmed in *Dawood and Another v Minister of Home Affairs and Others*<sup>239</sup> where Justice O’Regan held that human dignity as a fundamental value informs constitutional adjudication and interpretation as an interpretive aid and is of central significance in the limitations analysis. Moreover, in terms of section 10 of the Constitution, it is a justiciable and enforceable right that must be respected and protected.<sup>240</sup> As a second-order rule, human dignity has featured most prominently in equality cases.<sup>241</sup>

The central role of inherent human dignity in the South African equality context was confirmed in *Harksen v Lane NO and Others*<sup>242</sup> and in subsequent decisions<sup>243</sup> concerning the

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<sup>235</sup> Ullrich 2003: 21.

<sup>236</sup> See Chapter IV: 4.3.1.3.

<sup>237</sup> Haysom in Cheadle, Davis & Haysom 2002 (updated 2007): 5.1.

<sup>238</sup> Woolman in Woolman & Bishop 2008: par 36-3, 36-19–36-25.

<sup>239</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936.

<sup>240</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*: par 35.

<sup>241</sup> Woolman in Woolman & Bishop 2008: 36-20.

<sup>242</sup> *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC): par 51.

<sup>243</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*: par 35; *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000): par 42. See Cheadle *et al* 2002 (updated 2007): 4.4.1.



application of section 9 of the Constitution. In *S v Makwanyane and Another*<sup>244</sup>, Justice President Chaskalson described the rights to life and dignity as the most important of all human rights, and the source of all other personal rights in the Bill of Rights. Justice O'Regan, in *S v Makwanyane and Another*, elaborated that the right to human life includes the right to be part of a broader community, to share in the experience of humanity, and to be treated as a human being with dignity.<sup>245</sup> In *The President of the Republic of South Africa and Another v Hugo*, the Constitutional Court stated that “inherent human dignity is at the heart of individual rights in a free and democratic society”.<sup>246</sup> This view was reflected in *Minister of Home Affairs and Others v Watchenuka and Another* where the Court described humankind as pre-eminently a social species with an instinct for meaningful association. The Court viewed self-esteem and the sense of self-worth as “the fulfilment of what it is to be human”.<sup>247</sup>

Devenish states that, to be classified as wrongful behaviour, violating dignity must not only infringe subjective emotions, but must also be *contra bonos mores*.<sup>248</sup> In the context of the Constitution, this statement can be construed as implying that the violation has to be in conflict with the foundational value of human dignity. In this regard, the discussion in the context of the democracy theory of the boundaries to free expression required by the constitutional order, applies. The focus in the present discussion is on the foundational value of human dignity and its place in constituting the society envisaged by the Constitution.<sup>249</sup>

The relation between the value of human dignity and the categorical exclusion in terms of section 16(2)(c) of the South African Constitution of “hate speech” from the right to freedom of expression serves as a clear example that the human-dignity theory, while it substantiates the protection of freedom of expression in consideration of the autonomy of the individual, at the same time may exclude expression that is irreconcilable with the constitutional guarantee afforded inherent human dignity. As was stated in the discussion of the democracy theory, the Court, in *Islamic Unity Convention v Independent Broadcasting Authority and Others*, related

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<sup>244</sup> *S v Makwanyane and Another*: par 44.

<sup>245</sup> *S v Makwanyane and Another*: par 326-327.

<sup>246</sup> See *The President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; 1997 (4) SA 1: par 4 and *Prinsloo v Van der Linde and Another*: par 32 with reference to *Egan v Canada* (1995) 29 CRR (2d) 79: 104-105.

<sup>247</sup> *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 SCA: par 27.

<sup>248</sup> Devenish 1999: 82.

<sup>249</sup> Chaskalson 2000: 196.28.

the provisions of section 16(2) of the South African Constitution to the interest of the state in regulating the particular forms of expression in a society based on the values of human dignity and the achievement of equality “because of the harm it may pose to the objectives informed by these values”.<sup>250</sup>

#### **4.5 The exclusion of expression that is irreconcilable with the value of human dignity related to equality**

The question arises whether the value of equality similarly restricts the protection of freedom of expression based on the dignity theory. The relevant issue is whether equality considerations only constitute an important government objective which may require limitations on the right to freedom of expression, or whether equality is interrelated with the dignity rationale to the extent that it constitutes an interpretive element of the scope of the freedom-of-expression guarantee. The focus in this context will be on equality as a constitutional value, interrelated with the value of human dignity, informing constitutional rights, including the right to freedom of expression.

This question has particular relevance in the context of the study, as, in South Africa, “hate speech” is prohibited in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000 (Equality Act)*. The overall aims of the Act are reflected in its title.<sup>251</sup>

An equality right is guaranteed in the American, German, Canadian and South African constitutions. Of these, only the South African Constitution explicitly recognises equality as a foundational value alongside freedom and human dignity. The aforementioned duties imposed by sections 1, 7 and 39 of the South African Constitution similarly apply.

The relevance of the fact that the South African Constitution recognises equality as a foundational constitutional value, that the Bill of Rights also has horizontal application<sup>252</sup>,

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<sup>250</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 30-31. See also Woolman in Woolman & Bishop 2008: 36-4(h)(ii), 36-53–36-55.

<sup>251</sup> See the discussion of the objects of the Act in Chapter V: 4.2.

<sup>252</sup> Section 8 provides as follows:

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person

and that the state is obliged in terms of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights, is illustrated by contrasting the implications of these facts with the reasoning of the Canadian Supreme Court in *R v Keegstra*. As mentioned above, the Court did not accept the argument that sections 15<sup>253</sup> and 27 of the Charter, which deal with equality and multiculturalism, and the international agreements signed by Canada on the prohibition of racist statements, should be used to interpret the scope of section 2(b). Considering the nature of the freedom of expression and equality guarantees, the Court reasoned that, on the one hand, section 2(b) confers on each individual freedom of expression, unconstrained by state regulation or action, and subject only to a possible limitation under section 1. On the other hand, section 15 grants the right to be free from inequality and discrimination effected by the state. Given that the protection under section 2(b) is aimed at protecting individuals from having their expression infringed by the government, it would be a misapplication of Charter values to thereby limit the scope of that individual guarantee with an argument based on section 15, which is also aimed at circumscribing the power of the state. A further factor regarded by the Court as lending support to this conclusion was that statements should not be denied constitutional protection on the basis of their content. This would be the effect of denying expression protection on the basis that its content conflicts with the values underlying the section 15 guarantee.<sup>254</sup> The international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism in sections 15 and 27 of the Charter were hence regarded by the Court as considerations relevant to the assessment of the importance of the objective of the legislation concerned.<sup>255</sup>

It has, however, also been mentioned that Canadian jurisprudence has recognised human dignity as a definitional element of the equality right. Dignity specifically comes into play in an equality dispensation where the approach to equality is substantive. This entails a situation-sensitive focus on the actual effect of a law or conduct in the lives of different groups in society. The approach is in contrast to a formal approach which requires that the

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if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

<sup>253</sup> *R v Keegstra*: par II B 1.

<sup>254</sup> *R v Keegstra*: par II B 1.

<sup>255</sup> *R v Keegstra*: par VII C iii. See the discussion of the first stage of the application of section 36 of the South African Constitution in Chapter V: 4.10.1.

law treat people in the same manner, regardless of their circumstances.<sup>256</sup> The substantive approach is reflected by the following statements in Canadian Supreme Court cases. Justice L’Heureux-Dube, in *Egan v Canada*, stated that “equality ... means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences”.<sup>257</sup> In *Law v Canada*, the Court affirmed that the purpose of section 15(1)<sup>258</sup> is:

to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.<sup>259</sup>

Ultimately, as contended by Rao with reference to this *dictum*, the regulation of “hate speech” “occurs at the intersection of equality, dignity, and the right of recognition”.<sup>260</sup>

Support for the proposition that equality can be understood as being informed by, and intimately connected to, dignity is also found in international human rights law, both in its history, and in article 1 of the United Nations (UN) *Convention on the Elimination of All Forms of Racial Discrimination*, which states that “discrimination between human beings on the grounds of race, colour or ethnic origin is an offence to human dignity”.<sup>261</sup>

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<sup>256</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 126. See also Yap 2005: 78-80; Pretorius, Klink & Ngwena 2001: 2.1: 2-5; Chaskalson 2000: 203; De Chickera 2009: 35; Davis in Van Wyk *et al* 1994: 198-199. For an example of the contrasting American approach, see *Washington v Davis* 426 US 229 (1976).

<sup>257</sup> *Egan v Canada*: 104-5.

<sup>258</sup> Section 15(1) reads as follows: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

<sup>259</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497: par 42. The similarity between this statement and the following statement by Chief Justice Dickson with respect to the purpose of section 319 of the Canadian *Criminal Code* is striking:

The message of the expressive activity covered by section 319(2) is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.

See *R v Keegstra* par VII C iii.

<sup>260</sup> Rao 2011: 251.

<sup>261</sup> Cowen 2001: 48.

The value of equality in the South African Constitution, in contrast to the Canadian position, has explicit interpretive relevance with respect to all constitutional rights, including freedom of expression. This is because the foundational value of equality informs all these rights. This perspective underlies the inclusion of “hate speech” prohibitions in the *Equality Act*, which is aimed at the protection and promotion of equality. The relationship between human dignity and equality is therefore of direct concern in a discussion of the dignity theory underlying the protection of freedom of expression.

South African jurisprudence recognises that a person’s sense of human dignity and belonging to the community at large is closely linked to the concern for, and respect accorded to, the groups to which he or she belongs. While exposure to the expression of other groups and cultures of their adversities and aversions, including their repugnance of other groups, may promote tolerance<sup>262</sup>, it is indisputable that words and expression have the potential to intensify or create discriminatory stereotypes and to promote derision, abuse and humiliation based on group characteristics, thus having a severe impact on the sense of self-worth and acceptance of members of the target groups.<sup>263</sup> This substantive approach is illustrated in the following oft-quoted statement in *The President of the Republic of South Africa and Another v Hugo*:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.<sup>264</sup>

Liebenberg states that the quest for equal worth or dignity in terms of the concept of substantive equality is in fact a quest to eliminate the disadvantages and inferior status that attach to membership of particular groups.<sup>265</sup> She quotes Justice Sachs in this regard where he

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<sup>262</sup> See Milo *et al* in Woolman & Bishop 2008: 42-28–42-20.

<sup>263</sup> See *R v Keegstra*: par VII C. (i).

<sup>264</sup> *The President of the Republic of South Africa and Another v Hugo*: par 41. See also *Harksen v Lane NO and Others*: par 51; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*: par 35; *Government of the Republic of South Africa and Others v Grootboom and Others*: par 42. Cheadle *et al* 2002 (updated 2007): 4.4.1.

<sup>265</sup> Liebenberg 2005: 5; Woolman in Woolman & Bishop 2008: 35-8–35-10; Hogg 2007: 615-618.

says: “...at the heart of the equality jurisprudence is the rescuing of people from a castelike status and putting an end to their being treated as lesser human beings because they belong to a lesser group.”<sup>266</sup> According to him, one of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. Even though the manner in which discrimination is experienced on the grounds of race or sex or religion or disability varies considerably, the common factor is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Substantive as opposed to formal equality understands human dignity in this light. “The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons.”<sup>267</sup>

The discussion in Chapter V of freedom of expression in the context of the South African Constitution, and of legislation giving effect to the Constitution, will indicate that discriminatory expression forfeits constitutional protection if it is unfair in terms of the Constitutional standard, which is captured in terms of section 14 of the *Equality Act*. A narrow category of discriminatory expression is defined and categorically prohibited in terms of so-called “hate speech” provisions. The implication is that the legislator holds the view that expression of this nature will in all circumstances violate human dignity and equality to an extent that it will in no circumstances be justifiable. The merit of this view will be assessed. It is theoretically possible that expression that does not constitute “hate speech” as defined, may nonetheless constitute unfair discrimination. This is because the fairness analysis allows for relevant contextual circumstances – which may not be accommodated in the “hate speech” provisions – to be taken into account. However, the intrinsic tension between human dignity as autonomy and inherent human dignity, the interrelationship between human dignity and equality, as well as the fact that discriminatory expression may promote rather than violate equality by exposing rather than reinforcing stereotypes, complicate the fairness analysis.

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<sup>266</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 129. See also *The President of the Republic of South Africa and Another v Hugo*: par 41; Cheadle *et al* 2002 (updated 2007): 4.1.1 and fn 40.

<sup>267</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 126.

## **4.6 International law**

The application of the broader concept of human dignity in international law will be explored in the next chapter.

## **4.7 Conclusion**

Human dignity as autonomy guarantees the constitutional recognition and protection of a right to freedom of expression. The interrelationship with the other theories is apparent. Access to the marketplace of ideas and equal opportunity to participate in the public discourse foundational to democracy are essential facets of self-fulfilment and autonomy.

A concept of human dignity as inclusive of respect for, and the self-esteem of, others restricts the scope of protection afforded expression based on human dignity. Human dignity in this sense is interrelated with the value of equality.

## **5. GENERAL CONCLUSION**

The discussion in this chapter has definite relevance to the objectives of the study. It is apparent that the value afforded expression is related to these theories. Harmful expression based on group identity may be valued positively for its contribution to the marketplace of ideas, considering the response it may provoke and the ultimate challenge it may pose to negative stereotypes. Its protection will be supported by the argument that representative democracy “depends on the maintenance and protection of free expression”.<sup>268</sup> The often chilling effect of regulation will add force to this argument. Moreover, in terms of the South African Constitution, the argument based on democracy extends to the responsibility to maintain and protect the foundational values of freedom, human dignity and equality. The discussion has related the protection of expression to all these values. Finally, and probably most importantly, even expression of this nature will be positively valued for its intrinsic value as a freedom right. It represents the free choice, the autonomy, of the individual.

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<sup>268</sup> See 3.1 above.

The discussion, on the other hand, also pointed out circumstances which will jeopardise the instrumental value of expression, in particular in the context of the first two theories, as well as intrinsic value-based limitations, in particular with respect to the second and third theories. Where harmful expression related to group identity is concerned, these considerations will potentially provide counter-arguments to its protection.

The first objective of the study is to determine the reasons for the categorical exclusion of certain forms of hateful expression in terms of section 16(2) of the South African Constitution. The fact that the considerations informing the theories that were discussed did not save expression covered by the section from categorical exclusion from constitutional protection, provides relevant information in this regard. The inference can be drawn that the expression concerned jeopardises one or more of these interrelated ideas to the extent that the expression is afforded no value deserving of constitutional protection, from which it inevitably follows that the expression is unconstitutional. This raises the question whether a threshold consideration of the reasons for the protection of expression should not be preferred to a categorical approach that all expression outside the ambit of section 16(2) of the Constitution necessarily falls under the protection of section 16(1). This issue will be further highlighted in the course of the study.

The second objective is to understand the considerations that should apply in a fairness analysis pertaining to discriminatory expression. It is precisely these considerations that were theoretically set out in the chapter. What clearly emerged from the discussion is that the interrelationship in the context of freedom of expression between equality and democracy, equality interrelated with human dignity, and freedom as autonomy is complex. This complexity is enhanced by the inherent tension present in the respective values of democracy and human dignity. A substantive challenge of the study is to address this complexity in the context of the South African society which is described in the preamble of the *Equality Act* as a society still in the process of “restructuring and transforming”, and in which “institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy”.

The third objective is to interpret and consider the constitutionality of legislative provisions that categorically prohibit harmful expression related to group identity. This will be



endeavoured in Chapter V. It will be contended that, in order for categorical prohibitions of discriminatory expression to be constitutional, a contextual threshold enquiry along the lines of the present discussion should lead to a conclusion that the expression concerned will inevitably and to an unjustifiable extent jeopardise rather than promote the foundational values of the Constitution, in particular the value of equality. Differently put, if a fairness analysis in terms of the Constitution, or in terms of the particular act, will in all foreseeable circumstances determine the expression concerned to constitute unfair discrimination, the categorical prohibition will be constitutional. The fact is that the South African Constitution requires the prohibition of any conduct that constitutes unfair discrimination.<sup>269</sup> This indubitably includes expressive conduct.

The realisation of the complexity furthermore serves to explain the practical need for regulation in order to secure legal certainty and to give guidance to society. It moreover alerts one to the fact that a fairness analysis with respect to harmful expression based on group identity that falls outside the ambit of specific “hate speech” regulation should be approached with great caution in order to prevent outcomes that will jeopardise rather than promote equality.

Accordingly, an assessment of the constitutional value of expression requires an informed understanding of the reasons why free expression is afforded constitutional protection, and of the related limitations of such protection. This understanding is essential for a purposive interpretation of categorical “hate speech” prohibitions as well as for the consideration of the impact and weight of an infringement of freedom of expression in the context of a fairness analysis. As was concluded in the discussion, this includes the extent to which the expression ultimately potentially promotes or jeopardises equality in terms of the relevant considerations of the different theories.

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<sup>269</sup> Constitution 1996: section 9(4).

## CHAPTER III

# THE REGULATION OF HARMFUL EXPRESSION RELATED TO GROUP IDENTITY IN INTERNATIONAL LAW

*Never shall I forget that night, the first night in camp, that turned my life into one long night  
seven times sealed.*

*Never shall I forget that smoke.*

*Never shall I forget the small faces of the children whose bodies I saw transformed into  
smoke under a silent sky.*

*Never shall I forget those flames that consumed my faith forever.*

*Never shall I forget the nocturnal silence that deprived me for all eternity of the desire to live.*

*Never shall I forget those moments that murdered my God and my soul and turned my dreams  
to ashes.*

*Never shall I forget those things, even were I condemned to live as long as God Himself.*

*Never.*

*Elie Wiesel in Night: 32*

## 1. INTRODUCTION

The recognition and affirmation of human dignity are central to international conventions. Several conventions explicitly refer to “inherent human dignity”.<sup>1</sup> The *Charter of the United Nations*,<sup>2</sup> in its Preamble, commits its members to the “dignity and worth of the human person”. The Preamble of the *Universal Declaration of Human Rights*<sup>3</sup> (*UDHR*) begins with the declaration that the recognition of “inherent dignity” and of the “equal and inalienable rights” of all persons is the “foundation of freedom and justice and peace”. Article 1 states that “all human beings are born free and equal in dignity and rights”. The *International*

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<sup>1</sup> Botha 2009: 171.

<sup>2</sup> *Charter of the United Nations* 1945: United Nations (UN): <<http://www.un.org/en/documents/charter>> (accessed on 30-03-2013).

<sup>3</sup> *UDHR* 1948: UN: <<http://www.un.org/en/documents/udhr/index.shtml>> (accessed on 30-03-2013).

*Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*,<sup>4</sup> in its Preamble also commits its members to these convictions.<sup>5</sup> The Preamble of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>6</sup> recognises the “equal and inalienable rights of all members of the human family” and proclaims that these rights “derive from the inherent dignity of the human person”. The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*<sup>7</sup> affirms the dignity and worth of the human person proclaimed in the *Charter* and *UDHR* and regards discrimination as a violation of the principles of equality of rights and of respect for human dignity. Article 11(1) of the *American Convention on Human Rights*<sup>8</sup> states that “everyone has the right to have his honor respected and his dignity recognised”.<sup>9</sup> Article 5.2 provides that “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” The *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>10</sup> does not, however, explicitly refer to human dignity.

It is universally accepted that freedom of expression is not absolute.<sup>11</sup> Several provisions of international law contain conditional limitations of freedom of expression in relation to, inter alia, hateful or harmful speech, and states parties are in certain instances obligated to prohibit particular defined forms of expression.<sup>12</sup> There is also broad consensus that limitations must remain within strictly defined parameters. Particularly stringent restriction requirements for speech characterised as political speech have been established. A far greater margin of appreciation has been left to states for restrictions targeting other forms of speech, particularly speech offending public morals or religion. These parameters are established in

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<sup>4</sup> *ICERD* 1966: Office of the High Commissioner for Human Rights (OHCHR): <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>> (accessed on 30-03-2013).

<sup>5</sup> Illustrative of the narrower conceptual view of the United States of America (USA) is the objection to ratification of the *ICERD* to reservations that nothing in the *ICERD* shall be deemed to require or to authorise legislation or other action by it incompatible with the provisions of its Constitution for the protection of individual rights, in particular the right of free speech.

<sup>6</sup> *ICCPR* 1966: OHCHR: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> (accessed on 30-03-2013).

<sup>7</sup> *CEDAW* 1979: UN: <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>> (accessed on 30-03-2013).

<sup>8</sup> *American Convention on Human Rights* 1979: <[http://www.hrcr.org/docs/American\\_Convention/oashr.html](http://www.hrcr.org/docs/American_Convention/oashr.html)> (accessed on 30-03-2013).

<sup>9</sup> Haysom in Cheadle, Davis & Haysom 2002 (updated 2007): 5.3.

<sup>10</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950: Council of Europe: <<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>> (accessed on 30-03-2013).

<sup>11</sup> Ghana 2008: 2; Lerner 2008: 1, 5; Schmidt 2008: 2.

<sup>12</sup> Lerner 2008: 3-4; Thornberry 2008: 3; Callamard 2008: 4.

terms of the definitions of concepts like “hate speech”, as well as in terms of general and specific limitation requirements.

It furthermore appears that the existence of “hate speech” prohibitions does not preclude the restriction of discriminatory expression that falls outside the definitional ambit of such provisions. In the context of discrimination analyses, “due regard” has to be given to the right to freedom of expression and its inherent value for the achievement of equality.

The relevance for the interpretation of the right to freedom of expression in the South African context is that categorical exclusions in terms of section 16(2) of the South African Constitution to a material extent appear to resemble article 20 of the *ICCPR*<sup>13</sup>. Furthermore, it is a stated object of the South African *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) 4/2000* “to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the *ICERD* and the *CEDAW*.”<sup>14</sup> The present discussion will focus mainly on freedom of expression in the context of these treaties. Of the treaties mentioned, the *ICCPR* and the *ICERD* contain explicit provisions both on the protection and limitation of expression. It is, however, important that these conventions not be considered in isolation, and reference will accordingly also be made to other international conventions and to decisions in terms of these conventions.<sup>15</sup>

## **2. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)**<sup>16</sup>

Articles 18 and 19 of the *UDHR* respectively protect freedom of thought, conscience and religion, and freedom of opinion and expression in the following terms:

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<sup>13</sup> See Chapter V: 2.2.6.

<sup>14</sup> *Equality Act*: sections 2(h) and 3(2)(b).

<sup>15</sup> For the sake of completeness, mention is made of the *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, which is appended to the 2001 Council of Europe *Convention on Cybercrime*. Article 2(1) defines “racist and xenophobic material” as:

any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

2001: Council of Europe: <<http://conventions.coe.int/Treaty/en/Treaties/html/189.htm>> (accessed on 30-03-2013).

<sup>16</sup> The General Assembly of the UN adopted and proclaimed the *UDHR* on 10 December 1948.

Article 18 states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19 states:

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

The *UDHR* does not contain a limitation clause specifically with regard to freedom of expression, but the general limitation clause in article 29, which is applicable to all the rights and freedoms set forth in it, is relevant. For a limitation to be legitimate under article 29, it must satisfy two essential criteria: (i) it must be determined by law; and (ii) it must be enforced solely for one or several of the purposes mentioned in the article. The stipulated purposes are “securing due recognition and respect for the rights and freedoms of others”, and “meeting the just requirements of morality, public order and the general welfare in a democratic society”.<sup>17</sup>

### **3. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)<sup>18</sup>**

The text of the “hate speech” provisions of the *ICCPR* was controversial from the start. It was adopted by 52 votes to 19 in the UN General Assembly, with 12 abstentions. Several states recorded reservations, including Australia, Belgium, Luxembourg, New Zealand and the United Kingdom. Most of these countries expressed deep concern about the negative impact of the Convention on freedom of expression. It was submitted that legislation would not

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<sup>17</sup> Eltayeb 2008: 6.

<sup>18</sup> The *ICCPR* is a descendant of the *UDHR*. It was adopted by *General Assembly Resolution 2200A (XXI)* of 16 December 1966, came into force in 1976, and has repeatedly been reaffirmed by the General Assembly. More than three-quarters of the UN’s member states are now bound by the *ICCPR* under treaty law. South Africa ratified the *ICCPR* in 1998, Germany in 1973, Canada in 1976 and the USA, subject to reservations, in 1992.

eradicate racism, but could be used to suppress the opinions of opposition parties. Reservations were also expressed about the broad interpretations that could be given to the provision outlawing propaganda for the purposes of war. Article 20 of the *ICCPR*, dealing specifically with “hate speech”, was adopted after redrafting, by 50 votes to 18, with 15 abstentions, indicating the deeply divided views on “hate speech” in the countries that make up the UN.<sup>19</sup>

### 3.1 Article 18

Article 18 protects the right to freedom of thought, conscience and religion as well as the freedom to manifest one’s religion or belief, individually or in community with others, and in public or private, in worship, observance, practice and teaching.

Article 18(3) subjects the freedom to manifest one’s religion or beliefs to limitations similar to those provided for in article 19(3), namely limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The United Nations Human Rights Committee (UNHRC), in paragraph 8 of *General Comment 22* on article 18, points out that national security is not included as an express limitation in section 18(3). Unfortunately the UNHRC has issued few consensus comments on the limits to the freedom to manifest religion, inter alia with relation to the expression of discriminatory beliefs about women.<sup>20</sup>

### 3.2 Article 19

Article 19 of the *ICCPR* reads as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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<sup>19</sup> Clarke 2007: 102-103; Ash 2005: par 16-25.

<sup>20</sup> Joseph, Schultz & Castan 2003: 508.

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

### **3.2.1 United Nations Human Rights Committee (UNHRC): General Comments on article 19**

The UNHRC, in *General Comment 10* on the right to freedom of opinion and expression,<sup>21</sup> emphasises that the “right to hold opinions without interference” is a right for which the *ICCPR* permits no exception or restriction. There is no requirement under the *ICCPR* that individuals must censure their opinions on the religious beliefs or ideologies of others, and limitations to this effect will be contrary to the objectives of the *ICCPR*. This is in contrast to the right in article 19(2) which is subject to “special duties and responsibilities”, and hence possible restrictions, in terms of article 19(3).<sup>22</sup>

With respect to article 19(3), it is stated that when a state party imposes restrictions on the exercise of freedom of expression, “these may not put in jeopardy the right itself”.<sup>23</sup> The necessity of effective measures to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3 of article 19, is proclaimed.

*General Comment 28* provides that the publication and dissemination of pornography which portrays women and girls as objects of violence or of degrading or inhumane treatment, and which is likely to promote these kinds of treatment of women and girls, should be restricted.

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<sup>21</sup> *General Comment 10* on article 19 of the *ICCPR* (Freedom of expression) 1983: OHCHR: <<http://www.unhchr.ch/tbs/doc.nsf/0/2bb2f14bf558182ac12563ed0048df17?Opendocument>> (accessed on 30-03-2013).

Joseph *et al* 2003: 518, 522, 524-525, 544-545.

<sup>22</sup> Ghanea 2008 supports the view of the UNHRC that the right in article 19(1) of the *ICCPR* to hold opinions without interference is an absolute right. She reiterates that article 19(1) “permits no exception or restriction”. See Ghanea 2008: 2 where she refers to *General Comment 10* on article 19 of the *ICCPR*, Freedom of expression, adopted at the 19<sup>th</sup> session on 29/06/1983, par 1, 4, and the following jurisprudence of the UNHRC: *Faurisson v France* 550/1993 (1996) (UNHRC): par 9.6: Bayefsky.com: <[http://www.bayefsky.com/html/128\\_francevws55058.php](http://www.bayefsky.com/html/128_francevws55058.php)> and *Ross v Canada* CCPR/C/70/D/736/1997 (2000) (UNHRC): par 6.11: Bayefsky.com: <[http://www.bayefsky.com/html/165\\_canada736.php](http://www.bayefsky.com/html/165_canada736.php)> (both accessed on 30-03-2013).

<sup>23</sup> Joseph *et al* 2003: 524-525.

It specifically provides that those forms of pornography which are analogous to “hate speech”, must be prohibited.<sup>24</sup>

*General Comment 34*<sup>25</sup> was adopted in 2011 to replace *General Comment 10*. It states that the scope of article 19, paragraph 2, even embraces views that may be regarded as deeply offensive.<sup>26</sup> It adds that the harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment, for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.<sup>27</sup> Moreover, section 19(3) may never be invoked as a justification for the silencing of any advocacy of multiparty democracy, democratic tenets and human rights.<sup>28</sup>

### **3.2.2 The scope of article 19(2)**

Article 19(2) is broad in its application. Its application to information and ideas “of all kinds” indicates that it covers “every communicable type of subjective idea and opinion, of value-neutral news and information, of commercial advertising, art works and political commentary, regardless of how critical”, subject to the permissible limitations in paragraph 3, which will subsequently be discussed in detail.<sup>29</sup>

Article 26 requires the prohibition of discrimination in the following terms:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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<sup>24</sup> Joseph *et al* 2003: 567. Joseph *et al* comment that pornography controls are apparently seen as more than mere permissible limitations to freedom of expression.

<sup>25</sup> *General Comment 34* on article 19 of the ICCPR 2011: OHCHR: <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>> (accessed on 30-03-2013).

<sup>26</sup> *Ross v Canada*; *General Comment 34*: par 11, 12.

<sup>27</sup> *Mpaka-Nsusu v Zaire* 157/1983 (1986) (UNHRC); *Primo Jose Essono Mika Miha v Equatorial Guinea* 414/1990 (1994) (UNHRC): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/html/vws414.htm>> (accessed on 29-03-2013).

<sup>28</sup> *General Comment 34*: par 23.

<sup>29</sup> Nowak 2004: 443-444; *Ballantyne, Davidson, McIntyre v Canada* 359/1989 and 385/1989 (1993) (UNHRC): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/html/v359385.htm>> (accessed on 29-03-2013).



Jayawickrama argues that the interplay between the right to freedom of expression and restrictions in terms of the duties and responsibilities contemplated in terms of article 19(3) ultimately determines the scope of the individual's right in terms of article 19(2). It follows that, when a state restricts freedom of expression in accordance with the prerequisites of article 19(3), the right to freedom of expression is not impinged on.<sup>30</sup>

The UNHRC, in *General Comment 34*, reiterates that, although states parties are not precluded from prohibiting forms of "hate speech" not stipulated in article 20, as well as forms of discriminatory, derogatory and demeaning discourse, it is necessary to justify such prohibitions and their provisions in strict conformity with article 19.<sup>31</sup>

On the other hand, the recognition of "special rights and duties" in article 19(3) imposes on the "opinion-makers" an obligation not to abuse their power so as to undermine the rights of others. States parties are required to take positive measures to ensure diversity of opinion and an optimal balance between various human rights claims.<sup>32</sup> To the extent that states take an active part in the formation of public opinion, for example through press agencies or broadcasting authorities, this imposes on them the special responsibility to inform the public in an objective, impartial and balanced manner and to provide equal access to facilities.<sup>33</sup> Jayawickrama contends that different standards may be applicable to different categories of persons, such as civil servants, journalists and politicians, whose duties and responsibilities might be viewed in relation to their function in society. For instance, those responsible for radio and television programmes have special duties and responsibilities in this regard in the light of the risk of harmful effects on minors.<sup>34</sup>

Furthermore, according to Nowak, article 19 protects freedom of expression against interference not only by public authorities, but also by private parties. He bases this contention on the formulation of paragraph 1, which refers to the right to hold opinions

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<sup>30</sup> Jayawickrama 2002: 700. The same approach was followed in *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433: par 30 with respect to the relationship between section 16(1) and 16(2) of the South African Constitution.

<sup>31</sup> *General Comment 34*: par 22.

<sup>32</sup> Nowak 2004: 458; Joseph *et al* 2003: 517. According to Nowak, the "special duties and responsibilities" phrase was adopted to offer states parties an express tool to counter abuse of power by the modern mass media. It thus reinforces the obligation of states to ensure that interference does not take place on the horizontal level.

<sup>33</sup> Nowak 2004: 459-460; *General Comment 34*: par 13-17.

<sup>34</sup> Jayawickrama 2002: 697-699.

“without interference”, in contrast to article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which, in a similar context, refers to “interference by public authority”.<sup>35</sup>

### 3.2.3 *The listed purposes*

#### 3.2.3.1 “(a) For respect for the rights or reputations of others”

Joseph *et al* contend that the rights of others should be interpreted to include only constitutional rights.<sup>36</sup> Nowak does not agree. He, however, then uses freedom of religion, the prevention of discrimination, including the prohibition of advocacy of hatred on racial, religious or similar grounds, the protection of privacy, and protection of the freedom of expression of others as examples of what he regards as rights in terms of the article. All these interests constitute, or are closely related to, fundamental constitutional rights.<sup>37</sup> *General Comment 34* stipulates that the term “rights” includes human rights as recognised in the *ICCPR* and, more generally, in international human rights law.<sup>38</sup> Jayawickrama contends that the rights concerned may relate to the interests of other persons or to those of the community as a whole. This contention is endorsed in *General Comment 34*. It states that the term “others” may, for instance, refer to individual members of a community defined by its religious faith or ethnicity.<sup>39</sup>

The concept “rights or reputations of others” was interpreted by the UNHRC in *Faurisson v France*<sup>40</sup> and *Ross v Canada*. *Faurisson v France* dealt with so-called Holocaust denial, which, in terms of the *Gayssot Act*, is a criminal offence in France. The Act makes it an offence to challenge the existence or extent of crimes against humanity as defined in the London Charter of 1945.<sup>41</sup> Faurisson, a professor of literature, was interviewed by a French

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<sup>35</sup> Nowak 2004: 448-449.

<sup>36</sup> Joseph *et al* 2003: 541.

<sup>37</sup> Nowak 2004: 462.

<sup>38</sup> *General Comment 34*: par 28.

<sup>39</sup> Jayawickrama 2002: 709; *General Comment 34*: par 28; *Ross v Canada*: par 11.6; *Faurisson v France*: par 9.6.

<sup>40</sup> *Faurisson v France*: par 9.6.

<sup>41</sup> The “*Gayssot Act*”, enacted on 13 July 1990, was proposed by the Communist Deputy Jean-Claude Gayssot. Article 1 of the Act provides that “any discrimination founded on membership or non-membership of an ethnic group, a nation, a race or a religion is prohibited”. Article 9 makes it an offence in France to question the existence or size of the category of crimes against humanity as defined in the London Charter of 1945, on the basis of which Nazi leaders were convicted by the International Military Tribunal at Nuremberg

monthly magazine, which published the interview, including Faurisson's personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps. A private action was instituted against Faurisson and the editor of the magazine. Both were convicted of having committed the crime of *contestation de crimes contre l'humanité*, and fined. The UNHRC found that, although the *Gayssot Act* may be too broad and may lead to decisions or measures incompatible with the *ICCPR*, its task was to ascertain whether the conditions of the restrictions imposed on the right of freedom of expression were met in the matter before it. Since the statements concerned were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served to respect the Jewish community's right to live free from fear of an atmosphere of anti-Semitism. The Act was intended to serve the struggle against racism and anti-Semitism. The denial of the *Holocaust* was characterised as the principal vehicle for anti-Semitism. The restriction of Faurisson's freedom of expression was therefore necessary in order to protect the rights and reputations of Jews.<sup>42</sup>

However, 10 years onwards, *General Comment 34* specifically states that the *ICCPR* does not permit general prohibitions on expression of historical views, nor does it prohibit a person's entitlement to be wrong or to incorrectly interpret past events.<sup>43</sup> In this regard, with reference to *Faurisson v France*, it is proclaimed that laws that penalise the promulgation of specific views about past events, so-called "memory-laws", must be reviewed to ensure that they violate neither freedom of opinion nor expression.

Joseph *et al* make the observation that *Ross v Canada* is the last in a number of UNHRC cases which have dismissed complaints about restrictions on the public expression of extreme right-wing views. This is in contrast to the protection afforded to the complainant in the matter of *Kim v Republic of Korea*, which dealt with article 7 of the *National Security Law of Korea*. The article provided that anyone who supports or thinks in positive terms about

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in 1945 and 1946. Its first article states that "any discrimination founded on membership or non-membership of an ethnic group, a nation, a race or a religion is prohibited".

<sup>42</sup> Joseph *et al* 2003: par 18.58: 559-563. See also *Ross v Canada* where the UNHRC, with reference to *Faurisson v France*, noted that the rights or reputations of others, the protection of which may in terms of article 19(3)(a) justify restrictions, may relate to other persons or to a community as a whole. The UNHRC concluded that, *in casu*, the restrictions imposed were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance. See Joseph *et al* 2003: 558.

<sup>43</sup> *General Comment 34*: par 49.

socialism, communism or the political system of North Korea, is liable to punishment.<sup>44</sup> According to Joseph *et al*, this potentially discriminatory position may be justified by the inclusion in the *ICCPR* of article 20, which was clearly aimed at suppressing the views of the fascist right.<sup>45</sup> Article 20 will subsequently be discussed.

3.2.3.2 “(b) For the protection of national security or of public order (ordre public), or of public health or morals”

Nowak contends that restrictions on freedom of expression and information in order to protect national security in terms of article 19(3)(b) are permissible only in serious cases of political or military threat to the entire nation.<sup>46</sup>

“Public order” may be defined as “the sum of rules which ensure the peaceful and effective functioning of society”. The French concept *ordre public* has a similar meaning, although it seems to have a broader ambit in the private sphere than the concept of public order.<sup>47</sup> In order to prevent the complete undermining of freedom of expression in the name of the protection of public order – considering that all universally accepted fundamental principles on which a democratic society is based can possibly be included under the term *ordre public* – particularly strict requirements must be placed on the necessity of a given statutory restriction.<sup>48</sup> Limitations may include prohibitions on speech which may incite crime, violence or mass panic. To determine whether certain publications may incite these and similar responses, might not be easy. It may be an indication of a genuine threat if the said consequences have previously materialised.<sup>49</sup>

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<sup>44</sup> Joseph *et al* 2003: 95. See *JRT and the WG Party v Canada* 104/81 (1984) (UNHRC): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/html/104-1981.htm>> (accessed on 29-03-2013) and *MA v Italy* 117/81 (1984) (UNHRC): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/session39/117-1981.htm>> (accessed on 29-03-2013).

<sup>45</sup> Joseph *et al* 2003: 95.

<sup>46</sup> Nowak 2004: 463-464; *Draft General Comment 34*: par 30-33.

<sup>47</sup> Joseph *et al* 2003: 530.

<sup>48</sup> Nowak 2004: 464-466.

<sup>49</sup> Joseph *et al* 2003: 522. In *Kim v Republic of Korea* 574/1994 (1996) UNHRC: Refworld: <<http://www.unhcr.org/refworld/category.LEGAL.HRC.KOR.3f588eff7.0.html>> (accessed on 29-03-2013), it was argued that the criminalisation of support for socialism, communism or the political system of North Korea had often been applied to restrict freedom of thought, conscience and expression. The Committee noted that the complainant was convicted for having read out and distributed printed material which was viewed as corresponding with the policy statements of the DPRK (North Korea), with which country the state party was in a state of war. He was convicted by the Court on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Committee considered that North Korean policies were well known within the territory of the state party and that it was not clear how the

### 3.2.4 “provided by law”

This provision means that restrictions must be sufficiently defined in state law.<sup>50</sup> In *Ross v Canada*, the UNHRC, in this regard, noted that Ross, a teacher, had been removed from his teaching position pursuant to proceedings within the legal framework.<sup>51</sup> *General Comment 34* states that a norm, to be characterised as a “law”, may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>52</sup> It must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and it must be made public.<sup>53</sup>

### 3.2.5 “necessary”

In the final analysis, restrictions may not go further than is necessary to achieve their protective functions. Joseph *et al* comment that, although the UNHRC in *Faurisson v France* unanimously found that the application of the *Gayssot Act* to suppress Faurisson’s expression was permitted under article 19(3), the breadth of the law clearly troubled all Committee members. They warned that the law was so broad, in effect prohibiting any criticism of the conclusions of the Nuremburg Tribunal, that it could potentially prohibit certain speech in ways that fell outside article 19(3).<sup>54</sup>

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publication of similar views created a risk to national security, nor was it clear what the nature and extent of any such risk was. The Committee concluded that the state party had failed to provide specific justifications as to why it was necessary for national security to prosecute the author for the exercise of his freedom of expression. The restriction of the complainant’s right to freedom of expression was accordingly found not to be compatible with the requirements of article 19, paragraph 3, of the *ICCPR*.

<sup>50</sup> Nowak 2004: 460; Joseph *et al* 2003: 525; *Ross v Canada*: par 11.3.1.

<sup>51</sup> *Ross v Canada*: par 11.3.

<sup>52</sup> *General Comment 34*: par 25; *Leonardus JM de Groot v The Netherlands* 578/1994 (1995) (UNHRC): Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/html/dec578.htm>> (accessed on 30-03-2013).

<sup>53</sup> *General Comment 34*: par 25, with reference to *General Comment 27*: par 13 which stipulates that the laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

<sup>54</sup> Joseph *et al* 2003: 559. The proportionality test of minimum impairment of freedom of expression in determining the validity of restrictions on article 19 rights was also applied in *Ross v Canada* and *Ballantyne, Davidson and McIntyre v Canada*: par 11.4: University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/html/v359385.htm>> (accessed on 30-03-2013). See Joseph *et al* 2003: par 18.43: 543.

The necessity requirement implies a proportionality standard.<sup>55</sup> Whilst restrictions may in fact achieve one of the enumerated ends in article 19(3), those measures must also use legitimate means of achieving those ends. This view is endorsed in *Draft General Comment 34* in terms of the provision that, when a states party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in a specific and individualised way the precise nature of the threat and the necessity of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>56</sup>

Jayawickrama contends that the adjective “necessary” implies the existence of a “pressing social need”. Freedom of expression may not be suppressed unless pressing community interests with a proximate and direct nexus with the expression concerned will otherwise be endangered. He makes a significant distinction when he emphasises that what is required is not the balancing of freedom of expression with another interest as if they were of equal weight. This distinction corresponds with the view that the interrelationship between articles 19(2) and 19(3) determines the scope of the protected right to freedom of expression.<sup>57</sup> The requirement of necessity implies that the restriction must be proportional in severity and intensity to the purpose being sought.<sup>58</sup>

Schmidt similarly contends that “necessary” in context means that there must be exceptional reasons for such restrictions. In his opinion, the exceptional reasons must generally comply with the following principles: they must be clearly and narrowly defined; they must be applied by a body which is independent of political, commercial or other unwarranted influences; and they must be applied in a manner which is neither arbitrary nor discriminatory, and which is subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal.<sup>59</sup> Furthermore, restrictions must respect the principle that no one should be penalised for statements which are true, neither should they be

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<sup>55</sup> The UNHRC, in *Ross v Canada*: par 11.6, applied a proportionality standard when in its consideration of the necessity requirement it took into account that the complainant’s rights were subjected to the minimum impairment necessary to protect the rights of the Jewish community; Joseph 2001: 93.

<sup>56</sup> *General Comment 34*: par 35-36.

<sup>57</sup> Jayawickrama 2002: 709-710.

<sup>58</sup> Nowak 2004: 460; Van Dijk, Van Hoof, Van Rijn & Zwaak 2006: par 14.4.1: 793-794; *General Comment 34*: par 34; *Unabhängige Initiative Informationsvielfalt v Austria* 28525/95 (2002) (ECHR): par 35.

<sup>59</sup> Schmidt 2008: 5-6.

criminally penalised for the dissemination of “hate speech”, unless it has been proven that they did so with the intention of inciting discrimination, hostility or violence.<sup>60</sup>

Schmidt cautions that, as far as sanctions are concerned, the least intrusive and restrictive measures should be applied in order to minimise the chilling effect on freedom of expression. Any imposition of sanctions should be in strict conformity with the principle of proportionality. In the context of the protection of religious freedom, restrictions on freedom of expression must be formulated in a way that makes it clear that their sole purpose is to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism.<sup>61</sup>

As for the media, the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance, and prior censorship should not be used as a tool to restrict the space for debate and discussion. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably, belief systems, opinions, and institutions, as long as this does not amount to advocating hatred of an individual. This does not mean that it should be standard practice to be “harsh” and “unreasonable”. Good journalism will often be guaranteed through a whole set of self-regulation practices, including ethical and professional standards, codes of ethics, and media-accountability mechanisms operated by the media themselves.<sup>62</sup> Especially in the media and in circumstances of public debate in a democratic society, the value placed by the *ICCPR* on uninhibited expression with respect to expression concerning figures in the political domain, is particularly high.<sup>63</sup>

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<sup>60</sup> Schmidt 2008: 5-6.

<sup>61</sup> Schmidt 2008: 5-6.

<sup>62</sup> Schmidt 2008: 5-6.

<sup>63</sup> *Bodrožić v Serbia and Montenegro* CCPR/C/85/D/1180/2003 (2006) (UNHRC): par 7.2: University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/1180-2003.html>> (accessed on 30-03-2013). See also *General Comment 34*: par 38-42.

### 3.3 Article 20

Article 20 of the *ICCPR* reads as follows:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### 3.3.1 Relationship with article 19

Article 20 concerns “hate speech” on the listed grounds of nationality, race and religion. In *General Comment 11* on article 20,<sup>64</sup> the UNHRC indicates that the prohibitions imposed by the article are fully compatible with the right to freedom of expression as contained in article 19. The prohibitions in article 20 in fact fall within the ambit of article 19(3). The prohibition of propaganda relating to war is necessary for the protection of national security, and the prohibition of advocacy of hatred is necessary for the respect of the rights of others and for the public order. Legal prohibitions under article 20 are thus to be interpreted in conformity with the restrictions that are legitimate under article 19(3). Accordingly, a limitation that is justified on the basis of article 20 must necessarily comply with article 19, paragraph 3.<sup>65</sup> The distinctive nature of article 20 is that it obliges states parties to adopt the necessary legislative measures prohibiting the action referred to, while article 19(3) merely entitles them to do so. *General Comment 34* stipulates that it is “only to this extent that article 20 may be considered as *lex specialis* with regard to article 19”.<sup>66</sup>

Ghanea distinguishes “hate speech” in terms of article 20 from discriminatory speech in general, which may fall under article 19(3), on the basis that discriminatory speech reflects and encourages bias and harmful stereotyping, while “hate speech”, by contrast, “makes use of traditional epithets or symbols of derision to vilify and express contempt on the basis of group membership, and seems more likely to cause emotional distress and to provoke visceral, rather than articulate, response”.<sup>67</sup> However, as significantly pointed out by Langton

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<sup>64</sup> *General Comment 11* on article 20 of the *ICCPR* 1983: University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/gencomm/hrcom11.htm>> (accessed on 30-03-2013).

<sup>65</sup> Nowak 2004: 477; *General Comment 34*: par 52-54; *Ross v Canada*: par 10(6).

<sup>66</sup> Eltayeb 2008: 10; *General Comment 34*: par 51.

<sup>67</sup> Ghanea 2008: 4.



with respect to article 4 of the *ICERD*, which will subsequently be discussed, the terms “advocacy” and “incitement” imply that the “hate speech” contemplated in terms of article 20 is “speech with effects on hearers’ attitudes”.<sup>68</sup> It appears that “assaultive hate speech” which does not constitute incitement to harm should be addressed outside the ambit of article 20.

### **3.3.2 Conceptual interpretation**

According to Nowak, a sensible interpretation of article 20 will take into account its responsive character with regard to the Nazi racial-hatred campaigns which ultimately led to the murder of millions of human beings on the basis of racial, religious and national criteria. Against this background, he argues that the article does not require states parties to prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination.<sup>69</sup> The requirement to prohibit the public incitement of racial hatred and violence within a state, or against other states and people, is aimed rather at combating the horrors of fascism, racism and National Socialism at their origin. Actions should accordingly only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.<sup>70</sup> Previous violent response by certain parts of the population to perceived criticism is a relevant consideration in ascertaining what will give rise to incitement of hostility and violence. While all types of “hate speech” have the power to intimidate minority groups, and in the process disrupt society, “hate speech” that attempts to minimise or justify past instances of such violence can be extremely disruptive.<sup>71</sup>

In a study prepared by ARTICLE 19<sup>72</sup> for the regional expert meeting on article 20, organised by the OHCHR in Vienna from 8 to 9 February 2010, it is argued that article 20 of the *ICCPR* requires both the criteria of intention to promote hatred publicly and of the imminence, not

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<sup>68</sup> Langton in Maitra & McGowan 2012: 75.

<sup>69</sup> Nowak 2004: 474-475.

<sup>70</sup> Jahangir 2008: par 47: 4.

<sup>71</sup> Ghanea 2008: 2 with reference to *General Comment 10* on article 19 of the *ICCPR* adopted at the 19<sup>th</sup> session on 29/06/1983, par 1, 4, and to the following jurisprudence from the UNHRC: *Faurisson v France*: par 9.6 and *Ross v Canada*: par 6.11; Ghanea 2008: 5-6.

<sup>72</sup> ARTICLE 19 is a company limited by guarantee, registered in England and Wales. It campaigns with people around the world for the right to exercise free-expression rights. It has offices in Bangladesh, Brazil, Kenya, Mexico, Tunisia, Senegal and the United Kingdom (UK), and works in collaboration with 90 partners worldwide. Article 19: <<http://www.article19.org/pages/en/what-we-do.html>> (accessed on 30-03-2013).

just the likelihood, of the risk of discrimination, hostility or violence. These are cumulative requirements in respect of “hate speech”, rather than alternative ones.<sup>73</sup>

The study suggests that the term “hatred” should be defined as a state of mind characterised as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”. “Discrimination” should be understood as any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language, political or other opinion, national or social origin, nationality, property, birth or other status colour, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. “Violence” should be understood as the intentional use of physical force or power against another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation. “Hostility” implies a manifested action. It is not just a state of mind, but implies a state of mind which is acted upon. In context, “hostility” can be defined as the manifestation of hatred, meaning the manifestation of “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”.<sup>74</sup>

### ***3.3.3 Criminal penalties***

The study furthermore contends that article 20 of the *ICCPR* lays down the only time when speech should attract criminal penalties on the ground that it incites hatred. It recommends that a threshold to be passed before speech is deemed “hate speech” falling under article 20, should be articulated and codified. The aim of the codification should be to assist in drawing the line between forms of speech that warrant criminal sanctions, and hurtful, harmful, offensive and even inflammatory speech that should be sanctioned by means of civil law or administrative law, for example sanctions imposed by the communication, media and press councils, consumer protection authorities, or other regulatory bodies. Criminal legislation should include specific reference to the terms “incitement to discrimination, hostility and

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<sup>73</sup> Bukovska, Callamard & Parmar for ARTICLE 19 2010: 5, 9, 18-19: [http://www2.ohchr.org/english/issues/opinion/arts1920\\_ICCPR/docs/CRP7Callamard.pdf](http://www2.ohchr.org/english/issues/opinion/arts1920_ICCPR/docs/CRP7Callamard.pdf) (accessed on 30-03-2013).

<sup>74</sup> Bukovska *et al* for ARTICLE 19 2010: 7.

violence” rather than “incitement to hatred” only. The view is expressed that the overly broad use of “hate speech” prohibitions marks an absence of alternative options to the criminal law. This indicates a failure of the legal and political systems to provide for other causes of action in order to guarantee and implement the right to equality and take positive steps to promote diversity and pluralism.<sup>75</sup>

The Report of the European Commission for Democracy through Law expresses the corresponding view that “criminal sanctions related to unlawful forms of expression which impinge on the right to respect for one’s beliefs ... should be seen as last resort measures to be applied in strictly justifiable situations when no other means appears capable of achieving the desired protection of individual rights in the public interest”. Moreover, “the application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology”.<sup>76</sup>

### **3.3.4 Religious speech**

The UNHRC, in *General Comment 34*, cautions that blasphemy laws should not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith. The view is expressed that states parties should repeal criminal law provisions on blasphemy and displays of disrespect for religion or other belief systems, other than in the specific context of compliance with article 20.<sup>77</sup> Eltayeb contends that it is of the utmost importance not to confuse a racist statement with an act of defamation of religion. The elements are not the same. The legal measures, and, in particular the criminal measures, which have been adopted to combat racism may therefore not necessarily be applicable to defamation of religion. Furthermore, the distinction should take into account that a broad application of the restrictions imposed by article 20(2) may also limit scholarship on religious

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<sup>75</sup> Bukovska *et al* for ARTICLE 19 2010: 9. The view is expressed that a broad application of “incitement” laws in relation to speech targeting vulnerable groups and speech by Holocaust deniers should not pass the threshold of article 20 and should accordingly not be dealt with in terms of the criminal law.

<sup>76</sup> Bukovska *et al* for ARTICLE 19 2010: 5, 9, 18-19; ARTICLE 19 2010: Commentary on the regulation of “hate speech” in Kenya: par 25, 55: <<http://www.art19.org/pdfs/analysis/kenya-commentary-on-the-regulation-of-hate-speech-.pdf>> (accessed on 30-03-2013).

<sup>77</sup> *General Comment 34*: par 48.

issues.<sup>78</sup> Jahangir, in this regard, articulates the relevant perspective that criminalising speech that defames religions can limit discussion of practices within religions that may impinge on other human rights. In such a context, criticism of practices which are, or appear to be, in violation of human rights, but which are sanctioned by religion or are perceived to be sanctioned by religion, and which may fall within the ambit of defamation of religion, will be subdued.<sup>79</sup>

### 3.3.5 Case law

The UNHRC has not as yet made a finding that expression is in breach of article 20 of the *ICCPR*.<sup>80</sup> Article 20 has, however, had an influence on jurisprudence in matters where restrictions on speech have been found to be justified under article 19(3). In some instances, expression has been identified as the type of expression contemplated by article 20.<sup>81</sup> The following decisions illustrate this observation. The perspective articulated in *Faurisson v France* is of pertinent relevance with respect to “hate speech” regulation in South Africa, which will be discussed in Chapter V.

Even though the matter in *Faurisson v France* was heard by the Committee on the basis that it raised issues under article 19 of the *ICCPR*, four Committee members invoked article 20. Two of these members, in an individual concurring opinion, stated that the crime of which the complainant was convicted under the *Gayssot Act* did not expressly include the element of incitement, nor did the statements which served as the basis for the conviction fall clearly within the boundaries of incitement in accordance with article 20(2). They acknowledged that there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20(2). This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable

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<sup>78</sup> Eltayeb 2008: 10. See also Jahangir 2008: par 31-39: 2-3, 49: 4; and Jahangir & Doudou 2006: par 42.

<sup>79</sup> Jahangir 2008: par 43: 3.

<sup>80</sup> See Bayefsky.com: Index of cases of CCPR:

<[http://www.bayefsky.com/complain/18\\_list\\_article\\_ccpr.php](http://www.bayefsky.com/complain/18_list_article_ccpr.php)> (accessed on 30-03-2013).

<sup>81</sup> Joseph *et al* 2003: 567. See also *JRT and the WG Party v Canada*; *Ross v Canada*.

under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.<sup>82</sup>

In *Taylor and Western Guard Party v Canada*,<sup>83</sup> the UNHRC regarded messages based on the theme that corrupt Jewish conspirators controlled Canadian society, caused unemployment and inflation, weakened Canadians by encouraging perversion, laziness, drug use and race mixing, became enriched by stealing property that belonged to Canadians, and had founded and continued to espouse communism, which was responsible for many economic problems, to constitute advocacy of racial or religious hatred “which Canada [had] an obligation under article 20(2) of the Covenant to prohibit”.<sup>84</sup>

### **3.4 The Camden Principles on Freedom of Expression and Equality**

To conclude the discussion of articles 19 and 20, the Camden Principles on Freedom of Expression and Equality<sup>85</sup> are now considered. The Principles to a great extent summarise the views referred to above.

ARTICLE 19 prepared the Principles on the basis of discussions involving a group of high-level UN and other officials, as well as civil society and academic experts in international human rights law on freedom of expression and equality issues, at meetings held in London in 2008 and 2009. The Principles represent an interpretation of international law and standards, accepted state practice as reflected, inter alia, in national laws and the judgments of national courts, and the general principles of law recognised by the community of nations. The following Principles relate to permissible restrictions on the right to freedom of expression:

Principle 2.2 provides that states should ensure that domestic constitutional provisions set out clearly the scope of permissible restrictions on the right to freedom of expression, including the fact that such restrictions must be provided for by law, must be narrowly defined to serve

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<sup>82</sup> *Faurisson v France*: par 10(C) 4.

<sup>83</sup> *Taylor and Western Guard Party v Canada* 104/1981 (1983) (UNHRC): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/undocs/html/104-1981.htm>> (accessed on 30-03-2013).

<sup>84</sup> *Taylor and Western Guard Party v Canada*: par 8(b); see also *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892.

<sup>85</sup> ARTICLE 19: <<http://www.art19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>> (accessed on 30-03-2013).

a legitimate interest recognised in the constitution, and must be necessary in a democratic society in order to protect that interest.

Principles 11 and 12 read as follows:

- 11(1) States should not impose any restrictions on freedom of expression that are not in accordance with the standards set out in Principle 2.2 and, in particular, restrictions should be provided by law, serve to protect the rights or reputations of others, national security or public order, or public health or morals, and be necessary in a democratic society to protect these interests. This implies, among other things, that restrictions: i. Are clearly and narrowly defined and respond to a pressing social need; ii. Are the least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression; iii. Are not overbroad, in the sense that they do not restrict speech in a wide or untargeted way, or go beyond the scope of harmful speech and rule out legitimate speech; iv. Are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.
- 11(2) States should review their legal framework to ensure that any restrictions on freedom of expression conform to the above.
- 12(1) All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that: i. The terms “hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; ii. The term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group; iii. The term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups; iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.
- 12(2) States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.

12(3) States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.

12(4) States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12.1 have a right to an effective remedy, including a civil remedy for damages.

12(5) States should review their legal framework to ensure that any hate speech regulations conform to the above.

#### **4. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)<sup>86</sup>**

The *ICERD* imposes stringent obligations on signatories to eradicate racism, including the promulgation of laws against “hate speech”.<sup>87</sup>

##### **4.1 Discrimination**

Article 1 broadly defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Article 2 states that states parties condemn racial discrimination and, inter alia, provides that they must prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation. Article 5 constitutes an undertaking to, in compliance with article 2, prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

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<sup>86</sup> The *ICERD* was adopted by the UN General Assembly on 21 December 1965 and entered into force on 4 January 1969. It was ratified by Germany in 1969, Canada in 1970, the USA, with material reservations, particularly with regard to restrictions on freedom of expression, in 1994, and South Africa in 1998: OHCHR: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>> (accessed on 30-03-2013).

<sup>87</sup> See *General Recommendation 31 on the ICERD (Racial discrimination in the administration and functioning of the criminal justice system) 2005*: par 4: Bayefsky.com: <[http://www.bayefsky.com/themes/expression\\_hate-speech\\_general-comments.pdf](http://www.bayefsky.com/themes/expression_hate-speech_general-comments.pdf)> (accessed on 30-03-2013).

distinction as to race, colour, or national or ethnic origin, to equality before the law, to security of the person and protection by the state against violence or bodily harm, to political rights, and to civil rights, including the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression.

Article 6 provides that states parties must assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals and other state institutions, against any acts of racial discrimination which violate their human rights and fundamental freedoms contrary to the *ICERD*, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

#### **4.2 Expression under article 4**

Article 4 reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare [as] an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organisations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.



### 4.2.1 Mandatory nature

The Committee on the Elimination of Racial Discrimination (CERD), in *General Recommendation 7*,<sup>88</sup> confirmed the mandatory nature of article 4. In *General Recommendation 15*, it expresses the opinion that the prohibition of the dissemination of all ideas based on racial superiority or hatred is compatible with the right to freedom of opinion and expression as embodied in article 19 of the *UDHR* and as recalled in article 5(d)(viii) of the *ICERD*.<sup>89</sup>

Part III of *General Recommendation 30*<sup>90</sup> is concerned with the protection of non-citizens against “hate speech” and racial violence. Article 11 directs states parties to:

take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens

and article 12 directs them to:

take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.

### 4.2.2 Racist intent

The fact that racist intent is not explicitly required for the offences that are constituted in terms of article 4 has led to controversy. Thornberry states that a stance that “the mere act of dissemination is penalised, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination”, violates basic principles of criminal liability in

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<sup>88</sup> *General Recommendation 7* on article 4 of the *ICERD* (Legislation to eradicate racial discrimination) 1985: Bayefski.com: <[http://www.bayefsky.com/general/CERD\\_genrecom\\_7.php](http://www.bayefsky.com/general/CERD_genrecom_7.php)> (accessed on 30-03-2013).

<sup>89</sup> *General Recommendation 15* on article 4 of the *ICERD* (Organised violence based on ethnic origin) 1993: par 4: Bayefski.com: <[http://www.bayefsky.com/general/CERD\\_genrecom\\_15.php](http://www.bayefsky.com/general/CERD_genrecom_15.php)> (accessed on 30-03-2013).

<sup>90</sup> *General Recommendation 30* on the *ICERD* (Discrimination against non-citizens) 2004: UNHRC: <<http://www.unhchr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?Opendocument>> (accessed on 30-03-2013).

many, if not most, jurisdictions. He notes, in particular, that the element of striving to bring about a particular result is commonly built into the notion of incitement. In his view, it is not unreasonable to read the *Convention* such that the local application of the relevant provisions “will be embedded in criminal law principles”.<sup>91</sup>

Lerner reasons that article 4 has an opening paragraph condemning all propaganda and all organisations based on theories of racial superiority, and three operating paragraphs imposing concrete duties on states parties.<sup>92</sup> The phrase “all dissemination of ideas based on racial superiority or hatred” in article 4(a) should accordingly be read in the context of the opening paragraph.<sup>93</sup> A restriction of the ambit of article 4(a) to racist propaganda and organised racist activities can be reconciled with *General Recommendation 15*, which relates article 4 to the time when the *ICERD* was being adopted. It states that, at the time, there was a widespread fear of the revival of authoritarian ideologies. In this context, the proscription of the dissemination of ideas of racial superiority and of organised activity likely to incite persons to racial violence was properly regarded as crucial. Evidence of organised violence based on ethnic origin, and the political exploitation of ethnic difference since that time, rendered the implementation of article 4 of increased importance.<sup>94</sup> Thornberry comments that the

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<sup>91</sup> Thornberry 2008: 14.

<sup>92</sup> Lerner 1979: 47.

<sup>93</sup> Lerner 1979: 48-53.

<sup>94</sup> *General Recommendation 15*: par 1-4 reads as follows:

1. When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.
2. The Committee recalls its General Recommendation VII in which it explained that the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.
3. Article 4(a) requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.
4. In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen’s exercise of this right carries special duties and responsibilities, specified in

“strongly preventive or pro-active mode” of article 4 reflects on such phenomena as “the discourses of dehumanisation that are characteristic elements of genocidal processes or other forms of oppressive action”.<sup>95</sup>

#### **4.2.3 Relationship to the UDHR**

Limitations in terms of article 4 have been criticised on the basis that they are contradictory to section 19 of the *UDHR*. Countries reconcile the relevant provisions of the *UDHR* and the *ICERD* in different ways. The USA considers the *First Amendment* and the *UDHR* as overriding the *ICERD*. Great Britain holds that the *ICERD* is not mandatory and that its language allows a country to accept laws limiting “hate speech” only when deemed necessary in order to obtain the end specified in the earlier part of article 4. Canada argues that the rights and limitations in the *ICERD* should be balanced. This approach is reflected in section 319 of the Canadian *Criminal Code* and its assessment in terms of section 1 of the Canadian Charter of Rights and Freedoms in *R v Keegstra*, which will be discussed in Chapter IV. Belgium, likewise, argues for a reconciliation between the right to freedom of opinion and expression and the requirements in terms of article 4. Some countries do, however, interpret article 4 straightforwardly as saying that “hate speech” must be made illegal.<sup>96</sup>

The relevant consideration is that article 4 requires due regard to the principles embodied in the *UDHR*, which include the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression protected in articles 18 and 19 of the *UDHR* quoted in section 2 above. Johannessen remarks in this regard that article 4 does not require that its implementation be effected at constitutional level. Moreover, it does not mandate that legislation in terms of it be immune to, for instance, constitutional review of an imposed sanction.<sup>97</sup> The Committee of Ministers of the Council of Europe, in its *Recommendation R(97)20*, confirmed that the obligation in article 4 is qualified, in that states parties should

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article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

See *General Recommendation 15*: par 1.

<sup>95</sup> Thornberry 2005: 253.

<sup>96</sup> Trager & Dickerson 1999: 127-128; Lerner 1979: 53; *Jersild v Denmark* 15890/89 (1993) (ECHR): par 21.

<sup>97</sup> Johannessen 1997: 147.

have “due regard” to the principles embodied in the *UDHR* and the rights expressly set forth in article 5 of the *ICERD*.<sup>98</sup>

As was mentioned in the discussion of article 20 of the *ICCPR*, Langton contends that what he refers to as “assaultive hate speech” is apparently not captured in the definition of “hate speech” in terms of article 4 of the *ICERD*.<sup>99</sup> In his view, the article uses the term “promote” in conjunction with “dissemination”, and “incitement” in the sense of “advocate” rather than “cause”. It follows that the expression contemplated is directed towards hearers who are not members of the target group.<sup>100</sup> This perspective will be reflected when examples of relevant decisions of the CERD are discussed. Of material relevance in this regard is to distinguish between the obligation to prohibit all discrimination, and the related obligation to criminalise expression of the nature described in article 4(a). Langton’s perspective will have particular relevance when section 16(2)(c) of the South African Constitution and subsection 7(a) and sections 10 and 12 of the *Equality Act* are discussed in Chapter V.

#### ***4.2.4 Relevant case law***

In the matter of *Mohammed Hassan Gelle v Denmark*,<sup>101</sup> the CERD observed:

It does not suffice, for purposes of article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in article 4 of the Convention, under which State parties “undertake to adopt immediate and positive measures” to eradicate all incitement to, or acts of, racial discrimination. It is also reflected in other provisions of the Convention, such as article 2, paragraph 1(d), which requires States to “prohibit and bring to an end, by all appropriate means,” racial discrimination, and article 6,

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<sup>98</sup> *Recommendation R(97)20* of the Committee of Ministers of the Council of Europe to member states on “hate speech” (Explanatory memorandum) 1997: par 18: Council of Europe: <[http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1997\)020&expmem\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1997)020&expmem_EN.asp)> (accessed on 30-03-2013).

The principles were set out in particular with respect to “hate speech” in the media.

<sup>99</sup> Langton in Maitra & McGowan 2012: 77.

<sup>100</sup> Langton in Maitra & McGowan 2012: 75, 77.

<sup>101</sup> *Mohammed Hassan Gelle v Denmark* 34/2004 (2006) (CERD): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/country/decisions/34-2004.html>> (accessed on 30-03-2013).

guaranteeing to everyone “effective protection and remedies” against acts of racial discrimination.<sup>102</sup>

The petitioner in the matter was a Danish citizen and a resident of Somali origin. The initial complaint had been lodged in terms of section 266(b) of the *Danish Criminal Code*, which reads as follows:

- (1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
- (2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance.

No investigation was, however, opened, based on the view that “it could not reasonably be presumed that a criminal offence subject to public prosecution had been committed”.<sup>103</sup>

The matter related to a letter, published in the daily newspaper *Kristeligt Dagblad*, by a member of the Danish Parliament and leader of the Danish People’s Party to the editor of the newspaper. The letter was given the title “A crime against humanity” and stated: “How many small girls will be mutilated before Lene Espersen, Minister of Justice (Conservative People’s Party), prohibits the crime?” The letter referred to the fact that the Minister had presented the proposed Bill dealing with the issue of female genital mutilation, to the Danish–Somali Association for comment. This action was compared with asking an association of paedophiles whether they had any objections to a prohibition against child sex, or asking rapists whether they had any objections to an increase in the sentence for rape.<sup>104</sup>

The CERD noted that the choice of “paedophiles” and “rapists” as examples for the comparison could be understood as degrading or insulting to an entire group of people, that is, persons of Somali descent, on account of their national or ethnic origin and not because of their views, opinions or actions regarding the offending practice of female genital mutilation.

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<sup>102</sup> *Mohammed Hassan Gelle v Denmark*: par 7.3.

<sup>103</sup> *Mohammed Hassan Gelle v Denmark*: par 2.2 and fn 1.

<sup>104</sup> *Mohammed Hassan Gelle v Denmark*: par 2.1.

Moreover, the fact that the statements were made in the context of a political debate did not absolve the states party from its obligation to investigate whether or not the statements amounted to racial discrimination.

The CERD recalled that *General Recommendation 30* recommends that states parties take “resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of ‘non-citizen’ population groups, especially by politicians”. It related “hate speech” contemplated in *General Recommendation 30* to paragraph 4 of *General Recommendation 15*, and hence to article 4 of the *ICERD*.<sup>105</sup> It reiterated that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas. In the light of the states party’s failure to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place, the CERD concluded that articles 2, paragraph 1(d)<sup>106</sup>, 4 and 6 of the *ICERD* had been violated.<sup>107</sup>

The reasoning in *Hagan v Australia*<sup>108</sup> is of particular interest with respect to the distinction between discriminatory speech, and “hate speech” within the ambit of article 4(a). The complainant contended that the use in public announcements and match commentaries of the name of a grandstand which, in 1960, was named the “E.S. ‘Nigger’ Brown Stand” in honour of a well-known sporting and civic personality who had died in 1972, was extremely racially offensive, fell within the definition of racial discrimination in article 1, and violated articles 2(1)(c), 4, 5(d)(i) and (ix), 5(e)(vi) and (f), 6 and 7 of the *ICERD*. Mr Brown was of white Anglo-Saxon descent. He was nicknamed “Nigger Brown” “either because of his fair skin and blonde hair, or because he had a penchant for using ‘Nigger Brown’ shoe polish”.<sup>109</sup> The complainant contended that the use of words such as the offending term in a public way constituted a formal sanction or approval of the term. He argued that words convey ideas and power, influence thoughts and beliefs, and may perpetuate racism and reinforce prejudices leading to racial discrimination, which also runs counter to the objectives of article 7. The

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<sup>105</sup> *Mohammed Hassan Gelle v Denmark*: par 7.5.

<sup>106</sup> Section 2(1)(d) reads as follows: “Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”

<sup>107</sup> *Mohammed Hassan Gelle v Denmark*: par 7.6-8.

<sup>108</sup> *Hagan v Australia* 26/2002 (2003) (CERD): UN: <<http://www.unhchr.ch/tbs/doc.nsf/0/53243a41b17d73a8c1256d2b002ef02d?Opendocument>> (accessed on 30-03-2013).

<sup>109</sup> *Joseph et al* 2003: 550.

states party, in its argument, referred to contextual elements, namely that the offending term was displayed as an integral part of the name of the person who was being honoured and that the nickname, as had been corroborated, inter alia, by the absence of any complaint for 40 years, even if it did initially have a racial connotation, had ceased to have such connotation.

The CERD considered that the *ICERD*, as a living instrument, must be interpreted and applied taking into consideration the circumstances, including the sensitivities, of contemporary society. It therefore recommended that the states party take the necessary measures to secure the removal of the offending term.

Joseph *et al* observe that there was no suggestion by the CERD that the impugned words were so offensive as to amount to a racial vilification contrary to article 4(a) of the *ICERD*. It can accordingly be stated that racial discrimination as contemplated by the *ICERD* can be manifested by an incident of expression that causes offence, but that not all instances of dissemination of offensive discriminatory expression constitute “hate speech” in terms of article 4.<sup>110</sup>

*Zentralrat Deutscher Sinti und Roma et al v Germany*<sup>111</sup> related to a complaint regarding a letter published in an issue of the journal of the Association of German Detective Police Officers. The letter, inter alia, stated that Sinti and Roma were disproportionately involved in criminal activities, and that hardly any Roma worked regularly and paid social insurance. The states party argued that not every discriminatory statement fulfils the elements of the offence of incitement to racial or ethnic hatred. There must be a certain targeting element for incitement of racial hatred. The CERD agreed and concluded that the facts did not disclose a violation of articles 4(a) and 6 of the *ICERD*.

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<sup>110</sup> Joseph *et al* 2003: 552. See also *LR et al v Slovak Republic* 31/2003 (2005) (CERD): Netherlands Institute of Human Rights:  
<<http://sim.law.uu.nl/SIM/CaseLaw/ICERDcase.nsf/7b3b4f4570e34865c125685e00333e15/2ddea147580f69d7c1256fce0033cda6?OpenDocument>> (accessed on 30-03-2013).

See also *Ahmad v Denmark* Communication No. 16/1999, UN Doc *ICERD/C/56/D/16/1999* (2000); Joseph *et al* 2003; University of Minnesota Human Rights Library:  
<<http://www1.umn.edu/humanrts/country/decisions/16-1999.html>> (accessed on 30-03-2013): 548-550.

<sup>111</sup> *Zentralrat Deutscher Sinti und Roma et al v Germany* 038/2006 (2008): Netherlands Institute of Human Rights:  
<<http://sim.law.uu.nl/SIM/CaseLaw/CERDcase.nsf/7b3b4f4570e34865c125685e00333e15/eeac71a8d036b0d0c125746b002ba802?OpenDocument>> (accessed on 30-03-2013).

*LK v The Netherlands*<sup>112</sup> related to actions taken by local inhabitants who gathered outside a house in respect of which a lease had been offered to the complainant, a Moroccan citizen. These actions included threats that, if he were to accept the lease over the house, they would set fire to it and would damage his car, as well as a petition to the Municipality that noted that the complainant could not be accepted in the street, and that another house should be allocated to him. It was found that these actions constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, and were therefore contrary to article 4(a) of the *ICERD*.<sup>113</sup>

At issue in the case of *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*<sup>114</sup> was whether certain statements fell within any of the categories of impugned speech set out in article 4, and, if so, whether those statements were protected by the “due regard” provision as it relates to freedom of speech. The statements were made during a march in Askim in commemoration of Nazi leader Rudolf Hess. Mr Sjolie, who led the march, upon reaching the town square, made a speech in which he, inter alia, stated:

...every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts

and

Our dear Führer Adolf Hitler and Rudolf Hess sat in prison for what they believed in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism ... .<sup>115</sup>

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<sup>112</sup> *LK v The Netherlands* 4/1991 (1993) (CERD): University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/country/decisions/CERD-DLR.htm>> (accessed on 30-03-2013); Joseph *et al* 2003: par 18.56-18.57: 553-559.

<sup>113</sup> *LK v The Netherlands*: par 6.3, 6.6.

<sup>114</sup> *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway* 030/2003 (2006) (CERD): Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/CERDcase.nsf/f318ad264bb0b16cc125667f004f30ae/de1daf225a63f354c1257090003bf33f?OpenDocument>> (accessed on 30-03-2013).

<sup>115</sup> *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*: par 2.1.



The majority of the Norwegian Supreme Court held that the speech contained derogatory and offensive remarks, but that no actual threats had been made, nor any instructions given to carry out any particular actions. The CERD, contrary to the finding of the Court, considered these statements to contain ideas based on racial superiority or hatred. In the CERD's view, deference to Hitler and his principles and "footsteps" had to be taken as incitement at least to racial discrimination, if not to violence.<sup>116</sup>

The CERD noted that the principle of freedom of speech has been afforded a lower level of protection in cases of racist and "hate speech" dealt with by other international bodies, and that the CERD's own *General Recommendation 15* clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.<sup>117</sup> The CERD furthermore noted that the "due regard" clause relates generally to all principles embodied in the *UDHR*, and not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due-regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, in certain circumstances, of limiting the exercise of this right.<sup>118</sup> The conclusion was reached that the statements of Sjolie, given that they were of "exceptionally/manifestly offensive character", were not protected by the due-regard clause, and that, accordingly, his acquittal by the Supreme Court of Norway gave rise to a violation of article 4, and consequently article 6, of the *ICERD*.<sup>119</sup>

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<sup>116</sup> *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*: par 10.4.

<sup>117</sup> *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*: par 10.5.

<sup>118</sup> *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*: par 10.5.

<sup>119</sup> *The Jewish Community of Oslo; the Jewish Community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt v Norway*: par 10.6, 11.

## **5. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)<sup>120</sup>**

The *CEDAW* does not contain a provision that explicitly deals with either the protection or limitation of freedom of expression, and no cases dealing with harmful expression based on gender or sex have as yet been decided by the *CEDAW* Committee on this basis.<sup>121</sup> It can, however, be argued that the prohibition of harmful speech based on sex and gender gives effect to the general aims of the *CEDAW*.

### **5.1 Discrimination**

The *CEDAW* defines discrimination against women as:

...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>122</sup>

#### ***5.1.1 The obligation in terms of article 2 to eliminate discrimination***

Article 2 states that states parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. States parties undertake to incorporate the principle of equality of men and women in their legal systems, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women, establish tribunals and other public institutions to ensure the effective protection of women against discrimination, and

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<sup>120</sup> The *CEDAW* was adopted in 1979 by the UN General Assembly and 99 states are currently parties to it. It defines discrimination against women and sets up an agenda for national action to end such discrimination. It was ratified by Canada in 1981 and Germany in 1985, and was signed and ratified by South Africa in 1993 and 1995 respectively. See UN Division for the Advancement of Women (UNDAW): <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>> (accessed on 30-03-2013).

<sup>121</sup> Sepper 2008-2009: 595 indicates that the Philippine proposal included the following paragraph: “Any advocacy of hatred for the feminine sex that constitutes incitement to discrimination against women shall be prohibited by law.” States participating in the drafting of the *CEDAW* objected to the paragraph’s potential to restrict freedom of expression and, therefore, ultimately chose not to adopt it.

<sup>122</sup> The *CEDAW*: article 1.

ensure elimination of all acts of discrimination against women by persons, organisations or enterprises.<sup>123</sup>

*General Recommendation 28* on the core obligations of states parties under article 2 makes it clear that the *CEDAW* not only concerns sex-based but also gender-based discrimination against women. Discrimination against women based on sex and gender is also inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, marital status, age, class, caste, and sexual orientation. In related contexts, discrimination on the basis of sex or gender may negatively affect women to a different degree or in different ways than men. States parties must legally recognise and prohibit such intersecting forms of discrimination.<sup>124</sup>

The phrase “effect or purpose” renders the definition as broad as the definition of race discrimination in the *ICERD*. *General Recommendation 28* furthermore affirms a substantive approach by stating that identical or neutral treatment of women and men might constitute discrimination against women if such treatment results in, or has the effect of, women being denied the exercise of a right because of no recognition of the pre-existing, gender-based disadvantage and inequality that women face.<sup>125</sup> It is furthermore stated that article 2 also imposes a due-diligence obligation on states parties to prevent discrimination by private actors.

### ***5.1.2 The obligation in terms of article 5 to eliminate stereotyping***

Article 5(a) provides that states parties must take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of

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<sup>123</sup> UNDAW: <<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>> (accessed on 30-03-2013). Article 2(f) provides that states parties undertake “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.

<sup>124</sup> *General Recommendation 28* on article 2 of the *CEDAW* (Core obligations of states parties) 2010: OHCHR: <<http://daccess-ods.un.org/TMP/9271130.56182861.html>> (accessed on 30-03-2013).

<sup>125</sup> The broad definition of violence in the *UN General Assembly Declaration on the Elimination of Violence against Women* substantiates a substantive approach. Violence is defined as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life: *UN General Assembly Declaration on the Elimination of Violence against Women* 1993: A/RES/48/104: UN: <<http://www.un.org/documents/ga/res/48/a48r104.htm>> (accessed on 30-03-2013).

the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.

Sepper indicates that, in its early years, the *CEDAW* Committee gave article 5(a) the narrowest possible meaning, limiting its function to mandating the adoption of public information and education campaigns. The broad terms of article 5(a), however, render it potentially far-reaching. The *CEDAW* Committee gradually intensified its demands in accordance with the development stages of gender equality in respective states. Specifically as regards media portrayal of women, the *CEDAW* Committee has, in response to states' periodic reports, proposed the regulation of the media to combat negative gender roles and stereotypes. In its response to Germany's Fifth Periodic Report,<sup>126</sup> the *CEDAW* Committee, for example, expressed concern that women are sometimes depicted by the media and in advertising as sex objects and in traditional roles. It therefore recommended that policies be strengthened and programmes implemented to help ensure the elimination of stereotypes associated with traditional roles in the family and the workplace, and in society at large.

In *General Recommendation 19*,<sup>127</sup> the *CEDAW* Committee acknowledges that traditional attitudes in terms of which women are regarded as subordinate to men perpetuate widespread practices involving violence or coercion.<sup>128</sup> *General Recommendation 23*<sup>129</sup> recognises that stereotyping, including that perpetrated by the media, confines women in political life to issues such as the environment, children and health, and excludes them from responsibility for finance, budgetary control and conflict resolution.<sup>130</sup>

Holtmaat and Tobler contend that, because stereotyped views will not change by themselves, it is necessary to develop an active policy in which every legal measure and every public

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<sup>126</sup> Fifth Periodic Report (Germany): Concluding observations 2004: (CEDAW/C/DEU/5) OHCHR: <<http://www2.ohchr.org/english/bodies/cedaw/docs/co/GermanyCO30.pdf>> (accessed on 30-03-2013).

<sup>127</sup> *General Recommendation 19* of the Committee on the Elimination of Discrimination against Women (Violence against women) 1992: UN: <<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>> (accessed on 30-03-2013).

<sup>128</sup> The *CEDAW*: par 11, 12.

<sup>129</sup> *General Recommendation 23* of the Committee on the Elimination of Discrimination against Women (Women in political and public life) 1997: UN: <<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>> (accessed on 30-03-2013).

<sup>130</sup> *General Recommendation 23*: par 12; UNDAW: <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>> (accessed on 30-03-2013). See also *Optional Protocol to the Convention on the Elimination of Discrimination against Women* 1999: UNDAW: <<http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>> (accessed on 30-03-2013).

policy is critically examined in order to ensure the elimination of fixed gender stereotypes. This goes further than an obligation to ban gender stereotypes from the mass media and advertising, and from school teaching materials.<sup>131</sup> In the recent matter of *Karen Tayag Vertido v The Philippines*,<sup>132</sup> the *CEDAW* Committee, in its discussion of states parties' obligations, appeared to affirm that there is a "due diligence obligation" inherent in articles 2(f) and 5(a) of the *CEDAW* to address wrongful gender stereotyping by private actors beyond gender-based violence against women.<sup>133</sup>

## 5.2 Conclusion

The definition of discrimination in terms of the *CEDAW* is broad to the extent that states parties, in terms of the principle of due diligence, are also obliged to take preventative measures. This includes a focus on the elimination of sex and gender stereotypes. The relevance of the provisions of the *CEDAW* in the context of this study appears from the inclusion in the South African Constitution of gender as a basis for "hate speech", and the fact that the *Equality Act*, in its Preamble, specifically refers to South Africa's international obligations under binding treaties, inter alia the *CEDAW*. Moreover, the endorsement in principle of the limitation of free expression by means of measures aimed at the elimination of stereotypes, especially in the media, is significant.

## 6. THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS<sup>134</sup>

### 6.1 Freedom of expression

Article 10(1) of the *Convention* protects freedom of expression in the following terms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

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<sup>131</sup> Holtmaat & Tobler 2005: 408-409.

<sup>132</sup> *Karen Tayag Vertido v The Philippines* C/46/D/18/2008 (2010) (*CEDAW*).

<sup>133</sup> Cusack & Timmer 2011: par 5.

<sup>134</sup> The *Convention* was adopted in 1950 and entered into force in 1953. It was ratified by 47 countries. Germany ratified it in 1952.

authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Article 10(2) provides that 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 interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 9 provides that everyone has the right to freedom of thought, conscience and religion. This includes the freedom to manifest religion or belief in worship, teaching, practice and observance, subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 provides that the enjoyment of the rights and freedoms set forth in the *Convention* must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>135</sup>

The subsequent discussion of the recommendations of the Council of Europe, and of case law of the European Court of Human Rights (ECHR), will indicate that the ambit of article 10(2) is narrow. When the “rights of others” are considered, it has to be noted that the *Convention* does not mention human dignity as a protected right as such, and that, moreover, the discrimination provision specifically concerns equal security of enjoyment of the rights and freedoms set forth in the *Convention*. It is significant that “hate speech aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided for in terms of article 10” is regarded as falling outside the protective ambit of article 10.

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<sup>135</sup> See also *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* 2000: article 1: Council of Europe: <http://conventions.coe.int/treaty/en/treaties/html/177.htm> (accessed on 30-03-2013).

## **6.2 Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on “hate speech”, adopted on 30 October 1997**

The *Recommendation*, inter alia, contains the following relevant principles:

In terms of Principle 3, governments should ensure that interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

In terms of Principle 4, national law and practice should allow the courts to bear in mind that specific instances of “hate speech” may be so insulting to individuals or groups as not to enjoy the level of protection afforded by article 10 of the *Convention* to other forms of expression. This is the case where “hate speech” is aimed at the destruction of the rights and freedoms laid down in the *Convention* or at their limitation to a greater extent than provided for in terms of article 10.

In terms of Principle 5, national law and practice should allow the competent prosecution authorities, in cases involving “hate speech”, to give careful consideration to the suspect’s right to freedom of expression, given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, when imposing criminal sanctions on persons convicted of “hate speech” offences, ensure strict respect for the principle of proportionality.

In terms of Principle 6, national law and practice relating to “hate speech” should take due account of the role of the media in communicating information and ideas which expose, analyse and explain specific instances of “hate speech” and the underlying phenomenon in general, as well as the right of the public to receive such information and ideas. To this end, national law and practice should distinguish clearly between the responsibility of the author

of expressions of “hate speech”, on the one hand, and the responsibility of the media and media professionals to communicate information and ideas on matters of public interest, on the other hand.

In terms of Principle 7, in furtherance of Principle 6, national law and practice should take account of the fact that reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by article 10, paragraph 1, of the *Convention*, and may only be interfered with under the conditions set out in paragraph 2 of that provision.

### **6.3 Recommendations of the Council of Europe’s European Commission against Racism and Intolerance (ECRI) in its *General Policy Recommendation No. 7*<sup>136</sup>**

The Council, inter alia, recommended that the constitutions of member states should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the *Convention*.<sup>137</sup>

It is further recommended that the law should penalise the following acts when committed intentionally:<sup>138</sup>

- a) public incitement to violence, hatred or discrimination; b) public insults and defamation or
- c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes; f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d), e); g) the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with

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<sup>136</sup> *ECRI (European Commission against Racism and Intolerance) General Policy Recommendation No. 7 (National legislation to combat racism and racial discrimination) 2002: Council of Europe: <[http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N7/Recommendation\\_7\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#TopOfPage)> (accessed on 30-03-2013).*

<sup>137</sup> *ECRI General Policy Recommendation No. 7: par 3.*

<sup>138</sup> Compare with section 2 of the South African *Draft Prohibition of Hate Speech Bill* of 2004. See Chapter VI: 6.3.



the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f); h) racial discrimination in the exercise of one's public office or occupation.<sup>139</sup>

Furthermore, the law should provide for effective, proportionate and dissuasive sanctions, inter alia, for the offences set out above, as well as for ancillary or alternative sanctions.<sup>140</sup>

The Committee of Ministers' *Declaration on Freedom of Political Debate in the Media*, adopted in February 2004, holds that defamation or insult by the media should not lead to prosecution, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as "hate speech".<sup>141</sup>

According to Harris, O'Boyle and Warbrick, the ECHR ascribes a hierarchy of value, first to political expression, then to artistic expression, and, lastly, to commercial expression. The character of the expression involved is an important factor in determining whether interference with freedom of speech is permitted.<sup>142</sup> The requirement of a "pressing social need" in order to limit political speech places a considerable burden upon the state to show that its action was necessary, but, for advertising, it appears to be sufficient that its restrictions were not unreasonable. Other relevant factors are related to the vigour of the expression, the means by which it is communicated, and the audience at which it is directed. The issue of proportionality of the interference to its objective has come to play a prominent part in deciding cases on freedom of expression. It is, however, significant in this regard that the requirement of necessity of the interference has to be met before the existence of "relevant and sufficient" grounds for the interference is demonstrated.<sup>143</sup>

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<sup>139</sup> *ECRI General Policy Recommendation No. 7*: par 18.

<sup>140</sup> *ECRI General Policy Recommendation No. 7*: par 23.

<sup>141</sup> *Declaration on Freedom of Political Debate in the Media* (adopted by the Committee of Ministers of the Council of Europe) 2004: Council of Europe: <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=118995&Lang=en>> (accessed on 1-04-2013).

<sup>142</sup> Harris, O'Boyle & Warbrick 1995: 396, 411, 414.

<sup>143</sup> Harris *et al* 1995: 396, 411, 414.

## 6.4 Decisions of the European Court of Human Rights (ECHR)

The following decisions illustrate the approach of the Court in the application of article 10. The focus of the references is on the definitional ambit of the guarantee in terms of article 10(1), read with article 10(2). The effect of context is also illustrated.

### 6.4.1 *Incitement*

*In Ceylan v Turkey*<sup>144</sup> and *Sener v Turkey*<sup>145</sup>, the Court held that the decisions to punish the publishers or authors violated article 10. The cases concerned incitement to violence.

In the former matter, the president of a workers' union wrote an article describing state laws and actions as "terrorism", as "intensifying genocide", and as "bloody massacres", and calling for people to "struggle" against these and to oppose them with "all our powers". The Turkish Court, and one dissenting judge in the ECHR proceedings, suggested that the article could "be construed as an incitement to hatred and extreme violence". The Court majority, while noting that "there is little scope under article 10(2) ... for restrictions on political speech or on debate on matters of public interest", affirmed that "where such remarks incite to violence ... the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression". The Court nevertheless protected the publication. According to Baker, the Court seemed unwilling to find language to constitute incitement to violence unless the language does so explicitly and in circumstances where a violent response seems to be the likely result of the publication. The Court took note of the tense period during which the remarks were made, but concluded that, "despite its virulence, [the article] does not encourage the use of violence or armed resistance or insurrection". This fact, plus the severity of the penalty the state imposed, namely imprisonment of one year and eight months, plus a fine, led the Court to find Ceylan's conviction to be a violation of article 10.<sup>146</sup>

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<sup>144</sup> *Ceylan v Turkey* 23556/94 (1999) (ECHR).

<sup>145</sup> *Sener v Turkey* 26680/95 (2000) (ECHR).

<sup>146</sup> Baker 2003: 19.

In *Garaudy v France*,<sup>147</sup> the Court found that a book published by the applicant “systematically denied the crimes against humanity perpetrated against the Jewish community”. The Court stated that “denying crimes against humanity is ... one of the most serious forms of racial defamation of Jews and of incitement of hatred [against] them”. It regarded Holocaust denial as unprotected expression, and endorsed the *Gayssot Act* on the basis that it “falls within measures ‘necessary in a democratic State’ for the protection of the rights of others, provided for in Article 10, as it concerns the protection of the rights of the [Nazi’s] victims in terms of ensuring and safeguarding the respect due to their memory”. The Court reiterated that article 10 of the *Convention* has to be interpreted in the light of the provisions of article 17, according to which none of its provisions may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the *Convention*.<sup>148</sup>

#### **6.4.2 The press**

The Court, in several assessments, took into account the essential function of the press in a democratic society, namely to impart information and ideas on all matters of public interest and to play its vital role as public watchdog. The Court was mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation, with the proviso that the limits of permissible criticism are narrower in relation to a private citizen than with respect to politicians and governments.<sup>149</sup>

*Jersild v Denmark* concerned the conviction, in terms of Danish “hate speech” legislation, of a Danish journalist who had interviewed several members of an extremist youth group, the Greenjackets, on a news programme. The Greenjackets, in the course of the interview, made extreme racist remarks. They were also convicted. The Court affirmed that there could be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups, and did not enjoy the protection of article 10.

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<sup>147</sup> *Garaudy v France* 65831/01 (2003) (ECHR) Icelandic Human Rights Centre: <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/498>> (accessed on 1-04-2013).

<sup>148</sup> *Garaudy v France*: par A.1; Altman in Maitra & McGowan: 2012.

<sup>149</sup> See Van Dijk *et al* 2006: 775 with reference to, inter alia, the judgments in *Unabhängige Initiative Informationsvielfalt* 26 February 2002: par 37; *Prager and Oberschlick* 26 April 1995: par 38; *Gomes da Silva* 28 September 2000: par 34; *Pedersen and Baadsgaard*, 19 June 2003: par 65; *Ukrainian Media Group* 29 March 2005: par 38-40.

The conviction of the journalist was, however, found to be in violation of article 10. The Court held as follows:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.<sup>150</sup>

It seems clear from the discussion in *Jersild* that an appropriately drafted statute which targets the actual perpetrators of “hate speech” will not necessarily breach article 10.<sup>151</sup>

In *Karman v Russia*,<sup>152</sup> the applicant, the editor in chief of a newspaper, published an article in which he described Terentyev, the organiser of a meeting of the Russian National Unity movement, as the “local neofascist”. The Court considered that the term was to be regarded as a value judgement rather than a statement of fact. It was reiterated that even a value judgement without any factual basis to support it might be excessive. The Court nevertheless noted that the applicant did offer documentary evidence that the movement was indeed anti-Semitic in nature and that its ideals were similar to those of National Socialism. Furthermore, taking into account the role of a journalist and the press to impart information and ideas on matters of public concern, even those that might “offend, shock or disturb”, the Court found that the use of the term “local neofascist” to describe Terentyev’s political inclination did not exceed the acceptable limits of criticism.

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<sup>150</sup> *Jersild v Denmark*: par 35.

<sup>151</sup> Bamforth, Malik & O’Cinneide 2008: 509.

<sup>152</sup> *Karman v Russia* 29372/02 (2006) (ECHR): Summary: Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0ad4f5ba6f6a119bc125668f004c455e/347402e3717c4133c12572450042fae1?OpenDocument&Highlight=0,hated>> (accessed on 1-04-2013). See also *Sevgi Yilmaz v Turkey* 62230/00 (11 April 2006) (ECHR): Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0ad4f5ba6f6a119bc125668f004c455e/595f6aa02c2558a9c125714c002ba43d?OpenDocument&Highlight=0,hated>> (accessed on 1-04-2013); *Kar and others v Turkey* 58756/00 (3 May 2007) (ECHR): Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0ad4f5ba6f6a119bc125668f004c455e/9d7a63625f1a8748c12572cf0046703c?OpenDocument&Highlight=0,hated>> (accessed on 1-04-2013).

### 6.4.3 Political speech

In *Féret v Belgium*,<sup>153</sup> the complainant was convicted by a Belgian criminal court for publicly inciting to racism, hatred and discrimination following complaints concerning leaflets distributed by the Front National Party, a political party, during election campaigns. The leaflets had been distributed by Féret who, as chairman of the Front National Party, was the editor in chief of the party's publications. The leaflets presented certain immigrant communities as criminally minded and keen to exploit the benefits they derived from living in Belgium. The leaflets also sought to make fun of the immigrants.<sup>154</sup>

It was contended that an inevitable risk was created of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners. The Court stated that the impact of racist and xenophobic discourse was magnified in an electoral context in which arguments naturally became more forceful. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. The four judges in the majority were of the opinion that the Belgian authorities had acted within the scope of the justified limitations restricting freedom of political expression, as the litigious leaflets contained incitement to hatred and discrimination based on nationality or ethnic origin. It was concluded that article 10 had not been violated.<sup>155</sup>

Three dissenting judges disagreed with the findings of the Court, arguing that the leaflets were in essence part of a sharp political debate during election time. The dissenting judges expressed the opinion that the leaflets did not incite to violence, nor to any concrete discriminatory act, and that criminal convictions in the domain of freedom of political debate and "hate speech" should only be considered as necessary in a democratic society in cases of direct incitement to violence or discriminatory acts. They argued that the reference to a potential impact of the leaflets in terms of incitement to discrimination or hatred did not sufficiently justify an interference with freedom of expression.<sup>156</sup>

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<sup>153</sup> *Féret v Belgium* 15615/07 (2009) (ECHR): Summary: Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0ad4f5ba6f6a119bc125668f004c455e/a691c278887848d4c12575f2002d8833?OpenDocument&Highlight=0,hate>> (accessed on 1-04-2013).

<sup>154</sup> *Féret v Belgium*: Summary.

<sup>155</sup> *Féret v Belgium*: Summary.

<sup>156</sup> Voorhoof: 2009.

#### 6.4.4 *Blasphemy and religious insults*<sup>157</sup>

Member states have an obligation under article 9 of the *Convention* to protect freedom of religion, including the freedom to manifest one's religion. The challenge facing the authorities is how to strike a fair balance between the interests of individuals as members of a religious community in ensuring respect for their right to manifest their religion, and the general public interest or the rights and interests of others, including the right to criticise and debate religious activities, teachings and beliefs.

Bamforth, *et al* distinguish between blasphemy and “hate speech”. They remark that, in so far as the ECHR analyses the harm caused by the relevant expression in terms of the harm to the “religious feelings” of individuals or religious groups rather than harm in the sense of group hatred, the offence of blasphemy is at issue. While the offence of incitement to religious hatred is aimed at preventing hatred against those who hold a certain belief, the purpose of blasphemy laws is to protect religious belief and sentiment from attack.<sup>158</sup> In the latter case, it can be argued that “the state loses democratic legitimacy with respect to those who do not believe in the truths protected by a law of blasphemy”.<sup>159</sup>

In accordance with this view, in its recommendation on blasphemy, religious insults and “hate speech” against persons on grounds of their religion,<sup>160</sup> the Parliamentary Assembly of the Council of Europe reaffirmed that “hate speech” against persons, whether on religious grounds or otherwise, should be penalised by law. It was, however, recommended that blasphemy, as an insult to a religion, should not be deemed a criminal offence. National law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence, and then only in accordance with article 10, paragraph 2.<sup>161</sup>

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<sup>157</sup> See Wiles 2006: 124-128.

<sup>158</sup> Bamforth *et al* 2008: 510-511; Addison 2007: 122. For an overview of the English law on blasphemy, see Patrick 2008: 196-207.

<sup>159</sup> Post 2007: 78.

<sup>160</sup> *Recommendation 1805* (On blasphemy, religious insults and “hate speech” against persons on grounds of their religion) 2007: Council of Europe: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm> > (accessed on 1-04-2013).

<sup>161</sup> *Recommendation 180*: par 4, 12-14.

The application of the necessity and proportionality requirements in the context of religious speech is illustrated in the Court's decision in *Gündüz v Turkey*.<sup>162</sup> Criminal proceedings were instituted against Gündüz, a Turkish national, following his appearance, in his capacity as a leader of Tarikat Aczmendi (a community that describes itself as an Islamic sect), on a television programme. A state security court found him guilty of inciting the people to hatred and hostility on the basis that he had described contemporary secular institutions as "impious", had fiercely criticised secular and democratic principles, and had openly called for the introduction of the *shariah*.<sup>163</sup> He was sentenced to two years' imprisonment and a fine.

In the Court's view, the applicant's conviction amounted to interference with his right to freedom of expression. The Court found that merely defending the *shariah*, without calling for the use of violence to establish it, could not be regarded as "hate speech" based on religious intolerance. Furthermore, when weighing up the competing interests of freedom of expression and the protection of the rights of others in order to determine whether the interference was necessary for the purposes of article 10(2) of the *Convention*, greater weight should have been given to the fact that the applicant was actively engaged in a lively public debate. The Court accordingly found that it had not been convincingly established that the restriction was necessary.<sup>164</sup>

The Court, in the case of *İ.A. v Turkey*,<sup>165</sup> came to the conclusion that the Turkish authorities had not violated freedom of expression by convicting a book publisher for publishing insults against "God, the Religion, the Prophet and the Holy Book". The Court was of the opinion that this interference in the applicant's right to freedom of expression had pursued the legitimate aims of preventing disorder and protecting morals and the rights of others. The issue for the Court was to determine whether the conviction of the publisher had been necessary in a democratic society. This involved the balancing of the applicant's right to impart his ideas on religious theory to the public, on the one hand, and the right of others to

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<sup>162</sup> *Gündüz v Turkey* 35071/97 (2003) (ECHR): Summary: Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0ad4f5ba6f6a119bc125668f004c455e/3afe92916187310741256e1c0046b835?OpenDocument&Highlight=0.hatred>> (accessed on 1-04-2013). See also *Bingöl v Turkey* 36141/04 (2010) (ECHR) (accessed on 1-04-2013).

<sup>163</sup> "Shariah" means Islamic law.

<sup>164</sup> *Gündüz v Turkey*: Summary.

<sup>165</sup> *İ.A. v Turkey* 42571/98 (2005) (ECHR): Summary: Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/36ea3be85b4dc446c1257077004386bc?OpenDocument>> (accessed on 1-04-2013).

respect for their freedom of thought, conscience and religion<sup>166</sup>, on the other hand. The Court reiterated that religious people have to tolerate and accept the denial by others of their religious beliefs, and even the propagation by others of doctrines hostile to their faith. A distinction is, however, to be made between “provocative” opinions and abusive attacks on one’s religion. According to the Court, one part of the book indeed contained an abusive attack on the Prophet of Islam. In this part, it was asserted that some of the statements and words of the Prophet were “inspired in a surge of exultation, in Aisha’s arms” and that “God’s messenger broke his fast through sexual intercourse, after dinner and before prayer”. It was furthermore stated that “Mohammed did not forbid sexual intercourse with a dead person or a living animal”. The Court accepted that believers might legitimately believe that these passages of the book constituted an unwarranted and offensive attack on them. Hence, the conviction of the publisher was a measure that was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. Accordingly, there had been no violation of article 10 of the *Convention*.<sup>167</sup>

The same approach was followed in the matter of *Otto-Preminger v Austria*,<sup>168</sup> which concerned the seizure and forfeiture, based on section 188 of the *Austrian Penal Code*,<sup>169</sup> of a certain film that was potentially offensive to Christians. The Court noted that, because there was no uniform conception of the significance of religion in society throughout Europe, the state had a wide margin of appreciation as to whether it was necessary to prevent the applicant from showing the film in order to protect the rights of the local people.<sup>170</sup> The Court acknowledged that the film under scrutiny portrayed God the Father, the Virgin Mary and

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<sup>166</sup> Article 9: “Freedom of thought, conscience and religion” determines as follows:

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>167</sup> Voorhoof 2005.

<sup>168</sup> *Otto-Preminger v Austria* 13470/87 (1994) (ECHR): Summary: Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0/1703f1d98ca04f72c1256640004c2940?OpenDocument>> (accessed on 1-04-2013).

<sup>169</sup> Section 188 of the *Austrian Penal Code* reads as follows:

Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.

<sup>170</sup> Harris *et al* 1995: 393.



Jesus Christ in a provocative way, that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans, and that, in seizing the film, the Austrian authorities had acted “to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner”, which was within their “margin of appreciation” under article 10(2).<sup>171</sup>

In *Wingrove v UK*,<sup>172</sup> the British Board of Film Classification refused a classification for a video film which depicted sexually explicit scenes of Christ and St Theresa of Avila on the basis that it was blasphemous in terms of section 4(1) of the *Video Recordings Act* of 1984. The Court held that there was no breach of article 10. It accepted that the aim of the interference was to protect against the treatment of a religious subject in such a manner “as to be calculated (that is bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented”, which was an aim within the meaning of paragraph 2 of article 10 and consonant with the aim of the protections afforded by article 9 to religious freedom.<sup>173</sup>

The Court noted that strong arguments have been advanced in favour of the abolition of blasphemy laws, for example that such laws may discriminate against different faiths or denominations, or that legal mechanisms are inadequate to deal with matters of faith or individual belief. It, however, stated that there is as yet not sufficient common ground to conclude that a system whereby a state can impose restrictions on the propagation of material

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<sup>171</sup> *Otto-Preminger v Austria*: par 52-56. The same principles were applied in the case of *Aydin Tatlav v Turkey* 50692/99 (2006) (ECHR) where the Court, in its assessment of whether the interference in the applicant’s right in order to protect the morals and the rights of others could be legitimised as “necessary in a democratic society”, came to the conclusion that, although certain passages of a book contained strong criticism of religion in a sociopolitical context and Muslims could feel offended by the caustic commentary on their religion, these passages had no insulting tone and did not contain an abusive attack on Muslims or on sacred symbols of Muslim religion.

<sup>172</sup> *Wingrove v UK* 17419/90 (1996) (ECHR): Summary: Netherlands Institute of Human Rights: <<http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/308595c4c6cdd756c1256640004c31ed?OpenDocument>> (accessed on 1-04-2013). See also *Choudury v UK* [1991] 12 HRLJ: 172 where the European Commission on Human Rights did not accept a claim that because the blasphemy law in England only protected Christianity it was in breach of the *European Convention on Human Rights*. Blasphemy and blasphemous libel were long-established offences in English common law, but were abolished by the *Criminal Justice and Immigration Act of 2008*. Addison notes that prosecutions for blasphemy in the UK have been rare in the 20<sup>th</sup> century. The last prosecution was in the case of *Whitehouse v Gay News Ltd and Lemon* [1979] 2 WLR: 281 for publishing a homo-erotic poem concerning Christ and the crucifixion. For historical reasons, the blasphemy law in the UK only applied to the protection of the Christian religion in its Anglican form. See Addison 2007: 123.

<sup>173</sup> *Wingrove v UK*: par 48; Bamforth *et al*: 510.

on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the *Convention*. The Court affirmed that a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of religion. Moreover, what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place.<sup>174</sup>

## 7. THE EUROPEAN UNION (EU)

### 7.1 Background

The EU was created in the aftermath of the Second World War. It began as a purely economic organisation, but eventually extended its influence to policy areas, including development aid, the environment, and the promotion of human rights both internally and around the world. Human dignity, freedom, democracy, equality, the rule of law and respect for human rights are the core values of the EU. Since the 2009 signing of the *Treaty of Lisbon*, the EU's Charter of Fundamental Rights consolidates these rights in a single document. Binding treaties, voluntarily and democratically agreed to by all member countries, have set out the EU's goals in its many areas of activity. The EU's institutions as well as EU governments are legally bound to uphold these treaties as well as EU directives and regulations.<sup>175</sup>

### 7.2 The Court of Justice of the EU (ECJ)

The Court constitutes the judicial authority of the EU and, in cooperation with the courts and tribunals of the member states, ensures the uniform application and interpretation of EU law.<sup>176</sup>

The judgment of the Court in the matter of *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*<sup>177</sup> is significant.<sup>178</sup> Belavusau describes the decision as

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<sup>174</sup> *Wingrove v UK*: par 57-58.

<sup>175</sup> European Union: <[http://europa.eu/about-eu/index\\_en.htm](http://europa.eu/about-eu/index_en.htm)> (accessed on 1-04-2013).

<sup>176</sup> Court of Justice of the European Union: <[http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/)> (accessed on 1-04-2013).

marking the “long-awaited birth of what can be symbolically entitled a European law of freedom of expression”, with the focus on the victim rather than on the action.<sup>179</sup> The case concerned a statement made by a co-director of a Brussels firm, Mr Feryn, during an interview with a newspaper, to the effect that his company’s customers did not want immigrants to install up-and-over doors in their homes, because they were reluctant to give them access to their private residences for the period of the work.<sup>180</sup> Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000,<sup>181</sup> which implements the principle of equal treatment among persons irrespective of racial or ethnic origin, was invoked. The Court held that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of article 2(2)(a) of the Directive, with such statement “being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market”. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking’s actual recruitment practice does not correspond to those statements.<sup>182</sup> *Belavusau* reiterates that, in the view of the Court, the existence of such direct discrimination was not dependent on the identification of a complainant who claimed to have been the victim.<sup>183</sup> The character of the utterances, namely “the speech-as-performative significance of the director’s interview”, was sufficient to demonstrate employment discrimination.<sup>184</sup>

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<sup>177</sup> *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* C-54/07; 2008 (ECRI): 5187.

<sup>178</sup> The scenario that was addressed and the reasoning of the Court will be related to section 12 of the *Equality Act*, which will be discussed in Chapter V: 4.5.3.7.

<sup>179</sup> *Belavusau* 2012: 22, 29.

<sup>180</sup> *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*: par 16.

<sup>181</sup> *Council Directive 2000/43/EC* (Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) 2000: Eur-Lex: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>> (accessed on 3-04-2013). Article 2 provides as follows:

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

<sup>182</sup> *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*: par 41.

<sup>183</sup> *Belavusau* 2012: 30.

<sup>184</sup> *Belavusau* 2012: 30-31.

## 8. THE AMERICAN CONVENTION ON HUMAN RIGHTS<sup>185</sup>

### 8.1 Freedom of expression

Article 13(1) of the *Convention* protects freedom of thought and expression, which includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.<sup>186</sup>

Article 13(5) is a so-called “hate speech” provision and reads as follows:

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

Article 12 protects freedom of conscience and religion, which includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. Article 12(3) prescribes that freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, morals, or the rights or freedoms of others.

Article 14(1) determines that anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has

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<sup>185</sup> *American Convention on Human Rights*: UNHRCR: Human and Constitutional Rights Documents: Signatories and ratification:

<[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)> (accessed on 1-04-2013). The bodies responsible for overseeing compliance with the *Convention* are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both of which are organs of the Organisation of American States (OAS): The Inter-American Court of Human Rights: <<http://www.corteidh.or.cr/historia.cfm>> (accessed on 1-04-2013. Pasqualucci 2003: 2-3.

<sup>186</sup> Article 13(2) determines that the exercise of this right shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the rights or reputations of others, or the protection of national security, public order, or public health or morals. Article 13(3) determines that the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

According to Pasqualucci, the initial draft of article 13(5) was broader, reading: “Any propaganda for war shall be prohibited by law, as shall any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, crime or violence.” The United States of America put forward a proposed amendment, which was accepted and resulted in the current provision. The report of the United States (US) delegation commented that the wording that resulted in the final provision was guided by the US Supreme Court decision in *Brandenburg v Ohio*, which set forth the principle that:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>187</sup>

## **8.2 Decisions of the Inter-American Court of Human Rights**

The Court has not yet been presented with the opportunity to interpret the *American Convention's* restriction on “hate speech”. The following cases concerned defamation matters, but certain general remarks and approaches are relevant.

The Court, in the case of *Herrera-Ulloa v Costa Rica*,<sup>188</sup> explained that freedom of expression has an individual and a social dimension. Freedom of expression, on the one hand, requires that no one be arbitrarily limited or impeded in expressing his or her own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever, and to have access to the thoughts expressed by others. For the ordinary citizen, awareness of other people's opinions and information is as important as the right to impart his or her own opinions. The Court, with reference to judgments of the ECHR, regarded freedom of expression as the “cornerstone of democracy”, being “one of the essential pillars of democratic society and a

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<sup>187</sup> Pasqualucci 2006: 415-416.

<sup>188</sup> *Herrera-Ulloa v Costa Rica*, judgment of 2 July 2004 (IACHR): par 108-110: Corteidh: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf)> (accessed on 1-04-2013). See also *Case of Ivcher-Bronstein*, judgment of 6 February 2001, Series C No. 74: par 146, 148; *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.)*, judgment of 5 February 2001, Series C No. 73: par 64, 66.

fundamental condition for its progress and the personal development of each individual” which “should not only be guaranteed with regard to the dissemination of information and ideas that are received favourably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population”. This approach, according to the Court, is in accordance with the requirements of pluralism, tolerance and the spirit of openness, without which no democratic society can exist.

With reference to the interpretation of the ECHR of section 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the Court stated that restrictions on freedom of speech must be necessary in a democratic society. The ECHR had ruled that “necessary”, while not synonymous with “indispensable”, implied “the existence of a pressing social need”. For a restriction to be “necessary”, it is not enough to show that it is “useful” or “reasonable”. Hence, the restriction must be proportionate to the legitimate interest that justifies it, and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with the effective exercise of the right to freedom of expression.<sup>189</sup>

The Court acknowledged the essential role that the media play as vehicles for the exercise of the social dimension of freedom of expression in a democratic society, which is why it is vital that the media are able to gather the most diverse information and opinions. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion. It thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society. Within this context, journalism is the primary and principal manifestation of freedom of expression of thought.<sup>190</sup>

In the recent case of *Kimel v Argentina*,<sup>191</sup> the Court reiterated the need to protect the rights of freedom of thought and expression, as well as other rights which might be affected by the abusive exercise of freedom of thought and expression. This requires due compliance with the limitations imposed by the *Convention* in accordance with strict proportionality criteria.

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<sup>189</sup> With reference to *Dichand and Others v Austria* 29271/95 (2002) (ECHR): par 39 and *Lingens v Austria* 9815/82 (1986) (ECHR): par 42.

<sup>190</sup> *Herrera-Ulloa v Costa Rica*: par 112-113; *Castells v Spain* 11798/85 (1992) (ECHR): par 43.

<sup>191</sup> *Kimel v Argentina*, judgment of 2 May 2008 (IACHR).

The state must not only minimise restrictions on the dissemination of information, but should further informative pluralism. This will entail the protection of the human rights of those who face the power of the media, and the assurance of “structural conditions which allow the equitable expression of ideas”.<sup>192</sup>

The Court in particular emphasised the principle of minimum penal law typical of democratic societies. Of special importance is the Court’s statement that criminal proceedings should be resorted to “where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused”. Moreover, the criminal definition of such conduct must be clear and accurate. Imposing a criminal sanction regarding the right to inform or give one’s opinion has to be an exception. It should require actual malice and extremely serious conduct on the part of the individual who expressed the opinion. An absolute necessity to resort to criminal proceedings should be a prerequisite. At all stages, the burden of proof must fall on the party who brings the criminal proceedings.<sup>193</sup>

The Court acknowledged that, in a democratic society, the press must inform extensively on issues of public interest which affect social rights. In the domain of political debate on issues of great public interest, the expression of statements which shock, irritate or disturb public officials or any sector of society is also protected.<sup>194</sup>

## **9. THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS**

The African member states of the Organisation of African Unity (OAU) adopted the *African Charter on Human and Peoples’ Rights*<sup>195</sup> in 1981. It entered into force in 1986. Articles 1 to 6 of the *Charter* protect the equality, dignity and freedom of all individuals. Article 8 guarantees freedom of conscience as well as the free practice of religion, and provides that no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. The *Charter* does not stipulate specific limitations in terms of this provision. Article 9 determines as follows: “1. Every individual shall have the right to receive

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<sup>192</sup> *Kimel v Argentina*: par 53-57.

<sup>193</sup> *Kimel v Argentina*: par 77-80.

<sup>194</sup> *Kimel v Argentina*: par 89-93.

<sup>195</sup> *African Charter on Human and Peoples’ Rights* 1981: University of Minnesota Human Rights Library: <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> (accessed on 30-03-2013).

information. 2. Every individual shall have the right to express and disseminate his opinions within the law.” Article 28 bestows on every individual the duty to respect and consider his or her fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.<sup>196</sup> The OAU was disbanded in 2002 and replaced by the African Union (AU). The *Charter*, however, remained in force. The main judicial organ of the AU, the African Court on Human and Peoples’ Rights, has to the writer’s knowledge not as yet made any findings specifically with respect to “hate speech”.

## 10. CONCLUSION

The relevance of the discussion in this chapter to the objectives of the study is clearly apparent. Section 39(1)(b) of the South African Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. This means that obligations in terms of international agreements have to be primarily complied with, and, moreover, that potential compliance or non-compliance should, where applicable, be a consideration in the purposive interpretation of provisions. With respect to the first objective of the study, namely to determine the reasons informing the categorical exclusion from constitutional protection of certain forms of expression and the scope of such exclusion, it is of pertinent relevance that section 16(2)(c) of the Constitution can be directly related to article 20 of the ICCPR. As far as the second objective is concerned, namely to explore the considerations that will be relevant in a fairness analysis, not only will expressive value be diminished if the expression concerned violates international commitments, but views expressed by international tribunals in the application of fairness or justification standards have comparative value. As far as the third objective is concerned, namely the interpretation and determination of legislative and common law “hate speech” restrictions, it is particularly significant that the *Equality Act* gives explicit recognition to South Africa’s obligations in this respect in terms of the *ICERD* and the *CEDAW*. Especially with respect to the former, direct connections will be made between specific provisions of the Act and, in particular, article 4 of the *Convention*.

The discussion highlighted the following relevant general trends in the international approach to the restriction of freedom of expression:

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<sup>196</sup> With regard to duties, see also articles 27 and 29.



“Due regard” to the right to freedom of expression in discrimination analysis was confirmed as requiring an appreciation of freedom of expression as the cornerstone of democracy, and as essential for the personal development of the individual and the exposure of stereotypes and unfair discrimination. The nature and context of expression, be it political, artistic, journalistic, or historically, politically or religiously sensitive, play a role in this analysis.

It appears that there is a broad consensus that the criminalisation of expression should apply only in situations where individual rights and the public order are intentionally put at risk by the instigation of hatred to the extent that effective protection is only possible by means of criminal sanction.

Both article 20 of the *ICCPR* and article 4 of the *ICERD* require measures to be necessary for the achievement of the specified purposes. Johannessen expresses the view that, given the fact that any expression which falls within the ambit of section 16(2) of the South African Constitution is beyond the scope of limitation analysis, section 16(2) potentially allows for “hate speech” legislation to exceed the requirements of international law.<sup>197</sup> Differently perceived, it can be inferred that the framers of the Constitution had in mind that the restriction of free expression in terms of section 16(2) will in all circumstances, and without any reasonable possibility of exception, comply with the justifiability standard set in terms of the foundational values of the Constitution. Both perspectives point towards a narrow interpretation of section 16(2).

An analogy for the view that all expression not explicitly excluded in terms of section 16(2) of the Constitution does not necessarily enjoy Constitutional protection in terms of section 16(1) can be found in the recommendation, in Principle 4 of *Recommendation R(97)20* of the Committee of Ministers of the Council of Europe on “hate speech”, that national law and practice should allow the courts to bear in mind that specific instances of “hate speech” may be so insulting to individuals or groups as not to enjoy the level of protection afforded by article 10 of the *Convention* to other forms of expression. In this regard, it should specifically be noted that it was pointed out that article 20 of the *ICCPR* and arguably article 4 of the *ICERD* do not involve direct assaultive expression, but rather expression that incites to harm

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<sup>197</sup> Johannessen 1997: 138-141, 147, 150.

the target group.<sup>198</sup> Incitement to harm is similarly an element of “hate speech” in terms of section 16(2)(c) of the South African Constitution. In the context of the South African constitutional scheme, the different views with respect to this issue will be addressed in the discussion of the application of section 36 of the Constitution.<sup>199</sup>

It is clear that international law does require regulation by means other than criminalisation of discriminatory expression outside the boundaries of article 20 of the *ICCPR* and article 4 of the *ICERD*. Prohibitions against unfair discrimination generally allow for the consideration of specific contextual aspects which may justify the restriction of discriminatory expression that does not constitute “hate speech” as defined in terms of the aforementioned articles. These include the particular sensitivity of race and gender stereotyping articulated in terms of specific treaties. Accordingly, in order to fully comply with the duties and responsibilities imposed in terms of South Africa’s international commitments, it may be necessary to limit expression outside the ambit of section 16(2) of the South African Constitution. The references to findings of international tribunals against claims of “hate speech” as defined in context, but simultaneously in favour of the alternative (unfair) discrimination claims, illustrate this. This perspective will become pertinent when the broader scope of sections 6, 10 and 12 of the *Equality Act* and the application of section 36 of the Constitution are discussed in Chapter V.

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<sup>198</sup> See 6.2 above.

<sup>199</sup> See Chapter V: 4.2.3.

# CHAPTER IV

## COMPARATIVE LAW

*If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.*

*George Washington*<sup>1</sup>

### 1. INTRODUCTION

In this chapter, the constitutional approach to the protection of freedom of expression in the United States of America (USA), Canada and Germany will be considered. The respective approaches adopted by these jurisdictions with regard to the regulation of expression in general, and expression that can be described as “hate speech” in particular, provide noteworthy perspectives, perspectives which have been recognised by the South African Constitutional Court.<sup>2</sup> Substantial distinctions will be considered, the most important being

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<sup>1</sup> The statement was made in a speech to the officers of the army at the Newburgh headquarters on 15 March 1783. See The Claremont Institute: Rediscovering George Washington: <[http://www.pbs.org/georgewashington/multimedia/larry\\_arnn.html](http://www.pbs.org/georgewashington/multimedia/larry_arnn.html)> (accessed on 1-04-2013).

<sup>2</sup> See, inter alia, *Case and another v Minister of Safety and Security and others, Curtis v Minister of Safety and Security and others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC): par 37, 78; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another (Independent)* (CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC): par 57; *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658: par 33; *S v Lawrence, S v Negal, S v Solberg* (CCT38/96, CCT39/96, CCT40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176: par 87, 122, 167; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333: par 58-59; *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* [2001] ZACC 17; 2001 (5) BCLR 449 (CC); 2001 (3) SA 409 (CC): par 20-21. The following approach of Ackermann J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1: par 72 will be followed:

It is appropriate to consider whether comparable foreign case law would lead to a different conclusion. Direct comparison is of course difficult and needs to be done with circumspection because the right to personal freedom is formulated differently in the constitutions of other countries and in the international and regional instruments. Nevertheless, section 33(1) of our Constitution enjoins us to consider, inter alia, what would be “justifiable in an open and democratic society based on freedom and equality” and section 35(1) obliges us to promote the values underlying such a society when we interpret Chapter 3 and encourages us to have regard to comparable case law.

See also Milo, Penfold & Stein in Woolman and Bishop 2008: 42-3.

that the American approach to freedom of expression is focused on unrestricted development in all spheres of human endeavour, and governmental guarantees of individual rights and civil liberties,<sup>3</sup> which is in contrast to the focus of the Canadian, German and South African constitutions on the establishment of “a society based on democratic values, social justice and fundamental human rights”.<sup>4</sup>

It will be explained why consideration of the American approach will be the point of departure before discussing the approaches in jurisdictions where freedom of expression is not a predominant right, where different human rights have equal standing, and where human dignity is greatly valued and even afforded normative priority.<sup>5</sup>

## **2. THE UNITED STATES OF AMERICA**

### **2.1 The constitutional right to freedom of speech**

The United States’ (US) constitutional approach can be viewed as not essentially serving to ensure social rights, community rights or positive citizen entitlements,<sup>6</sup> but rather as a manifestation of the strong individualistic aspects of American society itself. Schauer contends that this is enhanced by a culture of distrust of government<sup>7</sup> and a tradition of strong principle-based judicial review.<sup>8</sup> Dorf and Katz remark that the record of judicial review and years of academic and associated commentary in the US show that the classical notion of a judiciary devoid of politics does not reflect the reality that American courts rarely act in a strongly counter-majoritarian way, and that, when they do, the political system eventually finds ways of bringing the courts back in line with the considered opinions of the public.<sup>9</sup> As stated by Dorf, this affects the ability of the Court to protect minority rights when they are threatened.<sup>10</sup> In this context, freedom of speech predominantly protects the expression of ideas, “despite the harm and the consequences that expression may produce”.<sup>11</sup>

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<sup>3</sup> Chemerinsky 2011: 4-6; Baker 2008: 4-5.

<sup>4</sup> Constitution 1996: Preamble.

<sup>5</sup> See Kentridge in Budlender & Rajab 2009: 117.

<sup>6</sup> Milo 2008: 53.

<sup>7</sup> Schauer 2005: 23; Barendt 1994: 157.

<sup>8</sup> Schauer 2005: 27-29.

<sup>9</sup> Dorf 2010: 283; Katz 2000: I. See also Tribe 2000: 28-29.

<sup>10</sup> Dorf 2010: 285, 304.

<sup>11</sup> Schauer 2005: 27-29.

The *First Amendment* to the American Constitution, adopted in 1791, reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>12</sup>

According to Chemerinsky, the *First Amendment* was a reaction to the suppression of speech and of the press that existed in English society. Until 1694, no publication in England was allowed without a government-granted licence. Speech was also restricted by the law of seditious libel that made criticising the government a crime.<sup>13</sup>

Freedom of speech is often stated to be the primary right in the American constitutional system. It has been referred to as “the matrix, the indispensable condition, of every other form of freedom”.<sup>14</sup> Schauer observes that, whereas in the rest of the world freedom of expression appears to be understood as an important value to be considered along with other important values, including fairness, equality, dignity, health, privacy, safety and respect, in the US it prevails with remarkable consistency in its conflicts with other values and interests.<sup>15</sup> He points out that a noteworthy feature of the *First Amendment* is the “seeming absoluteness of the text”, and the broad scope within which that absoluteness appears to apply. Unlike, for example, the *International Covenant on Civil and Political Rights (ICCPR)*, the *European Convention on Human Rights*, the Canadian Charter of Rights and Freedoms, and the Constitution of South Africa, the US Constitution makes no explicit provision for conditional limitations of constitutional rights, for instance when “necessary in a democratic society”.<sup>16</sup> Significantly, though, apart from the equality right and the right of the accused to a fair trial, which are respectively protected by the *Fourteenth* and *Sixth Amendments*, some interests that are typically taken as justifying constraints on freedom of expression worldwide, for example the right to reputation, are recognised by statute and by common law.<sup>17</sup> Chemerinsky contends that, once such constraints are recognised, the issue becomes one of how to draw the line as to when government can regulate speech.<sup>18</sup> However,

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<sup>12</sup> Constitution of the USA: <[http://www.usconstitution.net/xconst\\_Am1.html](http://www.usconstitution.net/xconst_Am1.html)> (accessed on 30-03-2013).

<sup>13</sup> Chemerinsky 2011: 950-951.

<sup>14</sup> Milo 2008: 53, with reference to *Palko v Connecticut* 302 US 319 (1937): 327.

<sup>15</sup> Schauer 2005: 18.

<sup>16</sup> Schauer 2005: 21, 24.

<sup>17</sup> Schauer 2005: 21, 24.

<sup>18</sup> Chemerinsky 2011: 16.

in *United States v Stevens*,<sup>19</sup> the Supreme Court rejected the state's contention "that a claim of categorical exclusion" of a given category of speech from protection in terms of the *First Amendment* should be considered by means of a test that determines protection based upon "a balancing of the value of the speech against its societal costs"<sup>20</sup>. The Court described the proposed test as "startling and dangerous". It stated that references in precedents on particular categories of unprotected speech to the "slight social value" of the speech were merely descriptive, and did not set forth a test to be generally applied.<sup>21</sup> The Court reiterated:

The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits. The First Amendment itself reflects a judgement by the American people that the benefits of its restrictions on the Government outweigh the costs.<sup>22</sup>

Baker evaluates the American approach to freedom of expression from the premises:

(i) that the legitimacy of the state depends on its respect for people's equality and autonomy and (ii) that, as a purely formal matter, the state only respects people's autonomy if it allows people in their speech to express their own values, no matter what these values are, and irrespective of how this expressive content harms other people or makes government processes or achieving governmental aims difficult.<sup>23</sup>

He adds that this does not mean that the legal order should not advance people's substantive autonomy and substantive egalitarian aims as legitimate policy goals, as long as people's formal autonomy<sup>24</sup> and formal equality will not be disrespected in doing so.<sup>25</sup> Typically, "hate speech" expresses the speaker's values. While it does not respect others' equality or dignity, it does not contradict anyone else's formal autonomy, even if it does cause injuries that sometimes include undermining others' substantive autonomy. For this reason, prohibitions on racist or "hate speech" should generally be impermissible.<sup>26</sup>

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<sup>19</sup> *United States v Stevens* US 08-769 (2010); Hertz & Molnar 2012: 116-117.

<sup>20</sup> *United States v Stevens*: par II.

<sup>21</sup> *United States v Stevens*: par II.

<sup>22</sup> *United States v Stevens*: par II.

<sup>23</sup> Baker 2008: 4.

<sup>24</sup> See the distinction between formal and substantive autonomy in Chapter II, 4.3.1.

<sup>25</sup> Baker 2008: 5.

<sup>26</sup> Baker 2008: 5.

The US courts have defended so-called “hate speech” on the basis that only by providing protection for all forms of valuable speech could the public be assured of uninhibited, robust and wide-open debate. The harm that speech might inflict is generally risked in order to avoid the greater harm that the suppression of speech has so often caused. “Hate speech” is typically defended as “the price society has determined it must pay to assure a system of free expression”.<sup>27</sup>

## 2.2 Freedom of the press

### 2.2.1 *The media*

There are different perspectives on the implications of the distinct “freedom of the press limb”<sup>28</sup> of the *First Amendment* with respect to the relationship between freedom of speech and freedom of the press.<sup>29</sup> The US Supreme Court has mostly based protection of the press and of other media on the constitutional principle of freedom of speech as such, without relying on any special approach in terms of freedom of the press.<sup>30</sup> Barendt proposes that media freedom should be regarded as an instrumental rather than a primary or fundamental human right. Press claims to special privileges and immunities should only be recognised insofar as they promote the values of freedom of speech, in particular the public interest in a variety of sources of information.<sup>31</sup>

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<sup>27</sup> Louw in Duncan 1996: 27-28. See the discussion of the judicial debates concerning the balancing versus absolute approaches, and the categorisation versus balancing approaches, to *First Amendment* rights: Sullivan & Gunther: 965-968; see the discussion of the discovery of truth and the advancement of knowledge theory in Chapter II: 2.

<sup>28</sup> Barendt 2005: 419.

<sup>29</sup> Barendt 2005: 419-423.

<sup>30</sup> *Cohen v Cowles Media Company* 501 US 663(1991); Chemerinsky 2011: 1208-1209. The decision in *Miami Herald Publishing Co v Tornillo* 418 US 241(1974) may be an exception. In this matter, after the appellant newspaper had refused to print the appellee’s replies to editorials critical of appellee’s candidacy for state office, the appellee brought suit based on Florida’s “right of reply” statute that grants a political candidate a right to equal space to answer criticism and attacks on his or her record by a newspaper, and making it a misdemeanour for the newspaper to fail to comply. Burger CJ, in a unanimous opinion, stated as follows:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. ... The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgement. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

<sup>31</sup> Barendt 2005: 421-422.

During the first decades of American nationhood, the press became bold and forceful. It played an influential role in leading colonial America into its revolution against the British Empire.<sup>32</sup> The US media today is frequently known as the Fourth Estate, “an appellation that suggests that the press shares equal stature with the three branches of government created by the Constitution, namely the legislature, the judiciary, and the executive”.<sup>33</sup> It has become a familiar American political saying that “one should never argue with the fellow who buys ink by the barrel”.<sup>34</sup>

Very few laws or regulations restrict the content of material presented in the media. While non-profit organisations have a significant voice in the US media, most of the public’s primary sources of information, including the major urban newspapers, the weekly news magazines, and the broadcast and cable networks, are profit-driven enterprises. The *First Amendment* right to speak includes the media owner’s right to censor everyone else’s speech in his or her medium.<sup>35</sup> Johnson points out that this applies even where a single newspaper, radio station or TV station is operative in an area.<sup>36</sup> The onus is on news consumers to judge the quality of reporting. Media companies that disseminate biased, inaccurate or imbalanced reports risk losing the audience and, consequently, the revenue from advertisers who want to reach that audience. In accordance with this democratic approach, citizens, non-governmental interest groups and journalistic associations monitor and report on media quality.<sup>37</sup> Many publications have created the position of an ombudsman to whom readers can go with their complaints about the publication and the quality of its news coverage. Johnson asserts that, although none of them has any meaningful enforcement powers, they are effective in reinforcing the principles of fairness, truth, and accuracy in reporting.<sup>38</sup>

It follows from the above approach that economics plays a major role in the focus of the information that is disseminated to the public. Barendt, in line with his perspective that press and media freedom is protected because it promotes the values that underlie freedom of speech, argues that it seems legitimate to ensure that the press serves freedom of speech by enriching public discourse. That would mean that newspaper owners and editors might be

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<sup>32</sup> Johnson 2001: par 3.

<sup>33</sup> Johnson 2001: par 3.

<sup>34</sup> Schauer 2005: 24. See also Sullivan & Gunther 2001: 1392-1394.

<sup>35</sup> Barendt 2005: 425-427.

<sup>36</sup> Johnson 2001: “The Law”.

<sup>37</sup> Johnson 2001: “The Market”.

<sup>38</sup> Johnson 2001: “The Watchdogs”.



subject to modest “public service” requirements. He, by implication, cautions that, if this approach is not adopted, freedom of speech in the American media will in practice be enjoyed by a handful of owners and editors of national newspapers.<sup>39</sup>

## **2.2.2 Broadcasting**

### *2.2.2.1 Regulation of broadcasting*

Broadcasting stations are not owned, funded or operated by government agencies. Equipment is privately owned. The right to broadcast is, however, regulated by government and limited by licence. The *Radio Act* of 1927, the first law governing the broadcast medium, provides that the Federal Communications Commission (FCC), established by the *Communications Act* of 1934, is responsible for the issuing and renewal of broadcast licences and for monitoring whether licensees operate in terms of “public convenience, interest, and necessity”.<sup>40</sup> The FCC is an independent government agency, which means that Congress has delegated some of its law-making authority to it, and that it resides in the executive branch of government, which is responsible for its administration.<sup>41</sup> Individual corporations, which have largely replaced individuals as the licensees, may hold licences for hundreds of radio and television stations.<sup>42</sup> Earlier restrictions that limited the number of stations that one owner could control in any one city, have been lifted. When available frequencies are sought by multiple qualified applicants, the FCC awards the licences by means of an auction process. The licence goes to the highest bidder, and the bid money to the US Treasury<sup>43</sup>. In order to help ensure that small businesses and businesses owned by minority groups and women have a good chance of succeeding in the auctions, the FCC awards “new entrant” bidding credits to applicants with no or few media properties.<sup>44</sup>

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<sup>39</sup> Barendt 2005: 449-450.

<sup>40</sup> See Zelezny 2004: 372-373, 379-383. See also Kennard 2001.

<sup>41</sup> Zelezny 2004: 369.

<sup>42</sup> Johnson 2001: “The Airwaves”.

<sup>43</sup> Zelezny 2004: 377.

<sup>44</sup> Zelezny 2004: 379.

### 2.2.2.2 Constitutional protection of broadcasting

Broadcasting was initially not accorded the full range of *First Amendment* privileges enjoyed by the print media. Several justifications for this distinction have been proffered, for example that broadcasting entered homes in an intrusive way and that it possessed a unique power to influence the audience, especially children. The primary justification for broadcasting regulation, known as the “scarcity rationale”, held that, because the usable radio spectrum could not accommodate all interested broadcasters and access accordingly had to be limited by government, those selected to broadcast could be mandated by government as to how best serve the public interest.<sup>45</sup> Chemerinsky comments that the distinction seems to have been based on the inherent scarcity of the broadcast media, “although in every city there are far more television and radio stations than newspapers”.<sup>46</sup>

The scarcity rationale was applied in *Red Lion Broadcasting Co v FCC*,<sup>47</sup> where the Supreme Court considered the constitutionality of the so-called “fairness doctrine” of the FCC, which required licensed broadcast stations to present coverage of public issues, to assure fair coverage for each side, and to offer individuals who had been personally attacked in their programming free reply time to respond over the airwaves. The Court unanimously upheld the FCC rule, concluding that scarcity of available spectrum space justified regulating broadcasting to ensure a diversity of voices. The Court viewed broadcast licensees as trustees who received licences with certain public-interest obligations that might include complying with content-based regulations that could not be applied to other media.<sup>48</sup>

In *Columbia Broadcasting System Inc v Democratic National Committee*,<sup>49</sup> Justice Douglas, in a concurring judgment, stated his disagreement with the *Red Lion* doctrine. He held that, if

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<sup>45</sup> Zelezny 2004: 363-369. See the discussion of the case in Epstein & Walker 2004: 320-325. See also the overview by Corn-Revere (2013) of *Trinity Methodist Church v FRC* 62 F 2<sup>nd</sup> 850 (DC Cir 1932), *Near v Minnesota* 283 US 697 (1931) and *NBC v United States* 319 US 190 (1943): First Amendment Center: <<http://archive.firstamendmentcenter.org/speech/internet/overview.aspx>> (accessed on 1-04-2013).

<sup>46</sup> Chemerinsky 2011: 127-1218. See also the discussion of *Columbia Broadcasting System Inc v Democratic National Committee* 412 US 94 (1973) in Sullivan & Gunther 2001: 1427.

<sup>47</sup> *Red Lion Broadcasting Co v FCC* 395 US 367 (1969): 399-400; *Turner Broadcasting System Inc v FCC* 512 US 622 (1994): 644-647; Zelezny 2004: 365-367. See the discussion of the case in Epstein & Walker 2004: 345-350.

<sup>48</sup> Sullivan & Gunther 2001: 1328, 1422-1424; Levels of First Amendment Protection for Different Media: Exploring Constitutional Conflicts: <<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/mediatests.htm>> (accessed on 1-04-2013).

<sup>49</sup> *Columbia Broadcasting System Inc v Democratic National Committee*.

a broadcast licensee was not engaged in governmental action for purposes of the *First Amendment*, TV and radio could not in terms of the Constitution be treated differently from newspapers.<sup>50</sup>

In *FCC v League of Women Voters*,<sup>51</sup> the Court similarly held that Congress may seek to secure the public's *First Amendment* interest in receiving, through the broadcasting medium, a balanced presentation of information and views on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of the owners and operators of broadcasting stations.<sup>52</sup> At the same time, in order to maintain the independent character of broadcasting as a vital form of communicative activity, the *First Amendment* must inform the manner in which Congress exercises its regulatory power.<sup>53</sup> As a result, broadcasters are, in contrast to, for example, newspaper publishers, denied the absolute freedom to advocate their own viewpoints without also presenting opposing viewpoints.<sup>54</sup> The Court reiterated that such restrictions have been upheld "only when they were narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues".<sup>55</sup>

Five years after *Red Lion*, the Court in *Miami Herald Publishing Co v Tornillo*<sup>56</sup> unanimously struck down a Florida law that required newspapers to print the replies of individuals who had been personally attacked in newspaper editorials. The Court expressed a level of appreciation for the argument that, owing to the elimination of competing newspapers in most of the large cities as a result of economic factors, "uninhibited, robust" debate was "open only to a monopoly controlled by the owners of the market".<sup>57</sup> This, the argument went, constituted an appeal that the *First Amendment* should be employed not only to protect the press from government regulation, but also to impose obligations on the owners of the press to duly regard the *First Amendment* interest of the public being informed.<sup>58</sup> However, this submission was rejected in no uncertain terms. It was stated that the choice of

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<sup>50</sup> *Columbia Broadcasting System Inc v Democratic National Committee*: par II (concurring judgment of Douglas J).

<sup>51</sup> *FCC v League of Women Voters* 468 US 364 (1984).

<sup>52</sup> *FCC v League of Women Voters*: 377.

<sup>53</sup> *FCC v League of Women Voters*: 378.

<sup>54</sup> *FCC v League of Women Voters*: 380.

<sup>55</sup> *FCC v League of Women Voters*: 364.

<sup>56</sup> *Miami Herald Publishing Co v Tornillo*.

<sup>57</sup> *Miami Herald Publishing Co v Tornillo*: 249-250.

<sup>58</sup> *Miami Herald Publishing Co v Tornillo*: 251.

material to go into a newspaper, the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials, whether fair or unfair, constituted the exercise of editorial control and judgement. Governmental regulation of this crucial process could not be exercised consistent with *First Amendment* guarantees of a free press. Moreover, the threat of penalties might promote avoidance of controversy, with the result that “political and electoral coverage would be blunted or reduced”.<sup>59</sup> Despite the similarity of the question to that presented in *Red Lion* and the fact that *Red Lion* was the case most discussed in the briefs of both parties, the Court did not make any reference to *Red Lion*.<sup>60</sup>

In 1987, the FCC repealed the fairness doctrine. In announcing the repeal, the chairperson stated: “The First Amendment does not guarantee a fair press, only a free press.”<sup>61</sup>

In *Arkansas Educational Television Commission (AETC) v Forbes*,<sup>62</sup> Justice Kennedy, writing for the majority, stated that, considering their obligation to air programming that serves the public interest:

[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming. They should be allowed to exercise sound journalistic judgement without being unduly exposed to claims of viewpoint discrimination. That editors can and do abuse this power is beyond doubt, [but] “[c]alculated risks of abuse are taken in order to preserve higher values.”<sup>63</sup>

The Court nonetheless applied the *First Amendment* requirement of viewpoint-neutrality<sup>64</sup> and held that the exclusion of a ballot-qualified candidate from a debate sponsored by a state-

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<sup>59</sup> *Miami Herald Publishing Co v Tornillo*: 257-258.

<sup>60</sup> Levels of First Amendment Protection for Different Media: Exploring Constitutional Conflicts: <<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/mediatests.htm>> (accessed on 1-04-2013); *Miami Herald Publishing Co v Tornillo*. In *Reno v American Civil Liberties Union* 521 US 844 (1997), the Court held that the special factors recognised in some of the Court’s cases as justifying regulation of the broadcast media are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of *First Amendment* scrutiny that should be applied to the Internet.

<sup>61</sup> Sullivan & Gunther 2001: 1424; Barendt 2005: 446-447; Rossum & Tarr 2003: 159-160.

<sup>62</sup> *Arkansas Educational Television Commission v Forbes* 523 US 666 (1998).

<sup>63</sup> *Arkansas Educational Television Commission v Forbes*: 673-674.

<sup>64</sup> See 2.4 below.

owned public television broadcaster was a “reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the *First Amendment*”.<sup>65</sup>

The FCC, on a very limited basis, enforces programming standards regarding quality or quantity. Section 326 of the *Communications Act* of 1934 prohibits the Commission from censoring programme material and from interfering with broadcasters’ freedom of expression. The Commission’s role in overseeing programme content mainly concerns the enforcement of statutory and regulatory provisions in terms of Title 18 of the *United States Code*, section 1464, which prohibits the utterance of “any obscene, indecent or profane language by means of radio communication”, and section 73.3999 of the Commission’s rules, which provides that radio and television stations may not broadcast indecent material during the period 6a.m. through to 10p.m.<sup>66</sup> The FCC has held that it can only take action in response to an allegation that a broadcast should be characterised as an incitement to violence or illegal action satisfying the “clear and present danger” test (which will subsequently be discussed) in situations where a local court of competent jurisdiction has made such a determination.<sup>67</sup> No such action has, however, been taken to date.

### 2.3 Comparative relevance

It will be indicated that, in contrast to the international consensus that various forms of “hate speech” need to be prohibited by law, the American commitment to the view that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the point of view espoused, extends to views “that certain races or religions are inferior, that hatred of members of minority races and religions is desirable, and that violent or otherwise illegal action is justified against people because of their race, their ethnicity, or their religious beliefs”.<sup>68</sup> It nonetheless remains important that due regard be had to the American approach, and the reasoning underlying it. The following considerations are relevant in this regard.

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<sup>65</sup> *Arkansas Educational Television Commission v Forbes*: 666-668.

<sup>66</sup> *AMFM Radio Licenses LL v Licensee of Station WWDC-FM Washington, DC* FCC File No EB-02-IH-0472 2-10-2003: par 6-7: FCC.gov: <<http://transition.fcc.gov/eb/Orders/2003/FCC-03-233A1.html>> (accessed on 1-04-2013).

<sup>67</sup> *Greater Boston Radio Inc v Licensee of Station WTKK(FM) Boston, Massachusetts* FCC File No EB-04-IH-0181 14-07-2004: FCC.gov: <<http://www.fcc.gov/eb/Orders/2004/DA-04-2120A1.html>> (accessed on 1-04-2013).

<sup>68</sup> Schauer 2005: 8-10, 17; Ignatieff 2005: 35; *R.A.V. v City of St Paul*: 505 US 377 (1992): 392.

It is generally agreed that the American jurisprudence on free speech “is by far the most fertile from which to draw inspiration”, and that the American version of freedom of expression has undoubtedly been influential in the development of the law worldwide.<sup>69</sup> Pieterse significantly remarks that the South African Bill of Rights is equally and strongly focused on entrenching all the rights, freedoms and structures associated with liberal democratic constitutionalism, and on social transformation.<sup>70</sup> It is primarily with respect to the first focus that the American approach has comparative value.

Even though its authority and application may differ, the principle of content-neutrality, which is paramount in the American approach to the protection of freedom of expression, is an important focus in determining the constitutionality of limitations on the right to freedom of expression, including “hate speech” limitations, in all constitutional democracies.

Arguments typically supporting extensive protection of freedom of expression in the American context have relevance for balancing and justification analyses. The following considerations, submitted by Baker, are significant examples:

- (1) allowing and then combating hate speech discursively is the only real way to keep alive the understanding of the evil of racial hatred;
- (2) forcing hate speech underground obscures the extent and location of the problem to which society must respond;
- (3) suppression of hate speech is likely to increase racists’ sense of oppression and their willingness to express their views violently;
- (4) suppression is likely to reduce the societal self-understanding that democracy means not eliminating conflict through suppression – what Justice Jackson described as the unanimity of the graveyard – but rather moving conflict from the plane of violence to the plane of politics;
- (5) legal prohibition and enforcement of laws against hate speech are likely to divert political energies away from more effective and meaningful responses, especially those directed at changing material conditions in which racism festers;
- (6) the principle justifying prohibitions and the specific laws prohibiting hate speech are likely to be abused, creating a slippery slope to results contrary to the needs of victims of racial hatred

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<sup>69</sup> Barendt 1994: 149, 154; Schauer 2005: 20. Sachs regards the *New York Times v Sullivan* decision as magnificent on a world scale in promoting open society and preventing abusive use of the law to hold back human rights advances, including the right to freedom of speech – see Sachs in Budlender & Rajab 2009: 113.

<sup>70</sup> Pieterse 2003: 8-9.

(including jailing the subjects of racial hatred for their verbal responses) and to the needs of other marginalized groups.<sup>71</sup>

Furthermore, arguments substantiating the regulation of speech based on its content have to be extremely well founded. Under “strict scrutiny”, which applies to the infringement of rights deemed to be fundamental, government, in order to justify infringement, not only has to prove a compelling interest, but it must also be shown that the law at issue is necessary in the sense that no less intrusive alternative can achieve the objective.<sup>72</sup> Obviously, these arguments have significant comparative value.

Finally, and significantly, the categorical approach to the exclusion of certain defined categories of speech from constitutional protection has specific relevance with respect to the interpretation of section 16(2) of the South African Constitution. Of particular significance is the interpretation of the requirement in terms of section 16(2) that the expression concerned should constitute “incitement to cause harm”.

Chief Justice Dickson’s evaluation of the comparative value of the American approach for Canadian law reflects the above contentions and is applicable in the South African context. Firstly, he gives recognition to the practical and theoretical experience of the US resulting from 200 years of protecting constitutional rights, noting that differences may require that Canada’s constitutional vision depart from that endorsed in the US. He mentions in this regard that there exists a growing body of academic writing in the US which is receptive to the idea that the *First Amendment* doctrine might be able to accommodate statutes prohibiting hate propaganda that can undermine the very values which free speech is said to protect.<sup>73</sup> Secondly, he identifies the strong aversion to content-based regulation of expression as the aspect of the *First Amendment* doctrine most incompatible with section 319(2)<sup>74</sup>, but again indicates that, significantly so, the American Supreme Court has occasionally allowed the categorisation and non-protection of expression based on its content, and has employed balancing in *First Amendment* cases. This reveals that, even in the US, it is sometimes thought justifiable to restrict a particular message because of its meaning. Obscenity laws and

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<sup>71</sup> Baker 2008: 19-20.

<sup>72</sup> Chemerinsky 2011: 554.

<sup>73</sup> *R v Keegstra* [1990] 3 SCR 697: par VII. B. See also Rossum & Tarr 2003: 164.

<sup>74</sup> *R v Keegstra*: par VII. B.

laws proscribing child pornography serve as examples.<sup>75</sup> Thirdly, he points out that, most importantly, section 1 of the Charter<sup>76</sup> has no equivalent in the US. The nature of the section 1 test may well demand a perspective particular to Canadian constitutional jurisprudence when weighing competing interests. Values fundamental to the Canadian conception of a free and democratic society – most importantly the special role of equality and multiculturalism in the Canadian Constitution – necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.<sup>77</sup>

Against this background, some of the essential features of the American approach to freedom of speech will now be highlighted.

## **2.4 The principle of content-neutrality**

The American “free speech methodology”<sup>78</sup> turns on the distinction between content-based and content-neutral restrictions of speech. This approach is motivated by the view that “above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject-matter or its content”.<sup>79</sup> Content-based regulation must, accordingly, pass strict scrutiny.<sup>80</sup>

Content-neutrality refers to subject matter- as well as viewpoint-neutrality.<sup>81</sup> Chemerinsky states that the former concerns the “topic” of the speech, and the latter “the ideology of the message”. An example of the former is a law regulating activities in a park, allowing only demonstrations about the war and not about any other issue. An example of the latter is a law allowing only anti-war demonstrations in the park.<sup>82</sup>

According to Glazer, content-neutral restrictions are upheld “only if they substantially relate to an important government purpose”, “restrictions of particular viewpoints are presumed

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<sup>75</sup> *R v Keegstra*: par VII. B. The established approach with relation to sexual harassment and alternative views with relation to university hate speech codes can be added in this regard. See 2.5.3 below.

<sup>76</sup> See 4.1 below.

<sup>77</sup> *R v Keegstra*: par VII. B; Jackson 1999: 613 fn 136.

<sup>78</sup> Chemerinsky 2011: Chapter 11.2.

<sup>79</sup> Chemerinsky 2000: 50; Glazer 2008: 1390-1394.

<sup>80</sup> Chemerinsky 2011: 961. See the description of the concept “strict scrutiny” in 2.3 above.

<sup>81</sup> Chemerinsky 2011: 962-963.

<sup>82</sup> Chemerinsky 2000: 51.



invalid”, and “restrictions of an entire subject-matter fall somewhere in between them along the hierarchy of constitutional review”.<sup>83</sup> The greater reluctance to allow viewpoint restrictions is due to “the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or manipulate the public debate through coercion rather than persuasion”.<sup>84</sup> It is noteworthy in this regard that, by contrast, the prohibition of “hate speech” provision of the South African *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act)* excludes bona fide engagement in the publication of any information from its ambit, but not engagement in the publication or dissemination of ideas or viewpoints.<sup>85</sup>

#### ***2.4.1 Content-based limitations of speech in private law***

The constitutionalisation of libel laws and other common law torts illustrates the extent of the scrutiny standard that applies to the regulation of free speech.<sup>86</sup>

##### *2.4.1.1 Libel*

*New York Times v Sullivan* was a landmark decision in this regard, being the first case where a libel judgment was held to conflict with the *First Amendment*.<sup>87</sup> The case concerned an advertisement by Dr Martin Luther King Jnr and the Civil Rights Movement describing brutal actions against civil rights protesters, some of which involved the police force of Montgomery, Alabama, in the South. Sullivan, a commissioner of the City of Montgomery, claimed the descriptions of lawless police behaviour in Montgomery libelled him, because he was in charge of the police there.<sup>88</sup>

In terms of the traditional common law of defamation, once libel per se had been established, the defendant had no defence as to the stated facts unless he or she could persuade the jury

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<sup>83</sup> Glazer 2008: 1392.

<sup>84</sup> Chemerinsky 2000: 56.

<sup>85</sup> See Chapter V: 4.7.2.3.

<sup>86</sup> *New York Times v Sullivan* 376 US 254 (1964); *Gertz v Robert Welch Inc* 418 US 323 (1974); *Philadelphia Newspapers Inc v Hepps* 475 US 767 (1986); *Hustler Magazine Inc v Falwell* 485 US 46 (1988); *Greenbelt Cooperative Publishing Association Inc v Bresler* 398 US 6 (1970). See the discussion of these cases in Epstein & Walker 2004: 396, 405, 411.

<sup>87</sup> *New York Times v Sullivan*: 267; Schauer 2005: 14-15. See the discussion of *New York Times v Sullivan*, *Gertz v Robert Welch Inc* and *Hustler Magazine Inc v Falwell* in Epstein & Walker 2004: 396-405, 405-411, 411-414.

<sup>88</sup> Lewis in Budlender & Rajab 2009: 97-98.

that they were true in all their particulars. The Supreme Court stated that libel had to be measured by standards that satisfied the *First Amendment*. To the Court, the traditional common law, by imposing all of the risk of falsity on the publisher, made publishers wary of publishing even those charges that turned out to be true. This “chilling effect”<sup>89</sup> was inconsistent with a *First Amendment* commitment to the principle that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”.<sup>90</sup> The Court held that actions for libel and slander brought by public officials could succeed only upon proof by clear and convincing evidence of intentional falsity, that is “actual malice”, a burden of proof almost impossible to meet.<sup>91</sup> The implication of the Court’s conclusion was that, “although requiring intentional falsity to sustain liability would undoubtedly increase the amount of published falsehood, this error was less grave than the opposite error of inhibiting the publication of political truth”.<sup>92</sup>

A few years after *Sullivan*, the Supreme Court extended its basic tenet to candidates for public office, office holders,<sup>93</sup> public figures and public officials,<sup>94</sup> and even to those public figures, for example pop stars, television chefs, and professional athletes, who have little to no involvement in, or effect on, public policy or political debates. As contended by Schauer, for all practical purposes, the availability in the US of defamation remedies for public officials and public figures, even in cases of provable falsity, has come to an end.<sup>95</sup>

In *Gertz v Robert Welch Inc*, a distinction was drawn between the standard of liability for the defamation of public and private complainants. It was held that, on condition that they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.<sup>96</sup> The Court affirmed jurisprudence to the effect that, even though there is no constitutional value in false statements of fact, the *First Amendment* requires the protection of

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<sup>89</sup> *New York Times v Sullivan*: 300 (Goldberg J in a concurring judgment).

<sup>90</sup> *New York Times v Sullivan*: 270.

<sup>91</sup> *New York Times v Sullivan*: 267; Schauer 2005: 14-15.

<sup>92</sup> Schauer 2005: 14-15; Sullivan & Gunther 2001: 1031-1032.

<sup>93</sup> Schauer 2005: 15; *Monitor Patriot Co v Roy* 401 US 265 (1971).

<sup>94</sup> Schauer 2005: 15; *Curtis Publishing Co v Butts* and *Associated Press v Walker* 388 US 130 (1967).

<sup>95</sup> Schauer 2005: 15. *Hustler Magazine v Falwell* extended the “actual malice” standard to intentional infliction of emotional distress in a ruling which protected a parody. In the ruling, “actual malice” was described as “knowledge that the statement was false or with reckless disregard whether or not it was true” – see summary: Oyez: <[http://oyez.org/cases/1980-1989/1987/1987\\_86\\_1278](http://oyez.org/cases/1980-1989/1987/1987_86_1278)> (accessed on 1-04-2013).

<sup>96</sup> *Gertz v Robert Welch Inc*: 339.

some falsehood in order to protect speech that does have value. It was, however, pointed out that “the need to avoid self-censorship by the news media” was not “the only societal value at issue”. The legitimate state interest to compensate individuals for the harm inflicted on them by defamatory falsehood reflects the “basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of ordered liberty”.<sup>97</sup>

The distinction between the liability standards with respect to defamation of private and public individuals focuses on circumstances that would promote or hinder access to expression opportunities. Access to expression opportunities, as indicated above, concerns a substantive autonomy interest.<sup>98</sup> It was pointed out that public officials and public figures usually enjoy significantly greater access than private individuals to the channels of effective communication; hence they have a more realistic opportunity to counteract false statements.<sup>99</sup> Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. Furthermore, an individual who decides to seek government office must accept the consequent risk of closer public scrutiny than might otherwise be the case. Baker criticises the greater protection of private as opposed to public speakers. He points out that public participation should be valued and could rather be rewarded than being afforded less protection than civic participation.<sup>100</sup>

From a comparative view, it is significant, firstly, that the protection of speech with no or low value can be substantiated on the basis that the “chilling effect” of its prohibition might jeopardise free speech that does have value. Secondly, the “chilling effect” on protected speech will be of greater concern where public figures are involved. Thirdly, a target’s lack of access to means of response can be a factor to constitute an infringement of the target’s substantive autonomy. As far as “hate speech” is concerned, targets are often vulnerable groups and individuals susceptible to harm and hurt related to their group characteristics. They are often marginalised. Furthermore, the effect of “hate speech” is often reinforced by stereotypes and prejudice, to the extent that the response from individuals who have been harmed will have no considerable negating effect.

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<sup>97</sup> *Gertz v Robert Welch Inc*: 341.

<sup>98</sup> See the distinction between formal and substantive autonomy in Chapter II: 4.2.

<sup>99</sup> See *Gertz v Robert Welch Inc*: fn 9.

<sup>100</sup> Baker 2004: 259-260.

#### 2.4.1.2 *The tort of intentional infliction of emotional distress*

The opinion of the Supreme Court in the recent matter of *Snyders v Phelps et al*<sup>101</sup> highlights the above-mentioned principles with respect to the intentional infliction of harm in the sense of emotional distress. The relationship to the theme of the present study is apparent. The Court held that the *First Amendment* shielded the respondents, members of the Westboro Baptist Church, from tort liability for picketing. The picketing occurred near the funeral of the applicant's son, a marine who had been killed in Iraq in the line of duty. The respondents displayed picket signs reflecting the church's view that the US was overly tolerant of sin, and that God killed American soldiers as punishment.<sup>102</sup> The opinion of the Court, as in *Gertz v Robert Welch Inc*, turned on the distinction between speeches on matters of private or public concern. It was held that "speech on 'matters of public concern' [was] at the heart of the First Amendment's protection". That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government". Where matters of purely private significance are at issue, *First Amendment* protections are often less rigorous, because "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas" and the "threat of liability" does not pose the risk of "a reaction of self-censorship" regarding matters of public import. The latter occupied "the highest hierarchy on values and is entitled to special protection".<sup>103</sup> With respect to "matters of public concern", the Court referred to matters relevant for the community, and with political or social content. Deciding whether speech is of public or private concern requires consideration of the "content, form, and context" of the speech. It was held that "Westboro must be shielded from tort liability for its picketing because hurtful speech on public issues ensures that public debate is not stifled". The Court regarded the hurtful effect, and even the arguable "inappropriateness" of the use of the funeral "as a stage for leveraging their opinions" as irrelevant.<sup>104</sup> Justice Alito delivered a dissenting opinion stating that "our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case". He did not regard as deserving of *First Amendment* protection against liability what he viewed as the transformation of a private ceremony into a media event causing severe emotional injury "with no intention of enriching the public

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<sup>101</sup> *Snyders v Phelps* US 09-751 (2011).

<sup>102</sup> *Snyders v Phelps*: par I.A.

<sup>103</sup> *Snyders v Phelps*: par II.

<sup>104</sup> *Snyders v Phelps*: par II.

debate”. The approach of the dissenting judge is noteworthy. It reminds one of the exclusion from the ambit of the categorical prohibition of “hate speech” in terms of sections 10 and 12 of the South African *Equality Act*, only of bona fide engagement in the relevant stipulated constitutionally protected forms of expression.<sup>105</sup>

## **2.4.2 Unprotected categories of speech**

### *2.4.2.1 Introduction*

Certain categories of speech, which will subsequently be indicated and discussed, have been found to be not deserving of *First Amendment* protection, based on the idea that expression can have no or low value.<sup>106</sup> The value concerned is related to those values that underlie the protection of freedom of expression that have been discussed in Chapter II. Restrictions of expression of this nature, even if content-based, will accordingly not infringe the *First Amendment*. It has, however, been held that distinctions within categories of unprotected expression may nevertheless be regarded as content-based and as requiring strict scrutiny. This approach will subsequently be discussed.

In conjunction with the principle of content-neutrality, the idea that expression may have no or low value is of particular comparative relevance in the context of restrictions of expression in South African law. It is apparent that, within the South African constitutional structure, expression explicitly excluded from protection in terms of section 16(2) of the Constitution can likewise be perceived as lacking value that warrants constitutional protection. For this reason, it can be limited without justification in terms of the constitutional standard.<sup>107</sup> Moreover, the assignment of different levels of speech value to different forms of speech will affect the weight afforded expression in the context of a proportionality analysis to determine whether or not an incidence of discriminatory expression constitutes unfair discrimination contemplated and prohibited in terms of section 9 of the South African Constitution and related legislation. The categorical exclusion from constitutional protection of “hate speech” in terms of section 16(2)(c) of the South African Constitution only on the basis of a selection from a broader range of constitutionally prohibited grounds will give rise to the question

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<sup>105</sup> See Chapter V: 4.7.2.2.

<sup>106</sup> Chemerinsky 2011: 1017.

<sup>107</sup> See Chapter V: 2.2.1.

whether, were the same circumstances which informed the selection of particular grounds be found to exist with respect to other “prohibited grounds”, similarly based exclusion from constitutional protection should not be inferred. Such inference will be in contrast to an approach that the exclusions in terms of section 16(2)(c) constitute a *numerus clausus*.<sup>108</sup>

Next, the different relevant categories will be indicated and discussed. It will be considered to what extent, if any, these categories accommodate, even if on a different basis, prohibitions of expression that harm on the basis of group identity. Thereafter, case law primarily dealing with the principle of content-neutrality and the related principle of different levels of speech value will be discussed.

#### 2.4.2.2 *Incitement to imminent lawless action*

The US Supreme Court, in 1919, in the matters of *Schenck v United States*,<sup>109</sup> *Debs v United States*,<sup>110</sup> *Frohwerk v United States*<sup>111</sup> and *Abrams v United States* for the first time treated free speech as a fundamental value that needed to be protected.<sup>112</sup> These judgments laid the foundation for the development of the modern *First Amendment* doctrine.<sup>113</sup>

The facts of *Schenk* were as follows: The *Espionage Act* of 1917 made it a crime to convey information with the intent to interfere with the operations or success of the armed forces of the US or to promote the success of its enemies. This had the effect of constraining sedition and political speech. During World War I, Schenk mailed circulars to draftees. The circulars suggested that the draft was a monstrous wrong motivated by the capitalist system, urged that draftees should not “submit to intimidation”, and advised only peaceful action, such as petitioning. Schenk was charged with conspiracy to violate the *Espionage Act* by attempting to cause insubordination in the military and to obstruct recruitment. The question was whether this expression was protected by the free-speech clause of the *First Amendment*. Justice Holmes, speaking for a unanimous Court, concluded that Schenk was not protected

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<sup>108</sup> See Chapter V: 2.2.6.5.

<sup>109</sup> *Schenck v United States* 249 US 47 (1919).

<sup>110</sup> *Debs v United States* 249 US 211 (1919).

<sup>111</sup> *Frohwerk v United States* 249 US 204 (1919).

<sup>112</sup> Schauer 2005: 3; Lewis in Budlender & Rajab 2009: 112. See the discussion of the case in Epstein & Walker 2004: 217-219.

<sup>113</sup> See also *Gitlow v New York* 268 US 652 (1925); *Dennis v United States* 341 US 494 (1951); *Yates v United States* 354 US 298 (1957). See the discussion of the *Gitlow* and *Dennis* cases in Epstein & Walker 2004: 224-235.

in this situation. The Court regarded the relevant question in every case to be “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”. The Court reasoned that, during wartime, utterances tolerable in peacetime can be punished.<sup>114</sup>

The facts of *Debs* were that, on 16 June 1918, Eugene Debs, a leader of the Socialist Party of America, gave a speech in Canton, Ohio, protesting involvement in World War I. During the speech, he discussed the rise of socialism and specifically praised individuals who had refused to serve in the military and had obstructed military recruiting. Debs was arrested and charged with violating the *Espionage Act*. At trial, Debs similarly argued that the *Espionage Act* violated his right to free speech under the *First Amendment*. A federal district court rejected his claim and sentenced Debs to 10 years in prison. The question in the US Supreme Court was whether Debs’s conviction under the *Espionage Act* violated his *First Amendment* rights to freedom of speech. In a unanimous opinion, the Court found that Debs’s case was clearly similar to *Schenck v United States* and upheld his conviction.<sup>115</sup>

In *Abrams*, Justice Holmes, in a minority opinion, confirmed the decisions on the questions of law in *Schenck*, *Debs* and *Frohwerk*. He, however, emphasised the following perspective: “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country.”<sup>116</sup>

In *Brandenburg v Ohio*,<sup>117</sup> the question was whether Ohio’s criminal syndicalism law, prohibiting public speech that advocated various illegal activities, violated Brandenburg’s right to free speech as protected by the *First* and *Fourteenth Amendments*. The Supreme Court used a “two-pronged test” to evaluate speech acts. Speech could be prohibited if it was “directed at inciting or producing imminent lawless action” and was “likely to incite or produce such action”. The Court held that the failure to require this test rendered the law

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<sup>114</sup> *Schenck v United States*: 52.

<sup>115</sup> *Debs v United States*: 215. In *Frohwerk v United States*, a similar set of facts substantiated a similar conclusion.

<sup>116</sup> *Abrams v United States* 250 US 616 (1919): 628. See the discussion of the case in Epstein & Walker 2004: 219-22.

<sup>117</sup> *Brandenburg v Ohio* 395 US 444 (1969).

overly broad and in violation of the constitutional right to free speech.<sup>118</sup> The Court thus upheld the right of the Ku Klux Klan to call publicly for the expulsion of African Americans and Jews from the US, even though the speech in question suggested the desirability of using violence.<sup>119</sup>

In the context of “hate speech”, therefore, as summarised by Schauer:

Brandenburg stands for the proposition that in the United States restrictions on the incitement of racial hatred can only be countenanced under the *First Amendment* when they are incitements to violent racial hatred, and even then only under the rare circumstances in which the incitements unmistakably call for immediate violent action, and even then only under the more rare still circumstances in which members of the listening audience are in fact likely immediately to act upon the speaker’s suggestion.<sup>120</sup>

Baker, with reference to *Brandenburg*, contends that a central requirement for a democratic society is a recognition that actions do not follow automatically from expression. Advocacy of any action merely presents a view for people to consider. Action will follow only if the listener accepts this view and makes an independent decision to act in accordance with it.<sup>121</sup> Criminal action should therefore not be excused on the basis that it was recommended by someone else’s speech.<sup>122</sup> He adds that the law’s responsibility is not to “prevent evil ideas from being expressed”, but rather to prevent them from being acted upon. Eventually, it is by presenting more persuasive and appealing views and alternatives that people may be convinced not to follow these ideas. The prohibition or suppression of the advocacy of such ideas will not facilitate peace and reconciliation. Learning to critically, responsibly and convincingly respond to other people’s objectionable ideas will rather achieve that.<sup>123</sup>

The application of the requirement of incitement has obvious relevance with respect to the requirement of incitement in terms of section 16(2)(c) of the South African Constitution.<sup>124</sup> It is furthermore significant to take into account that, in the South African constitutional

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<sup>118</sup> *Brandenburg v Ohio*. See summary: Oyez: <[http://oyez.org/cases/1960-1969/1968/1968\\_492](http://oyez.org/cases/1960-1969/1968/1968_492)> (accessed on 1-04-2013). See the discussion of the case in Epstein & Walker 2004: 242-246. See also *United States v Eichman* 496 US 310 (1990).

<sup>119</sup> *Brandenburg v Ohio*: 447.

<sup>120</sup> Schauer 2005: 10. See also Devenish 2002: 964-867.

<sup>121</sup> Baker 2003: 8.

<sup>122</sup> Baker 2003: 8.

<sup>123</sup> Baker 2003: 6, 8-9.

<sup>124</sup> See Chapter V: 2.2.6.



context, the establishment of a peaceful and tolerant society is even more than a laudable societal interest. It involves equally rated values interrelated with the value of free expression at threshold level, and, as indicated in Chapter II, also potentially in competition with it.<sup>125</sup> Moreover, the fact that discriminatory expression may be instrumental in ultimately promoting equality and human dignity will throughout Chapter V be a relevant, and often complicating, consideration, both in determining the constitutionality of categorical prohibitions of harmful expression based on group identity and in fairness analyses, in the context of conditional prohibitions, aimed at the prevention of discrimination and the promotion of equality.

The *Brandenburg* test has proven nearly impossible to satisfy.<sup>126</sup> In *New York Times v United States (the Pentagon papers case)*,<sup>127</sup> the Nixon Administration attempted to prevent the *New York Times* and the *Washington Post* from publishing materials belonging to a classified Department of Defense study regarding the history of US activities in Vietnam. The President argued that prior restraint was necessary to protect national security. Justices Black and Douglas argued that the vague word “security” should not be used “to abrogate the fundamental law embodied in the *First Amendment*”.<sup>128</sup> Justice Brennan, in his concurring judgment, reasoned that, since publication would not cause an inevitable, direct, and immediate event imperilling the safety of American forces, prior restraint was unjustified.<sup>129</sup>

#### 2.4.2.3 *Fighting words*

The so-called “fighting words” doctrine was articulated by Justice Murphy in a unanimous opinion in *Chaplinsky v New Hampshire*.<sup>130</sup> “Fighting words” were defined as those words that neither contributed to the expression of ideas nor possessed any social value in the search for truth and that incited an immediate, violent response. It was stated that “resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question

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<sup>125</sup> See Chapter II: 4.5.

<sup>126</sup> Abrams in Duncan 1996: 153.

<sup>127</sup> *New York Times v United States* 403 US 713 (1971).

<sup>128</sup> *New York Times v United States* 403 US 713 (1971).

See summary: Oyez: <[http://www.oyez.org/cases/1970-1979/1970/1970\\_1873](http://www.oyez.org/cases/1970-1979/1970/1970_1873)> (accessed on 1-04-2013).

<sup>129</sup> *New York Times v United States*: 726-727.

<sup>130</sup> *Chaplinsky v New Hampshire* 315 US 568 (1942). See the discussion of the case in Epstein & Walker 2004: 265-266.

under that instrument”.<sup>131</sup> The facts of the case were that Chaplinsky, a Jehovah’s Witness, had called a city marshal a “God-damned racketeer” and “a damned fascist” in a public place. He was arrested and convicted under a state law providing that:

no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.<sup>132</sup>

The Court construed the statute as aimed at preserving the public peace, by only forbidding words with “a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed”. On this basis, it was held to be constitutional. It was concluded that Chaplinsky had uttered “fighting words” as contemplated, being words that “inflict injury or tend to incite an immediate breach of the peace”.<sup>133</sup>

Justice White, in his concurring opinion in *R.A.V. v City of St Paul*, reiterated that “the exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication”.<sup>134</sup>

The scope for restriction of freedom of speech based on the *Chaplinsky* definition was increasingly limited. Judicial developments starting in the mid-1960s and going through the mid-1970s, and mostly having to do with the civil rights movement, anti-McCarthyism or protests against the war in Vietnam,<sup>135</sup> gave broad scope to “speech that some would classify as hateful”.<sup>136</sup> The following statement made by the Court in *Texas v Johnson*<sup>137</sup> reflects this approach: “...if there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea

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<sup>131</sup> *Chaplinsky v New Hampshire*: 571-572.

<sup>132</sup> *Chaplinsky v New Hampshire*: 569-570.

<sup>133</sup> *Chaplinsky v New Hampshire*: 573.

<sup>134</sup> *R.A.V. v City of St Paul*: 386. See the discussion of the case in Epstein & Walker 2004: 280-286.

<sup>135</sup> Schauer 2005: 26, fn 70 and 71. See *New York Times v Sullivan*; *New York Times v United States*; *Brandenburg v Ohio*; *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976). See also *United States v O’Brien* 391 US 367 (1968), *Cohen v California* 403 US 15 (1971), *Tinker v Des Moines Independent Community School District* 393 US 503 (1969), *Bethel School District v Fraser* 478 US 675 (1986). See the discussion of the *O’Brien*, *Tinker* and *Cohen* cases in Epstein & Walker 2004: 251-253, 254-258, 266-272.

<sup>136</sup> Abrams in Duncan 1996: 153, with reference to *New York Times v Sullivan*.

<sup>137</sup> *Texas v Johnson* 491 US 397 (1989). See the discussion of the case in Epstein & Walker 2004: 259-264.

offensive or disagreeable.” The question was whether the desecration of an American flag, by burning or otherwise, was a form of speech protected under the *First Amendment*.<sup>138</sup>

However, the approach to the use of racial epithets and related racial slurs is distinguished by Wright.<sup>139</sup> Insults of this nature have been argued to “conjure up the entire history of racial discrimination in this country” and have been described as “a reflection of social violence”.<sup>140</sup> They “invite no discourse” and “are typically ‘not intended to inform or convince the listener’ [or] communicate a social idea in any classically discursive sense”, but rather “to wound, humiliate or otherwise inflict pain”. They therefore arguably fall outside the scope of *First Amendment* protection.<sup>141</sup> He points out that “epithet speech” has come into conflict with, inter alia, equal-protection claims, civil rights claims, discipline policies and the common law tort of severe emotional distress.<sup>142</sup>

In the context of “hate speech” protection in terms of the South African Constitution, it is noteworthy that section 16(2)(c) only covers expression that constitutes incitement to harm. Directly assaultive expression will thus only be excluded from protection in terms of the section if it simultaneously incites to harm, and then only on that basis. The comparative relevance of Wright’s observation will become apparent in the discussion of the question of whether or not the exclusions from protection of freedom of expression in terms of the South African Constitution constitute a closed list.<sup>143</sup>

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<sup>138</sup> *Texas v Johnson*: 414.

<sup>139</sup> Wright 2000-2001: 994. See also Moon 2008-2009: 81-82.

<sup>140</sup> Wright 2000-2001: 1009.

<sup>141</sup> Wright 2000-2001: 998-999, 1008.

<sup>142</sup> Wright 2000-2001: 995.

<sup>143</sup> See Chapter V: 2.2.6.5.

#### 2.4.2.4 Obscenity, “filthy words” and pornography

The existing *First Amendment* doctrine has defined obscenity narrowly, to the extent that obscenity prosecutions have virtually been eliminated.<sup>144</sup> Restrictions on obscenity did, however, in several cases pass constitutional scrutiny.<sup>145</sup> Furthermore, legislation criminalising pornography was the subject of several court decisions.<sup>146</sup> Truly hard-core pornography was treated as falling outside the constitutional protection of freedom of speech and the press on the basis that it satisfied the test for obscenity.<sup>147</sup> It should be noted that the prohibition of pornography on this basis should be distinguished from prohibitions as in *New York v Ferber*, where the Supreme Court ruled unanimously that the right to free speech did not forbid states from banning the sale of material depicting children engaged in sexual activity. The Court found that the state’s interest in preventing sexual exploitation of minors was a compelling “government objective of surpassing importance”. The Court recognised that general definitions of what may be banned as obscene do not “reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children”.<sup>148</sup> It was held that the law was carefully drawn to protect children from the mental, physical, and sexual abuse associated with pornography, while not violating the *First Amendment*.<sup>149</sup> In *Ashcroft v Free Speech Coalition*, it was held that certain provisions of the *Child Pornography Prevention Act of 1996 (CPPA)* were overly broad and unconstitutional. The Court found that the provisions could not be read to prohibit obscenity, because the required link between the prohibitions and the affront to community standards prohibited by the definition of obscenity, was absent. Neither could it find support in *Ferber*,

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<sup>144</sup> Louw in Duncan 1996: 23.

<sup>145</sup> Louw in Duncan 1996: 23; Sullivan & Gunther 2001: 1076-1081; *Miller v California* 413 US 15 (1973); *Roth v United States* 354 US 476 (1957); *Memoirs v Massachusetts* 383 US 413 (1966). In *Reno v American Civil Liberties Union*, the Supreme Court struck down provisions of the *Communications Decency Act*, which, in an attempt to protect minors from explicit material on the Internet, criminalised the knowing transmission of “obscene or indecent” messages to any recipient under 18, as well as the knowing sending to a person under 18 of anything “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs”, finding that they violated the freedom-of-speech provisions of the *First Amendment*.

<sup>146</sup> *Roth v United States*; *Miller v California*; *New York v Ferber* 458 US 747 (1982); *Ashcroft v Free Speech Coalition* 535 US 234 (2002); *United States v Williams* 553 US 285 (2008); *Jacobellis v Ohio* 378 US 184 (1964). See the discussion of the first four cases in Epstein & Walker 2004: 360-367, 367-372, 372-376, 376-81.

<sup>147</sup> Louw in Duncan 1996: 23. See Sullivan & Gunther 2001: 1076-1081.

<sup>148</sup> *Ashcroft v Free Speech Coalition*: 240.

<sup>149</sup> *New York v Ferber*: 761.

since the CPPA prohibited speech “that recorded no crime and created no victims by its production”.<sup>150</sup>

It is a violation of federal law to broadcast obscene programming at any time, and indecent or profane programming during certain hours. The FCC is responsible for the administrative enforcement of the law that governs these types of broadcasts and has authority to issue civil monetary penalties, revoke a licence or deny a renewal application. In addition, violators of the law, if convicted in a federal district court, are subject to criminal fines and/or imprisonment for not more than two years.<sup>151</sup> The approach that children should be protected against exposure to “offensive language” on a broader basis than provided for in terms of the definition of obscenity, is noteworthy. Even more noteworthy is the distinction of the broadcasting context in the evaluation of speech value. In *FCC v Pacifica Foundation*,<sup>152</sup> the Supreme Court upheld the possibility of the FCC imposing administrative sanctions on a radio station for broadcasting George Carlin’s monologue titled “Filthy Words” during afternoon hours when children were likely to be in the audience. The FCC characterised the language of the monologue as “patently offensive”, though not necessarily obscene. The Court stated that the fact that, during most of the broadcast hours, both adults and unsupervised children were likely to be in the broadcast audience was one of the distinctions between the broadcast and other media to which the Court had often reverted as justifying different treatment of the broadcast media for *First Amendment* purposes. A second difference that was regarded as relevant was that broadcasting, unlike most other forms of communication, comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.<sup>153</sup> The finding was that the Commission was therefore entitled to give substantial weight to this difference in reaching its decision in this case.

In *Miller v California*, a divided Court confirmed that obscene materials did not enjoy *First Amendment* protection. The case concerned a mass-mailing campaign to advertise the sale of “adult” material. Some unwilling recipients of Miller’s brochures initiated the legal

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<sup>150</sup> *Ashcroft v Free Speech Coalition*: 256.

<sup>151</sup> Federal Communications Commission (FCC.gov): <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw>; <http://www.fcc.gov/aboutus.html> (accessed on 1-04-2013).

<sup>152</sup> *FCC v Pacifica Foundation* 438 US 726 (1978).

<sup>153</sup> *FCC v Pacifica Foundation*: 758-760; *Sable Communications of California, Inc v FCC* 492 US 115 (1989): 128.

proceedings. Miller was convicted of violating a California statute prohibiting the distribution of obscene material. The Court rejected the very narrow standard in the *Memoirs v Massachusetts* decision, terming it “utterly without redeeming social value”, and reaffirmed the standard previously established in *Roth v United States*, namely that the expression concerned, apart from the other requirements, “does not have serious literary, artistic, political, or scientific value”. It was held as follows:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards”, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>154</sup>

In its application of the aforementioned test, the Court stated:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people ... . But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

The relevant question to be answered was whether the “dominant theme of the material as a whole ... goes substantially beyond customary limits of candor” and affronts “contemporary community standards of the State of California”.<sup>155</sup>

The implication that the same expression can be differently valued depending on the intended purpose of its dissemination, is significant. In accordance with this approach, a determination of the constitutional speech value, for example of art, will take into account whether the presentation of the piece of art displaying content that complies with the definitional requirements of obscenity is directed at the “interchange of ideas” or merely at the portrayal of unacceptable content for the sake of such portrayal. This perspective will be regarded as of material relevance when the “bona fide” qualification of the exclusion of engagement in certain forms of expression from the categorical prohibition of “hate speech” in terms of

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<sup>154</sup> *Miller v California*: 24.

<sup>155</sup> *Miller v California*: 31.

South African legislation, in particular section 10 of the *Equality Act*, is scrutinised in Chapter V of the present study.<sup>156</sup>

The further relevance of the approach to obscenity lies therein that it illustrates the constitutional risk that distinctions within the context of low-valued speech, based on the nature of its subject matter, may constitute viewpoint-discrimination. This point will be explored in the subsequent discussion of *R.A.V. v City of St Paul* where Justice Scalia employed the example of obscenity to explain the notion that distinctions within unprotected categories of speech may require strict scrutiny.<sup>157</sup>

#### 2.4.2.5 *Blasphemy*

In *Joseph Burstyn Incorporated v Wilson*,<sup>158</sup> the Court held that, from the standpoint of freedom of speech and the press, the state has no legitimate interest in protecting any or all religions from views distasteful to them, sufficient to justify prior restraints upon the expression of those views. The Court did not regard it as the business of government to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches or motion pictures.<sup>159</sup> While there are no federal laws which forbid “religious vilification” or “religious insult”, some states such as Massachusetts, Michigan, Oklahoma, South Carolina, Wyoming, and Pennsylvania still have laws that make reference to blasphemy.

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<sup>156</sup> See Chapter V: 4.7.2.2.

<sup>157</sup> See *R.A.V. v City of St Paul*: 388.

<sup>158</sup> *Joseph Burstyn Incorporated v Wilson* 343 US 495 (1952).

<sup>159</sup> *Joseph Burstyn Incorporated v Wilson*: 505. The case concerned the rescinding, in terms of the *New York Education Law*, of the licence allowing the exhibition of the film *The Miracle* on the basis that the film was “sacrilegious”. *The Miracle* is about a religious parable featuring a dim-witted peasant woman, Nanni, who is supplied with drink and is then seduced and impregnated by a vagabond whom she in her stupor mistakes for St Joseph.

## 2.5 Case law

### 2.5.1 Background

When scrutinising the relevant case law, the following perspectives should be kept in mind.

Chemerinsky points out that the Supreme Court has defined viewpoint-discrimination extremely narrowly. He criticises this approach on the basis that an unduly restrictive definition of viewpoint-discrimination compromises the protection against content-based regulation of expression.<sup>160</sup>

He furthermore criticises the treatment of prima facie content-based laws as content-neutral because of a permissible purpose, for example a legitimate aim to prevent secondary effects of the speech.<sup>161</sup> He reiterates that, if the application of a law depends on the content of the message, the law, by definition, is content-based. The law can be upheld on the basis that it serves a sufficiently important purpose. It may even be said that it is a category of speech that warrants less than full *First Amendment* protection, but remains a content-based restriction.<sup>162</sup> This perspective can be related to a distinction between categorical and conditional prohibitions of forms of expression, not only in the application of the *First Amendment*, but also in the determination of the constitutionality of relevant South African legislative provisions.

Finally, he criticises the approach in *R.A.V. v City of St Paul* that content-based distinctions can exist within a category of unprotected speech and will accordingly have to pass strict scrutiny.<sup>163</sup> The criticism is rather pragmatic. In his view, even though it may seem that this approach increases protection of speech, it can lead to courts finding content-based laws to be content-neutral in order to uphold laws. He points out that virtually all government regulation draws distinctions within the categories of unprotected speech.<sup>164</sup>

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<sup>160</sup> Chemerinsky 2000: 56.

<sup>161</sup> Chemerinsky 2006: 59, 938-941.

<sup>162</sup> Chemerinsky 2011: 964-968.

<sup>163</sup> Chemerinsky 2000: 63.

<sup>164</sup> Chemerinsky 2000: 63.



Glazer's discussion of distinctions within categories of unprotected expression highlights the opposite perspective. She argues that despite the fact that obscenity, a category of speech which was held to be unprotected, has disappeared from court dockets, its discriminatory application has become systemic and still prevails.<sup>165</sup> The focus of her analysis is the discriminatory collateral effect of the obscenity doctrine on gays and lesbians.<sup>166</sup> She observes this effect in the arrest of a volunteer firefighter, Stephen Cole, under Ohio's disorderly-conduct statute "for his 'offensive attire', which included 'a skimpy woman's blue bikini with two tan water balloons placed in the top to simulate two woman's breasts and a pair of pink Speedo flipflop sandals', an outfit he wore in anticipation of a cross-dressing contest at a nearby gay bar".<sup>167</sup> It is apparent that the application of the Act constituted viewpoint-based discrimination. From a South African constitutional perspective, this example highlights the danger that the selective, inconsistent or biased application of speech regulation may have a discriminatory effect, which may constitute unfair discrimination.

### 2.5.2 *R.A.V. v City of St Paul and related cases*

In *R.A.V. v City of St Paul*,<sup>168</sup> the Supreme Court followed the approach that content-based distinctions within categories of unprotected speech must pass strict scrutiny.<sup>169</sup> The Court held that, while so-called unprotected areas of speech such as obscenity and defamation can be regulated "because of their constitutionally proscribable content", they may not be made "the vehicles for content discrimination unrelated to their distinctively proscribable content".<sup>170</sup> This overruled the conventional view that laws which regulate speech within certain categories of unprotected expression will be upheld as long as they meet the rational-basis test that all government actions must satisfy.<sup>171</sup> The Court invalidated an anti-bias ordinance under which several teenagers were convicted of burning a cross on an African American family's lawn. The ordinance made it a misdemeanour to place on public or private property any symbol that one knows would arouse anger or resentment in others on the basis of race, colour, creed, religion or gender.<sup>172</sup> The Court accepted that the ordinance only

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<sup>165</sup> Glazer 2008: 1385.

<sup>166</sup> Glazer 2008: 1380.

<sup>167</sup> Glazer 2008: 1383.

<sup>168</sup> See also *Dawson v Delaware* 503 US 159 (1992).

<sup>169</sup> See Chemerinsky 2006: 539-541. Chemerinsky 2011: 961; 1017-1018; 1037-1040.

<sup>170</sup> *R.A.V. v City of St Paul*: 383-384.

<sup>171</sup> Chemerinsky 2006: 987, 1001-1008; Chemerinsky 2011: 1037-1040.

<sup>172</sup> Zelezny 2004: 51.

reached an unprotected category of speech, namely “fighting words”.<sup>173</sup> It nonetheless concluded that, based on the “principle of content neutrality”, the statute was unconstitutional, because it was limited to those fighting words involving race, colour, creed, religion or gender.<sup>174</sup> It was reaffirmed that “content-based regulations are presumptively invalid”, and that the *First Amendment* prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed. The Court remarked that, under the statute “one could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion’”.<sup>175</sup>

The Court explicitly excepted sexual-harassment claims, in particular Title VII hostile-work-environment claims, from its broad prohibition against content discrimination. The exception was formulated on the basis that certain content-based regulations will be constitutional if the regulated subclass “happens to be associated with particular ‘secondary effects’ of the speech”. Accordingly, “where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy”.<sup>176</sup>

The minority in *R.A.V. v City of St Paul* concurred with the conclusion, but not with the analysis of the majority. The minority were of the opinion that the case should have been decided on the basis that, in terms of a strict-scrutiny analysis, the ordinance was fatally overbroad, because it criminalised not only unprotected expression, but also expression protected by the *First Amendment*. It contended that the majority had obscured the line between the narrow categories of expression falling outside the *First Amendment* that could

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<sup>173</sup> *R.A.V. v City of St Paul*: 393-394.

<sup>174</sup> Ruescher 2004: 359.

<sup>175</sup> *R.A.V. v City of St Paul*: 391-392. See Schauer 2005: 8-11; Moon 2008-2009: 80. See also the discussion of the differences between the Canadian proportionality analysis and the American approach in *R.A.V. v City of St Paul* – Jackson 1999: 611. Kagan 1993: 901-902 contends that it has to be realised that the effect of the presumption that content-based regulations are invalid with regard to hate speech and pornography is that regulation will be acceptable only when directed at conduct rather than speech, and when using viewpoint-neutral classifications. She suggests that efforts to regulate these forms of expression should take advantage of the long-established, unprotected category of obscenity. She expresses the view that, while such efforts will not eradicate all pornography or all hate speech from American society, they ought to be debated and tested in a continuing and multifaceted effort to enhance the rights of minorities and women, while also respecting core principles of the *First Amendment*. See also Hutchinson 1998 where the competition between free-speech interests and the goal of social equality, with specific reference to gay and lesbian equality, is discussed.

<sup>176</sup> *R.A.V. v City of St Paul*: 391.

be regulated freely on the basis of content, and all remaining expression that could be regulated on the basis of content only upon a showing of a compelling state interest. By placing “fighting words”, a concept that the Court had long held to be valueless, on at least an equal constitutional footing with political discourse and other forms of speech that had been deemed to have the greatest social value, the majority had devalued the latter category. It further contended that, in terms of the majority’s reasoning, one would have expected the Court to overturn sexual-harassment law, because Title VII was similar to the St Paul ordinance that the majority had condemned, in the sense that it also “impose[d] special prohibitions on those speakers who express[ed] views on disfavored subjects”.<sup>177</sup>

When Frank Collin, then the leader of the American Nazi Party, in 1977 proposed to march with his followers in full Nazi regalia in Skokie, Illinois, a community disproportionately populated by survivors of the Holocaust, the town passed a variety of ordinances aimed at stopping the march. A state circuit court thereupon entered an injunction prohibiting the march.<sup>178</sup> When the matter eventually came before the US Supreme Court,<sup>179</sup> it reversed the Illinois Supreme Court’s denial of a stay of the injunction during the period of appellate review on the basis that it constituted a denial of the applicants’ *First Amendment* rights.<sup>180</sup>

Kahn expresses the view that, while both the *Skokie* and *R.A.V.* decisions overturned restrictions on “hate speech”, both cases turned on special circumstances that attracted attention away from the core question of whether the state has the power to enact “hate speech” laws. He points out that the *R.A.V.* case turned on the legal doctrine of content-neutrality, while the *Skokie* decision did not involve the politically sensitive issues raised by cross-burning in the US and by Holocaust denial in Germany. From this perspective, he contends that, while the US may never accept “hate speech” laws with the same openness with which Germany accepts them, to say that there is a complete rejection of “hate speech” laws is not exactly right.<sup>181</sup>

Rosenfeld distinguishes the impact of the “hate speech” in *Skokie* and that in *R.A.V.* with regard to the emotional reactions of the respective target and non-target audiences involved.

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<sup>177</sup> *R.A.V. v City of St Paul*: 389-390, 409-411; Gould 1999: 167-168.

<sup>178</sup> Schauer 2005: 11; Epstein & Walker 2004: 279.

<sup>179</sup> *National Socialist Party of America v Village of Skokie* 432 US 43 (1977).

<sup>180</sup> Schauer 2005: 12.

<sup>181</sup> Kahn 2005-2006: 171-172. See also Epstein & Walker 2004: 279.

In *Skokie*, the vast majority of Jews experienced no genuine present or future threat, and the non-target gentile audience experienced mainly contempt and hostility concerning the Nazi hate message. In *R.A.V.*, however, the target audience definitely experienced anger, fear and concern, while the non-target audience “was split along a spectrum spanning from revulsion to mixed emotions to downright sympathy for the substance of the hate message if not for its form”.<sup>182</sup>

The Supreme Court in *Wisconsin v Mitchell*<sup>183</sup> drew a sharp distinction between the regulation of speech and conduct. At issue was a Wisconsin statutory provision increasing the maximum penalty for an offence whenever the defendant “intentionally selects the person against whom the crime ... is committed ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person”.<sup>184</sup> The Court held that, “whereas the ordinance struck down in *R. A. V.* was explicitly directed at expression”, the statute in *Mitchell* was “aimed at conduct unprotected by the First Amendment”. It was affirmed that, if drafted in a sufficiently narrow way, hate crime legislation was compatible with the constitutional right to free speech. Sullivan and Gunther remark that, in *Mitchell*, in permitting the state to increase the punishment for a crime motivated by the victim’s race, the Court focused strongly on the material consequences of such conduct. If the state, instead, increased the punishment for a crime “motivated by the defendant’s beliefs about race”, such crimes might have similar effects, but such laws would violate the *First Amendment*.<sup>185</sup>

In *Virginia v Black*, the Supreme Court revisited the *R.A.V.* decision. The issue to be decided was whether a Commonwealth of Virginia statute banning cross-burning with “an intent to intimidate a person or group of persons” violated the *First Amendment*. Unlike the St Paul ordinance, which targeted defendants who used burning crosses and other symbols to arouse anger on the basis of “race, colour, creed, religion or gender”, the Virginia statute, by its terms, applied to all defendants who burned crosses with the intent to intimidate, regardless of whether they were motivated by racial or religious animosity or by some other form of hate.<sup>186</sup> The Supreme Court held that while a state, consistent with the *First Amendment*, may

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<sup>182</sup> Rosenfeld 2002-2003: 1540-1541.

<sup>183</sup> *Wisconsin v Mitchell* 508 US 47 (1993). See the discussion of the case in Epstein & Walker 2004: 286-289. See also Bamforth, Malik & O’Cinneide 2008: 483.

<sup>184</sup> *Wisconsin v Mitchell*: Notes: 1.

<sup>185</sup> Sullivan & Gunther 2001: 1060-1061.

<sup>186</sup> Ruescher 2004: 365.

ban cross-burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross-burning as prima facie evidence of intent to intimidate, rendered the statute unconstitutional.<sup>187</sup> The Court reiterated that the *First Amendment* permitted a state to ban a “true threat”.<sup>188</sup> “True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence with regard to a particular individual or group of individuals. The speaker does not actually need to intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders”, in addition to protecting people “from the possibility that the threatened violence will occur”.<sup>189</sup>

Having distinguished the St Paul ordinance by characterising the Virginia law as neutral in terms of the message it targeted, the Court next had to consider whether targeting intimidating threats specifically in the form of cross-burning – in contrast to the St Paul ordinance which prohibited any symbol that one knows would arouse anger or resentment – was a constitutionally permissible subcategory under the *R.A.V.* decision. On the factual basis that cross-burners do not direct their intimidating conduct solely at racial or religious minorities, the Court reasoned that cross-burning was apparently not motivated by religious or racial animus. The Court furthermore found cross-burning to be qualitatively different from other threats, because it was “a particularly virulent form of intimidation with a long and pernicious history as a signal of impending violence”. This “special virulence”, in the view of the Court, justified the statute’s focus. The door was thus left open for states to pass content-neutral, cross-burning laws.<sup>190</sup>

Ruescher comments that the Court’s attempt to bring its decision in line with the exceptions in the *R.A.V.* case was unconvincing. Cross-burning, generally, is an act of bias, which makes it more than “arguable”, as was held in *R.A.V.*, that the decision to outlaw cross-burning was influenced by the legislator’s disapproval of the message cross-burners commonly wished to convey. He indicates that it has been argued that, in effect, the Court interpreted *R.A.V.*’s exception as allowing the state to restrict low-value speech associated with a specific

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<sup>187</sup> *Virginia v Black* 538 US 343 (2003): 347.

<sup>188</sup> See *Chaplinsky v New Hampshire*; *Watts v United States* 394 US 705, 708 (1969); *R.A.V. v City of St Paul*: 388; *Madsen v Women’s Health Center, Inc* 512 US 753, 774 (1994); *Schenck v Pro-Choice Network of Western NY* 519 US 357, 373 (1997).

<sup>189</sup> *Virginia v Black*: 359-360. See Moon 2008-2009: 80-81.

<sup>190</sup> Kahn 2005-2006: 171-173; Moon 2008-2009: 79-82.

message, as long as the state was motivated by legitimate state interests and not by the desire to suppress ideas.<sup>191</sup> Altman, however, contends that a communicative action can be both a threat and the advocacy of a viewpoint. In his view, in *Virginia v Black*, cross-burning was prohibited on the basis that it was a threat.<sup>192</sup>

It has to be noted that, ultimately, the reasoning of the Court in *R.A.V.* was that the state could not limit the speech of those expressing racial hatred while permitting other hateful messages.<sup>193</sup> Suk argues that, had the Virginia statute banned only cross-burning intended to express racial hatred, it would also have been unconstitutional. She points out that the majority in *R.A.V.* clearly stated that “the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content”.<sup>194</sup> She contends that a state’s disapproval of racism can “compromise the state’s legitimate authority to govern us all”.<sup>195</sup> She finds it curious, however, that the same approach is not followed with respect to employment discrimination laws.<sup>196</sup>

### ***2.5.3 Jurisprudence with respect to university speech codes***

The debate about the constitutionality of university “hate speech” regulations has been described as “one of the most divisive First Amendment debates of the late twentieth and early twenty-first centuries”.<sup>197</sup> The issue has not specifically been addressed by the Supreme Court. Tsesis contends that the Supreme Court’s decision in *Virginia v Black* provides the key to resolving the dispute.<sup>198</sup> Before discussing this contention, case law with respect to university speech codes will be explored.

Since 1980, many universities and colleges have regulated “hate speech” on campuses by means of so-called speech codes.<sup>199</sup> Several of these codes were successfully challenged in

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<sup>191</sup> Ruescher 2004: 369.

<sup>192</sup> Altman in Herz & Molnar 2012: 36.

<sup>193</sup> Suk in Herz & Molnar 2012: 146.

<sup>194</sup> Suk in Herz & Molnar 2012: 147.

<sup>195</sup> Suk in Herz & Molnar 2012: 147-148.

<sup>196</sup> Suk in Herz & Molnar 2012: 147.

<sup>197</sup> Tsesis 2010-2011: 619.

<sup>198</sup> Tsesis 2010-2011: 619.

<sup>199</sup> See the discussion of the purpose, scope and effect of campus speech codes by Jacobson in Herz & Molnar 2012: 232-237. For examples of hate-speech incidents on campuses, see Tsesis 2010-2011: 621-623.

the lower courts on the basis that they violated the right to freedom of speech.<sup>200</sup> The principle of content-neutrality as articulated in *R.A.V. v City of St Paul* formed the basis of the decisions.<sup>201</sup> Rossum and Tarr remark that most speech codes make viewpoint distinctions similar to those in *R.A.V.*; hence they are constitutionally suspect in terms of the standard announced in *R.A.V.*<sup>202</sup> Baldwin, on the other hand, expresses the view that *R.A.V.* established a precedent for the upholding of university “hate speech” codes. He contends that, on the basis that *R.A.V.* clearly signals the Court’s intent to protect speech, though not speech action, “there are sufficient means at the institutions’ disposal to prevent reprehensible speech without adding the *First Amendment* to the fire”.<sup>203</sup>

In *Doe v University of Michigan*,<sup>204</sup> the code typically imposed sanctions on individuals for “discriminatory harassment” if they engaged in any behaviour, verbal or physical, that “stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation or creed”, and that “creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University-sponsored extra-curricular activities”.<sup>205</sup> The Court, with reference to Supreme Court decisions that had held that statutes punishing speech or conduct solely on the grounds that these were unseemly or offensive, were unconstitutionally overbroad, held that the policy in issue was also overly broad. It reasoned that the University could not establish an anti-discrimination policy which had the effect of prohibiting certain speech because it was contrary to ideas and messages that were sought to be conveyed. In this context, the Court remarked that the terms “stigmatise” and “victimise” were not self-defining, and “could only be understood with reference to some exogenous value system”. What one individual might find victimising or stigmatising, another might not.<sup>206</sup>

In *UWM Post v Board of Regents of University of Wisconsin*,<sup>207</sup> both the “fighting words” and “content-neutral” principles were invoked. The University argued that the speech code concerned was a constitutional way to prohibit “fighting words” or words defined by the

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<sup>200</sup> Rossum & Tarr 2003: 154.

<sup>201</sup> Tsesis 2010-2011: 620 and fn 13.

<sup>202</sup> Rossum & Tarr 2003: 154.

<sup>203</sup> Baldwin 1994-1995: 93.

<sup>204</sup> *Doe v University of Michigan* 721 F. Supp. 852 (ED Mich. 1989).

<sup>205</sup> *Doe v University of Michigan*: par III A.

<sup>206</sup> *Doe v University of Michigan*: 863, 867, 859; Gould 1999: 168.

<sup>207</sup> *UWM Post v Board of Regents of University of Wisconsin* 774 F. Supp. 1163 (ED Wis. 1991). See also *Dambrot v Central Michigan University* 839 F. Supp. 477 (ED Mich. 1993).

Supreme Court as “inciting an immediate breach of the peace”, as described in *Chaplinsky v New Hampshire*.<sup>208</sup> The Federal Court, however, concluded as follows: “Since the elements of the UW Rule do not require that the regulated speech, by its very utterance, tend to incite violent reaction, the rule goes beyond the present scope of the fighting words doctrine.”<sup>209</sup> The Court also rejected the argument that the code was necessary to stop discriminatory harassment. It warned against following a balancing approach in terms of which pressing and tangible short-run concerns, such as discriminatory harassment, were likely to outweigh the long-run benefits of free speech. It was reiterated that the suppression of speech, even where the speech’s content appears to have little value and great costs, amounts to governmental thought control.<sup>210</sup>

In *Corry v Stanford University*,<sup>211</sup> the university speech code of Stanford University, which prohibited insulting or “fighting words” or non-verbal symbols intended to insult or stigmatise on the basis of sex, race, colour, handicap, religion, sexual orientation or national and ethnic origin, was considered. The Court held that the fact that the code proscribed only the “fighting words” on the specified grounds rendered it an “impermissible content-based regulation” prohibited by the *First Amendment*.<sup>212</sup>

Chemerinsky, in addressing the constitutionality of university speech codes, reiterates that the *First Amendment* does not tolerate governmental control over the content of messages expressed by private individuals. Accordingly, a public university cannot, subject only to narrow and well-understood exceptions, and without infringing the *First Amendment*, prohibit the expression of hate.<sup>213</sup> Speakers thus generally have the right to proclaim the most vile racist, homophobic or anti-Semitic ideas on any public-university campus. Significantly though, this does not mean that every place on the campus should be equally open for speech, that time, place and manner restrictions may not be imposed, and that threats and harassment of specific individuals may not be punished.<sup>214</sup>

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<sup>208</sup> See 2.4.2.3 above.

<sup>209</sup> *UWM Post v Board of Regents of University of Wisconsin*: par II 10.

<sup>210</sup> *UWM Post v Board of Regents of University of Wisconsin*: fn 9.

<sup>211</sup> *Corry v Stanford University* 740309 (Cal. Super. Ct. Feb. 27, 1995).

<sup>212</sup> *Corry v Stanford University*; Gould 1999: 156-157.

<sup>213</sup> Chemerinsky 2011: 1046.

<sup>214</sup> Chemerinsky 2006: 1013-1014.



Other voices have however been raised.<sup>215</sup> The American judicial approach to common law harassment, in particular sexual harassment, has been used in support of an argument that the *First Amendment* can tolerate university “hate speech” codes. However, as pronounced by Gould, while the terms of “hate speech” codes were substantially similar to those of sexual harassment claims, and while they were directed toward similar harms, namely, as described in the University of Wisconsin’s speech code, psychological responses to stigmatisation, inter alia, feelings of “humiliation, isolation and self-hatred”, sexual harassment is widely recognised by the courts as a valid legal claim, while campus “hate speech” codes, despite having similar elements and purposes, have been ruled unconstitutional.<sup>216</sup>

Tsesis refers to the “parameters of a ‘true threats’ statute that prohibits intentional intimidation” as set out in the majority judgment in *Virginia v Black*. True threats encompass those statements where the speaker communicates “a serious expression of an intent to commit an act of unlawful violence [in respect of] a particular individual or group of individuals”.<sup>217</sup> In line with this definition:

general racist statements at public university campuses are probably protected forms of expression, but when a person stands up in a classroom or in the college commons area and advocates the commission of specific criminal conduct, his statements are no longer immune from campus regulation and criminal prosecution.<sup>218</sup>

It follows that a narrow reading of *Virginia v Black* would require campus “hate speech” codes to be as open-ended as the Virginia statute. A broader reading, however, would allow

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<sup>215</sup> Tsesis 2010-2011: 619, 619 fn 6.

<sup>216</sup> Gould 1999: 164-165. Gould remarks that the tort of sexual harassment developed out of the doctrine of unfair labour practices. Under Title VII of the *Civil Rights Act* of 1964, employers are prohibited from discriminating against any individual with respect to employment conditions on the basis of race, religion, colour, sex or national origin. Today, the vast majority of lawsuits under Title VII concern sexual harassment. Apart from requests for sexual favours as a quid pro quo for employment, the creation of a hostile, intimidating or offensive workplace is recognised as sexual harassment. The tort of hostile workplace harassment has five elements, namely:

Verbal or physical conduct of a sexual or sex-based nature; That is unwelcome; That is directed against an individual because of her (or his) sex; That has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment; And that an employer knew or should have known of and did not take adequate action to stop or prevent.

Gould 1999: 157-158. See also the discussion of harassment in Chapter V: 4.9 of the present study.

<sup>217</sup> Tsesis 2010-2011: 635 fn 93.

<sup>218</sup> Tsesis 2010-2011: 635.

university speech codes that punish, for instance, cross-burning that intentionally intimidates others because of their racial, social, gender, political, or sexual orientation statuses.<sup>219</sup>

## 2.6 Conclusion

Various relevant aspects from a comparative perspective have been identified in the above discussion. What should ultimately be noted is that the protection of freedom, dignity as autonomy, and democracy are shared values in terms of the American and South African constitutions. It was indicated in Chapter II that these values inform the protection of freedom of expression. In the light of the predominance of freedom of expression in terms of the American Constitution, the constitutional value of expression categorically excluded from protection in terms of American law should certainly also be suspect in the South African constitutional context. The considerations that apply to fighting words, obscenity and incitement may, in given circumstances, have relevance with respect to expression that hurts or harms.

Furthermore, taking into account the general substantive approach of the South African constitutional structure, substantive autonomy interests that have survived strict scrutiny, for example those interests referred to in *Gertz v Robert Welch Inc*, should be duly considered in threshold as well as proportionality analyses in order to determine the constitutionality of categorical and conditional limitations of free expression in the South African context.

It is apparent that expression excluded from constitutional protection in terms of section 16(2)(c) of the South African Constitution is regarded as valueless, or of very low value, in terms of the values that have been indicated as informing the protection of free expression. In terms of section 9(4) of the Constitution,<sup>220</sup> expression that constitutes unfair discrimination also does not enjoy constitutional protection. Content-based regulation of expression of this nature, whether through its subject matter or the particular point of view that is expressed, will not infringe the right to freedom of expression. However, the “chilling effect” of regulation even of unprotected expression has been highlighted. This aspect should be regarded as of substantial relevance, especially in the context of the analysis required in terms of the South African Constitution to determine whether or not discriminatory expression

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<sup>219</sup> Tsesis 2010-2011: 643.

<sup>220</sup> See the discussion of section 9 of the South African Constitution in Chapter V: 3.

constitutes unfair discrimination. Considerations that have been highlighted in the discussion, for example the “chilling effect” of regulation, substantive autonomy interests and the reality that the suppression of harmful expression may jeopardise rather than promote peace and reconciliation, should be taken into account. Lastly, consideration should be given to the principle, based on the reasoning in *R.A.V. v City of St Paul*, that content-based distinctions within categorical prohibitions of expression should still be content-neutral. It will be reasoned that, insofar as South African legislation prohibiting “hate speech” exceeds the grounds stipulated in terms of section 16(2)(c) of the Constitution, it gives effect to this principle.

### 3. GERMANY

#### 3.1 The value-basis of the Basic Law

While the American Constitution is “based on an idea of liberty rooted in personal choice”, the German Basic Law is “value-ordered around the norm of dignity”<sup>221</sup> and sets forth both rights and duties with which citizens or government have to comply.<sup>222</sup> According to Ullrich, the new constitutional democratic order in Germany has in fact been founded on the basis of the state’s obligation to realise a set of objectively ordered principles “designed to restore the centrality of humanity to the social order”.<sup>223</sup> This objective, positive dimension of rights obligates the government to create the proper conditions so that rights may be realised. The human-dignity guarantee, with respect to the state, constitutes an objective legal norm and supreme value within the constitutional value system. With respect to the individual, it manifests itself as a subjective right substantiating an enforceable claim against the state for the protection of dignity, and also for protection from violations by private parties.<sup>224</sup>

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<sup>221</sup> Eberle 2007: 3; Kommers & Miller 2012: 44, 57-58, 355.

<sup>222</sup> Kommers 1997: 239; Ullrich 2003: 71.

<sup>223</sup> Ullrich 2003: 80.

<sup>224</sup> Ullrich 2003: 80, 82, 83, 86. The concept of an “objective” ordering of values was outlined in the *Liith* decision, the first major free-speech case decided under the Basic Law of 1949. The Court regarded those values which are not only specified rights of individuals, but are also part of the general legal order as so important that they must exist apart from any specified legal relationship. It was reiterated that they accordingly apply not only against the state exercising its authority under public law, but also affect the rules of private law which regulate legal relations among individuals. The perspective was highlighted that values of private law make their own important contribution to the autonomy of the individual and to the public good. With respect to the substantial tension between the force of private-law values and the influence of constitutional norms, the Court adopted what has come to be known as the doctrine of the “indirect” effect of constitutional values on private legal relations, in terms of which constitutional rights are said to “influence”

Articles 1 and 2<sup>225</sup> proclaim, respectively, the principle of human dignity and the right to life and personal inviolability. Human dignity is recognised as the predominant constitutional value.<sup>226</sup> In the *Mephisto* decision,<sup>227</sup> the Federal Constitutional Court stressed that the dignity of the person, as guaranteed in article 1 of the Basic Law, dominates the whole value system of basic rights.<sup>228</sup> In relation to the aforementioned rights, the Basic Law guarantees equality under the law, religious liberty, freedom of expression, freedom of assembly and association, the right to conscientious objection, and other basic rights. Finally, article 19 emphasises the value of these guaranteed rights by declaring that “in no case may [the state] encroach upon the content of a basic right”.<sup>229</sup> Other protected interests which typically have to be considered include the collective interest of all citizens in conditions such as public peace, as well as minorities’ and society’s interest in “civility of discourse”.<sup>230</sup>

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rules of civil law rather than to override them. See Quint 1989: 261-263. See also Eberle 1996-1997: 808-812, 816-818, 830-837; Eberle 2007: 47-48; Kommers & Miller 2012: 442-450.

<sup>225</sup> Article 1 (Protection of human dignity) reads as follows:

- (1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

Article 2 (Rights of liberty) reads as follows:

- (1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.
- (2) Everyone has the right to life and to inviolability of his person. The freedom of the individual is inviolable. These rights may only be encroached upon pursuant to a law.

Article 3 (Equality before the law) reads as follows:

- (1) All persons are equal before the law.
- (2) Men and women have equal rights.
- (3) No one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions.

<sup>226</sup> Ullrich 2003: 80; Eberle 1996-1997: 818.

<sup>227</sup> *Mephisto* decision BVerfGE 30, 173 (24 February 1971). *Interstate Broadcasting Agreement (Rundfunkstaatsvertrag)* 1991: IUSCOMP:

<<http://www.iuscomp.org/gla/judgements/tgcm/v710224.htm>> (accessed on 1-04-2013). The complainant in this case sought constitutional review of the injunction obtained by the adopted son and sole heir of Gustaf Gründgens, actor and theatre director, against the printing, distribution or publication of a book by Klaus Mann entitled *Mephisto, a Novel, or How to Get on in the World*. Gründgens was the model for the main character in the book, Hendrik Höfgen, a talented actor who, in order to make a career for himself as an artist in collusion with Nazi powers, is false to his true political leanings and rides roughshod over all human and ethical considerations. The Court stated that, given the effect which a work of art may have on the social plane, the guarantee of artistic freedom may come into conflict with the area of human personality, which is equally protected by the Constitution. See *Mephisto* decision: par 5. Kommers & Miller 2012: 358-361.

<sup>228</sup> Ullrich 2003: 80; Eberle 1996-1997: 834-837; Eberle 2007: 4-6.

<sup>229</sup> Kommers & Miller 2012: 51-52. ; Ullrich 2003: 71.

<sup>230</sup> Brugger 2003: 9.

### 3.2 The democratic order

Ullrich indicates that the hierarchy of constitutional rules flows from the amending formula in article 79 of the Basic Law. While the first two paragraphs address the formal requirements for constitutional amendments, article 79(3) prescribes substantive limitations to constitutional amendments. These include the fact that amendments to the Basic Law affecting the principles laid down in articles 1 and 20 will be inadmissible. The implication is that a constitutional amendment in violation of the principles protected by article 79(3) will be invalid and void. Thus article 79(3), the guarantee of human dignity, and the principles contained in article 20 of the Basic Law establish a “constitutional core” or, in other words, “a positivist expression of the categorical limits inherent to the Constitution”. All provisions of the Basic Law that do not fall within the “guarantee of perpetuity” will be evaluated against these principles for their constitutionality.<sup>231</sup>

Positive protection may be effected through regulation and the performance of administrative and constitutional functions in conformity with the human-dignity guarantee, as well as through interpretation by the courts of norms and rights in accordance with it. The *Sozialstaat* principle obligates the state to take necessary welfare measures so that all citizens will have a dignified existence.<sup>232</sup> State action is subject to the *Rechtsstaat* principle which requires legal measures to have a legal basis and a distinct content, and be necessary and proportional to the ends they seek to accomplish.<sup>233</sup>

### 3.3 Human dignity

According to Eberle, the Federal Constitutional Court articulated its conception of human dignity in its “human nature formula”.<sup>234</sup> In terms of this formula, the human-dignity norm is based on an understanding of the human being as an intellectual and moral creature capable of freely determining and developing itself.<sup>235</sup> Liberty plays a central role in this formula. Without negative legal liberty, arbitrary limitation of freedom would be permissible, and there would be no human dignity in any legally significant sense. The freedom which the

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<sup>231</sup> Ullrich 2003: 72; Eberle 2007: 23-24.

<sup>232</sup> Eberle 2007: 60-62.

<sup>233</sup> Eberle 2007: 54-56; Alexy 2002: 233-234.

<sup>234</sup> Eberle 2007: 20-23.

<sup>235</sup> Eberle 2007: 16.

Basic Law associates with human dignity is, however, not the unlimited freedom of an isolated and autonomous individual, but the freedom of an individual related and bound to society.<sup>236</sup> The Federal Constitutional Court explained this in the following words:

[T]he individual must submit himself to those limits on his freedom of action which the legislature sets in order to maintain and support social co-existence within the limits of what is generally acceptable according to the relevant subject-matter, and so long as the independence of the person remains guaranteed.<sup>237</sup>

In the words of Unberath: “What respect for human dignity requires in detail cannot be completely detached from the social circumstances of the time.”<sup>238</sup> The satisfaction of the human-dignity guarantee accordingly, “alongside the formal principle of negative liberty”, depends on principles related to substantive conditions, including “those principles which protect the innermost aspect of human beings, and those which grant to the individual a *prima facie* right to self-representation before fellow human beings”.<sup>239</sup>

Alexy contends that the impression that article 1(1) of the Basic Law is absolute, is incorrect. Based on the premise that the conditions under which one principle takes precedence over another constitute the conditions of a rule which requires the legal consequences of the principle to take precedence, the article treats the human-dignity norm partly as a rule and partly as a principle.<sup>240</sup> Secondly, there is a large set of conditions of precedence for the principle of human dignity, together with a strong degree of certainty that, when they are satisfied, it takes precedence over other competing principles. The area defined by such conditions is what the Federal Constitutional Court calls “the absolute protected core area of private autonomy.”<sup>241</sup> Ullrich, in this regard, contends that case law delineating the boundaries of human-dignity protection reflects the core understanding of the human-dignity

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<sup>236</sup> Eberle 2007: 16.

<sup>237</sup> Alexy 2002: 234.

<sup>238</sup> Markesinis & Unberath 2001: 176.

<sup>239</sup> Alexy 2002: 235; Eberle 2007: 27-29.

<sup>240</sup> Alexy 2002: 57, 69. Alexy defines a rule as a norm which, if it validly applies, requires that what it says be exactly complied with. He explains that, in the application of rules, there is no room for the weighing up of competing principles. This is in contrast to principles “which require that something should be realised to the greatest extent possible given the legal and factual possibilities”, with the scope of the legally possible being determined “by opposing principles and rules” in the given context. See Alexy 2002: 47-48; Kommers 1997: 424; Kommers & Miller 2012: 485.

<sup>241</sup> Alexy 2002: 62-63.

guarantee of article 1(1) of the Basic Law as “meant for the protection against attacks on human dignity by others, such as humiliation, stigmatization, persecution and ostracism”.<sup>242</sup>

Outside this inviolable core of human dignity it will be necessary to address the potential competition inherent in the human-dignity concept, as well as the competition between human dignity and other constitutional rights and interests.

### ***3.3.1 The inviolable right to human dignity***

In the *Mephisto* decision, the Federal Constitutional Court stated that the clear terms of the article 5(3) guarantee that the arts and sciences shall be free “foredoom any attempt to limit it, whether by narrowing the idea of art in the light of one’s value-judgements or by extending or invoking the limitations applicable to other constitutional provisions”. The absolute nature of the guarantee of artistic freedom means that its limits are to be found only within the Constitution itself, that is, “by construction in terms of the order of values”.<sup>243</sup>

The Court, in the *Soldiers Are Murderers* decision, acknowledged that freedom of opinion must always take second place if the statement concerned violates the human dignity of another. This is because “the basic rights as a whole, are concrete manifestations of the principle of human dignity”, and because human dignity “as the root of all the basic rights, is not capable of being weighed against any individual basic right”. The Court significantly added that it always requires careful reasoning to determine if it is to be assumed that the use of a basic right affects inviolable human dignity. Accordingly, because of its effect in suppressing freedom of opinion, the Federal Constitutional Court has narrowly defined the concept of abusive criticism developed in the specialist courts. In terms of this perspective, an exaggerated or even rude criticism does not of itself turn a statement into abuse. Instead, the prominent feature about the statement should be defamation of the person rather than debate about the issue. “It must be personal disparagement beyond even polemical and overstated criticism.”<sup>244</sup>

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<sup>242</sup> Ullrich 2003: 73.

<sup>243</sup> *Mephisto* decision: par 4, 7.

<sup>244</sup> *Soldiers Are Murderers* decision BVerfGE 93, 266-312I (10 October 1995): par III 2. Kommers & Miller 2012: 470-475.

The distinction between violations which involve the inviolable right to human dignity and those which do not, was articulated in the *Acoustic Surveillance* decision.<sup>245</sup> The Court affirmed the view, based on the philosophy of Kant, that it is inconsistent with the dignity of the individual for the state to treat him or her as an object. It then stated that this view does, however, have its limits. The mere fact that a person is the object of a criminal investigation does not prejudice his or her human dignity, but it may do so if the procedures adopted disregard his or her individuality as a person, and if the public power fails to show the consideration to which every individual is entitled in his or her own right. Such conduct is impermissible even with a view to enforcing the criminal law or ascertaining the underlying facts. The central core of a person's private life is categorically protected. Its invasion cannot be justified in the public interest, even where its demands are powerful and pressing. Articles 1(1) and 79(3) of the Constitution forbid the state to make an evaluation in this regard in terms of the principle of proportionality. Whether the inviolable core of private life is reached in a particular case depends on whether the situation has a highly personal character, and also on the manner and the extent to which the life of others and the needs of society are affected.<sup>246</sup>

The *Strauss Caricature* decision<sup>247</sup> provides an earlier example of a violation that went to the core of inviolable human dignity protected in terms of article 1(1). A satirical magazine had portrayed the then prime minister of Bavaria as a pig engaged in sexual activity. The Court confirmed that protection of the general right of personality enjoys no general primacy over the right to freedom of expression, but must also be understood and weighed up in the light of this fundamental right. However, when the general personality right is a direct consequence of human dignity, the limitation operates absolutely without the possibility of a balancing of interests. "In the case of interference with the core of human dignity protected by Article 1(1) [of the] Basic Law, a severe restriction on the right of personality is always present, which ... is no longer covered by the freedom of artistic activity." Not even the fact that the person concerned is a politician caught in the crossfire of the official clash of opinion divests him or

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<sup>245</sup> *Acoustic Surveillance* decision BVerfG, 1 B v R 2378/98 (3 March 2004):

The University of Texas School of Law: Foreign Law Translations:  
<[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=658](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=658)>  
(accessed on 1-4-2013).

<sup>246</sup> *Acoustic Surveillance* decision: par 116-123.

<sup>247</sup> *Strauss Caricature* decision BVerfGE 75, 369 (3 June 1987): par I(4)(b): The University of Texas School of Law: Foreign Law Translations:

<[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=634](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=634)>  
(accessed on 1-04-2013). Kommers & Miller 2012: 467-468.



her of his or her personal dignity and justifies such injuries to honour, even on the basis of an appeal to the freedom of art.<sup>248</sup>

### 3.3.2 Conflict inherent in the concept of human dignity

Tension arises in instances where the state may be required to show deference to choices of the individual flowing from personal autonomy and grounded in human dignity, while, at the same time, it may be obliged to intervene with regard to the same choices in order to protect human dignity.<sup>249</sup> It is apparent that this tension will be inherent in limitations of the right to freedom of expression, especially taking into account that not only the utterance per se but also its effect on the audience involve the right to human dignity.<sup>250</sup>

The inherent tension between human-dignity claims to autonomy and to social respect was addressed in the *Mephisto* decision. The Court stated that, as part of the system of basic rights, the freedom of art is coordinate with the dignity of the person as guaranteed by article 1(1).<sup>251</sup> However, given the effect which a work of art may have on the social plane, the guarantee of artistic freedom may come into conflict with the area of human personality, which is equally protected by the Constitution.<sup>252</sup> The conception of the human being which underlies article 1(1) of the Basic Law is as much infused with the guarantee of freedom in article 5(3) as the latter is influenced by the value implicit in article 1(1). The individual's claim to social respect and value is not superior to artistic freedom, but neither can art simply ignore the individual's claim to proper respect. However, the resolution of the tension between the protection of the personality and the right to artistic freedom cannot turn solely on the "social" effects of a work of art, but must also take account of aesthetic considerations.

The Court concluded that only by weighing all the circumstances of a given case can one decide whether the publication of a work which artistically deploys true details about an actual person poses a serious threat of encroachment on the protected area of his or her

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<sup>248</sup> *Strauss Caricature* decision: C I 4(b).

<sup>249</sup> Ullrich 2003: 81-83.

<sup>250</sup> Brugger 2003: 9.

<sup>251</sup> *Mephisto* decision: par 7.

<sup>252</sup> In this matter, because the person whose reputation was allegedly violated was deceased, the personality right was not considered in terms of section 2(1) of the Constitution, but rather directly in terms of section 1(1). The Court stated that, although the protection of the personality guaranteed by article 2(1) terminates on death, an individual's death does not put an end to the state's duty under article 1(1) to protect him or her from assaults on his or her human dignity – *Mephisto* decision: par 6.

personality. One consideration must be whether, and how far, the artistic treatment of the material and its incorporation into the work as an organic whole have made the “copy” independent of the “original” by rendering objective, symbolical, and figurative what was individualised, personal, and intimate. If it appears that the artist has indeed produced a “portrait of the original”, the outcome will depend on the extent of the artistic alienation and how seriously the “falsification” damages the reputation or memory of the subject.<sup>253</sup>

### 3.4 The principle of proportionality

Although not explicitly referred to in the Basic Law, the Federal Constitutional Court regards the principle that limitations of basic rights have to meet the standards set by the principle of proportionality as an indispensable element of a state based on the rule of law.<sup>254</sup> Quint contends that basic rights and general laws qualify each other through the exercise of a “reciprocal effect” (*Wechselwirkung*). The only way in which a result can be reached in any specific case, is by deciding which of the values respectively embodied in the general laws and in the basic right are more weighty in the particular circumstances.<sup>255</sup> Alexy contends that a conflict between two principles can be managed only through balancing. The purpose of balancing must be both to resolve alleged conflicts between principles and to aid all of the organs of the state in their task of properly optimising rights and other countervailing principles.<sup>256</sup>

The proportionality test that has developed comprises three elements. Firstly, the limitation concerned must be directed at the achievement of a legitimate end. Secondly, no less restrictive and equally effective means to achieve the purpose must be available. Thirdly, the means must be proportionate to the end.<sup>257</sup> Alexy refers to this as “the principles of suitability, of necessity and of proportionality in [the] narrow sense”.<sup>258</sup> The principles of suitability and necessity, according to him, concern “optimization relative to what is factually possible”, while the principle of proportionality in its narrow sense concerns “optimization

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<sup>253</sup> *Mephisto* decision: par 7.

<sup>254</sup> *Lüth* decision BVerfGE 7, 198 (15 January 1958): par 3; Bomhoff 2008: 121-122; Eberle 2007: 56-57.

<sup>255</sup> Quint 1989: 283.

<sup>256</sup> Alexy 2002: 47-50.

<sup>257</sup> Kommers 1997: 46; Kommers & Miller 2012: 67; Currie 1994: 309-310; Grimm 2007: 384-389; BVerfGE 3, 383 (1954): 399; *Pharmacy* decision BVerfGE 7, 377 (1958): IV 5; BVerfGE 13, 97 (1961): 104, 108. BVerfGE 16, 194 (1963): 201; BVerfGE 19, 342 (1965): 348; BVerfGE 95, 48 (1996): 58.

<sup>258</sup> Alexy 2005: 572.

relative to the legal possibilities”. “The legal possibilities are essentially defined by competing principles.”<sup>259</sup> Balancing thus consists in “optimization relative to competing principles”. Proportionality in its narrow sense, therefore, “can be expressed by a rule that states: The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other”.<sup>260</sup> The reasons justifying the interference must thus weigh the heavier the more intensive the interference.<sup>261</sup> The third requirement has appeared to be the biggest stumbling block in the justification of limitations on basic rights.<sup>262</sup>

The so-called see-saw theory of reciprocal effect (*Wechselwirkungstheorie*), viewed either as a separate fourth element of the proportionality test or as an especially strict application of the third element, requires case-specific balancing. In the context of judicial review of the limitation of freedom of expression, this will include reference to the functions that free speech serves in a given context.<sup>263</sup> Brugger explains the guidelines for case-specific balancing in the context of freedom of expression by indicating that, while an assertion of fact known or proved to be untrue is not covered by the protection of freedom of opinion, all opinions and value judgements are protected speech, but if such speech attacks the dignity of persons or groups of persons, or constitutes formal vilification of such persons or groups, it only counts as “speech minus” or “low-value speech”. Such speech would be outweighed by other constitutional interests, including the dignity interests of those persons and groups, even if it touches on public issues that would normally put it in the category of “high-value speech”.<sup>264</sup>

The following Federal Constitutional Court cases provide examples of the application of the proportionality principle with respect to limitations of the right to freedom of expression.

The Court in the *Auschwitz Lie* decision, in considering the position if the statement at issue did fall under the protection of the right to freedom of opinion, took into account the weight to be given to the injury to honour, as well as the lesser worthiness of protection owing to the

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<sup>259</sup> Alexy 2005: 573.

<sup>260</sup> Alexy 2005: 572-573.

<sup>261</sup> Alexy 2005: 574-575; Grimm 2007: 393-394.

<sup>262</sup> Grimm 2007: 389; *Riding in the Woods* decision BVerfGE 80, 137 (1980): par 3(a). See also the *Falconry* decision BVerfGE 55, 159 (1980): B I; BVerfGE 81, 156: 188 (1990); *Cannabis* decision BVerfGE 90, 145 (1994); BVerfGE 91, 207(1994): 222.

<sup>263</sup> Brugger 2003: 21.

<sup>264</sup> *Auschwitz Lie* decision BVerfGE 90 (13 April 1994): par II 1.

factual incorrectness of the statement concerned, and concluded that there was no objection to the fact that the decisions under challenge had accorded the protection of the personality priority over freedom of opinion.<sup>265</sup>

The Court furthermore confirmed that article 5(4) of the *Meetings Act* is reconcilable with the Constitution, and, in particular, does not violate article 8(1), which unconditionally guarantees the right to hold meetings in closed rooms. Article 5(4) provides that a meeting in closed rooms can be forbidden if facts are established from which it follows that the organiser or his or her followers will defend views or tolerate statements which amount to a crime or an offence of the kind which is to be pursued by the state.<sup>266</sup> The Court stated that expressions of opinion which are threatened with punishment by a norm which is permissible in terms of article 5(2) of the Constitution remain prohibited, even at such meetings. The fact that the legislator sought to prevent the highly probable and expected commission of criminal acts at the meeting, was endorsed in principle. The Court asserted that the dangers that this approach holds for freedom of opinion can be met by strict requirements regarding the certainty of the risk that the expected criminal acts will be committed.<sup>267</sup>

In the *Soldiers Are Murderers* decision, the Court gave special weight to the fact that freedom of opinion is “simply constitutive for the free democratic order”. The aim of the limitation was to guarantee the public recognition needed by state institutions to fulfil their function. The Court held that if this aim comes into conflict with the freedom of opinion, the importance of that freedom is to be rated particularly highly, because the basic right has grown from the special need for protecting the criticism of authority.<sup>268</sup>

In the recent *Wunsiedel* decision,<sup>269</sup> the Court held that interferences with the freedom of expression in order to prevent a “disturbance of public peace” would only be constitutional

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<sup>265</sup> *Auschwitz Lie* decision: II 2(c)(aa) 2. Kommers & Miller 2012: 493-497.

<sup>266</sup> Article 8 reads as follows: “(1) All Germans have the right to assemble peacefully and unarmed without prior notification or permission. (2) With regard to open-air meetings this right may be restricted by or pursuant to a law.”

<sup>267</sup> *Auschwitz Lie* decision: II 2(c)(aa). See also *Osho* decision BVerfG 1, BvR 670/91: par 92: The University of Texas School of Law: Foreign Law Translations: <[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=614](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=614)> (accessed on 1-4-2013).

<sup>268</sup> *Soldiers Are Murderers* decision: par III 1-2.

<sup>269</sup> *Wunsiedel* decision BVerfG 1, BvR 2150/08 (4 November 2009): par 71-79. The complainant in the case gave advance notice of his intention to organise an open-air event in memory and honor of Rudolf Hess, a prominent political figure in Nazi Germany and temporary deputy to Adolf Hitler. At previous similar

when the expression of opinions crossed the threshold and constituted aggression or a breach of law.<sup>270</sup> The freedom of expression would not allow interferences merely to ensure the “peacefulness” of the public discourse, to prevent a “poisoning of the intellectual climate”, or to prevent statements with detrimental or harmful content.<sup>271</sup> The Court reiterated that constitutional limits of public political discourse are not exceeded by the dissemination of anti-constitutional ideas, but only by an active and aggressive attitude towards the free and democratic basic order. As a result, article 5 of the Basic Law would allow the state to interfere with the freedom of expression “only when the expression of an opinion goes beyond the intellectual sphere and turns into a danger to legally protected interests”.<sup>272</sup>

### **3.5 The constitutional protection of freedom of expression**

#### ***3.5.1 Articles 4 and 5***

The following articles of the German Basic Law directly concern freedom of expression. Articles 4(1) and 4(2) provide as follows:

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.

Article 5 provides as follows:

- (1) Every person shall have the right freely to 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 in the right to personal honour.
- (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

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events, between approximately 1 000 and 5 000 Nazi supporters marched through the streets of Wunsiedel. The announced assembly was banned on the basis that it constituted a danger to public security. The complainant claimed a violation of his fundamental rights.

<sup>270</sup> Payandeh 2010: 935.

<sup>271</sup> Payandeh 2010: 940.

<sup>272</sup> Payandeh 2010: 940; *Wunsiedel* decision: par 64-68.

Article 21(1) provides that political parties “may be freely established”, and article 3(3) forbids preference or prejudice on grounds of “political opinions”.<sup>273</sup>

The interrelationship of the different facets of article 5, namely the formation of opinion and artistic or scholarly ideas, the expression of opinion and creation of works of art or science, and an external dimension, namely the effect of opinions, art or science on the addressee or the audience, were articulated by the Federal Constitutional Court in the broadcasting context in the *Rundfunkurteil North Rhine-Westphalia Broadcasting* decision.<sup>274</sup> The Court stated that freedom of broadcasting serves the same goal as all other guarantees under article 5(1), namely ensuring free individual and public formation of opinion. This goal is not limited to mere reporting or to propagation of political opinions, but concerns every propagation of information and opinion. Free formation of opinion takes place in a process of communication. On the one hand, this presupposes the liberty to express and disseminate opinions, and, on the other, the liberty to inform oneself by taking note of opinions. Since article 5(1) guarantees the freedom to express and disseminate opinions, as well as the freedom to receive information, as human rights, it also seeks to protect the process so as to exercise these rights constitutionally. Broadcasting was described as a “medium” and a “factor” of this constitutionally protected process of free formation of opinion.<sup>275</sup>

Article 18 provides:

Whoever abuses freedom of opinion, in particular freedom of the press (Article 5, paragraph 1), freedom of teaching (Article 5, paragraph 3), freedom of assembly (Article 8), freedom of association (Article 9), the secrecy of mail posts and telecommunications (Article 10), property (Article 14), or the right of asylum (Article 16, paragraph 2) in order to attack the free democratic basic order, forfeits these basic rights.

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<sup>273</sup> Currie 1994: 175.

<sup>274</sup> *Rundfunkurteil North Rhine-Westphalia Broadcasting* decision BVerfGE 83, 238 (5 February 1991): The University of Texas School of Law: Foreign Law Translations: <[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=627](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=627)> (accessed on 1-4-2013).

<sup>275</sup> Brugger 2003: 6-7. See also Karpen 1989: 396.

The forfeiture and its extent are pronounced by the Federal Constitutional Court. The provision was employed twice in the 1950s to ban political parties of the extreme right and left.<sup>276</sup>

### 3.5.1.1 *Opinion*

The object of the basic-right protection of article 5(1), sentence 1, of the Basic Law is opinions.<sup>277</sup>

Accordingly, whether “hate speech” has the benefit of the protection of article 5(1) depends, in the first instance, on whether the speech concerned constitutes opinion in terms of the article.

The distinction between fact and opinion in German case law was briefly discussed in Chapter II of the present study.<sup>278</sup> The context of this chapter warrants a more detailed discussion. In the *Auschwitz Lie* decision, the Federal Constitutional Court stated:

[O]pinions are characterised by the subjective attitude and personal judgement of the person expressing himself with regard to the object of the statement. In this respect they cannot be proved true or untrue. The protection therefore exists independently of whether the statement is rational or emotional, well founded or groundless, or regarded by others as useful or harmful, valuable or valueless. The protection of the basic right also extends to the form of the statement. A statement of opinion does not lose the basic right protection by being formulated sharply or hurtfully.<sup>279</sup>

The Court distinguished assertions of fact on the basis that the objective relationship between the statement and reality predominates. It follows that statements of fact are open to an examination of their truth content. However, assertions of fact do not, for this reason, automatically fall outside the area of protection of article 5(1), sentence 1. Insofar as factual assumptions are the prerequisite for the formation of opinions which article 5(1) in its totality guarantees, they are in any case protected by the basic right. The Court reasoned that, consequently, “the protection of assertions of fact ends at the point where they cease to

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<sup>276</sup> See Chapter II: 3.2.2.

<sup>277</sup> See *Auschwitz Lie* decision: Case summary.

<sup>278</sup> See Chapter II: 2.4.2.

<sup>279</sup> *Auschwitz Lie* decision: par II 1.

contribute anything to the formation of opinion that is presupposed in constitutional law”. Where a division of the factual and evaluating components is not possible without falsifying the sense of the statement, the statement as a whole must, in the interest of effective protection of the basic right, be regarded as an expression of opinion and be included within the protected area of freedom of opinion.<sup>280</sup>

The Court concluded that the prohibited statement that there was no persecution of Jews under the Third Reich did not enjoy the protection of freedom of opinion, because it was an assertion of fact which was proved to be untrue. The Court distinguished the denial of persecution of Jews under the Third Reich and of German guilt at the outbreak of World War II, which was the issue in the *Book about War Guilt* decision of the Federal Constitutional Court, and was held to amount to an opinion.<sup>281</sup>

It has to be noted that the Court then proceeded to deal with the question of whether, if considered in connection with the subject of the meeting, the denial should be regarded as a prerequisite for formation of opinion as to the “blackmailability” of German politics, in which case it would enjoy the protection of article 5(1). The question was left unanswered, and the possibility that the denial was in fact protected in terms of article 5(1) was accordingly not explicitly excluded. The Court was satisfied with this position on the basis that, even if the statement were to be regarded as an expression of opinion, nothing would change as to the proven incorrectness of its factual content. As a result, the interference with freedom of expression relating to this statement would even then not be weighted particularly heavily.<sup>282</sup>

The decision in the *Soldiers Are Murderers* case concerned criminal court convictions for insulting the Federal Army and individual soldiers by distributing statements like “Soldiers are murderers”, and “Soldiers are potential murderers”, as well as the following:

Are soldiers potential murderers? One thing is clear: Soldiers are trained to be murderers ...  
Mass extermination, murder, destruction, brutality, torture, mercilessness, terror, threats,  
inhumanity, revenge, retaliation ... practised in peace, perfected in war. That is the trade of

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<sup>280</sup> *Auschwitz Lie* decision: par II 1.

<sup>281</sup> *Auschwitz Lie* decision: par I, par II 2(c)(bb)(1); Kommers & Miller 2012: 97-498; Rosenfeld 2002-2003: 1551.

<sup>282</sup> *Auschwitz Lie* decision: par I, par II 2(c)(bb)(1).



soldiers. ... There is only one answer to this: For peace, disarmament and humanity – refuse military service! Resistance against militarism!

Based on the distinction between opinions and facts in the *Auschwitz Lie* decision, the Court concluded that the statements for which the complainants had been punished for insult were not assertions about facts, but were opinions expressing a judgement about soldiers and about the profession of soldier, which, in certain circumstances, compels the killing of other human beings. Punishment for these statements was therefore an intrusion into the protected area of the basic right to freedom of opinion.<sup>283</sup> It was stated that article 5(1), sentence 1, of the Basic Law gives everyone the right to express and disseminate his or her opinion freely in word, writing, and picture, and that the person making the statement may also choose the circumstances which assure the widest dissemination or the strongest effect of the expression.<sup>284</sup>

The *Wunsiedel* decision illustrates that the Federal Constitutional Court increasingly refrained from categorising statements as facts per se and consequently as not protected in terms of the right to freedom of expression. This reached a point where the exclusion of Holocaust denial from protection was acknowledged as a specific and extraordinary exception to the conditional protection of freedom of expression. The Court held that article 5 generally protects every kind of opinion, even “worthless” opinions and opinions which can be dangerous or which are in conflict with the fundamental values underlying the Basic Law.<sup>285</sup> The state may restrict the external effects of the expression of an opinion, but it may not interfere with the subjective and intellectual belief and ethos of the individual.<sup>286</sup> It was stated that the Basic Law and the constitutional order of the Federal Republic of Germany had to be understood, to a large extent, as a reaction to the totalitarian regime of National Socialism. Against this background, the Court justified the specific prohibition of approving of, glorifying, or justifying National Socialist rule of arbitrary force on the basis that it represented an exceptional historic constellation, constituted an attack on the identity of the German community, and could evoke profound concerns abroad. The Court stated that the propagandistic affirmation of the violent and arbitrary National Socialist rule would have

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<sup>283</sup> *Soldiers Are Murderers* decision: par I 1.

<sup>284</sup> *Soldiers Are Murderers* decision: par I 1.

<sup>285</sup> *Wunsiedel* decision: par 49-50. See Payandeh 2010: 932.

<sup>286</sup> *Wunsiedel* decision: par 74. See Payandeh 2010: 935.

effects beyond the general battle of opinions and could not be captured by the general limitations of freedom of expression.<sup>287</sup>

### 3.5.1.2 *Limitation grounds in terms of article 5(2) of the Basic Law*

#### 3.5.1.2.1 General laws

The Federal Constitutional Court, in the *Lüth* decision, explained that the mutual relationship between basic rights and “general laws” as mentioned in article 5(2) of the Basic Law is not to be understood as a unilateral limitation on the applicability of the basic rights. The “general laws” set limits to the basic rights, but they themselves must be interpreted in recognition of the significance of these rights in a value-based democratic state.<sup>288</sup> “General laws” in terms of article 5(2) is to be understood as including “all laws which do not forbid an opinion as such and are not directed against the expression of the opinion as such, but serve to protect a legal interest which is simply to be protected without regard to any particular opinion”.<sup>289</sup> The Court noted that “there is no reason why norms of private law should not be recognized as ‘general laws’ within the meaning of article 5(2).”<sup>290</sup>

These principles were applied in the *Wunsiedel* decision. The Federal Constitutional Court considered whether the criminalisation in terms of section 130(4) of the *Criminal Code* of disturbance of the public peace by means of approving of, glorifying, or justifying National Socialism, could be regarded as a general law in terms of article 5(2). The Court confirmed the above-mentioned understanding of general laws in terms of article 5(2). It was held that the interest pursued by the constraint on freedom of expression must constitute a public interest protected by the legal order in general. The law must be content-neutral in the sense that it should be primarily aimed at protecting the interest, and it must be neutral with regard to different political beliefs and ideologies. Laws that aim at prohibiting a specific political or ideological form of expression are therefore not general laws in the sense of article 5(2) of the

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<sup>287</sup> *Wunsiedel* decision: par 26-27. See Payandeh 2010: 934; Rosenfeld 2002-2003: 1550.

<sup>288</sup> *Lüth* decision BII(2); Reimann 1987-1988: 209.

<sup>289</sup> *Soldiers Are Murderers* decision: par II 1(a)-(b). The Court held that, insofar as the section 185 provision of the *Criminal Code* which prohibits insult also protects authorities, it can be justified as a general law. State institutions cannot fulfil their function without a minimum degree of social acceptance. They ought, therefore, in principle to be protected from verbal onslaughts which threaten to undermine this prerequisite. The criminal law protection ought not, however, to lead to state institutions being shielded from public criticism, even if it takes a harsh form.

<sup>290</sup> Kommers & Miller 2012: 446, 449.

Basic Law. Measured against this standard, the Court held that section 130(4) of the *Criminal Code* did not qualify as a general law in terms of article 5(2). While the statute was content-neutral in the sense that it aimed at protecting public peace, which did constitute a public interest protected by the legal order in general, it did not pursue this protection in a content-open, general manner. On the contrary, the statute did not provide protection for the victims of totalitarian regimes in general, but specifically prohibited the public expression of opinions that enunciate a specific attitude to National Socialism.<sup>291</sup> The Court moreover extended the scope of application of the generality requirement of content-neutrality to all three alternatives for a constitutional justification for limitation of the right to freedom of expression in terms of section 5(2) of the Basic Law. Statutes in protection of young persons, and the right to personal honour, similarly could justify an interference with the right to freedom of expression only when they were drafted in a neutral and open way and not directed at specific convictions.<sup>292</sup>

#### 3.5.1.2.2 Honour

Brugger defines three levels of honour. In its most basic sense, honour describes the status of a person who enjoys equal rights, and is entitled to respect as a member of the human community, irrespective of individual accomplishments. The constitutional point of reference for this level of honour is the protection of the dignity of all human beings in terms of article 1(1) of the Basic Law. Honour in this sense is violated and an insult occurs when, for example, a human being is called worthless or a verbal attack is based on assertions of racial inferiority.<sup>293</sup>

A second level of honour is concerned with the preservation of minimum standards of mutual respect in public. This level of honour is rooted in the constitutional protection of personality in terms of article 2(1) of the Basic Law. Instances of disrespect and insult that violate the law include accusing another person of having severe moral or social faults or having intellectual shortcomings, for instance by calling the person “a swine” or “a jerk”.<sup>294</sup>

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<sup>291</sup> Payandeh 2010: 933. *Wunsiedel* decision: par 52-68. Compare Brugger 2003: 20; *Lüth* decision BII(4). The Court nevertheless found the statute to be compatible with article 5 on the basis that it constituted a defence of the constitutional order – see Payandeh 2010: 936.

<sup>292</sup> Payandeh 2010: 937-938.

<sup>293</sup> Brugger 2003: 23.

<sup>294</sup> Brugger 2003: 23-24.

A third level of honour covers defamation, that is, making factual assertions that tend to so harm the reputation of another as to lower him or her in the estimation of the community.<sup>295</sup>

In the *Soldiers Are Murderers* decision, the Court held that section 185 of the *Criminal Code*, which primarily protects personal honour, is reconcilable with the Basic Law. The Court stated that, within the framework of the general right of personality derived from section 2(1) in combination with section 1(1) of the Basic Law, honour enjoys basic-right protection. It can be harmed by expressions of opinion; therefore, it is expressly recognised in article 5(2) as a ground justifying limitations on the freedom of opinion.<sup>296</sup>

A significant aspect of the decision is the approach that the courts in certain circumstances see, in a disparaging statement which neither names nor recognisably refers to certain persons, an attack on the personal honour of the members of a collective.<sup>297</sup> The Court held that a statement which refers to a collective can also insult every individual member of the collective if it is linked to a characteristic which obviously, or at least typically, applies to all members of the collective. The larger the collective to which a disparaging statement relates, the weaker the personal involvement of the individual member may be. However, where minority groups are involved and where the collective criticism refers to the criteria that are commonly related to “hate speech”, the court will more easily find that all the members were targeted.<sup>298</sup>

According to Kübler, it was only after the defeat of the Nazi regime that precedents where the German courts refused to punish insulting or defamatory expressions addressed to “the Jews” or other groups in general, were overruled. This modification of a well-established principle has been explained to have been brought about by the fact that the common destiny, the experience of the persecution by the Nazi regime, has generated a new identity not only of those who have survived, but also of their descendants living within Germany. This approach rendered German courts much more ready to grant protection against attacks on reputation and similar interests addressed exclusively against groups or organisations. It, however,

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<sup>295</sup> Brugger 2003: 23-24.

<sup>296</sup> *Soldiers Are Murderers* decision: par I 2-3, par III 1-2.

<sup>297</sup> *Soldiers Are Murderers* decision: par III 1-2.

<sup>298</sup> *Soldiers Are Murderers* decision: IV 2.

remained a problem to explain why a pure and simple denial of the fact of the Holocaust should constitute an insult or defamation of Jews living in Germany. For this reason, section 130 of the *Criminal Code*, which will subsequently be discussed, was completely rewritten in its present form.<sup>299</sup>

### 3.5.1.3 *Scholarship and art and freedom to profess a religious or philosophical creed*

Brugger points out that, while article 5(2) lists three limitations to the general rights provided for in article 5(1), the specialised rights provided for in article 5(3) are not subject to an explicit limitation clause. Consequently, scholarship and art may be restricted only by general constitutional limitations, such as competing basic rights or constitutionally protected values that deserve, in specific circumstances, priority over the freedoms afforded by article 5(3).<sup>300</sup>

Like article 5(3), article 4(1) has no explicit constitutional limitations. The same position therefore pertains as regards expression motivated by religious considerations.<sup>301</sup>

## 3.6 The regulation of expression

### 3.6.1 *The German Criminal Code (Strafgesetzbuch, StGB)*<sup>302</sup>

#### 3.6.1.1 *“Crimes against peace”*

Section 80a provides as follows: “Whoever publicly incites to a war of aggression (Section 80) in a meeting or through the dissemination of writings (Section 11 subsection (3))<sup>303</sup> in the territorial area of application of this law shall be punished with imprisonment from three months to five years.”

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<sup>299</sup> Kubler 1998-1999: 341-342. Section 130 in its original form, before it was amended in 1994, did not explicitly refer to the atrocities committed under National Socialist rule.

<sup>300</sup> Brugger 2003: 3-4. See also *Mephisto* decision: par 4.

<sup>301</sup> Brugger 2003: 3-4.

<sup>302</sup> *Criminal Code* (Strafgesetzbuch, StGB) 1998, Federal Law Gazette I: 945, 3322: The University of Texas School of Law:

<[http://bundesrecht.juris.de/englisch\\_stgb/englisch\\_stgb.html#StGBengl\\_000P130](http://bundesrecht.juris.de/englisch_stgb/englisch_stgb.html#StGBengl_000P130)> (accessed on 1-04-2013).

<sup>303</sup> Section 11(3) reads as follows: “Audio and visual recording media, data storage media, illustrations and other images shall be the equivalent of writings in those provisions which refer to this subsection.”

### 3.6.1.2 “Endangering the democratic rule of law”

Sections 84 to 91 forbid the dissemination and use of propaganda by unconstitutional organisations. This includes displaying “flags, badges, uniform parts, passwords, and salutes”, as well as symbols which are so similar as to be mistaken for these.

Section 86(1) prohibits the dissemination of propaganda of non-constitutional or banned organisations. Section 86(3) provides that subsection (1) will not be applicable if the means of propaganda or the act serve to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, or reporting about current historical events, or similar purposes.

Section 86(1)4 specifically forbids the dissemination of means of propaganda, the contents of which are intended to further the aims of a former National Socialist organisation.<sup>304</sup>

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<sup>304</sup> Section 86 provides as follows:

- (1) Whoever domestically disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination domestically or abroad; means of propaganda: 1. of a party which has been declared to be unconstitutional by the Federal Constitutional Court or a party or organisation, as to which it has been determined, no longer subject to appeal, that it is a substitute organisation of such a party; 2. of an organisation, which has been banned, no longer subject to appeal, because it is directed against the constitutional order or against the idea of international understanding, or as to which it has been determined, no longer subject to appeal, that it is a substitute organisation of such a banned organisation; 3. of a government, organisation or institution outside of the territorial area of application of this law which is active in pursuing the objectives of one of the parties or organisations indicated in numbers 1 and 2; or 4. means of propaganda, the contents of which are intended to further the aims of a former National Socialist organisation, shall be punished with imprisonment for not more than three years or a fine.
- (2) Means of propaganda within the meaning of subsection (1) shall only be those writings (Section 11 subsection (3)) the content of which is directed against the free, democratic constitutional order or the idea of international understanding.
- (3) Subsection (1) shall not be applicable if the means of propaganda or the act serves to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes.
- (4) If guilt is slight, the court may refrain from imposition of punishment pursuant to this provision.

Section 86a provides as follows:

- (1) Whoever: 1. domestically distributes or publicly uses, in a meeting or in writings (Section 11 subsection (3)) disseminated by him, symbols of one of the parties or organisations indicated in Section 86 subsection (1), nos. 1, 2 and 4; or 2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use domestically or abroad, in the manner indicated in number 1, shall be punished with imprisonment for not more than three years or a fine.
- (2) Symbols, within the meaning of subsection (1), shall be, in particular, flags, insignia, uniforms, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in sentence 1 shall be deemed to be equivalent thereto.
- (3) Section 86 subsections (3) and (4), shall apply accordingly.

Section 86a prohibits the distribution or public use of symbols of any of the organisations referred to in section 86.

The Federal Constitutional Court has confirmed that section 86a, by means of banning the symbols concerned, aims to protect the democratic rule of law and the public political peace from abstract dangers specifically associated with these symbols.<sup>305</sup> The Court did not question the categorical tabooing of the offensive symbols. With respect to the identification of similar symbols, the Court followed the approach that semantic content and the purpose of the prohibition, namely to prohibit symbols identified with specific organisations, should be taken into account. It was held that the term “glory and honor” (*Ruhm und Ehre*) had in itself no Nazi colouration and that an unbiased observer who knew the slogan of the Hitler Youth, “Blood and Honor” (*Blut und Ehre*), would not form the impression that it did.<sup>306</sup>

The Federal Court of Justice (*Bundesgerichtshof*) deviated more substantively from a rigid application of the prohibition when it held that a defendant who ran a mail-order business for punk accessories, which included armbands displaying a crossed-out swastika, had not transgressed section 86a.<sup>307</sup> The finding was based on the observation that the display *in casu* expressed enmity in respect of the organisation represented by the badge in an apparent and clear way. The Court’s reasoning amounted to “a form of dangerousness test that inevitably involved the concrete circumstances of the case in question, thus creating a teleological exception from the legislators’ presumed intention in categorically prohibiting the display of such symbols under section 86a”.<sup>308</sup>

### 3.6.1.3 “Crimes against public order”

Sections 123 to 145<sup>309</sup> proclaim crimes against the public order. Section 130 reads as follows:

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<sup>305</sup> BVerfG, 1 BvR 150/03 (1 June 2006): par 18-25; BUNDESVERFASSUNGSGERICHT: <[http://www.bverfg.de/entscheidungen/rk20060601\\_1bvr015003.html](http://www.bverfg.de/entscheidungen/rk20060601_1bvr015003.html)> (accessed on 1-04-2013).

<sup>306</sup> BVerfG, 1 BvR 150/03: par 23.

<sup>307</sup> Newman & Rackow 2011: 152.

<sup>308</sup> Newman & Rackow 2011: 151-155.

<sup>309</sup> Other sections in this chapter that concern freedom of expression are articles 125 and 126, which prohibit breaching the peace by means of threats to commit acts of violence, and breaching the public peace by means of threats to commit crimes. Section 140 prohibits rewarding and approving certain crimes in a manner that is capable of disturbing the public peace.

- (1) Whosoever, in a manner capable of disturbing the public peace incites hatred against segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years.
- (2) Whosoever with respect to written materials (Section 11(3)) which incite hatred against segments of the population or a national, racial or religious group, or one characterised by its ethnic customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group (a) disseminates such written materials; (b) publicly displays, posts, presents, or otherwise makes them accessible; (c) offers, supplies or makes them accessible to a person under eighteen years; or (d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services shall be liable to imprisonment of not more than three years or a fine.
- (3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in Section 6(1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment of not more than five years or a fine.
- (4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine.
- (5) Subsection (2) above shall also apply to written materials (Section 11(3)) of a content such as is indicated in subsections (3) and (4) above.
- (6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86 (3) shall apply *mutatis mutandis*.

It is apparent that, in terms of section 130, the incitement of others to hatred and violence becomes punishable well before the conduct would be considered concrete incitement to a specific criminal act punishable under different provisions of the *Code*.<sup>310</sup> Brugger describes

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<sup>310</sup> See articles 26, 30, 111.



its aim as to pre-empt the climate conducive to hate crimes that can be created by collective verbal attacks.<sup>311</sup>

Stradella contends that the introduction in terms of section 130(3) to (6) of one significant auto-justifying exception to the freedom of speech is radical. In evaluating this radical choice, anti-Semitism should be acknowledged as being historically most sensitive and, at the same time, more strongly resistant to condemnation.<sup>312</sup> Brugger similarly submits that Holocaust denial should be viewed as a specific “Never Forget, Never Again” commitment. Based on this maxim, the use of criminal law to encroach upon the freedom to deny the Holocaust is considered justified, even if the usual doctrinal safeguards in respect of freedom of opinion are substantially disregarded in the process.<sup>313</sup>

This approach was indeed followed in the *Wunsiedel* decision. Having concluded that the terms of article 5(2) of the Basic Law did not provide a constitutional basis for section 130(4), the Court held that the statute was nevertheless compatible with article 5. The basis for the finding was that article 5(1) and (2) encompassed an inherent exception to the general-law requirement owing to the historical dimension of injustice and horror that National Socialist rule brought to Europe and large parts of the world. The Court reasoned that the propagandistic affirmation of the violent and arbitrary National Socialist rule constituted an attack on the identity of the German community, could evoke profound concerns abroad, would have effects beyond the general battle of opinions, and could not be captured by the general limitations of freedom of expression. The Court added that this, however, would not mean that the Basic Law encompassed a general anti-National Socialist principle that would allow for the categorical prohibition of right-wing extremist or National Socialist opinions. It was reiterated that constitutional limits of public political discourse are not exceeded by the dissemination of anti-constitutional ideas, but by an active and aggressive attitude to the free and democratic basic order.<sup>314</sup>

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<sup>311</sup> Brugger 2003: 28-29.

<sup>312</sup> Stradella 2008: 72-73.

<sup>313</sup> Brugger 2003: 37.

<sup>314</sup> Payandeh 2010: 934-935; *Wunsiedel* decision: par 64-68.

### 3.6.1.4 “Representation of violence”

Section 131 prohibits the representation of violence in the following terms:

- (1) Whoever, in relation to writings (Section 11 subsection (3)), which describe cruel or otherwise inhuman acts of violence against human beings in a manner which expresses a glorification or rendering harmless of such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which injures human dignity: 1. disseminates them; 2. publicly displays, posts, presents, or otherwise makes them accessible; 3. offers, gives or makes them accessible to a person under eighteen years; or 4. produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers 1 through 3 or facilitate such use by another, shall be punished with imprisonment for not more than one year or a fine.
- (2) Whoever disseminates a presentation of the content indicated in subsection (1) by radio, shall be similarly punished.
- (3) Subsections (1) and (2) shall not apply if the act serves as reporting about current or historical events.
- (4) Subsection (1), number 3 shall not be applicable if the person authorized to care for the person acts.

### 3.6.1.5 “Insulting of faiths, religious societies and organisations dedicated to a philosophy of life”

Section 166 reads as follows:

- (1) Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults the content of others’ religious faith or faith related to a philosophy of life in a manner that is capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine.
- (2) Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults a church, other religious society, or organisation dedicated to a philosophy of life located in Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall be similarly punished.

In 2006, Manfred van H was found guilty in terms of this section after he had distributed toilet paper on which he had imprinted the words “Koran, the Holy Koran”. He sent the toilet paper to 22 mosques and to German television stations to win attention, provoking outrage in Islamic countries. He was given a suspended sentence of one year in prison and was ordered to do 300 hours of community service. At the time, there was worldwide political controversy over recently published cartoons that Muslims regarded as offensive because they depicted the Prophet Mohammed. The Judge stated that the significance of what Manfred van H had done, became far greater as a result of the world political situation.<sup>315</sup>

#### 3.6.1.6 “Dissemination of pornographic writings”

Section 184 prohibits the dissemination of pornographic writings in certain circumstances. Section 184(2) specifically states that the section is applicable to “whoever disseminates a pornographic presentation by radio”.

#### 3.6.1.7 “Insult”

Sections 185 to 200 of the *Code* criminalise insult and defamation. Legal protection in terms of these provisions gives effect to the right of every person to social worth, with reference to reputation or external honour, and to the right to be respected as a human being, with reference to internal worth or integrity. Brugger describes insult as “an illegal attack on the honor of another person by intentionally showing disrespect or no respect at all”. The “insult” has to occur in front of others. “If the insult further involves defamatory assertions of facts attacking the honor of a person, an important consideration is whether the recipient of the abuse was insulted in private or whether third parties were also made aware of the occurrence.”<sup>316</sup>

Typical forms of group defamation do not attack organisations as such, but rather members of groups with unifying traits. Such insults include overarching statements such as “soldiers are

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<sup>315</sup> Expatica.com: <[http://www.expatica.com/de/news/local\\_news/suspended-prison-for-german-who-insulted-koran-27912.html](http://www.expatica.com/de/news/local_news/suspended-prison-for-german-who-insulted-koran-27912.html)> (accessed on 1-04-2013).

<sup>316</sup> Brugger 2003: 26. For a discussion of the concept “honour”, see Brugger 2003: 23-24. See also the *Strauss Caricature* decision: par C.I.4.(a).

murderers” and “Jews use the Holocaust to extort money from Germany”. Insults directed at large groups rarely satisfy the requirement for individualisation.<sup>317</sup> Collective insult will much rather be constituted when the disparaging statement involves “a social minority with alleged negative characteristics that are supposed to be irreversibly typical of its individual members”. The Federal Constitutional Court, furthermore, is more likely to find that all members of a whole group are targeted in cases where the collective criticism refers to criteria that are commonly tied to “hate speech”, in particular “ethnic, racial, physical or mental characteristics from which the inferiority of a whole group of persons and therefore simultaneously each individual member is deduced”.<sup>318</sup>

Section 185 provides that insult will be punished with imprisonment for not more than one year, or a fine, and, if the insult is committed by means of violence, with imprisonment for not more than two years or a fine. Section 192 shows that even disseminating true facts may constitute criminal defamation. It reads: “Proof of the truth of the alleged or disseminated fact does not preclude punishment pursuant to section 185 if the existence of an insult arises from the form of the assertion or dissemination or from the circumstances under which it occurred.” Section 186 prohibits malicious gossip and section 189 determines that whoever disparages the memory of a deceased person will be punished with imprisonment for not more than two years or a fine. In terms of section 190, if the asserted or disseminated fact is a crime, then proof of the truth thereof will be considered to have been provided if a final judgment of conviction for the act has been entered against the person insulted. Proof of the truth is, on the other hand, excluded if the insulted person was acquitted in a final judgment before the assertion or dissemination. Section 192 determines that proof of the truth of the asserted or disseminated fact will not exclude punishment under section 185 if the existence of an insult results from the form of the assertion or dissemination or the circumstances in which it occurred.

Section 193 provides:

Critical judgements about scientific, artistic or commercial achievements, similar utterances which are made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrances and reprimands of superiors to their subordinates, official reports or

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<sup>317</sup> Brugger 2003:15-16.

<sup>318</sup> Brugger 2003: 27.

judgments by a civil servant and similar cases are only punishable to the extent that the existence of an insult results from the form of the utterance or the circumstances under which it occurred.

The Court in the *Soldiers Are Murderers* decision, in the context of determining whether the statements concerned were covered by section 185, stated that the meaning of a statement should be understood accurately. Neither the subjective intention of the person making the statement nor the subjective understanding of the person affected by the statement, but the sense that the statement has according to the understanding of an unprejudiced and sensible public, is decisive. The starting point is always the literal meaning of the statement. The sense of the statement is also determined from its linguistic context and the accompanying circumstances in which it is made, insofar as these can be known to the recipient.<sup>319</sup>

In the application of this exercise, the Court conceded that rating a soldier on a level with a murderer could be seen as a deep insult. Even accepting that the statement was used in the colloquial sense to describe a person who contributes to the destruction of human life in a morally unjustifiable manner or is ready to do so, there is likewise a condemnation of such a nature as to appreciably disparage the person affected in the eyes of those around him or her. That applies especially if the accusation refers not to occasional behaviour, but to the totality of vocational activity. However, when consideration is given to the linguistic context as well as circumstances external to the statement, alternative meanings emerge. In the first instance, it is relevant that the statements refer to soldiers in general and not to individual soldiers or, in particular, to those of the Federal Army. In the second instance, the context was also articulated by the distribution of a leaflet and a reader's letter which were predominantly concerned with the destruction of human life, amongst soldiers as well as in the civil population, as an accepted consequence of the maintenance of armies and the associated readiness to carry on war, whether for the purposes of attack or defence. The Court concluded that, in context, the criminalised statements did not equate soldiers with murderers in the sense of satisfying the subjective characteristics of murder.<sup>320</sup>

The Court affirmed that the personal honour of a human being depends not only on his or her individual qualities and behaviour, but also on the characteristics and activities of the groups

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<sup>319</sup> *Soldiers Are Murderers* decision: par III 3.

<sup>320</sup> *Soldiers Are Murderers* decision: par IV 1.

to which he or she belongs, or of the institutions in which he or she is active. This applies especially if the statements are connected to ethnic, racial, physical or intellectual characteristics from which the inferiority of a whole group of persons, and, therefore, at the same time, every individual member, is deduced. The larger the collective to which a disparaging statement refers, the weaker the extent to which an individual member can be personally affected. This is because, with accusations against large groups, it is mostly not a question of individual inappropriate behaviour or individual characteristics of the members, but of the demerits, as they exist in the view of the speaker, of the group and of its social function, as well as the requirements for the behaviour of the members connected with this. The Court concluded that, in the present matter, the judgments of the courts *a quo* lacked a basis for saying that the Federal Army had been insulted as a whole, and, accordingly, that the personal honour of its individual members was violated.<sup>321</sup>

Section 194(1) provides:

An insult shall be prosecuted only upon complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the aggrieved party was persecuted as a member of a group under the National Socialist or another rule by force and decree, this group is a part of the population and the insult is connected with this persecution. The act may not, however, be prosecuted *ex officio* if the aggrieved party objects. The objection may not be withdrawn. If the aggrieved party dies, then the right to file a complaint and the right to object pass to the relatives indicated in Section 77 subsection (2).

In the *Auschwitz Lie* decision, the Federal Constitutional Court made reference to the fact that the Court *a quo* had described Holocaust denial as robbing Jews in Germany of their individual and collective identity and dignity, and as threatening to undermine the rest of the population's duty to maintain a social and political environment in which Jews and the Jewish community could feel themselves to be an integral part.<sup>322</sup> It was pointed out that the legislator had established a link with this case law and had inserted an exception to the requirement of a complaint for insults in section 194(1) of the *Criminal Code* by stating that, "if the aggrieved party was persecuted as a member of a group under the National Socialist or another rule by force and decree, this group is a part of the population and the insult is

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<sup>321</sup> *Soldiers Are Murderers* decision: par IV 2.

<sup>322</sup> Rosenfeld 2002-2003: 1552; *Auschwitz Lie* decision: par II 2.

connected with this persecution”.<sup>323</sup> While the Court *a quo* relied on the denial of persecution of the Jews as an insult inflicted on this group, the Federal Constitutional Court relied on the distinction between fact and opinion to explain on what basis the denial could be prohibited without violating the right to freedom of expression. However, the Federal Constitutional Court expressly stated that it had no objection to the weight given by the courts *a quo* to the injury to honour, and to the priority accorded to protection of the personality over freedom of opinion.<sup>324</sup>

### 3.6.2 *The German Civil Code*

Brugger indicates that, if criminal law provisions against insult and defamation apply, civil liability can often be established under the German *Civil Code (Bürgerliches Gesetzbuch)*.<sup>325</sup> Section 823 provides as follows:

- (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
- (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Section 824 also requires the payment of damages when the speaker “untruthfully states or disseminates a fact that is qualified to endanger the credit of another person or to cause other disadvantages to his livelihood or advancement”.

Section 826 provides that “a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage”.

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<sup>323</sup> Rosenfeld 2002-2003: 1552; *Auschwitz Lie* decision: par II 2.

<sup>324</sup> Rosenfeld 2002-2003: 1552; *Auschwitz Lie* decision: par II 2.

<sup>325</sup> Brugger 2003: 18; *Civil Code (Bürgerliches Gesetzbuch)* 2002, Federal Law Gazette [*Bundesgesetzblatt*] I: 42, 2909; 2003 I: 738, last amended by article 1 of the Statute of 27 July 2011 (Federal Law Gazette I: 1600): Bundesministerium der Justiz: <[http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html)> (accessed on 1-04-2013).

The claim in the *Lüth* case was based on section 826 of the *Code*. Lüth, an active member of a group seeking to heal the wounds between Christians and Jews, was enjoined by a Hamburg court from continuing his advocacy of a boycott of a post-war film by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. The injunction was granted as a private-law order on the basis that Lüth's statements were tortious under section 826 of the *Code*. Lüth filed a complaint with the Federal Constitutional Court, claiming a denial of his free-speech rights. The Federal Constitutional Court upheld his claim and voided the injunction against him. The Court acknowledged that the establishment of the truth should be encouraged. This requires open public debate to ensure well-considered decisions when politics or other issues of general interest are involved. The free exchange of ideas moreover "serves to stabilise society by fostering open discussion of disputed issues, thereby reducing the probability of recourse to violence". Lastly, the autonomous communicative development of the personality is a constitutive expression of human existence.<sup>326</sup> The Court then took account of the consequences, good and bad, of the speech.<sup>327</sup> Different aspects of human dignity, including the commitment to humanity, were considered. It was noted that Lüth had been motivated by apprehension that the re-emergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, "to mean that nothing had changed in German cultural life since the National Socialist period". The Court went on to note that Lüth's concerns were very important for Germans, as "nothing has damaged the German reputation as much as the Nazi persecution of the Jews. A crucial interest exists, therefore, in assuring the world that the German people have abandoned this attitude." Accordingly, in balancing Lüth's free-speech interests against the film director's professional and economic interests, the Court concluded that, "where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield".<sup>328</sup>

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<sup>326</sup> Brugger 2003: 8, with reference to the *Brokdorf Demonstration* decision BVerfGE 69, 315, 347 (14 May 1985).

<sup>327</sup> Brugger 2003: 9.

<sup>328</sup> Rosenfeld 2002-2003: 1549-1550; Rosenfeld in Herz & Molnar 2012: 267-268.



### **3.6.3 Public meetings, trade law and legislation that protects the youth**

Assemblies may be prohibited or dissolved in terms of the *Public Meetings Act (Versammlungsgesetz)*<sup>329</sup> if the authorities reasonably suspect that such assemblies will violate specific prohibitions on “hate speech”.

“Hate speech” and racial discrimination in a commercial establishment may lead to the suspension of the owner’s business licence.<sup>330</sup>

In terms of the *Act concerning the Dissemination of Publications that Endanger Youths (Jugendschutzgesetz)*, written material capable of morally endangering children and young people, including writings that incite others to violent acts, crimes or racial hatred, must be placed on a restricted list.<sup>331</sup>

### **3.6.4 Regulation of broadcasting**

#### **3.6.4.1 Background**

The right of an individual to speak freely, as provided for in terms of paragraph 1, sentence 1, of article 5 of the Basic Law, should be distinguished from freedom to broadcast in terms of sentence 2 of the article. According to Kommers and Miller, article 5 “not only incorporates a subjective right of the press against governmental encroachment, but also confers on the press an affirmative constitutional right to institutional autonomy and independence”.<sup>332</sup> This is because the press “performs a critical ‘public role’ in the life of a liberal democracy”.<sup>333</sup> Witteman similarly indicates that freedom to broadcast is primarily a guarantee that broadcasting as an institution will function freely. It protects a process more than a particular individual. He points out the potential contradiction in the Federal Constitutional Court holding that article 5(1) not only prevents the government from censoring the media, but also

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<sup>329</sup> *Public Meetings Act (Versammlungsgesetz)* 1978, Federal Law Gazette 1789, last amended December 2008, Federal Law Gazette I: 2366. Dejure.org: <<http://dejure.org/gesetze/VersG>> (accessed on 1-04-2013).

<sup>330</sup> Brugger 2003: 17-18.

<sup>331</sup> Brugger 2003: 18.

<sup>332</sup> Kommers & Miller 2012: 508.

<sup>333</sup> Kommers & Miller 2012: 508.

requires that same government to act to preserve a diversity of voices in the “marketplace of ideas”.<sup>334</sup>

While the *First Amendment* of the American Constitution focuses on the autonomy of the speaker, the Basic Law’s speech and communication guarantees encompass speaker and listener. Article 5(1) accommodates a right to comprehensive and truthful information, as well as the freedom of expression of those who produce the programming or speak in the broadcasts. The *Red Lion* fairness doctrine,<sup>335</sup> which was eventually declared unconstitutional in the USA, is analogous to German constitutional support of a diverse and at least partially non-commercial media landscape “founded on a media architecture that insures diverse public input to the media, as well as access to a broad range of information and opinion through the media”.<sup>336</sup> The Federal Constitutional Court’s broadcasting and information jurisprudence thus offers a clear alternative to the US laissez-faire market approach to communications issues. According to Witteman, this contrast can be described as the clash “between a libertarian and a democratic theory of speech”.<sup>337</sup>

One of the most important principles of broadcasting in Germany is nevertheless that the media are free from interference. Government agencies may not exercise any direct or indirect influence on the content of radio or television programmes. This also means that certain programmes may not be subsidised from public funds. Moreover, broadcasting regulations must ensure a variety of opinion. Public broadcasting is carried out by public-law agencies or corporations, that is, entities that are neither state nor private bodies. They are headed by a director general who is subject to control by two bodies, namely a managing committee and a programme monitoring committee, the Broadcasting Board. The main function of the latter is to ensure plurality of opinion and that the corporation’s programmes do not present a one-sided picture of the views of a particular section of the population or of a political ideology. In order to achieve this goal and to provide a community-based legitimacy apart from the state political apparatus, broadcasting laws generally require that the boards of directors of German public broadcasting institutions comprise representatives from a wide

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<sup>334</sup> Witteman 2010: 116. For a discussion of how the Federal Constitutional Court has handled this paradox, see Witteman 2010: 117-121.

<sup>335</sup> See 2.2.2.2 above. The doctrine provided for “the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here”.

<sup>336</sup> Witteman 2010: 101-102.

<sup>337</sup> Witteman 2010: 101-102.

variety of groups, including religious organisations, labour and chamber of commerce organisations, political parties, arts and film societies, and social organisations from women's groups to athletic clubs to disabled-rights organisations.<sup>338</sup>

The so-called “dual broadcasting system” means that private broadcasters, since the 1980s, operate alongside the long-established public broadcasting corporations. The continued existence of the public broadcasting corporations is regarded as essential for the admission of private broadcasters which, if only on account of their number, cannot yet ensure external plurality of opinion.<sup>339</sup>

#### 3.6.4.2 *The Interstate Treaty on Broadcasting*

State rather than federal legislators are charged with the implementation of the Federal Constitutional Court's rulings on the mission, scope, licensing, governance, and financing of both public and private broadcasting.<sup>340</sup> The states eventually coordinated their policies in the *Interstate Broadcasting Agreement*, dated 31 August 1991. The Treaty is a constantly evolving document that is periodically updated by way of amendment.<sup>341</sup> The state media authorities are independent agencies consisting of representatives of socially relevant groups or experts. They issue broadcasting licences, supervise the application of audiovisual law and take part in frequency management. The sanctions which they may use include a formal statement that there has been an infringement, the prohibition of further breaches, fines, and the revocation of a licence.<sup>342</sup>

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<sup>338</sup> Witteman 2010: 104-106; German Law Archive: Broadcasting Law in Germany: IUSCOMP: <<http://www.iuscomp.org/gla/literature/broadcst.htm>>.

<sup>339</sup> German Law Archive: Broadcasting Law in Germany.

<sup>340</sup> German Law Archive: Broadcasting Law in Germany.

<sup>341</sup> *Interstate Broadcasting Agreement (Rundfunkstaatsvertrag)* 1991.

<sup>342</sup> Witteman 2010: 106-107.

### 3.6.4.3 The “Television without Frontiers” (TVWF) Directive<sup>343</sup> and the European Convention on Transfrontier Television

Germany is also bound by the “*Television without Frontiers*” (TVWF) Directive<sup>344</sup> and the *European Convention on Transfrontier Television*,<sup>345</sup> which was ratified by Germany in 1994.

Article 22 of the *TVWF Directive* determines as follows: “Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.”

The Preamble to the Convention affirms the dignity and equal worth of every human being, confirms that freedom of expression and information, as embodied in article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, constitutes one of the essential principles of a democratic society, and proclaims the commitment of member states to the principles of the free flow of information and ideas and the independence of broadcasters. In terms of article 7(1), the responsibilities of the broadcaster include ensuring that all items of programme services, as concerns their presentation and content, “respect the dignity of the human being and the fundamental rights of others”, and that, “in particular, they shall not be indecent and in particular contain pornography” or “give undue prominence to violence or be likely to incite to racial hatred”.

### 3.6.4.4 The Interstate Broadcasting Agreement (Rundfunkstaatsvertrag)

Article 3(1) of the 1991 *Interstate Broadcasting Agreement (Rundfunkstaatsvertrag)* reads as follows:

- (1) Broadcasts shall be prohibited if they 1. arouse hatred against segments of the population or national, racial, religious or ethnic groups, encourage violent or arbitrary action against them or attack the human dignity of others by insulting segments of the population or any

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<sup>343</sup> Council Directive 89/552/EEC of 3 October 1989, as amended by Directives 97/36/EC and 2007/65/EC.

<sup>344</sup> *Television without Frontiers Directive (TVWF Directive) 89/552/EEC* 1989, as amended by Directives 97/36/EC and 2007/65/EC: 1989 EU:

[http://europa.eu/legislation\\_summaries/audiovisual\\_and\\_media/l24101\\_en.htm](http://europa.eu/legislation_summaries/audiovisual_and_media/l24101_en.htm) (accessed on 1-04-2013).

<sup>345</sup> *European Convention on Transfrontier Television*. 1994 Council of Europe:

<http://conventions.coe.int/treaty/en/treaties/html/132.htm> (accessed on 1-04-2013).

of the aforementioned groups or by maliciously degrading or defaming them (*Penal Code*, Section 130), 2. depict cruel or otherwise inhumane acts of violence otherwise inhumane acts of violence against persons in such a way as to glorify or trivialise such acts of violence or depict their cruel or inhumane aspects in a manner which constitutes a violation of human dignity (*Penal Code*, Section 131), 3. glorify war, 4. are pornographic (*Penal Code*, Section 184), 5. are obviously capable of seriously endangering the morals of children or adolescents, 6. portray people who are dying or who are or were exposed to severe physical or mental suffering in a manner which constitutes a violation of human dignity and show a real occurrence without any predominant, legitimate interest in especially this form of reporting; consent is irrelevant.

Section 3(2) to (5) contains provisions for the protection of children and young persons.

### **3.7 Comparative value**

When the South African Constitution, in particular the right to freedom of expression, is discussed in Chapter V of the present study, it will become apparent that substantial parallels can be drawn with the German approach. Comparable influences and aims have informed constitutional values, principles and guarantees. As in Germany, human dignity is a foundational constitutional value as well as an independent constitutional principle. Moreover, “hate speech” regulation as such can be regarded as constituting expression in the sense that it communicates an explicit commitment that past violations of human dignity will never again be allowed to occur.

The distinction between categorical and conditional exclusions of expression from the scope of the constitutional right to freedom of opinion, the internal limitations subject to the constitutional order, and conditional limitations subject to a proportionality analysis will be of material comparative value when the categorical and conditional restriction of the right to freedom of expression guaranteed in terms of the South African Constitution is discussed. The evaluation of the nature of expressive acts that have been criminalised or otherwise regulated in terms of the German *Civil Code* will be informative in this regard.

## 4. CANADA

### 4.1 The constitutional right to freedom of expression

Section 1 of the Canadian Charter of Rights and Freedoms<sup>346</sup> guarantees the rights and freedoms set out in the Charter.<sup>347</sup> These guaranteed rights include the rights stipulated in sections 2 and 15(1). Section 2 provides that everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.<sup>348</sup> Section 15(1) provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>349</sup>

Hogg regards content-neutrality as the governing principle in the regulation of expression.<sup>350</sup> The approach of the Supreme Court of Canada is that section 2(b) protects any activity that “conveys or attempts to convey a meaning”.<sup>351</sup> Protection is given “irrespective of the particular meaning or message sought to be conveyed”.<sup>352</sup> “This is because in a free pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.”<sup>353</sup> In a variety of decisions, the Court has held that, inter alia, defamation, hate promotion and pornography enjoy protection under section 2(b).<sup>354</sup>

The broad scope of the protected right to freedom of expression was articulated in *R v Sharpe*, a case that dealt with child pornography. Chief Justice McLachlin recognised

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<sup>346</sup> Constitution Act 1982: Part 1: Canadian Charter of Rights and Freedoms: Department of Justice: <<http://laws.justice.gc.ca/en/Charter/1.html>> (accessed on 1-04-2013).

<sup>347</sup> Hogg 2007: 112.

<sup>348</sup> The Canadian Charter does not contain a clause similar to section 16(2) of the South African Constitution.

<sup>349</sup> Hogg 2007: 270.

<sup>350</sup> Hogg 2007: 276-277.

<sup>351</sup> Moon 2008-2009: 83, with reference to *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892: 913-914 and *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927: 969.

<sup>352</sup> Moon 2008-2009: 84, with reference to *R v Keegstra*: 729.

<sup>353</sup> Moon 2008-2009: 84, with reference to *Irwin Toy Ltd v Quebec (Attorney General)*: 969.

<sup>354</sup> Moon 2008-2009: 84, with reference to *Hill v Church of Scientology* [1995] 2 SCR 1130: 1188, *R v Keegstra*: 733 and *R v Butler* [1992] 1 SCR 452: 488.

freedom of expression as “among the most fundamental rights possessed by Canadians”. She reiterated that, by protecting not only “good” and popular expression, but also unpopular or even offensive expression, the right facilitates liberty, creativity and democracy. It “rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs, lies in the free flow of ideas and images”.<sup>355</sup>

As was pointed out in Chapter II, there are two exceptions to the Court’s broad definition of the scope of freedom of expression under section 2(b). Firstly, violent acts are excluded, even if intended to carry a message.<sup>356</sup> Secondly, while a law that is intended to limit expression will be found to violate section 2(b) automatically, a law that simply has the effect of limiting expression will be found to violate section 2(b) only if the person attacking the law can show that the restricted expression advances the values that underlie freedom of expression.<sup>357</sup> Once the court has determined that the state has restricted expression protected by section 2(b), it then considers whether the restriction is justified under section 1 of the Charter.<sup>358</sup>

## 4.2 The principle of proportionality

The expression of an idea or image which is not categorically excluded, can be forbidden only if there exists a constitutionally adequate justification for the prohibition. In terms of section 1, the rights set out in the Charter are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>359</sup> Whether limitations can be justified in terms of section 1 is determined by means of the application of a proportionality standard similar to, but distinguishable from, the test applied in German law. It will appear from the ensuing discussion that, recently, the focus of the Canadian balancing approach has come to resemble the German focus even more closely.

The proportionality standard was articulated in *R v Oakes*, where the Supreme Court stipulated two central criteria that have to be satisfied. Firstly, the objective must be “of

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<sup>355</sup> *R v Sharpe* [2001] 1 SCR 45: par 21.

<sup>356</sup> Moon 2008-2009: 84, with reference to *Montreal v 2952-1366 Quebec Inc* [2005] 3 SCR 141: 167.

<sup>357</sup> Moon 2008-2009: 84, with reference to *Irwin Toy Ltd v Quebec (Attorney General)*: 976. See *Irwin Toy Ltd v Quebec (Attorney General)*: par C. b. In *R v Khawaja* 2012 SCC 69: par 70 it was held that violent acts include threats of violence.

<sup>358</sup> Moon 2008-2009: 84.

<sup>359</sup> Hogg 2007: 112.

sufficient importance to warrant overriding a constitutionally protected right or freedom”. The standard in this regard must be high in order to ensure that objectives which are trivial or not in accordance with the principles integral to a free and democratic society do not gain section 1 protection. At a minimum, the objective has to relate to concerns which are pressing and substantial in a free and democratic society. Secondly, once a sufficiently significant objective is recognised, the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test” with three important components. Firstly, the measures adopted must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective. The Court reiterated that, even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. As was stated in the German context of the application of the principle, the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>360</sup>

The Court, in *Irwin Toy Ltd v Quebec (Attorney General)*, recognised considerations like the prevention of hate that divides society or threatens vulnerable members of society, as possible justifications for restricting some forms of expression. It was, however, reiterated that the values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy. Accordingly, because of the importance of the guarantee of free expression, any attempt to restrict the right must be subjected to the most careful scrutiny.<sup>361</sup> It was highlighted that, while some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society.<sup>362</sup>

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<sup>360</sup> *R v Oakes* [1986] 1 SCR: par 69-71. See Hogg 2007: par 38.3, 38.4, 38.8 (b).

<sup>361</sup> *Irwin Toy Ltd v Quebec (Attorney General)*: 976; *Ford v Quebec (Attorney General)* [1988] 2 SCR 712: 765.

<sup>362</sup> *R v Sharpe*: par 21-23. See also *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835: 949. Even though such an approach has not been adopted in Canadian case law, it is noteworthy to mention in this regard Hogg’s remark that it is arguable whether the scope of section 2(b) should be narrowed to make way for a ban on expression that has as its purpose the advancement of equality which is guaranteed by section 15 of the Charter, an approach which would support a ban on hate propaganda without recourse to section 1.



The vast majority of decisions to the effect that the limitations concerned were not justifiable were based on non-compliance with the minimum-impairment requirement.<sup>363</sup> Hogg comments that, although Canadian courts true to *Oakes*, employ the fourth step, that is, the third component of the proportionality analysis, to his knowledge, this step has never influenced a decision. He ascribes this to the view that compliance with the first three requirements hardly leaves room for a negative conclusion based on the fourth requirement. It has to be noted in this regard that, unlike the position in German law, at the stage when the proportionality analysis is conducted, the importance of the objective has generally been determined in the preliminary step, where the court not only ascertains the purpose of the law, but also asks, in addition, whether it is sufficiently “pressing and substantial” to justify a limitation of Charter rights.<sup>364</sup> Furthermore, the minimal-impairment requirement in Canadian law does not require the less restrictive means to be equally effective. Grimm, taking as an example the considerations of Chief Justice Dickson in *R v Keegstra*,<sup>365</sup> which will subsequently be discussed, comments that, in practice, the approach of Canadian courts dealing with the second step looks much more value-laden than that of the German courts.<sup>366</sup> To an extent, this accommodates the fourth step. In the more recent decision in *Alberta v Hutterian Brethren of Wilson Colony*,<sup>367</sup> a new perspective was, however, established. The Court, with reference to Hogg’s comment as well as to the explanation in *Oakes* of the relevance of the fourth requirement, explained that the final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. While the focus of the first two steps of the proportionality analysis (steps 2 and 3) is the relationship between the purpose of the legislation and the means employed by the legislator, the third step of the analysis (step 4 of the *Oakes* test) provides an opportunity to assess, in the light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter.<sup>368</sup> This closely

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See Hogg 2007: 293, fn 162.

<sup>363</sup> See, for example, *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326; *R v Edwards Books & Art Ltd* [1986] 2 SCR 713. See in this regard Flanz 2008: Bundle IV: “Introductory notes” par III.3.

<sup>364</sup> Grimm 2007: 394.

<sup>365</sup> See 4.3.1.3 below.

<sup>366</sup> Grimm 2007: 395.

<sup>367</sup> *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567.

<sup>368</sup> *Alberta v Hutterian Brethren of Wilson Colony*: par 74, 77, 87; *Thomson Newspapers Co v Canada (Attorney General)* [1998] 1 SCR 877; *Toronto Star Newspapers Ltd v Canada* 2010 SCC 21, [2010] 1 SCR 721: par 33-34, 50.

resembles the balancing approach discussed above in the context of the German Basic Law. This approach is of particular significance when one considers the conflicting effects of the protection or restriction of freedom of expression that result from the tension inherent in the constitutional right to human dignity.<sup>369</sup>

The final step, with regard to both the German and Canadian proportionality tests, was criticised for forcing the Court to leave the legal realm and turn to political considerations. Grimm responds to this criticism by contending that this step is essential in order to give full effect to fundamental rights. The relative weight of the objective of the law on the one hand, and the fundamental right on the other, has to be considered. This requires an assessment of the impact of the infringement of the fundamental right in the context of the legislation under review. The danger of political decisions can be avoided by a careful and accurate determination of what is put into each side of the scales when it comes to balancing. If a legal measure affects only a certain aspect of a right, only that effect should be taken into account. The same is true of the good in the interest of which the right is restricted.

The importance of these aspects in view of the good at large must be carefully determined, as well as the degree of protection that the measure will render. If this is done accurately, the balancing process remains sufficiently linked to law and leaves enough room for legislative choice.<sup>370</sup>

### **4.3 The regulation of expression**

The following legislative enactments contain provisions regulating “hate speech” or “discriminatory” expression.

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<sup>369</sup> See Chapter II: 4.1.

<sup>370</sup> Grimm 2007: 393-397.

### 4.3.1 *The Canadian Criminal Code*

#### 4.3.1.1 *Genocide*

Section 318 of the Canadian *Criminal Code*<sup>371</sup> criminalises the promotion of genocide and, together with the “hate speech” provisions in terms of section 319, contains Canada’s most powerful sanctions against hate propaganda. Both sections define “identifiable group” as any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. “Sexual orientation” was added in 2004.

Section 318(2) defines genocide as follows:

In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely, (a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

#### 4.3.1.2 *The public incitement and the wilful promotion of hatred*

Section 319 prohibits the public incitement and the wilful promotion of hatred. The section also stipulates a number of defences to charges in this regard.

The section reads as follows:

- (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.
- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

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<sup>371</sup> *Criminal Code* RSC 1985 c C-46: Government of Canada Justice Laws Website: <<http://laws.justice.gc.ca/en/C-46>> (accessed on 1-04-2013).

(3) No person shall be convicted of an offence under subsection (2)[:] (a) if he establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

#### 4.3.1.3 R v Keegstra

In the leading case on the *Criminal Code* prohibition against the dissemination of hate propaganda, *R v Keegstra*,<sup>372</sup> the Supreme Court of Canada, by a majority of four to three, upheld the constitutional validity of section 319(2). In the more recent case, *Mugesera v Canada (Minister of Citizenship and Immigration)*,<sup>373</sup> the principles established in *R v Keegstra* were confirmed.

The charge against Keegstra related to statements made by him while teaching social studies classes. He taught that all the major events of history were connected to one central theme, namely a Jewish conspiracy to take over the world and rule it through the mechanism of one world government. He also taught that the Jews were responsible for World Wars I and II. He linked the Jewish people to the American, French and Russian revolutions. He furthermore taught that Jews formed secret societies to pursue their evil plan to rule the world and controlled the government, the banks, the courts and the media, that the Holocaust was a hoax, and that the Talmud was the “blueprint” for this one world government. For confirmation of his views, he pointed to the New Testament.<sup>374</sup>

In their analysis, both the majority and dissenting judges first examined whether section 319(2) of the *Criminal Code* violated section 2(b) of the Charter. The majority opinion stated that any activity which attempts to convey meaning through a non-violent form of expression, including expression which “wilfully promotes hatred”, has expressive content and falls within the scope of section 2(b). They further held that hate propaganda conveys a meaning

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<sup>372</sup> See also *R v Andrews* [1990] 3 SCR 870.

<sup>373</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, [2005] 2 SCR 100.

<sup>374</sup> *R v Keegstra*: par I; Elman 1990-1991: 86-87.

that is repugnant, but the repugnance stems from the content of the message and not from its form. Hate propaganda is therefore not analogous to violence and, consequently, does not fall within the ambit of an exception to section 2(b) of the Charter, which requires expression to be manifested directly through physical harm. They reiterated that even threats of violence are not excluded from the definition of expression envisioned by section 2(b). The assertion that section 2(b) had to be interpreted in the light of sections 15 (equal protection) and 27 (preservation of multiculturalism) of the Charter, as well as international instruments and agreements, was also rejected on the basis that sections of the Charter other than section 2(b), and international instruments and agreements, could not be used to attenuate the scope of the protection afforded by freedom of expression under the Charter. These contextual values and factors should be used in the second phase of the inquiry.<sup>375</sup> The dissenting judges were in general agreement with the majority at this stage of the analysis.

In the second phase of *Keegstra*, the Court, in terms of section 1 of the Charter, examined whether section 319(2) was a reasonable limit which was demonstrably justified in a free and democratic society.<sup>376</sup>

At the outset of his section 1 analysis, Chief Justice Dickson described the harms caused by “hate propaganda”. He referred, firstly, to the emotional or psychological injury experienced by the target group. He stated that, because an individual’s sense of self is shaped in important ways by the views and actions of others, attacks on his or her most important associations will cause injury to his or her self-worth or dignity. Secondly, he identified the harm that “hate speech” imposes upon “society at large”. “If members of the larger community are persuaded by the message of hate speech, they may engage in acts of violence and discrimination, causing ‘serious discord’ in the community.”<sup>377</sup> The majority held that the objective, namely preventing pain to the target group and reducing racial, ethnic, and religious tension and, perhaps, violence, was of sufficient importance to warrant overriding a guaranteed right. It was stated that Canada’s international obligations and Charter sections 15<sup>378</sup> and 27<sup>379</sup> emphasised the importance of this objective.<sup>380</sup>

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<sup>375</sup> *R v Keegstra*: par VI.

<sup>376</sup> *R v Keegstra*: par VII. A. See also *Irwin Toy Ltd v Quebec (Attorney General)*: par 4.

<sup>377</sup> *R v Keegstra*: par VII.C.(i); Moon 2008-2009: 87.

<sup>378</sup> Section 15(1) provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based

The provision was furthermore held to be a reasonable and proportional response to secure the objective, as it was rationally connected to the objective and did not unduly impair freedom of expression.<sup>381</sup>

The provision was also found not to be overly broad or vague. The reasoning was that its definitional limits rather ensure that it will capture only expressive activity which is openly hostile to the above-mentioned objective. The word “wilfully” restricts the reach of the section by requiring proof of either an intent to promote hatred or knowledge of the substantial certainty of such a consequence. The word “hatred” further reduces the scope of the prohibition. This word, in the context of the section, must be construed as encompassing only the most severe and deeply felt form of opprobrium. Further, the exclusion of private communications from the scope of the section, the need for the promotion of hatred to focus upon an identifiable group, and the presence of the section 319(3) defences, which clarify the scope of section 319(2), all support the view that the impugned section creates a narrowly confined offence.<sup>382</sup>

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on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canadian Charter of Rights and Freedoms: *Constitution Act* 1982 c. 11 (U.K.) Schedule B: Government of Canada Justice Laws Website: <<http://laws.justice.gc.ca/en/Charter/1.html>> (accessed on 1-04-2013).

<sup>379</sup> Section 27 provides as follows: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

<sup>380</sup> *R v Keegstra*: par VII.C. (iv).

<sup>381</sup> *R v Keegstra*: par VII.D. (i) and (ii).

<sup>382</sup> *R v Keegstra*: par VII.D. (iii). a.

With respect to section 319(3)(a) of the *Code*, which provides that no person may be convicted of wilfully promoting hatred “if he establishes that the statements communicated were true”, the judges concurred that by requiring an accused to prove some fact on a balance of probabilities to avoid conviction infringed the presumption of innocence guaranteed in section 11(d) of the Charter. The majority concluded that the section constitutes a reasonable limit on the presumption of innocence and meets the proportionality test. They reasoned that harm is created whenever statements are made with the intention of promoting hatred, whether or not they contain an element of truth. If the defence of truth is too easily available, the objective of the provision will be unduly jeopardised. To require that the state prove beyond a reasonable doubt the falsity of a statement would excuse much of the harmful expressive activity covered by section 319(2), despite minimal proof as to its worth. It is therefore in the furtherance of that same objective that truthfulness must be proved by the accused on a balance of probabilities.

The dissenting judges found it difficult to discern a rational connection between the aims of section 319(3)(a) and its requirement that the accused prove the truth of his or her statements. They reasoned that Parliament intended the truth to be a defence and falsehood to be an important element of the offence created by section 319(2). That fact, coupled with the centrality of the presumption of innocence in Canadian criminal law indicates that only a countervailing state interest of the most compelling kind could justify the infringement. They reiterated their general viewpoint that the actual effects of section 319(2) might be counter-productive and, instead of stemming hate propaganda and promoting social harmony and individual dignity, might promote the cause of hate-mongers by providing them with publicity and even by provoking sympathy for them. See *R v Keegstra*: par 2: “Presumption of innocence.”

The Court moreover held that the provision is not an excessive impairment of freedom of expression merely because the defence of truth in section 319(3)(a) does not cover negligent or innocent error as to the truthfulness of a statement. Such error, in the view of the Court, should not excuse an accused who has wilfully used a statement in order to promote hatred against an identifiable group. It was noted that other methods, non-criminal in nature, may exist for combating racist incitement. Parliament is, however, not limited to only one of these methods. Occasionally, condemnation through the force of the criminal law will be necessary.<sup>383</sup>

Finally, the majority held that the advantages of the prohibition against racist incitement outweigh any resulting harmful effects. In this regard, the importance of the protection of equality, of the preservation and enhancement of multiculturalism, and of Canada's international obligations was reiterated. These factors were contrasted with the fact that hate propaganda is only "tenuously related" to the values underlying freedom of expression, namely the search for truth, individual self-fulfilment, and the maintenance of a vibrant democracy. The constitutional validity of section 319(2) of the *Criminal Code* was accordingly upheld.<sup>384</sup>

The dissenting judges, while agreeing that the objective was an important one, disagreed on whether section 319(2) was a reasonable and proportional means of securing the objective. They were of the view that the *Code* section was not rationally connected to the objective, as there was no evidence that criminalising the dissemination of hate propaganda would, in fact, suppress it. They pointed out that it might even have the reverse effect of promoting racism by providing greater publicity and exposure for the racist propaganda. They further held that section 319(2) was overly broad, in that it could potentially cover more expression than was justifiable. They noted that, in any event, the provision has a chilling effect on legitimate public discourse and that alternative and less intrusive methods were available to Parliament. Given the serious potential damage to freedom of expression and the dubious benefit to be gained from prohibiting the dissemination of hate propaganda, the dissenting judges held that section 319(2) was not a justifiable limit on freedom of expression and was of no force or effect.<sup>385</sup>

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<sup>383</sup> *R v Keegstra*: par VII.D. (iii). b.

<sup>384</sup> *R v Keegstra*: par VII.D. (iv).

<sup>385</sup> Elman 1990-1991: 88.

#### 4.3.1.4 *Mugesera v Canada (Minister of Citizenship and Immigration)*

The focus on context was indeed pursued in *Mugesera v Canada (Minister of Citizenship and Immigration)* where the Court stated that the challenged speech should be considered objectively, but with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed.<sup>386</sup>

It was reiterated that “promotes” means “actively supports” or “instigates”. More than mere encouragement is required. Within the meaning of section 319, “hatred” connotes “emotion of an intense and extreme nature that is clearly associated with vilification and detestation”. Only the most intense forms of dislike fall within the ambit of this offence.<sup>387</sup>

The Court stated that the offence does not require proof that the communication caused actual hatred. The intention of Parliament was to prevent the very real risk of serious harm caused by hate propaganda, and not merely to target actual harm caused. Reference was made to the following statement of the International Criminal Tribunal for Rwanda: “The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.”<sup>388</sup> In determining whether or not a communication had expressed hatred, the Court must look at the understanding of a reasonable person in the context, and must analyse the audience and the social and historical context of the speech.<sup>389</sup>

The Court furthermore stated that the use of the word “wilfully” in subsection (2) suggests that the offence is made out only if the accused had as a conscious purpose the promotion of hatred against the identifiable group, or if he or she foresaw that the promotion of hatred against that group was certain to result, and nevertheless communicated the statements. Although the causal connection need not be proven, the speaker must desire that the message

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<sup>386</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)*: par 106. See also *R v Krymowski* [2005] 1 SCR 101: par 19-20.

<sup>387</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)*: par 101.

<sup>388</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)*: par 102.

<sup>389</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)*: par 103.



stir up hatred. It was noted that, in many instances, the speech will be such that the requisite guilty mind can be inferred.<sup>390</sup>

4.3.1.5 *The wilful publication of a statement, tale or news known to be false and that causes or is likely to cause injury or mischief to a public interest*

Section 181 (formerly section 177) of the *Criminal Code* provides: “Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”

The Supreme Court in *R v Zundel* found section 181 to be unconstitutional. As both *Keegstra* and *Zundel* involved the dissemination of anti-Semitic propaganda, a distinction between the decisions is both necessary and informative.

4.3.1.6 *R v Zundel and R v Keegstra distinguished*

Zundel, a commercial artist living in Toronto, was charged with publishing and distributing Holocaust-denial literature contrary to section 181 of the *Criminal Code*. The charges arose from the publication of two articles, one of which was titled: “Did Six Million Really Die?” This pamphlet, inter alia, asserted that the Holocaust did not occur, that there never was an official Nazi policy of extermination of the Jews and other non-Aryan peoples, and that allegations regarding the Holocaust were not “merely ... exaggeration, but an invention of post-war propaganda”. Zundel’s defence at the trial was that he had an honest belief in the truth of the work. The matter was eventually decided in the Supreme Court of Canada only with respect to the Charter issue, that is, whether section 181 of the *Criminal Code* was constitutionally valid.<sup>391</sup>

Justice McLachlin noted that the *Keegstra* case stood for the proposition that content is irrelevant in determining whether or not the expression is protected, and that expressive

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<sup>390</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)*: par 104-105. This reasoning was followed by the appeal tribunal in *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC). See Chapter V: 2.2.6.1-2.2.6.2.

<sup>391</sup> Elman & Nelson 1993: 71.

activity is protected by section 2(b) unless it is “violent in form”. She stated that this contradicted the argument that lies or false statements can never have any value and therefore should not be protected by section 2(b). Similar to the finding in *Keegstra*, it was held that the type of speech prohibited by section 181 fell within the protected sphere of section 2(b) and that section 181 therefore violated the constitutional guarantee of freedom of expression.

In dealing with the section 1 inquiry, Justice McLachlin found no pressing and substantial objective. She found the “fatal flaw” of section 181 to be the fact that it was overly broad, particularly in relation to the “undefined and virtually unlimited reach of the phrase ‘injury or mischief to a public interest’ which, in contrast to the term ‘hatred against any identifiable group’ in section 319(2) was ‘capable of almost infinite extension’”. The two sections were further distinguished, in that section 319(2) was restricted to the prohibition of hate propaganda and provided specific statutory defences, while section 181 was not limited in this manner and could, therefore, affect a “broad spectrum of speech, much of which may be argued to have value”. Justice McLachlin also mentioned that, while the expression at issue was arguably of little or negative value, the issue before the court was the value of all expression which could potentially come within the reach of section 181. Although there was agreement among all members of the Court as to the potential harm which could result from the appellant’s publications, the Court struck down section 181 of the *Criminal Code* as a violation of section 2(b) of the Charter, stating that it could not be upheld as a reasonable limit under section 1, and entered an acquittal for Zundel.<sup>392</sup>

The different results in *Keegstra* and *Zundel* were reached in terms of the section 1 reasoning. Hogg observes that the hate-propaganda law that was upheld in *Keegstra* was specifically directed at the wilful promotion of hatred against identifiable groups, and it was easy to accept that the prevention of harm caused by that activity was an important objective. The false-news law that was struck down in *Zundel*, on the other hand, did not specify any particular type of statement and did not specify what type of injury to the public interest was contemplated. The false-news law was therefore so broad that it was difficult to identify an objective that was sufficiently important to justify the limit on freedom of expression.<sup>393</sup>

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<sup>392</sup> Elman & Nelson 1993: 72-74.

<sup>393</sup> Hogg 2007: 295.

Hasian remarks that “the strongest defense of the right of Holocaust deniers would come from absolutist positions that argue for maintaining the presumptive protection of the marketplace of ideas”. The unfortunate consequence of the *Zundel* trials has been “to legitimise and popularise the work of groups and institutions that deny the Holocaust”. This reality supports an argument against the prohibition. Moreover, “one of the most effective ways to counter the pernicious influence of the Holocaust deniers would be through the proliferation of counter-speech networks that monitor and assess hate speech sites”.<sup>394</sup>

#### 4.3.1.7 *Blasphemous and defamatory libel*

The publishing of blasphemous as well as of defamatory libel are offences. In terms of section 296(2), it is a question of fact whether or not any matter that is published is a blasphemous libel. Section 296(3) determines that no person may be convicted of publishing blasphemous libel under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.

In terms of section 298(1), a defamatory libel is “matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published”. In terms of section 299, “a person publishes a libel when he (a) exhibits it in public; (b) causes it to be read or seen; or (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person”.

Sections 300 and 301 impose criminal sanctions for the deliberate publication of defamatory lies which the publisher knows to be false.

The following exemptions and defences, among others, apply:

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<sup>394</sup> Hasian 1999: 54.

### Section 309:

No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

### Section 310:

No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments (a) on the public conduct of a person who takes part in public affairs; or (b) on a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof.

### Section 311:

No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

In *R v Lucas*,<sup>395</sup> the Supreme Court confirmed that deliberate falsehoods were protected by section 2(b). However, Justice Cory, for the majority, commented that defamatory libel was “so far removed from the core values of freedom of expression that it merits but scant protection”. The principle of content-neutrality did not allow the Court to exclude deliberate falsehoods from constitutional protection on that basis. However, the low value of the speech made the objective of a limiting law easier to justify. The Court therefore upheld the impugned provisions, namely sections 298, 299 and 300 of the *Criminal Code*.<sup>396</sup>

#### 4.3.1.8 *Obscene matter and child pornography*<sup>397</sup>

Section 163<sup>398</sup> creates a number of offences in relation to the fabrication and distribution of “obscene” publications, or to possessing them for the purpose of distribution. These offences

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<sup>395</sup> *R v Lucas* [1998] 1 SCR 439.

<sup>396</sup> Hogg 2007: 277.

<sup>397</sup> For a discussion of the law in Canada applicable to pornography, see Casavant & Robertson 2007: par B.

<sup>398</sup> Section 163, under the heading, Offences tending to corrupt morals, provides as follows:

may be punished on summary conviction or by indictment with up to two years' imprisonment. Section 163.1 prohibits the publication of child pornography.

Section 163(8) describes what is obscene as follows: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." The Supreme Court of Canada in *R v Butler* held that whether there was "undue" exploitation should be determined with reference to the "community standard of tolerance". The test is concerned "not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to". Justice Sopinka expressed the view that "the overriding objective of section 163 was not moral disapprobation, but the avoidance of harm to society". "Harm" is defined as follows: "Harm in this context means that it predisposes persons to act in an anti-social manner, in other words, a manner which society formally recognizes as incompatible with its proper functioning." In this regard, it was furthermore stated:

A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and

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- (1) Everyone commits an offence who (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.
  - (2) Everyone commits an offence who knowingly, without lawful justification or excuse, (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever; (b) publicly exhibits a disgusting object or an indecent show; (c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or art intended or represented as a method of causing abortion or miscarriage; or (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or art intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.
  - (3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.
  - (4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.
  - (5) For the purposes of this section, the motives of an accused are irrelevant.

Section 181, under the heading, Nuisances, criminalises the spreading of false news in the following terms:

Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

prohibiting any medium of depiction, description or advocacy which violates these principles.<sup>399</sup>

The Court accordingly found that, like hate propaganda, pornography offends fundamental values and that restrictions on expression are therefore justified. It was held that section 163 of the *Code* minimally impairs freedom of expression, since it does not proscribe sexually explicit erotica without violence that is not degrading or dehumanising, but is designed to catch material that creates a risk of harm to society.

Casavant and Robertson remark that the obscenity standard is flexible. It responds to shifts in public acceptance of explicit material.<sup>400</sup> Today, public acceptance is quite “liberal”. In media such as magazines or films, where there is little likelihood that those unwilling to view the material will be exposed to it, there is considerable leeway. Tolerance is lower in other “less discretionary forms of expression”, such as television.

#### 4.3.1.9 *Blasphemy*

Although the prohibition on blasphemy has been the basis for several prosecutions over the years, it has not been the subject of a reported case since 1935. Patrick contends that the offence of blasphemous libel deserves the neglect it has long received from the criminal justice system, and is simply “a sad reminder of a time when disagreeing with mainstream religion and using ‘uncouth’ speech was enough to merit a prison sentence”. He argues that the mere fact that the crime of blasphemous libel, although openly committed, has not been the subject of a reported prosecution since the 1930s should be enough for a court “to invalidate the statute and place it back in the hands of Parliament”.<sup>401</sup>

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<sup>399</sup> Noonan 1992-1993: 15, with reference to *R v Butler*: 493-494; Hogg 2007: 302-308. See also *Little Sisters Book and Art Emporium v Canada* [2000] 2 SCR 1120 and *R v Sharpe*.

<sup>400</sup> Casavant & Robertson 2007: par B.

<sup>401</sup> Patrick 2008: 193, 248.

### 4.3.2 The Canadian Human Rights Act

The following sections deal with expression constituting a discriminatory practice.

#### 4.3.2.1 Section 12

Section 12 of the Act provides as follows:

It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that (a) expresses or implies discrimination or an intention to discriminate, or (b) incites or is calculated to incite others to discriminate if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

Section 5 concerns the denial of goods, services, facilities or accommodation generally available to the general public, section 6 concerns the denial of commercial premises or residential accommodation, and sections 7 to 11 apply in the employment context. Section 14 concerns harassment.<sup>402</sup>

In *Dreaver et al v Pankiw*<sup>403</sup>, the Canadian Human Rights Tribunal (CHRT) found that statements made in a householder pamphlet that a Member of Parliament had sent to constituents were not a “representation” in terms of the meaning of the section. It was held that the word “representation” was intended to refer to an image, likeness or reproduction, and could not be interpreted to include statements or articles, such as those in the brochures.<sup>404</sup>

There do not appear to have been any other reported decisions based on complaints brought under section 12.<sup>405</sup>

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<sup>402</sup> See the discussion of section 12 of the Act in Walker 2010: par 5.2:  
<<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-31-e.htm#a16>> (accessed on 26-11-2013).

<sup>403</sup> *Dreaver et al v Pankiw* 2009 CHRT 8.

<sup>404</sup> Walker 2010: par 5.2.

<sup>405</sup> Walker 2010: par 5.2.

#### 4.3.2.2 Section 13

Section 13 provides as follows:

- (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
- (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided for in sections 53 and 54. While section 53 makes provision for orders to redress practices, to prevent repetition and to compensate victims, section 54, specifically with relation to section 13, also makes provision for an order to pay a penalty of not more than 10 000 dollars. In deciding whether to order the person to pay the penalty, the nature, circumstances, extent and gravity of the discriminatory practice, and the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in, and the person's ability to pay the penalty will be taken into account.<sup>406</sup>

In June 2013, the Senate of Canada passed a Bill<sup>407</sup> which repealed Section 13. The Bill has a one-year implementation period written into it.

In a companion case to *Keegstra, Canada (Human Rights Commission) v Taylor*, the *Canadian Human Rights Act (CHRA)* provisions regarding hate messages, in particular section 13(1) of the Act, were tested against the Charter's guarantee of freedom of

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<sup>406</sup> Walker 2012: par 5.1: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-31-e.htm#a16>> (accessed on 26-11-2013).

<sup>407</sup> Bill C-304, 2013.



expression. A clear distinction was made between legislation that criminalises speech, and prohibitions in terms of human rights legislation. This distinction was summarised by Chief Justice Dickson, writing for the majority, as follows:

The aim of human rights legislation ... is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.<sup>408</sup>

Unlike the *Criminal Code* prohibitions against racist incitement, the *CHRA* does not require the Commission to prove a discriminatory intent on the part of the respondent. Human rights codes are also aimed at addressing forms of discrimination that are systemic in nature, and therefore prohibit actions which will result in unintentional discrimination. "The purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate."<sup>409</sup>

The Court considered the international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism enshrined in sections 15 and 27 of the Charter. Parliament's objective of promoting equal opportunity unhindered by discriminatory practices, and hence of preventing the harm caused by hate propaganda, was held to be sufficiently important to warrant overriding a constitutional freedom. The basis for this finding was that hate propaganda presents a serious threat to society. It undermines the dignity and self-worth of target group members and contributes to disharmonious relations among various racial, cultural and religious groups, as a result "eroding the tolerance and open-mindedness that must flourish in a multicultural society committed to the idea of equality"<sup>410</sup>.

In *Canadian Human Rights Commission v Winnicki*,<sup>411</sup> the Federal Court allowed a motion for an interlocutory injunction to restrain the respondent from communicating by means of Internet messages likely to expose persons to hatred or contempt by reason of race, national

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<sup>408</sup> *Canada (Human Rights Commission) v Taylor*: par B.

<sup>409</sup> Schneiderman 1990-1991: 90-91. See also *Ross v New Brunswick School District No 15* [1996] 1 SCR 825: par 2-4.

<sup>410</sup> *Canada (Human Rights Commission) v Taylor*: par B(a).

<sup>411</sup> *Canada (Human Rights Commission) v Winnicki* 2005 FC 1493; [2006] 3 FCR 446.

or ethnic origin, colour or religion contrary to section 13(1) of the *CHRA*. The Court examined the similarities and differences between defamation actions and complaints of “hate speech” and pointed out that, since both seek to limit the right to freedom of expression, injunctions should be granted only in the clearest of cases. The view was expressed that a restriction on hate propaganda and hate-mongering should, however, not be assessed with the same stringent standards as limitations on defamatory speech.

The ensuing findings with relation to “hate speech” are specifically noteworthy in the context of the present study. It was held that:

the values underpinning hate propaganda are fundamentally inimical, even antithetical, to the rationale underlying the protection of freedom of expression, and directly contradict other values equally vindicated by the Charter ... The damage caused by hate messages to the groups targeted is very often difficult to repair. It insidiously reinforces the prejudice that some people may have towards minorities identified by race, colour and religion, thus prompting and justifying discriminatory practices and even violence against these groups. Hate messages are much more reprehensible and devoid of any redeeming value than any other type of expression. These messages are much more damaging than defamatory statements in that they affect a much larger group of persons. Additionally, truth or fair comment is not a defence in cases of hate messages. The focus of human rights inquiries is on the effects and not on the intent. Accordingly, there is no exception for truthful statements in the context of subsection 13(1) of the CHRA.<sup>412</sup>

In *Warman v Lemire*,<sup>413</sup> the Canadian Human Rights Tribunal ruled that section 13 violated the right to freedom of expression and was unconstitutional. The situation considered in *Taylor* had since changed with the introduction of the penalty provision in terms of section 54(1)(c). The human rights process under the Act no longer merely served to prevent discrimination and compensate victims, and no longer functioned in as conciliatory a manner as possible. On this basis, it was held that the *Oakes* minimum-impairment test had not been satisfied, and that section 13(1) went beyond what could be defended as a reasonable limit on

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<sup>412</sup> *Canada (Human Rights Commission) v Winnicki*: par 2, 28-31. See also *Canada (Human Rights Commission) v Canadian Liberty Net* [1998] 1 SCR 626: par 48. In *WIC Radio Ltd v Simpson* 2008 SCC 40, [2008] 2 SCR 420: par 28 the Court modified the “honest belief” element of the fair comment defence to defamation so that the test, as modified, consists of the following elements: “(a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?”

<sup>413</sup> *Warman v Lemire* [2009] CHRT 26.

free expression under section 1 of the Charter.<sup>414</sup> Judicial review of the decision was sought before the Federal Court of Canada, and judgment has been under reserve since late 2011.

In the recent matter of *Saskatchewan (Human Rights Commission) v Whatcott*<sup>415</sup>, the Supreme Court of Canada upheld key provisions against “hate speech” in the Saskatchewan Human Rights Code similar to the provisions of section 13 of the Human Rights Act, but struck down some of the Code’s wording. The case will be discussed in detail in Chapter V of the study.

### **4.3.3 Regulation of broadcasting**

#### *4.3.3.1 Background*

In the 1920s and 1930s, many national governments played a central role in the evolution of broadcasting, either through ownership and operation of broadcasting systems, as in Europe, or through regulation of a privately owned industry, as in the US.<sup>416</sup> In Canada, the Aird Commission adopted the British system based on a state corporation. Canadian broadcasting policy accordingly would be a national policy, and the system it directed would have a clearly national vocation.<sup>417</sup> According to Raboy, the national purpose of broadcasting policy was, on the one hand, to be the main cultural component of the federal strategy for maintaining a political entity distinct from the US, and, on the other, to serve as a strategic instrument against the internal threat to Canadian national integrity posed by cultural resistance among French Canadians in Quebec.<sup>418</sup> During World War II, the public broadcaster’s close integration with the Canadian government’s war effort was the key to creating the Canadian Broadcasting Corporation (CBC) as a model for what can be termed administrative broadcasting or broadcasting in the interest of the state. Canada’s cultural policy after 1963 was explicitly directed towards promoting national unity, and the central element of that policy was declared to be the public broadcasting institution, the CBC.<sup>419</sup>

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<sup>414</sup> *Warman v Lemire*: par 290.

<sup>415</sup> *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11.

<sup>416</sup> Raboy 1990: 7.

<sup>417</sup> Raboy 1990: 7.

<sup>418</sup> Raboy 1990: 8.

<sup>419</sup> Raboy 1990: 9-10. See also Kuhn 1984: 197-228.

The Canadian Radio-television and Telecommunications Commission (CRTC) is the federal government agency which regulates and supervises all sectors of the Canadian telecommunications and broadcasting system. The CRTC was established by Parliament in 1968. It is an independent public authority constituted under the *Canadian Radio-television and Telecommunications Commission Act*<sup>420</sup> and reports to Parliament through the Minister of Canadian Heritage. The CRTC generally hears complaints against public broadcasters such as the CBC.<sup>421</sup>

Despite legislation intending a single system, the power and importance of private broadcasters in Canada grew steadily and without interruption. Eventually, the role of Radio Canada became an important issue in the developing crisis about the appropriate role of the public broadcaster. Today, Canada's broadcasting system offers a tremendous amount of choice to listeners and viewers. As of 31 August 2008, there were 628 private commercial radio stations, approximately 32% more than a decade earlier.<sup>422</sup>

The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty services, and pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country. CAB research indicates that Canadians benefit in terms of the number of channels per million people, with three times as many choices as consumers in France and seven times as many consumers as in the US.<sup>423</sup>

The Canadian Broadcast Standards Council (CBSC) is an independent, non-governmental organisation created by the CAB to administer standards established by its members, Canada's private broadcasters. The Council's membership includes more than 730 private-

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<sup>420</sup> *Canadian Radio-television and Telecommunications Commission Act* RS 1985 c. C-22: sections 3 and 12. Government of Canada Justice Laws Website: <<http://laws-lois.justice.gc.ca/eng/acts/C-22/>> (accessed on 1-04-2013).

<sup>421</sup> Raboy 1990: 13; Canadian Radio-television and Telecommunications Commission (CRTC): <<http://www.crtc.gc.ca/eng/backgrnd/brochures/b29903.htm>> (accessed on 1-04-2013).

<sup>422</sup> Canadian Association of Broadcasters (CAB): <<http://www.cab-acr.ca/english/about/default.shtm>> (accessed on 1-04-2013).

<sup>423</sup> CAB: <<http://www.cab-acr.ca/english/keyissues/default.shtm#f%20six#f%20six>> (accessed on 1-04-013).

sector radio and television stations, specialty services and networks from across Canada, programming in English, French and third languages.<sup>424</sup>

The Association of Electronic Journalists (RTNDA) is an organisation offering a forum for open discussion and action in the broadcast news industry. The Association speaks for the leaders of Canada's radio and television news operations. The provisions of the *RTNDA Code of Ethics* have to be respected by its members, who will take all reasonable steps to encourage awareness and observance of the *Code* by all broadcast journalists in Canada, even if they are not themselves members of the RTNDA.<sup>425</sup>

Advertising Standards Canada is the national, not-for-profit, self-regulatory advertising body that was created by the advertising industry in 1957, founded on the belief that self-regulation of advertising would best serve the interests of the industry and the public.

#### 4.3.3.2 *The Canadian Broadcasting Act*

The *Broadcasting Act*<sup>426</sup> provides a detailed broadcasting policy for Canada. Section 3(1)(d) reads as follows:

The Canadian broadcasting system should (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society...

Section 3(1)(g) stipulates that “the programming originated by broadcasting undertakings should be of high standard”.

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<sup>424</sup> Canadian Broadcasts Standards Council (CBSC): <<http://www.cbsc.ca/english/index.php>> (accessed on 1-04-2013).

<sup>425</sup> Association of Electronic Journalists (RTNDA): <<http://www.rtndacanada.com/Content.asp?PageID=default>> (accessed on 1-04-2013).

<sup>426</sup> *Broadcasting Act* 1991: c. 11 section 3(1).

Regulation 3(b) of the Radio Regulations of 1986 determines that a licensee may not broadcast any abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.<sup>427</sup> Regulation 5(b) of the Television Broadcasting Regulations of 1987 adds abusive pictorial representation to the same prohibition.<sup>428</sup>

#### 4.3.3.3 *The Canadian Radio-television and Telecommunications Commission Act*

The *Canadian Radio-television and Telecommunications Commission Act* established the CRTC. The objects and powers of the Commission in relation to broadcasting are set out in the *Broadcasting Act*,<sup>429</sup> section 5 of which determines that the Commission must regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, must have regard to the regulatory policy set out in subsection (2). Section 9 bestows certain powers upon the Commission, in furtherance of its objects, with regard to the issuing, conditions, suspension, renewal or revocation of licences.

Section 10 empowers the Commission to make regulations, inter alia, respecting the proportion of time that must be devoted to the broadcasting of Canadian programmes, prescribing what constitutes a Canadian programme for the purposes of this Act, respecting standards of programmes and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1), and respecting such other matters as it deems necessary for the furtherance of its objects.<sup>430</sup>

The *Journalistic Standards and Practices Policy* of the CBC describes its mission as “to inform, to reveal, to contribute to the understanding of issues of public interest and to encourage citizens to participate in our free and democratic society”. This entails a

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<sup>427</sup> Radio Regulations 1986: Canadian Legal Information Institute (CANLII): <http://www.canlii.org/en/ca/laws/regu/sor-86-982/latest/sor-86-982.html> (accessed on 1-04-2013).

<sup>428</sup> Television Broadcasting Regulations 1987: Canadian Legal Information Institute (CANLII): <http://www.canlii.org/en/ca/laws/regu/sor-87-49/latest/sor-87-49.html> (accessed on 1-04-2013).

<sup>429</sup> *Broadcasting Act* 1991: c. 11.

<sup>430</sup> Other relevant Acts in the media context are the *Personal Information Protection and Electronic Documents Act* 2000 c 5, the *Radiocommunication Act* RS 1985 c R-2 and the *Telecommunications Act* 1993 c 38.

commitment to reflect accurately “the range of experiences and points of view of all citizens”. It includes a special responsibility to reflect regional and cultural diversity, as well as fostering respect and understanding across regions. It also entails the protection of its independence, which also means that public interest, independent of all political and economic influence, guides all decisions. It furthermore includes the upholding of freedom of expression. The values are described as “accuracy” with respect to the truth in all matters of public interest, “fairness” in the sense that, in information-gathering and reporting, individuals and organisations are treated with openness and respect, “balance” by reflecting a diversity of opinion and a wide range of subject matter and views, “impartiality” by providing professional judgement based on facts and expertise and by not promoting any particular point of view on matters of public debate, and “integrity”.

#### ***4.3.4 The common law of defamation***

In 2009, in *Grant v Torstar Corporation*<sup>431</sup> and *Quan v Cusson*<sup>432</sup>, the Supreme Court of Canada brought the common law of defamation with respect to criticism of public officials<sup>433</sup> in line with the constitutional right of freedom of expression. The Court agreed with the new defence created by the Ontario Appellate Court, namely that of “responsible journalism”, which it changed to “responsible communication in the public interest”.<sup>434</sup> Guidelines were laid down as to what is necessary to successfully raise the new defence. The publication has to be on a matter of public interest, and the publisher must have been diligent in trying to verify the allegation. Successful defendants must also show that their account is not one-sided and that they at least attempted to get both sides of the story.<sup>435</sup>

#### ***4.3.5 The nature of the harm that is addressed***

Moon points out that, while the leading “hate speech” cases in the US involve laws that respond to consequent harm in the form of fear, intimidation, insult, and emotional trauma

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<sup>431</sup> *Grant v Torstar Corporation* [2009] 3 SCR 640: par 98-126.

<sup>432</sup> *Quan v Cusson* [2009] 3 SCR 712.

<sup>433</sup> See *Hill v Church of Scientology* where it was held that false and injurious statements were not deserving of much protection. Reputation, on the other hand, although not explicitly protected by the Charter, was regarded as reflecting the innate dignity of the individual and was related to the right to privacy, which has been accorded constitutional protection; Hogg 2007: 297-298.

<sup>434</sup> *Quan v Cusson*: par I (5)-(6).

<sup>435</sup> *Quan v Cusson*: par IV (28)-(32).

suffered by the members of a racial, or other, target group, that is, the group that is both the subject and audience of the “hate speech”, Canadian cases generally involve the spread of hateful views in the community. He contends that laws that address the first harm are in principle reconcilable with a commitment to freedom of expression. “Hate speech” laws in the Canadian cases, addressing the second kind of harm, represent a more significant challenge to freedom of expression.<sup>436</sup> He refers to *Keegstra* as well as *Taylor* to illustrate this observation. He points out that both cases involved the regulation of racist claims that were meant to persuade members of the general community about the dangerous or undesirable character of particular minority groups. The concern in these cases is that “hate speech” in this form damages the group’s position in the community, because it changes or reinforces the way that members of the dominant group think about the target group and its members.<sup>437</sup>

Moon’s perspectives on the reasoning in these cases is noteworthy. He finds it difficult to see how a particular instance of racist speech, however extreme, will cause or lead others to hate. In his view, the spread or reinforcement of hatred in the community is a systemic problem. Hatred is not caused by any particular instance of expression, but rather by “a wide range of racist statements, some extreme and some more temperate and even commonplace”, that contribute to racist or hateful attitudes in the community. In his opinion, the causation requirement entails that, “since no statement alone causes hatred, either no hate speech is caught by the ban or all bigoted and racist expression is regarded as part of the system of racist speech that supports the spread of racism”.<sup>438</sup> He regards the acceptance by the majority in *Keegstra* that there is a causal link between expression and the spread of hatred as born from scepticism about “the role of rational agency in the communicative process”.. He comments that “faith in human reason underlies freedom of expression and cannot simply be discarded from the analysis”. With respect to the majority’s acceptance that the hate-promotion provision restricts only a narrow category of expression, as hatred is an emotion that is “intense and extreme” in character, and “only extreme statements would cause these extreme feelings”, he highlights the perspective that it “is difficult to imagine that the bizarre

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<sup>436</sup> Moon 2008-2009: 79.

<sup>437</sup> Moon 2008-2009: 82.

<sup>438</sup> Moon 2008-2009: 83.



views of *Keegstra* would be taken seriously by anyone who was not already deeply mired in irrational hatred”.<sup>439</sup>

Moon concludes that, in *Keegstra*, the majority’s emphasis was on risk rather than cause, and on the stimulation or circulation of hateful feelings rather than the creation of hatred. This perspective acknowledges that “the impact of expression is unpredictable and creates only a risk of harm, because it depends on the reaction of audience members who bring a wide range of attitudes and assumptions to their assessment of the claims made”.<sup>440</sup> He proposes that the exclusion of expression from protection should accordingly be related to circumstances where rational agency is less likely to prevail. *Keegstra*, for example, used his authority as a teacher to limit the opportunity of his students to critically evaluate his views.<sup>441</sup>

With regard to the above observations, it has to be highlighted that, both in *Keegstra* and *Taylor*, in the first step of the section 1 analysis the aim of preventing harm in the sense of psychological hurt imposed on the target group was recognised in conjunction with the operation of the expression concerned to convince listeners that members of certain racial or religious groups are inferior and should be subjected to discrimination. In *Keegstra*, Chief Justice Dickson stated:

A person’s sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs... . The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual’s sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.<sup>442</sup>

In *Taylor* it was stated:

[I]ndividuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and

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<sup>439</sup> Moon 2008-2009: 90-91.

<sup>440</sup> Moon 2008-2009: 89.

<sup>441</sup> Moon 2008-2009: 90.

<sup>442</sup> *R v Keegstra*: par VII. C. (i).

strong pressure to renounce cultural differences that mark them as distinct. This intensely painful reaction undoubtedly detracts from an individual's ability to ... make for himself or herself the life that he or she is able and wishes to have.<sup>443</sup>

#### 4.4 Conclusion

The following perspectives, among others, have significant relevance with respect to the interpretation of the scope of the right to freedom of expression, as well as the constitutionality of categorical and conditional restrictions on freedom of expression, in terms of South African legislation.

The proportionality analysis in Canadian jurisprudence will prove to be of relevance not only in balancing and justification analyses, but also in the determination of the scope of the right to freedom of expression in the South African constitutional context. While the broad scope afforded the right to freedom of expression in Canadian law points to a narrow interpretation of the categorical exclusions in terms of section 16(2) of the South African Constitution, the effect of the foundational values stipulated in terms of the South African Constitution, and the horizontal application of the South African Constitution with respect to prima facie protection of expression in South African law, will have to be taken into account. Nevertheless, the assessment of whether the benefits which accrue from the limitation are proportional to its deleterious effects measured with reference to the Constitution's values and principles, and the recognition of different levels of speech value, will have comparative value, whether in the context of the application of the justification standard in terms of section 36 of the South African Constitution or in the determination of the ambit of prima facie constitutional protection.

Of further relevance is the distinction between the standards that apply to restrictions in terms of criminal and human rights regulation. It is noteworthy in this regard that Canadian courts acknowledge the constitutional obligation of the Canadian government not only to punish the intentional instigation of hatred, but also to prevent the risk of harm, and to promote multiculturalism. Harm concerns the violation of the fundamental constitutional values of society at large in conjunction with injury to the self-worth and dignity of individuals.

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<sup>443</sup> *Canada (Human Rights Commission) v Taylor*: par III. V. B. (a).

The Radio Regulations have particular relevance for the consideration of the South African broadcasting codes and will be referred to in the context of Chapter VI.

## **5. GENERAL CONCLUSION**

The comparative law discussed in this chapter indicates that the framework of constitutions, the values protected, the historical realities and emanating sensitivities have a bearing on where the lines are drawn when free expression, in particular “hate speech”, is not tolerated in the face of the risk it holds for the well-being of democratic societies and their members.

In all three jurisdictions, the value of the particular expression at issue is regarded as a relevant consideration either in determining whether the expression falls within the ambit of constitutional protection or whether an infringement can be justified, or both. The consideration in these contexts of the values that inform the protection of free speech at threshold level is of material significance. The implication is that the theories discussed in Chapter II find direct practical application in freedom-of-expression analysis. It has to be noted in this respect that expression described as “assaultive expression”, where the focus is on the effect of the expression on the targeted individual, has been either categorically excluded from protection or criminalised, or otherwise prohibited based on the absence of speech value.

The principle of content-neutrality and the gravity and imminence of potential risk are relevant factors generally taken into account, albeit with substantial differences in focus, perception, conception and context of application.

Definitional limitations that authenticate the criminalisation of expression are narrowly construed. The focus is on incitement to harm or promotion of hatred. Risk-preventing objectives that justify criminal prohibitions of expression are generally required to be imperative, and transgressions have to be intentional.

In particular, in Germany and Canada, expression is also regulated in terms of human rights legislation and codes of conduct proscribing human rights abuses. Different standards apply with respect to the assessment of risk. Regulation in this context is aimed at the promotion of

the culture of the constitutional state by means of the elimination of systemic discrimination, the prevention of discrimination and, in particular in Germany, the positive protection of inherent human dignity.<sup>444</sup> Similar aims are articulated in terms of the South African Constitution.

Finally, when evaluating South African law with respect to freedom of expression, all the normative and instrumental arguments in support of either the protection or the restriction of freedom of expression in the jurisdictions that have been discussed should be duly considered in context, whether in determining the scope of the South African constitutional freedom-of-expression guarantee or in a justification analysis with respect to its limitation. This includes being alert to the fact that free expression of a discriminatory nature may serve to expose abuse of democratic authority as well as systemic discrimination.

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<sup>444</sup> *Canada (Human Rights Commission) v Taylor*: par B.

## CHAPTER V

# FREEDOM OF EXPRESSION IN SOUTH AFRICA: THE CONSTITUTION AND THE *PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT*

*May God protect our people.*

*Preamble to the Constitution*

### 1. INTRODUCTION

This chapter will focus, firstly, on the right to freedom of expression as protected in terms of section 16 of the Constitution. The study requires a particular focus on the definitional ambit of section 16(2)(c). In terms of the Constitution, “hate speech” falling within the ambit of section 16(2)(c) is a form of unprotected expression. The implication is that the expression contemplated by the section can, in principle, be categorically prohibited. Inter alia, the question that arises is whether or not the selected grounds for expression under section 16(2) constitute a *numerus clausus*.

Secondly, the discussion will focus on the equality provisions of the Constitution, in particular sections 9(3) and 9(4), which prohibit unfair discrimination and explicitly require the prevention or prohibition of unfair discrimination. The approach will be that expression that should be prohibited in terms of this obligation is, by implication, unconstitutional. It will be pointed out that the inherent conflict in the values of human dignity and equality in the context of discriminatory expression – which conflict was highlighted in Chapter II – complicates fairness analyses with respect to discriminatory expression. The challenge, in this context, is not to unintentionally jeopardise the promotion of equality by denying hurtful or harmful discriminatory expression constitutional protection on the basis that it constitutes

unfair discrimination, while its impact in reality is to promote equality by means of free expression and response.<sup>1</sup>

The focus will then shift to the regulation of expression, related to group characteristics, in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) 4/2000*<sup>2</sup>.

Compliance with obligations in terms of international agreements is one of the aims of the Act. Hence, for interpretation as well as comparative purposes, relevant provisions of applicable international agreements will be considered with reference to the discussion in Chapter II. It will be contended that the aims and ambit of the Act only allow for limited compliance with some of the relevant obligations.

The Act prohibits discriminatory expression primarily by giving effect to the constitutional obligation in terms of sections 9(3) and (4) of the Constitution. It simultaneously aims to respect, protect, promote and fulfil the rights to equality and human dignity in terms of the obligation imposed on the state in terms of section 7(2) of the Constitution.

It does so, firstly, by means of its general prohibition on unfair discrimination. It moreover contains specific conditional as well as categorical prohibitions on particular forms of discriminatory expression. The general prohibition on unfair discrimination meets the challenge of not unintentionally restricting free expression, thereby jeopardising rather than promoting equality, by requiring a case-by-case contextual application of the fairness analysis established in terms of section 14 of the Act. The same consideration informs a narrow and purposive interpretation of categorical prohibitions of discriminatory expression.

The value of the expression at issue will appear to be a seminal consideration in the fairness analysis pertaining to the conditional prohibitions, as well as in the interpretation and application of the categorical prohibitions on discriminatory expression. The impact on the human dignity of a complainant will be valued to be less if the expression at issue serves the societal goals to be achieved by protecting free expression than when the expression has no inherent virtue to counter the hurt or harm inflicted by it. The discussion in Chapter II

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<sup>1</sup> Moon 2008-2009: 92.

<sup>2</sup> Sections 6, 7, 10, 11 and 12 of the Act will be discussed.

revealed that the determination of the value of a particular form or incidence of expression requires an interrelated contextual consideration of the notions and values of truth and knowledge, equality, human dignity as autonomy, inherent human dignity, and democracy. It emerged from the discussion of comparative law that, in all the jurisdictions considered, different levels of speech value in different contexts have been recognised and related to applicable standards of protection, whether this be the level of scrutiny required in American law<sup>3</sup>, the determination in Canadian jurisprudence of whether the effect on expressive content of legislation with differing aims infringes the right to freedom of expression,<sup>4</sup> or the proportional weight accorded to the infringement of the right to freedom of expression in a balancing exercise in the context of proportionality analysis in Canadian<sup>5</sup> and German<sup>6</sup> law. The determination of speech value at threshold level in the context of the evaluation of the objective of a limit on a right or freedom in the first step of the section 1 justification analysis in *R v Keegstra* is significant in this regard and will be discussed further at a later stage.<sup>7</sup>

It will be contended that the categorical prohibition on “hate speech” in terms of section 10 of the Act was intended to cover only discriminatory expression that undeniably and consistently harms individuals (on account of their group membership), the groups targeted by the expression, and society as a whole. In addition, the nature of the harm that is contemplated is such that the expression is assumed to be categorically not justifiable, regardless of the specific context in which the expression is disseminated. The harm includes the effect on society of the toleration of the expression which may be construed as a condonation or even an endorsement of its aim. From this premise, “hate speech” in terms of section 10 will be perceived as a form of unfair discrimination, where the presumption of unfairness created by the discriminatory expression is regarded as conclusive.

A fairness analysis is inherent in the determination of the application of section 12 of the Act. However, similar to section 10, the section prohibits the engagement per se in the advertising, display or broadcasting of the expression contemplated, even if in fact no unfair discrimination is intended.

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<sup>3</sup> See Chapter IV: 2.4.2.1.

<sup>4</sup> See Chapter IV: 4.1.

<sup>5</sup> See Chapter IV: 4.2.

<sup>6</sup> See Chapter IV: 3.4.

<sup>7</sup> See Chapter IV: 4.3.1.3.

The potential ambit of sections 10 and 12 are to a great extent determined by the proviso in section 12, which excludes bona fide engagement in the forms of expression stipulated by it. An analysis of the proviso will, therefore, be an essential focus of the discussion.

The prohibition on harassment in terms of section 11 of the Act will be analysed. It will be concluded that harassment should be interpreted as a form of unfair discrimination, that the considerations relevant to a fairness analysis are inherent in its terms, and that its prohibition on this basis is constitutional.

In conclusion, the constitutionality of the different sections, to the extent that they go beyond the terms of section 16(2)(c) of the Constitution, in particular the categorical prohibitions, will be tested against the constitutional limitation standard in terms of section 36.

## **2. THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION**

Freedom of expression is entrenched in section 16, which provides as follows:

- (1) Everyone has the right to freedom of expression, which includes –
  - (a) freedom of the press and other media;
  - (b) freedom to receive or impart information or ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
  - (a) propaganda for war;
  - (b) incitement of imminent violence; or
  - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

### **2.1 The scope of the right in terms of section 16(1)**

The Constitutional Court has held that expression that is not specifically excluded by section 16(2) categorically enjoys the protection afforded by the right to freedom of expression.<sup>8</sup> The

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<sup>8</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333: par 48-50; *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5)



implication is that the categorical exclusions in terms of section 16(2), which exclusions will be discussed later in this chapter, are definitional of the right to freedom of expression.<sup>9</sup> The question inevitably arises why expression of a similar nature, and with the same violative impact on human dignity, but on other “prohibited” grounds in terms of section 9, is not likewise excluded from protection. This issue will be addressed below.<sup>10</sup>

It is generally accepted that the ambit of the “hate speech” provision of the *Equality Act*, namely section 10 of the Act, to a material extent exceeds that of section 16(2)(c) of the Constitution. The discussion of section 10 later in this chapter will explore the view that the forms of expression enumerated in the proviso that exclude engagement in the expression contemplated by it from the ambit of section 10, should be linked to the forms of expression enumerated in terms of section 16(1) of the Constitution, and interpreted accordingly. The discussion of these forms of expression will therefore have direct relevance in that context. It will be apparent from the subsequent analysis that, although section 16(1) does not provide a numerus clausus of forms of protected expression, its ambit in the context of expression is extremely broad.

### ***2.1.1 The meaning of “expression”***

Freedom of expression essentially comprises freedom to communicate. This implies that expressive conduct is included.<sup>11</sup> Examples are displaying posters, painting and sculpting, dancing, the publication of photographs, symbolic acts such as flag-burning, the wearing of certain items of clothing, and physical gestures.

It has been argued that, in contrast to speech or conduct “with an obviously communicative aim”, “speech or conduct with an entirely practical aim” is excluded from the protection of section 16.<sup>12</sup> The latter form of expression has been illustrated with reference to face-to-face insults to individuals, on the basis of their personal characteristics or their membership of particular social groups, which typically aim to harass or to cause distress rather than to

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BCLR 433: par 28; *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 113/11) [2012] ZACC 22: par 48.

<sup>9</sup> Roederer in Albertyn, Goldblatt & Roederer 2001: 91-92.

<sup>10</sup> See 2.2.6.5 below. See also Chapter VI: 6.2.

<sup>11</sup> Burchell 1998: 30; Meyerson 1997: 65-68.

<sup>12</sup> Meyerson 1997: 67. See also Wright 2000-2001: 999, 1006 and 1008, and Langton in Maitra & McGowan 2012: 77.

impart ideas or information.<sup>13</sup> The emotions felt by the person who is menaced in this way have been described as “more likely to be fear and alarm than conscious offence taken at the vestigial content of the message”.<sup>14</sup>

The American approach to “fighting words” as, *inter alia*, neither contributing to the expression of ideas, nor possessing any social value, has particular comparative relevance in this regard.<sup>15</sup> It has to be considered that this concept has been narrowed down to words with “a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed”, and to racial epithets that have been described as “a reflection of social violence”. These descriptions can be related to expression contemplated by section 16(2)(b) and, to the extent that the advocacy of hatred in a given situation is a feature of the speech, by section 16(2)(c).<sup>16</sup>

Meyerson points out that insults in a particular context, for example a political context, even if abusive, may nevertheless be communicative. She recognises that it may be problematic to deal on this basis with mixed motives, to accurately determine distress, and to draw a line between merely rough and truly outrageous language.<sup>17</sup>

It is contended that, in the broad sense of the term “communicate”<sup>18</sup>, even abusive insult can always be construed as communicating a message, even if one-sided in the sense that it does not “invite discourse”.<sup>19</sup> It may, for example, convey messages of hatred, disrespect, disillusionment or anger. Moreover, the forms of expression enumerated in terms of section 16(1) do not constitute a *numerus clausus*. It is difficult to envisage expression other than the above-described “speech or conduct with an entirely practical aim” that may conceivably not be captured by this enumeration. In particular, “to receive or impart information or ideas” has an extremely broad application. Rather than attempting to formulate a definitional limitation

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<sup>13</sup> See Wright 2000-2001: 997. Langton in Maitra & McGowan 2012: 77 refer to speech of this nature as “assault”.

<sup>14</sup> Meyerson 1997: 100-101.

<sup>15</sup> See Chapter IV: 2.4.2.

<sup>16</sup> See Chapter IV: 2.4.2.3.

<sup>17</sup> Meyerson 1997: 100.

<sup>18</sup> *Collins English Dictionary* 2000 defines “communicate” as including “to impart [knowledge]” and “[to] exchange (thoughts, feelings, or ideas) by speech, writing, gestures, etc.”.

<sup>19</sup> Wright 2000-2001: 1012.

of the concept “expression” based on the aim of the expressive conduct, the non-protection of expression should ultimately be related to the reasons for protecting expression.<sup>20</sup>

### **2.1.2 Section 16(1)(a): “freedom of the press and other media”**

This aspect of the right to freedom of expression will be discussed separately in Chapter VII. It will be contended that the specific enumeration of a right to freedom of the press and other media implies that there are distinct considerations involved in this sphere of expression, and that any regulation of the media should have due regard for the specific responsibilities and challenges of the media. Section 192 of the Constitution specifically requires the regulation of broadcasting in the public interest. In particular, the application of broadcasting codes will be utilised to illustrate the regulation of expression required in terms of the different applicable sections of the *Equality Act*.

### **2.1.3 Section 16(1)(b): “freedom to receive or impart information or ideas”**

The specific enumeration in section 16(1)(b) of the Constitution of a right to receive or impart information or ideas likewise emphasises a particular feature of the right to freedom of expression, that is, its aim to protect speakers as well as listeners. In *Case and Another v Minister of Safety and Security and Others*, the Court reiterated that a person’s right to freedom of expression is severely impaired if other people’s rights to hear the speech are not protected. It was added that a person’s right to freedom of expression includes, as a necessary corollary, the right to be exposed to inputs from others that will “inform, condition and ultimately shape” his or her own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.<sup>21</sup> Moreover, in *De Reuck v Director of Public Prosecutions and Others*, the Court endorsed the approach of the European Court of Human Rights that the right to freedom of expression applies “not only to

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<sup>20</sup> Barendt 2005: 417.

<sup>21</sup> *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC): par 25. See also *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC): par 29.

‘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...’.<sup>22</sup>

#### **2.1.4 Section 16(1)(c): “freedom of artistic creativity”**

##### *2.1.4.1 The concept “artistic creativity”*

When subsequently discussing the definition of “art”, reference will be made to the view that art involves creative ideas, forms and images, and that its nature is not to propagate, to constitute incitement or to threaten.<sup>23</sup> The protection of “artistic creativity”, in contrast to “art”, can be interpreted as endorsing this concept of art.

Milo, Penfold and Stein contend that the express inclusion of artistic creativity in section 16 is, firstly, for historical emphasis, and, secondly, places beyond any doubt that artistic expression is deserving of protection in its own right. The effect is that justification of infringement of expression under the limitation analysis will be more difficult when the expression is recognised as artistic creativity. This, which is similar to the approach to expression in the media, entails at least a weak form of “artistic exceptionalism”.<sup>24</sup>

Furthermore, the term “creativity”, rather than “expression”, makes it clear that not merely the end product, but also the process of creation itself, including engagement in activities producing, presenting, displaying or employing art, are included.<sup>25</sup> However, the applicable aspects of the factors that will be indicated to identify art, namely, inter alia, the subjective intention of the creator, the form and content of the work, and the mode of production, display and distribution, should be considered in context to determine whether or not artistic creativity is at stake. When, for example, an image of a naked woman is artistically painted on the door of the home of a woman accused of adultery, or an artistic painting of a naked

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<sup>22</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 49. See also Chapter II: 1.

<sup>23</sup> Eberle 2007-2008: 25.

<sup>24</sup> Milo *et al* in Woolman & Bishop 2008: 42-57. See Tănăsescu 2011: 25-26. In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 20, the guideline that depictions that predominantly stimulate aesthetic rather than erotic feelings were excluded from the definition of pornography, was accepted.

<sup>25</sup> Milo *et al* in Woolman & Bishop 2008: 42-52. See Tănăsescu 2011: 12-21 for an evaluation of the effect of legal documents explicitly protecting artistic freedom as an object of the protection of freedom of expression, and those that do not. See also the *Mephisto* decision BVerfGE 30, 173 (24 February 1971): par C. III.1.

woman is attached to the door, the painting as such will not lose its artistic merit. The display of the painting may, however, not be regarded as artistic creativity. Displaying the painting in an art gallery will, on the other hand, most certainly constitute engagement in artistic creativity. Hence, the display even of a painting with artistic merit may in a given context constitute defamation, *crimen iniuria*, an actionable violation of human dignity or “hate speech”.

The following example illustrates the above observations. With respect to the publication of the controversial “Danish cartoons”<sup>26</sup>, Denmark’s Director of Public Prosecutions, having considered the text of the related article<sup>27</sup> as well as the cartoons as such, stated that the basic assumption “must be that *Jyllands-Posten* commissioned the drawings for the purpose of debating, in a provocative manner, whether, in a secular society, special regard should be had to the religious feelings of some Muslims”. The main focus of the debate, during the controversy which followed, was on the conflict between freedom of expression and religious belief.<sup>28</sup> The Danish journalist, Al-Habahbeh, pointed out that the offending cartoons themselves were not the real issue. Instead, they were being misused by right-wing groups to assert that a Muslim could never be a democrat, as well as by Islamists and Muslim extremists to further their aims by alleging that they attacked Islam in order to exacerbate the clash of civilisations.<sup>29</sup> The most controversial of the cartoons, the depiction of Mohammed with a bomb-shaped turban, was defended by the cartoonist Westergaard as being an “incendiary but dignified drawing”.<sup>30</sup> The cartoonist Spiegelman was quoted as saying of this cartoon that “if the drawing had simply not appeared under the rubric of ‘Muhammad’s Face’

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<sup>26</sup> In 2005, a major Danish newspaper, *Jyllands-Posten*, published a series of cartoons satirising the Prophet Mohammed of the Muslim faith in an article under the headline: The Face of Mohammed. In an excerpt from the article headed Freedom of Expression that appeared on the front page, the newspaper reproduced one of the cartoons and explained that members of the Danish Newspaper Illustrators’ Union had been invited to submit drawings of Mohammed “as they saw him”. This excerpt read in part: “Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. This is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule.” The article drew attention to recent incidents in which authors had engaged in self-censorship to avoid provoking Muslims. The publication of the cartoons caused an international outcry that came to be known as the “cartoon wars” or the “cartoon controversy”. See Keane 2008: 857-862 where the author highlights the factual events and legal implications of the Danish cartoon controversy. See also Pillay 2010: 464-466. Cartoons of the Prophet Mohammed, allegedly the same series of cartoons referred to as “the Danish cartoons”, were also published in a number of South African newspapers. An application to interdict the publication of the cartoons was decided in the matter of *Jamiat-Ul-Ulama of Transvaal and Johncom Investment and Others* 1127/06 [006] ZAGPHC 12.

<sup>27</sup> See fn 26.

<sup>28</sup> Keane 2008: 845-846. The 2006 controversy was never resolved, and the issue has re-emerged in different incidents.

<sup>29</sup> Isenson 2006: Fodder for the Taking.

<sup>30</sup> Keane 2008: 858.

it would ... have been seen to specifically represent the murderous aspect of fundamentalism, the one that ... made this drawing a self-fulfilling prophecy”.<sup>31</sup> Rosenfeld points out that there are plausible interpretations of the cartoons that constitute criticism of a religion. This means that they ought to be protected in terms of the right to freedom of expression. However, had the message been that all Muslims are “would-be terrorists and suicide bombers bent on killing infidels”, they would have come within the ambit of “hate speech”.<sup>32</sup>

#### 2.1.4.2 *General reasons for the protection of art*

Eberle refers to different basic reasons why art should be viewed as positioned at the core of protected expression. Firstly, it contributes to the creative process that is central and unique to human existence. It is “integral to human culture” and “part of individual and social self-definition”. It can challenge the status quo and deconstruct stereotypes.<sup>33</sup> Artists frequently address themes and issues which are painful to, or difficult for, society or which are ignored through social prejudice or routine.<sup>34</sup> Secondly, it offers “a fuller conception of the human person” by providing “a portal” to non-rational, non-cognitive, non-discursive dimensions of human life. Thirdly, it functions as a private sphere of freedom within which “a person can contemplate and muse over elements of the human condition free from the pressures or sanctions of normal social forces”.<sup>35</sup> It does not only work as “aesthetic reality”, but also has an existence in the aspects of reality. These aspects, although “exaggerated in the artistic portrait”, do not lose their “effect on the social level”, because the real and the aesthetic worlds form one unity in the work of art.<sup>36</sup>

#### 2.1.4.3 *Defining art*

Even though literature and case law have contributed to developing criteria for the practical application of laws that use the term “art” as an element of a statutory provision, there is no

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<sup>31</sup> Keane 2008: 858. In *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment and Others*: par 10, an interdict was granted against the publication in the *Sunday Times* and other newspapers of one of the caricatures which had formed part of the cartoon series originally published in the Danish newspaper. The finding was based on the greater weight *in casu* of the value of human dignity balanced with the right to freedom of the press. Again, no focus on artistic creativity was pursued.

<sup>32</sup> Rosenfeld: Hate Speech in Constitutional Jurisprudence in Herz & Molnar 2012: 280.

<sup>33</sup> Eberle 2007-2008: 13.

<sup>34</sup> Eberle 2007-2008: 13; Milo *et al* in Woolman & Bishop 2008: 42-52.

<sup>35</sup> Eberle 2007-2008: 6; Salzman 1999: 438-439.

<sup>36</sup> *Mephisto* decision: par C. III.5. See Chapter IV: 3.1.

generally agreed-upon definition of “art”.<sup>37</sup> Salzman contends that the elusive qualities of “art” and “artistic” value are incapable of objective definition or assessment in a comprehensive manner. It is moreover difficult to determine who should be the appropriate judge of the status or value of an allegedly artistic expression, because personal and subjective qualities are involved. In addition, the degree of influence to be assigned to the intent and perspective of the speaker, whether to create art or not, is uncertain.<sup>38</sup> Farley observes that law needs not define “art” uniformly. “Art” may mean different things in different places in the law. All that courts need concern themselves with, is understanding what the purposes of the legal protections are. “Once a court has determined this, it can seek to connect the law with the aesthetic theory that best aligns with that doctrinal purpose.”<sup>39</sup>

However, defining “art” cannot be avoided when legislation using the term has to be interpreted.<sup>40</sup> In the *Strauss Caricature* decision, the German Federal Constitutional Court held that a distinction between “art” and “non-art” was necessary. A differentiation between “higher” and “lower” or “good” or “bad” art to support an argument for no or lesser protection would, by contrast, amount to “an inadmissible control of content”.<sup>41</sup> Farley observes that courts have intuitively invoked theories of art and definitions developed in other disciplines without explicitly acknowledging these theories.<sup>42</sup>

The following definition of “art speech” proffered by Eberle reflects combined elements of traditional and more recent notions of the essence of art<sup>43</sup>: “Art speech is the autonomous use

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<sup>37</sup> Tănăsescu 2011: 10-11.

<sup>38</sup> Salzman 1999: 442.

<sup>39</sup> Farley 2005: 857.

<sup>40</sup> Farley 2005: 857. *Strauss Caricature* decision BVerfGE 75, 369 (3 June 1987): C.I.2.

<sup>41</sup> *Strauss Caricature* decision: C.I.2.

<sup>42</sup> Farley 2005: 846, 849.

<sup>43</sup> Traditional theories of art, also referred to as “analytical aesthetic theories”, can be characterised as “essentialist” theories. Essentialism holds that there are necessary conditions for art without which something is not art. See Farley 2005: 842. Expressionism, or emotionalism, for example, holds that art should exhibit the expression of the emotions, feelings, moods, and mental states of the artist. Thus the essence of art is the communication of important ideas and other knowledge through symbolic language. Formalism holds that the essence of art is significant form. See Farley 2005: 842. The traditional theories can be contrasted with the more recent notion of aesthetic pragmatism which includes theories like “intentionalism”, “relativism”, “institutionalism”, and “pragmatism”. Intentionalism, for instance, holds that the intent of the artist is what should be considered when evaluating art. Thus one cannot perceive the art status of the object by merely observing it. Instead, one must have some insights into the creative mind of the artist. See Farley 2005: 843. The *Street Theater* decision BVerfGE 67, 213 1 BvR 816/82 (17 July 1984): par B.1.3(a): The University of Texas School of Law: Foreign Law Translations:

<[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=637](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=637)>

provides an example. The German Federal Constitutional Court reiterated that “free creative composition in which the artist’s impressions and experiences are given direct conception through the medium of a certain

of the artist's creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium."<sup>44</sup> Accordingly, "the purpose of the artist is to depict his or her vision, express his or her personality or convey meaning".<sup>45</sup> As was indicated above, Eberle contends that art involves creative ideas, forms and images. Its nature is not to propagate, to constitute incitement or to threaten.<sup>46</sup>

The following serve as examples of the application of the above approach. In the *Strauss Caricature* decision, the Court had to consider whether drawings portraying the Bavarian Minister-President Franz Josef Strauss as a pig engaged in sexual activity constituted criminal defamation. The Court was satisfied that the drawings were art within the meaning of the fundamental right guaranteed by Article 5(3), first sentence, of the Basic Law.<sup>47</sup> The basis for the Court's finding in this regard was that the drawings were the outcome of free creative action in which the creator brought his impressions, observations and experiences into direct display. The Court emphasised that the fact that the drawings at the same time expressed a particular opinion did not take away their quality of being works of art.<sup>48</sup>

Descriptions of, and arguments advanced in defence of, the "Danish cartoons" and cartoons in general made mention of characteristics of cartoons which correspond with characteristics intrinsic to particular concepts of art as described above. Cartoons have been described as "graphic satire", and as "not merely to be considered as 'satirical comment ... cast into amusing form for the entertainment of the present', but also as 'contemporary history for the use and information of future generations'".<sup>49</sup> A distinction has been made between "cartoons of opinion" and "joke cartoons", so that a joke cartoon will appear separately, while a cartoon of opinion will appear on the editorial page of a newspaper.<sup>50</sup> It was noted that cartoons

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language of forms" is essential in artistic creativity. Artistic creativity, the Court stated, is not a message but rather the most direct expression of the artist's individual personality. "Intentional and unintentional processes, intuition, phantasy and artistic sense work together and cannot be rationally unravelled." Pragmatism, also known as instrumentalism or experience, holds that "the essence of art is its usefulness in helping us to comprehend and improve our overall life experiences". Good art in terms of this theory is always a means to some important end. See Farley 2005: 845.

<sup>44</sup> Eberle 2007-2008: 7.

<sup>45</sup> Eberle 2007-2008: 7.

<sup>46</sup> Eberle 2007-2008: 25.

<sup>47</sup> *Strauss Caricature* decision: C.I.2.

<sup>48</sup> *Strauss Caricature* decision: C.I.2. See also *Mutzenbacher* decision BVerfGE 83, 130 1 BvR 402/87 (27 November 1990): par B.I.(a).

<sup>49</sup> Keane 2008: 849.

<sup>50</sup> Keane 2008: 849.



“have a special role in forming public opinion, because an image generally has a stronger, more direct impact on the brain than a sentence does”.<sup>51</sup>

The essential characteristics of so-called “performance art”, as pointed out by Salzman, include the fact that this form of art has to make use of the live human body and, therefore, involves conduct, that it represents a direct presentation of the body and, therefore, lasts only as long as the performance itself, and that it cannot be duplicated. In addition, all performance art represents the communication of some idea to another live human being, whether or not the idea or communication is intended by the artist. It follows that the presence of at least one viewer, willing or unwilling, comprehending or uncomprehending, is required.<sup>52</sup> In the *Street Theater* decision, the Court based its conclusion that the street performance at issue constituted artistic creativity on the following considerations. In the first instance, it contained creative elements, such as the manner in which it was performed, and the inclusion and interpretation of a famous poem. Secondly, the special form of street theatre gave rise to a distancing from the audience. Placards, puppets and costumes were, for instance, used. Spectators were aware that they were witnessing a “play”. Lastly, the statement made by the performance was open to a variety of interpretations. The Court added that this result was not changed by the organiser’s principal and undisputed political intentions. Historical experiences of a general and personal nature, “tailored to meet the current political situation” and “given direct conception”, are not excluded from the protective scope of artistic creativity.<sup>53</sup>

The Supreme Court of Canada, in *R v Sharpe*, determined the meaning of the concept “artistic merit” in the context of available defences to a charge of the possession of child pornography under section 163.1(2), (3) or (4) of the *Criminal Code*. In terms of section 163.1(6), an accused will be found not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.<sup>54</sup> In relation to the defence of artistic merit, the Court reiterated that “artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression”. The test is objective. Artistic merit

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<sup>51</sup> Keane 2008: 874.

<sup>52</sup> Salzman 1999: 445-452.

<sup>53</sup> *Street Theater* decision: B.1.3(a).

<sup>54</sup> *R v Sharpe* [2001] 1 SCR 45: par 5.

should be interpreted not in terms of a quality standard, but as including any expression that may reasonably be viewed as art. In terms of this meaning, expression “possessing the quality of art”, or “artistic character”, however crude or immature in the eyes of the objective beholder, will be protected. The Court acknowledged that what may reasonably be viewed as art is a difficult question. Although it is generally accepted that “art” includes the production, according to aesthetic principles, of works of the imagination, imitation or design, the question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. These factors include the subjective intention of the creator<sup>55</sup>, the form and content of the work, its connections with artistic conventions, traditions or styles, the opinions of experts on the subject, and the mode of production, display and distribution, none of which is conclusive as such.<sup>56</sup>

#### 2.1.4.4 *The scope of the constitutional protection of art and artistic creativity*

The Court in the *Strauss Caricature* decision, having found that the drawings at issue constituted art, stated that, in constitutional review, the technically appropriate method was to establish and distinguish the form of the piece of art and its core statement, and to consider them separately. Because alienation, exaggeration and distortion are intrinsic to the genres of satire and caricature, the criteria for assessing whether the “dress” or form of a depiction is defamatory are different and generally less strict than the criteria for assessing the core of the statement. In order to determine the actual content of the work of art, it is necessary to dissociate the content from the “satirical garb adopted, in word and image”.<sup>57</sup>

Once it has been accepted that an image constitutes art in the light of the intrinsic features of art, the core message of the image will reasonably be construed as aimed rather at social commentary than at the humiliation of an individual. This submission can be illustrated with reference to the following matters.

The South African Human Rights Commission, in its ruling on a complaint that the cartoonist Shapiro had defamed President Zuma, or had violated his right to dignity, in a cartoon published in the *Sunday Times* in September 2008, took into account that the cartoonist had

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<sup>55</sup> *Publications Control Board v Gallo (Africa) Ltd* 1975 (3) SA 665 (AD).

<sup>56</sup> *R v Sharpe*: par 61-67.

<sup>57</sup> *Strauss Caricature* decision: C.I.2; C.I.4(a).

engaged in artistic creativity. The cartoon depicted President Zuma with his pants undone, apparently preparing to rape a blindfolded “Lady Justice” who was being held down by the secretary-general of the African National Congress (ANC), the ANC Youth League president, the South African Communist Party general secretary and the general secretary of the Congress of South African Trade Unions (COSATU). She was wearing a sash with the words “Justice System” on it. A speech bubble showed the ANC secretary-general urging Zuma: “Go for it, boss!” The complainants argued that the cartoonist had defamed Zuma or had violated his right to dignity, and that the cartoon was an abuse of press freedom. The Commission reasoned that it was common knowledge that Zuma’s allies in the tripartite alliance were calling for a “political solution” to corruption charges he was facing at the time. It found that Zapiro had acted with “*bona fide* artistic creativity, in the public interest”, and that his cartoon did not discriminate against Zuma, women or rape victims, as was claimed. The Commission stated that the justice system highlighted in the image “is not a person, thus harm cannot be incited against an object”, and that the cartoon was “satirical and metaphorical”. It was, furthermore, “a political expression, published in the public interest and, as such, deserved heightened protection”.<sup>58</sup>

The image that was at issue in the Constitutional Court case of *Le Roux and Others v Dey*<sup>59</sup> was a manipulated image showing the applicant’s face on a naked body in a sexually suggestive position. The Constitutional Court held that this image was actionably injurious on the basis that a reasonable person in the applicant’s position would understandably be affronted by being depicted in, or aligned with, a naked, indecent and probably lewd picture.<sup>60</sup> The Court made it clear that “cartoons and caricatures are not excluded from the realm of defamation merely because they are clearly not true depictions of the persons concerned”.<sup>61</sup> However, the manipulated image, in the Court’s view, apparently did not even warrant consideration as artistic creativity.

Recently, the display and eventual removal by the Goodman Art Gallery of a painting titled *The Spear*, in which the South African president, Jacob Zuma, was depicted in the posture of Vladimir Lenin on a famous poster, but with his genitals exposed, induced a heated debate on

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<sup>58</sup> *Manamela, Buti and Others v Shapiro* GP/2008/1037/E (SAHRC) 2008: par 5.

<sup>59</sup> *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC); BCLR 446 (CC).

<sup>60</sup> *Le Roux and Others v Dey*: par 90.

<sup>61</sup> *Le Roux and Others v Dey*: par 104.

the constitutionality of the painting.<sup>62</sup> The painting indisputably complied with the essential characteristics of art. In accordance with the reasoning in the *Strauss Caricature* decision referred to above, the standard of assessment with respect to the form of the painting should therefore be less strict. The exposure as such of genitals in accordance with the essential features of art is widely accepted as in compliance with this standard. The artistic nature of the painting also has a bearing on the interpretation of the core statement most probably made by it. Rather than being aimed at the personal humiliation of Zuma, it is reasonable to accept that it comments on Zuma's conduct and views as a political leader. The same considerations that were taken into account by the Human Rights Commission with respect to the "Lady Justice" cartoon are relevant.

#### 2.1.4.5 Humour

Expression in the form of humour or jest may also be the mode of communication of opinions, facts and ideas. It can also constitute art in the form of comedy. It will be apparent that, generally speaking, every one of the forms of expression stipulated in the proviso in terms of section 12 of the *Equality Act*, some more comfortably than others, can either constitute humour or employ humour to convey its message. The technical question of whether or not humour should necessarily be considered and essentially be described as art will, however, not be pursued in depth. Because its essential feature, namely the creative skill of being funny, can be viewed as a form of artistic creativity, it will be discussed in this context. In the words of Oring, as quoted by Little: "I also believe humorous expressions to be art. Some jokes are truly beautiful, and those who create them, reshape them, and orally purvey them are often genuine artists."<sup>63</sup> The question that will be addressed is to what extent the presentation of information, art, reporting or advertising in the form of humour or jest may affect the meaning or impact of the message that is conveyed.

Research on the impact of humour or jest in the context of the law of defamation provides noteworthy guidelines. Little endorses the focus of Australian courts on the plaintiff's harm, "essentially asking whether a jest sufficiently disparages the plaintiff as to call for civil liability".<sup>64</sup> She indicates that humour is generally characterised in terms of the tripartite

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<sup>62</sup> See Barnard-Naudé & De Vos: 2012.

<sup>63</sup> Little 2011: 114 fn 100.

<sup>64</sup> Little 2011: 99.

theories of “superiority”<sup>65</sup>, “release”<sup>66</sup> and “congruity”, and contends that “the incongruity concept helps to calibrate an optimal balance of First Amendment concerns and the values of human dignity, property and honor reflected in defamation law”.<sup>67</sup> The premise of the theories is that humour concerns communication that is funny.<sup>68</sup>

Humorous incongruity, according to Little, manifests itself in a variety of ways. It can emerge because the familiar is placed in an unfamiliar context. It commonly results from a sudden altering of a point of view. The humorous setting may, for example, reflect both the “profound” and the “mundane”, or the characters may engage in role reversal. It may also result from confusion about the context in which the term is used. Fun is derived from surprise, in the sense of unforeseen insight, or fulfilled expectations.<sup>69</sup> Having recognised incongruity as an essential condition for humour, Little points out that it is, however, not a sufficient condition, because some incongruities “may be insightful, quirky, illogical, or ‘irredeemably absurd’, but not funny”. To be funny, incongruities must be “motivated by, and understandable within, the context of their use”. They “must take place in a non-threatening context”, “occur suddenly” or follow a “cue”, the intention of which on the part of the joke-teller is to make the audience laugh. In the latter instance, the listener anticipates that a punchline is coming, and experiences both fulfilment and surprise when it does.<sup>70</sup>

Humour’s individual and social value has been related, inter alia, to its operation as an effective stress-reducing device, its role in creating bonds among people, and its key role in regulating social norms by providing a mechanism for social commentary, “enabling powerful expressions of disapproval and approval through gradations of wit ranging from sugar-coated quips to acid barbs”.<sup>71</sup> It can “suck the power out of stereotypes” and release inhibition or tension related to group differences. The potential for negative consequences has, however, also been acknowledged. Humorous taunting or stereotyping based on group identity can defame an entire group.<sup>72</sup> A conclusion that the ultimate impact is negative

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<sup>65</sup> The superiority theory, according to Little, “derives from ancient thinkers ... who associated humor with the process of aggressively disparaging others in order to enhance oneself”: Little 2011: 102.

<sup>66</sup> The release theory, according to Little, “identifies repressed pleasure or anxiety as humor’s sources”: Little 2012: 102.

<sup>67</sup> Little 2011: 101.

<sup>68</sup> Little 2011: 101.

<sup>69</sup> Little 2011: 105.

<sup>70</sup> Little 2011: 109.

<sup>71</sup> Little 2011: 114.

<sup>72</sup> Little 2011: 115.

generally requires information with respect to contextual circumstances, for example employment conditions.<sup>73</sup>

### ***2.1.5 Section 16(1)(d): “academic freedom and freedom of scientific research”***

This concerns the right of the individual to conduct and to publish research, and to disseminate learning through teaching, without government interference.<sup>74</sup> Research has been described as “a serious and systematic attempt in terms of content and form to find the truth”, and includes all research-related activities, such as the dissemination of results through publication.<sup>75</sup> Freedom of expression is a “key component” of the right.<sup>76</sup>

Like other constitutional rights and freedoms, the right to academic freedom is not an end in itself, but should be recognised and exercised within the constitutional context. Academic freedom “unlocks” society’s “intellectual potential to serve humanity with ever-increasing understanding and skill. Academics are thus in the service of society and may be held accountable by society”<sup>77</sup> in accordance with the standards established in terms of the Constitution.

Academic freedom often involves inherent conflict between institutional autonomy and the loyalty of individual academics to their research disciplines.<sup>78</sup> Moreover, context plays a prominent role in drawing the boundaries of acceptable and non-acceptable academic expression. Alston and Malherbe point out that an educational environment which confines educators, for example by prescribing single textbooks and requiring syllabus conformity which excludes contentious issues, not only hinders teachers from sharing their views or introducing controversial subjects, but also, and equally, denies learners the capacity to reach their potential in a world of diverse ideas.<sup>79</sup> However, the inclusion in a primary-school curriculum of research that maintains that certain groups are intellectually, mentally or otherwise inferior to others, may be found inappropriate in the light of the aim to impart an

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<sup>73</sup> Little 2011: 116.

<sup>74</sup> Currie & De Waal 2005: 370.

<sup>75</sup> Alston & Malherbe 2009: 105.

<sup>76</sup> Currie & De Waal 2005: 370.

<sup>77</sup> Alston & Malherbe 2009: 103.

<sup>78</sup> Alston & Malherbe 2009: 111-112.

<sup>79</sup> Alston & Malherbe 2009: 111-112.

understanding of constitutional values.<sup>80</sup> Examples of academic views that have been categorically restricted are the so-called Holocaust denial, which was discussed in Chapter IV<sup>81</sup>, and expression of support for Nazi ideology based on a combination of scientific ideas. These ideas include Darwinism, which contends that, to survive, a superior race must not only separate itself from lesser ones, but also continue to suppress and dominate those who would threaten to overtake it.<sup>82</sup> The discussion of section 7(a) of the *Equality Act* further addresses this aspect.<sup>83</sup>

A further relevant perspective is highlighted by Braun when he points out that the right not to listen is a corollary of the right to speak. This choice is denied a “captive audience of school children who could either listen and ‘learn’ or suffer the consequences”.<sup>84</sup>

## **2.2 The limitation of the right in terms of section 16(2)**

### ***2.2.1 Section 16(2) in the context of the framework of the Constitution***

Rautenbach points out that section 7(3) of the Constitution<sup>85</sup> not only states the principle that the rights in the Bill of Rights may be limited for the protection of others and the well-being of all, but also recognises that:

[l]eaving these matters to be decided according to the unfettered discretion of those who exercise governmental power or to be settled by the dynamics of societal power relationships, could render the protection afforded by the bill of rights useless, and a useful pretext for the abuse of private or public power. Section 7(3) therefore also contains the principle that the power to limit the rights as formulated by the Constitution makers is a limited power – it is subject to provisions as to when, how and by whom the rights in the bill of rights may be limited.<sup>86</sup>

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<sup>80</sup> In this regard, it is noteworthy that two of the leading “hate speech” cases in Canada, *R v Keegstra* [1990] 3 SCR 697 and *Ross v New Brunswick School District No 15* [1996] 1 SCR 825: 873-874, involved teachers. In *Ross*, the court noted that “young children are especially vulnerable to the messages conveyed by their teachers ... [since] they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher”. See Moon 2008-2009: 88-91.

<sup>81</sup> See Chapter II: 2.4.2.

<sup>82</sup> Meinecke 2007: 11-13.

<sup>83</sup> See 4.6.2.1 below.

<sup>84</sup> Braun 2004: 27.

<sup>85</sup> Section 7(3) provides as follows: “The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

<sup>86</sup> Rautenbach 2001: 618-619.

Section 16(2) as such limits the protection afforded to freedom of expression. Woolman and Botha describe it as an “internal modifier” that serves to determine the content of the right to freedom of expression as protected in terms of section 16.<sup>87</sup> Expression, including the particular forms of expression enumerated in terms of section 16(1), that falls within the ambit of section 16(2) is categorically not covered by the constitutional right to freedom of expression entrenched in section 16(1) of the Bill of Rights and can accordingly be outlawed without the risk of violating the constitutional principle of freedom of expression.<sup>88</sup>

The Constitution intends to establish an open and democratic society, which means that the different and conflicting interests of individuals and groups within that society have to be accommodated.<sup>89</sup> It has been highlighted that constitutional protection generally requires the justification of impingements on constitutional rights in accordance with a set standard. The explicit exclusion by the founders of the Constitution of certain forms of expression from the right to freedom of expression at a definitional level<sup>90</sup> implies that expression of this nature is fundamentally uncharacteristic of the society contemplated in terms of the Constitution and its standards. It is contended that, while it is obvious that expression within the ambit of section 16(2)(a) constitutes a proven threat to the constitutional society, the other subsections of section 16(2) should be interpreted accordingly.

### ***2.2.2 The basis for the categorical exclusion from constitutional protection of expression under section 16(2) of the Constitution***

It can be accepted that the founders of the Constitution regarded expression under section 16(2) as lacking expressive value worthy of constitutional protection. However, this in itself would not conclusively explain the categorical exclusion. The fact that the constitutional structure generally allows for conclusions of this nature to be reached in the context of the limitation analysis in terms of section 36 suggests rather that the categorical exclusion was inspired by a perception that the expression categorically jeopardises the foundational

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<sup>87</sup> Woolman & Botha in Woolman & Bishop 2008: 34-30.

<sup>88</sup> Milo *et al* in Woolman & Bishop 2008: 42-6–42-7; *Islamic Unity Convention and Others v Independent Broadcasting Authority and Others*: par 30-31; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 47.

<sup>89</sup> Chaskalson 2000: 200.

<sup>90</sup> Chaskalson 2000: 201-202.



constitutional values to the extent that the exclusion would be instrumental in the safeguarding of the democracy.<sup>91</sup> Section 16(2) is comparable with article 18 of the German Constitution.<sup>92</sup> As was indicated in Chapter II, Rosenfeld remarks, with respect to article 18, that the German justification for the protection of freedom of expression based on the democracy theory “does not encompass extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets”, and, further, that “this provision reflects disillusionment with the ability of free democracy to sustain itself without having to restrict the very fundamental freedoms that define it, including freedom of expression”.<sup>93</sup>

The criminal prohibitions in Canada were, in contrast, enacted in response to materials circulating in Canada at the time which were found to be “deeply hurtful to the minority groups at which they [were] aimed” and to have both “a deleterious effect on society” and “a tendency to encourage other discriminatory social practices”.<sup>94</sup> This explains the selection of grounds for “hate speech” at the time, namely colour, race, religion, and ethnic origin.

Chief Justice Dickson in *R v Keegstra*, in an overview of hate propaganda and freedom of speech, related that, in 1965, the Minister of Justice had set up a Special Committee to study hate propaganda (the Cohen Committee). This was in response to an upsurge in neo-Nazi activity in Canada, the United States of America (USA) and Britain. The Committee recommended the addition of new offences to the Criminal Code. The Criminal Code was accordingly amended by the addition of the offences of advocating genocide (section 318), public incitement of hatred likely to lead to a breach of the peace (section 319(1)), and wilful promotion of hatred (section 319(2)).<sup>95</sup>

In 2004, the definition of identifiable groups was amended to include sexual orientation. According to Cohen, the impetus behind the amendment was, among other things, anti-gay hatred propaganda generated by the Kansas-based Reverend Phelps, who gained notoriety in Canada when he threatened to stage an anti-gay demonstration on the front lawn of the Supreme Court. Phelps’s propaganda represented a growing body of hate propaganda aimed

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<sup>91</sup> See 3.1.1 & 3.1.3.2 above and Chapter VII: 7.2 below.

<sup>92</sup> See Chapter IV: 3.5.

<sup>93</sup> See Chapter II: 3.2.2.

<sup>94</sup> Cohen 2000: 77.

<sup>95</sup> *R v Keegstra*: Analysis I C. See also Chapter IV: 4.3.1.

at silencing and persecuting sexual minorities and inciting violence against them.<sup>96</sup> As a result of pressure from various interest groups and individuals, the House of Commons in March 2013 passed a law adding “gender identity” to the list of protected grounds under the *Canadian Human Rights Act* and the *Criminal Code*.<sup>97</sup>

Chief Justice Dickson, in response to the argument against the constitutionality of the above-mentioned prohibitions, namely that the rise of Nazi ideology had occurred despite the existence and use of laws prohibiting hate propaganda, acknowledged that laws of this nature cannot in themselves prevent the tragedy of a Holocaust. Conditions particular to Germany had played a material role in the rise of Nazism, despite the existence of these laws. However, “the experience of Germany demonstrates the extent to which flawed and brutal ideas can capture the acceptance of a significant number of people”. Accordingly, “hate propaganda laws are one part of a free and democratic society’s bid to prevent the spread of racism, and their rational connection to this objective must be seen in such a context”.<sup>98</sup>

The approach of Chief Justice Dickson, although in the distinct context described above, draws attention to the probable role of the broader international context with respect to the categorical exclusions in terms of section 16(2) of the Constitution. The same can be said of the strong focus on National Socialism or anti-Semitism in the German criminalisation of “hate speech”.<sup>99</sup> Chapter III has given an overview of the international agreements that were in place at the time of the formulation of the Constitution. Moreover, at that time, the realisation that the hate campaign against Jews conducted by the Nazi regime in the 1930s was not an isolated historical event, was accentuated. Mahoney, in this context, refers to the 1990s campaign against Bosnian Muslims in the former Yugoslavia by Serbians and the mass murders of Tutsis and moderate Hutus during the Rwanda genocide by the majority Hutus during the same period.<sup>100</sup> She describes these instances of genocide as “state-sanctioned hatred”.<sup>101</sup>

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<sup>96</sup> Cohen 2000: 72-73.

<sup>97</sup> Bill C-279, 20 March 2013. Subsection 318(4) defines “gender identity” as, “in respect of a person, the person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the person was assigned at birth”.

<sup>98</sup> *R v Keegstra*: VII D(ii).

<sup>99</sup> See the discussion in particular of the decision in *Wunsiedel* BVerfG 1, BvR 2150/08 (4 November 2009) in Chapter IV: 3.5.1.1.

<sup>100</sup> Mahoney 2009: 74.

<sup>101</sup> Mahoney 2009: 74.

This discussion will be continued in more detail when the grounds enumerated in terms of section 16(2)(c) are discussed below.

### ***2.2.3 The obligation to prohibit expression excluded in terms of section 16(2)***

As was stated above, subject to the rule-of-law requirement of a rational relationship between legislation and its legitimate purpose,<sup>102</sup> limitations of expression contemplated in section 16(2) need not comply with the requirements of section 36.<sup>103</sup> Hence the state is permitted to combat the forms of expression falling within the section's ambit in an unfettered way. The question arises whether it follows that the state is obliged to prohibit the expression. As previously highlighted, the South African Constitution requires positive state action to promote its aims.<sup>104</sup> Section 16(2)(c), as was indicated above, makes a strong constitutional statement on the fundamental construction of the society that is established in terms of the Constitution. This was moreover inspired by, and closely resembles, article 20(2) of the *International Covenant on Civil and Political Rights (ICCPR)*, which was discussed in Chapter III.<sup>105</sup> Article 20 of the *ICCPR* as well as article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* require the prohibition of "hate speech" as respectively defined.<sup>106</sup> Article 4(a) explicitly requires criminalisation of the expression contemplated by it, while it has been argued that the distinctive feature of article 20 is that it indicates which expression may be criminalised.<sup>107</sup> Furthermore, it can be inferred that the discrimination constituted by expression under section 16(2)(c) will in all circumstances be unfair. This implies an additional obligation in terms of sections 9(3) and 9(4) to prohibit it by means of legislation.

The potential "chilling effect" of regulation of freedom of expression contemplated by section 16(2)(c) on expression outside this ambit must nonetheless be considered. This entails the nature and scope of regulation being narrowly tailored and strictly directed at compliance with the obligation to ensure that expression will not be utilised to jeopardise the foundational constitutional values. The government of the day does have leeway, for example in opting

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<sup>102</sup> Rautenbach 2007: 557.

<sup>103</sup> Rautenbach 2001: 618 fn 3.

<sup>104</sup> See Chapter II: 3.2.4.

<sup>105</sup> Milo *et al* in Woolman & Bishop 2008: 42-5; Currie & De Waal 2005: 373 and fn 69.

<sup>106</sup> See Chapter III: 3.3.1 & 4.2.1.

<sup>107</sup> See Chapter III: 3.3.3.

between criminalisation and other forms of regulation. It is in a position to, and it should diligently, take into account the intensity of sensitivity due to past violations of dignity, the current level of systemic disadvantage, and psychological elements related to the political and socio-economic realities of members of the relevant groups, as well as the practical reality that the same expression that conveys hatred and instigates harm in one community or context may have no such effect in another.<sup>108</sup>

The extreme nature of the expression prohibited in terms of section 16(2)(c) has to be emphasised and will be apparent from the subsequent discussion of its different elements. As was stated above, the categorical exclusion of the contemplated expression on the specified grounds is concerned with expression that has the potential to jeopardise the constitutional democracy by means of incitement to harm. The risk includes the fact that victimisation of those who are targeted and those who would want to speak in support of them will silence them rather than provoke a response. The statement of the Court in *Islamic Unity Convention v Independent Broadcasting Authority and Others* that “there is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality” corresponds with this view.

#### **2.2.4 Section 16(2)(a): “propaganda for war”**

The meaning of “war” should be confined to those conflicts that are contrary to international law.<sup>109</sup> Milo *et al*, in line with the view that section 16(2) should be narrowly interpreted, contend that, given the fact that expression amounting to propaganda for war is excluded from constitutional protection, the restrictive meaning of “propaganda” should apply.<sup>110</sup> This meaning refers to “an organised, systematic enterprise of circulating information or ideas to serve a purpose”. The expansive meaning, in contrast, refers to “the communication of ideas and information for the purpose of achieving a particular purpose”.<sup>111</sup>

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<sup>108</sup> Neisser 1994: 338.

<sup>109</sup> See Currie & De Waal 2005: 373 fn 69.

<sup>110</sup> This narrow interpretation, it will be contended, also applies in the context of section 7(a) of the *Equality Act*. See 4.6.2.1 below.

<sup>111</sup> Milo *et al* in Woolman & Bishop 2008: 42-70–42-71; *Black’s Law Dictionary* 2004 defines “propaganda” as follows: “The systematic dissemination of doctrine, rumor or selected information to promote or injure a particular doctrine, view or cause.”

### 2.2.5 Section 16(2)(b): “incitement of imminent violence”

The term “incitement” is used both in section 16(2)(b) and section 16(2)(c). The concept can be defined as “the act or instance of provoking, urging on, or stirring up”, or, in criminal law terms, as “the act of persuading another person to commit a crime”.<sup>112</sup> *Collins English Dictionary* defines “incites” as “to stir up or provoke to action”.

As indicated in Chapter IV, even United States (US) courts acknowledge that advocacy of the use of force or of a violation of law may be prohibited where the “advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>113</sup> The US approach may provide useful guidelines with respect to the interpretation of section 16(2)(b), especially as regards risk determination. Currie and De Waal point out that, unlike the *Brandenburg* test,<sup>114</sup> section 16(2)(b) does not require the incitement to be “likely” to lead to violence. However, the requirement of imminence dominates the requirement of likelihood. It will be practically impossible to determine whether a particular expression constitutes incitement of imminent violence without having regard to the context in which the statement is made and to the possible effects it may have on its audience.<sup>115</sup> Indications that it is not likely that the relevant result will ensue will be even more convincingly indicative of an inability to meet the imminence requirement.

Milo *et al* submit that, for purposes of section 16(2)(b), “‘incitement’ involves actively encouraging, calling for or pressurising others to engage in acts of violence where the threat of the violence occurring is imminent”. The speaker should subjectively intend to incite imminent violence, and it should be objectively likely that such violence will result from the expression.<sup>116</sup> Similar views have been expressed in relation to relevant provisions of international agreements.<sup>117</sup> It has to be borne in mind that these views mostly concerned the criminalisation of the expression at issue. As far as the requirement of intention is concerned, it is submitted that, while it should be required in the context of a criminal prohibition, for

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<sup>112</sup> *Black’s Law Dictionary* 2004.

<sup>113</sup> Milo *et al* in Woolman & Bishop 2008: 42-71. See also Chapter IV: 2.4.2.2; Currie & De Waal 2005: 373.

<sup>114</sup> See Chapter IV: 2.4.2.2.

<sup>115</sup> Currie & De Waal 2005: 374.

<sup>116</sup> Milo *et al* in Woolman & Bishop 2008: 42-72; Currie & De Waal 2005: 375-376.

<sup>117</sup> See Chapter III: 3.3.1, 3.3.2, 3.4, 6.4.1, 6.4.2 & 6.4.4.

example section 17 of the *Riotous Assemblies Act*<sup>118</sup>, an objective assessment to determine whether or not expression constitutes incitement to imminent violence should not require the presence of intent. A speaker may, for example, misjudge the potential response of an emotional audience to provocative expression. If the expression is objectively found to constitute incitement of violence, which could even be based on the fact that violence had in fact ensued, the absence of intention should not affect a finding to this effect.

### ***2.2.6 Section 16(2)(c): “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”***

Both “advocacy of hatred” and “incitement to cause harm” must be present before expression amounts to “hate speech” in terms of section 16(2)(c).<sup>119</sup> The distinct, explicit focus on the latter supports the view that the audience, or members of the audience, should in fact be encouraged or provoked to cause the harm. Whether these elements are present will be determined by a number of interrelated considerations, which will be discussed next.

#### *2.2.6.1 The meaning of the words*

As was indicated in *Afri-Forum and Another v Malema and Others*, in determining whether expression constitutes “hate speech”, the first issue is the meaning of the words for the relevant audience in the relevant context.<sup>120</sup> The Court pointed out that the meanings that words and groups of words convey can vary substantially. Moreover, “the context in which the words were uttered, the circumstances under which the words were uttered, the way in which the words were uttered, the gestures which accompanied the words and what the words imply” should be considered.<sup>121</sup>

The Court, following the approach adopted in the law of defamation, held that the meaning of the words is what the “reasonable listener”, having the “common knowledge and skill

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<sup>118</sup> *Riotous Assemblies Act* 17/1956. Incitement to violence is also criminalised in terms of section 29 of the *Films and Publications Act*.

<sup>119</sup> *Milo et al* in *Woolman & Bishop* 2008: 42-79.

<sup>120</sup> *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC): par 55.

<sup>121</sup> *Afri-Forum and Another v Malema and Others*: par 41 & 96.

attributed to an ordinary member of society” would consider it to be.<sup>122</sup> This includes the implied meaning of the words in the form of parodies or innuendos. Justice Lamont remarked that it is only when consideration is given to the range of knowledge available to the audience, and which the audience will use to decode the words, that the true meaning becomes apparent.<sup>123</sup> The Court held that, “if the words have different meanings, then each meaning must be considered and be accepted as a meaning. The search is not to discover an exclusive meaning, but to find the meaning that the target group would reasonably attribute to the words.”<sup>124</sup> It was furthermore held that, where there is publication by the press, the public at large, including target groups, even though they were not physically present, must be treated as being the audience at political rallies.<sup>125</sup> It has to be mentioned, though, that, in the context of section 16(2)(c), the relevant target group will be the audience and not the group that is the subject of the hatred.

It is contended that, in the light of the different aims of protection against defamation and protection against the effects of “hate speech”, the standard of the “reasonable listener” will not necessarily be appropriate. An audience of unreasonable fanatics with extreme racist or other discriminatory views will be more susceptible to understanding words with racist innuendos as incitement to harm, and will pose a greater danger to society than an audience of reasonable listeners. The speaker and the audience may both proceed from the mutual understanding that the words are infused by, for example, extreme racist ideas. The determination of the meaning that the audience “would reasonably attribute to the words” should accommodate this reality.

The meaning of the words in context is relevant with respect to all the elements of expression covered by section 16(2)(c), which will be discussed next.

#### 2.2.6.2 *Advocacy*

*Black’s Law Dictionary* defines “advocacy” as “the act of pleading for or actively supporting a cause or proposal”. Milo *et al* contend that the speaker must promote hatred or attempt to

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<sup>122</sup> *Afri-Forum and Another v Malema and Others*: par 41 & 103.

<sup>123</sup> *Afri-Forum and Another v Malema and Others*: par 100.

<sup>124</sup> *Afri-Forum and Another v Malema and Others*: par 109(7-8).

<sup>125</sup> *Afri-Forum and Another v Malema and Others*: par 91 & 109(1 & 5).

instil hatred in others.<sup>126</sup> As was indicated in Chapter III, Camden Principle 12(1) advises that the term be understood as “requiring an intention to promote hatred publicly towards the target group”.<sup>127</sup> Chief Justice Dickson, in *R v Keegstra*, described hate propaganda as repudiating and undermining democratic values with “unparalleled vigour” and with “condemnation of the view that all citizens need be treated with equal respect and dignity”.<sup>128</sup>

Whether or not advocacy requires intention should be discussed in relation to the element of incitement. Milo *et al* remark that it is difficult to envisage how one can advocate hatred and, by doing so, incite to cause harm, without intending to do so. However, as in the case of incitement to violence discussed above, scenarios are conceivable where a person advocating hatred may misjudge the disposition of the particular audience and may not realise that the audience may be incited by the particular expression of hatred to the extent that they might actually not only hate, but also harm the target group. The condemnation of the conduct, beliefs or ways of a certain group as a religious issue, and the expression of contempt for a certain group as part of a political campaign or cultural celebration, may serve as examples.

### 2.2.6.3 *Incitement*

It has been pointed out that the advocacy of hatred as such does not constitute “hate speech” in terms of section 16(2)(c). The advocacy has to constitute incitement to cause harm. It is this element in particular that specifically relates section 16(2)(c) to article 20 of the *ICCPR*, in contrast to other “hate speech” provisions where incitement is not a definitional requirement.<sup>129</sup> The comments on article 20 of the *ICERD* in Chapter III are noteworthy in this regard. It was suggested that, in determining incitement, objective consideration should be given to previous violent responses to perceived criticism and the imminence of the risk of discrimination, hostility or violence.<sup>130</sup>

Milo *et al* contend that the use of the word “incitement” indicates that the speech “must instigate or actively persuade others to cause harm”.<sup>131</sup> This interpretation corresponds with

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<sup>126</sup> Milo *et al* in Woolman & Bishop 2008: 42-80.

<sup>127</sup> Chapter III: 3.4.

<sup>128</sup> *R v Keegstra*: par VII D (i). See Chapter IV: 4.3.1.3.

<sup>129</sup> See Chapter III: 3.3.2; Rautenbach 2007: 552-553.

<sup>130</sup> See Chapter III: 3.3.2.

<sup>131</sup> Milo *et al* in Woolman & Bishop 2008: 42-83. Currie & De Waal 2005: 377 hold a contradictory view,



the comments of Nowak, Jahangir and ARTICLE 19, referred to in Chapter III. They contend that the concept “incitement” under international law requires an imminent risk of discrimination, hostility or violence against persons belonging to the targeted group.<sup>132</sup> The concept “imminence” in this sense, however, has to be distinguished from the concept as employed in terms of section 16(2)(b) of the Constitution and in the context of American regulation of expression that constitutes incitement to imminent lawless action.<sup>133</sup> The commentators on article 20 of the *ICCPR* use the term to describe a risk of ensuing discrimination and to indicate that more than just a likelihood that such risk is created, is required.<sup>134</sup> It is evident that the harms that they had in mind would not conform to the requirement of imminence as contemplated in terms of section 16(2)(b) of the Constitution and to American incitement to imminent lawless action. The fact is that the term has been excluded from section 16(2)(c), in contrast to its inclusion in section 16(2)(b).

The requirement that an actual risk has to exist can be compared with the respective requirements in terms of sections 130(1) and 130(2) of the German *Criminal Code*, namely capability of disturbing the public peace and the incitement of hatred.<sup>135</sup> It was, however, also reiterated in Chapter IV that, in terms of section 130 of the German *Criminal Code*, the incitement of others to hatred and violence becomes punishable well before the conduct would be considered concrete incitement to a specific criminal act punishable under different provisions of the *Code*.<sup>136</sup> Sections 319(1)<sup>137</sup> and 319(2) of the Canadian *Criminal Code* likewise respectively require the likelihood of leading to a breach of the public peace and the promotion of hatred.<sup>138</sup> The interpretation in *Mugesera v Canada (Minister of Citizenship and Immigration)* of concepts contained in section 319(2), which interpretation was highlighted in Chapter IV, is of significant relevance in the context of the present discussion.<sup>139</sup>

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namely that “incitement” should be read as meaning an intention (to cause harm), or as being directed at (causing harm).

<sup>132</sup> See Chapter III: 3.3.2.

<sup>133</sup> See Chapter IV: 2.4.2.2.

<sup>134</sup> See Chapter III: 3.3.2.

<sup>135</sup> See Chapter IV: 3.6.1.3. See also Brugger 2003: 29.

<sup>136</sup> See Chapter IV: 3.6.1.3.

<sup>137</sup> Section 319(1) provides as follows:

Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of  
(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or  
(b) an offence punishable on summary conviction.

<sup>138</sup> See Chapter IV: 4.3.1.2.

<sup>139</sup> See Chapter IV: 4.3.1.4.

It is evident that a risk of harm will be enhanced in a context where hostility and violence, or threats of violence, already prevail or create an explosive situation. This will be even more so if the “marketplace of ideas” is manipulated, with the effect that contradictory views will not be heard or respected. Pillay, for example, argues that the impact and meaning of the publication of a cartoon branding Islam’s holiest figure as a suicide bomber and a terrorist cannot be interpreted in isolation from recent global events, namely that many around the world have come to equate the war on terrorism to a war against Islam. This has resulted in Muslims being stereotyped, isolated and disadvantaged, and harmed in different ways. These contextual circumstances evidently enhance the risk of addressees being incited by the advocacy of hatred against Muslims, especially expression depicting them as terrorists.<sup>140</sup> There is an obvious resemblance between this approach and the German tolerance of the content-based specific prohibitions with respect to approving of, glorifying or justifying National Socialism.<sup>141</sup>

With respect to the objective test for identifying “hate speech”, it was stated in *Freedom Front v South African Human Rights Commission and Another* that “the issue is ... whether a reasonable person assessing the advocacy of hatred on the stipulated grounds within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm”.<sup>142</sup> The Panel stated that the closer the proximity or causal link between the advocacy of hatred on the stipulated grounds and the harm, the more likely it is that the expression will be deemed to be “hate speech”. This likelihood will clearly be greater the more vulnerable the target group, and the more sensitive the issue.<sup>143</sup>

It appears that the underlying reason for the exclusion from protection of expression in terms of section 16(2)(c) is the effect of the expression on the broad social cohesion, which is the fabric of the democratic society. The distinction which was made by the Human Rights Commission in *Freedom Front v South African Human Rights Commission and Another* between intention as an element of “hate speech” and as an element of proof of guilt of a

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<sup>140</sup> Pillay 2010: 482.

<sup>141</sup> See Chapter IV: 3.5.1.1.

<sup>142</sup> *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC): 1285.

<sup>143</sup> *Freedom Front v South African Human Rights Commission and Another*: 1296. The Panel’s conclusion that there must be a real likelihood that the expression causes harm before it can be deemed to be “hate speech” should rather have been that there must be a real likelihood that the expression incites to cause harm.

person being prosecuted for a crime of “hate speech”, is significant in this regard. The Commission held that, in the latter instance, it is clear that the state will have to prove, beyond reasonable doubt, that the accused wilfully engaged in “hate speech”. Likewise, if the crime description requires negligence, negligence will have to be proved. In contrast, the test as to whether expression amounts to “hate speech” for the purposes of section 16(2)(c) is an objective one.<sup>144</sup> It is contended that the required intention will include awareness of the risk that the audience will respond to the advocacy of hatred.<sup>145</sup> Actual response will generally be a significant indication that the speech did constitute the required incitement, as well as that the speaker did foresee, or should have foreseen, the response. On the other hand, the absence of response at the time of the assessment will not disprove that “hate speech” as contemplated was intended or that incitement was constituted.

#### 2.2.6.4 *Hatred*

Hatred may be interpreted to mean “an intense, passionate or active dislike, ill-will, malevolence, or feeling of antipathy or enmity connected with a disposition to injure”.<sup>146</sup> In *R v Keegstra*, Chief Justice Dickson described hatred as follows:

Noting the purpose of section 319(2), in my opinion the term “hatred” connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Justice Cory stated in *R v Andrews*: “Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another... .”<sup>147</sup> Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our 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.<sup>148</sup>

These excerpts were quoted with approval in *Abramjee and Kammies v Qwelane and Others*<sup>149</sup>, a finding of the South African Human Rights Commission. Camden Principle

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<sup>144</sup> *Freedom Front v South African Human Rights Commission and Another*: 1297.

<sup>145</sup> This resembles the approach of the Court in *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40; [2005] 2 SCR 100. See Chapter IV: 4.3.1.4.

<sup>146</sup> Van Wyk 2002: par 4; Currie & De Waal 2005: 375-376.

<sup>147</sup> *R v Andrews* [1990] 3 SCR 870: 179.

<sup>148</sup> *R v Keegstra*: par D(iii)a.

<sup>149</sup> *Abramjee and Kammies v Qwelane and Others* GP/2008/0161 (SAHRC) 2008.

12(1), quoted in Chapter III, states that the terms “hatred” and “hostility” refer to “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”.<sup>150</sup>

#### 2.2.6.5 Grounds

At first sight, it may appear anomalous that the specified grounds in section 16(2)(c), namely race, ethnicity, gender and religion, substantiate the “hate speech” contemplated by the subsection to the exclusion of other recognised grounds of discrimination.<sup>151</sup> There is no hierarchy of such grounds in section 9 of the Constitution. In the light of the commonly acknowledged fact that it is problematic to distinguish in principle between “hate speech” aimed at gays and lesbians and “hate speech” aimed at men and women, the view has been expressed that a purposive interpretation is required. Such an interpretation will include sexual orientation in particular, and may include other group characteristics contemplated in terms of section 9 of the Constitution.<sup>152</sup> Xenophobic attacks on foreigners<sup>153</sup> provide a recent example of hatred in society, and of the vulnerability of citizens targeted by those who feel and incite such hatred.<sup>154</sup> On the other hand, it has been argued that it will be an overly forced interpretation of section 16(2)(c) to read it as extending to homophobic or xenophobic speech, or to any other forms of speech not explicitly included in it.<sup>155</sup>

It is contended that the above distinction for the categorical exclusions in terms of section 16(2) of the Constitution, and prohibitions to prevent racism or other manifestations of inequality in society, provides the answer. The explanation for the selection of grounds that was suggested in *Freedom Front v South African Human Rights Commission* is in accordance with this approach.<sup>156</sup> It was pointed out that race, gender, ethnicity and, to a lesser extent, religion were the very lines on which South African society was legally and systemically divided. In terms of the apartheid ideology, race and ethnic separation constituted the fundamental basis for the determination of civil, social, economic and political power. Laws

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<sup>150</sup> See Chapter III: 3.4.

<sup>151</sup> Milo *et al* in Woolman & Bishop 2008: 42-80–42-81.

<sup>152</sup> Milo *et al* in Woolman & Bishop 2008: 42-81 fn 2; Van Wyk 2002: par 4.

<sup>153</sup> See: Centre for Human Rights, Faculty of Law, University of Pretoria 2009: 7-8.

<sup>154</sup> In *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (26 November 1997): par 16, the Constitutional Court established that citizenship was an analogous prohibited ground in terms of section 8(2) of the interim Constitution.

<sup>155</sup> Milo *et al* in Woolman & Bishop 2008: 42-81 fn 2; Van Wyk 2002: par 5.1; Currie & De Waal 2005: fn 88.

<sup>156</sup> *Freedom Front v South African Human Rights Commission and Another*: 1283.

and practices explicitly discriminated against women, and there was a favoured and state-supported religion “These divisions were the fault lines of our society and represented the points at which we were most vulnerable.”<sup>157</sup>

With respect to the inclusion of religion, it has to be remarked that, during the apartheid era, churches and religious bodies served as both a major source of support for and opposition to the apartheid regime, and religious doctrines were offered as rationale for both the promotion or justification and for the condemnation of apartheid ideology.<sup>158</sup> The South African Council of Churches (SACC) and other ecumenical bodies and voluntary church-related organisations to an extent filled the void in the protest against apartheid left by the incarceration of major black politicians. Protest was effected by means of the dissemination of official statements, the lodging of complaints with government officials, appeals to international organisations, and peaceful protests.<sup>159</sup> These activities were often disrupted, leaders were prosecuted and other forms of suffering were experienced. After the democratic transition, the coincidence of public and religious doctrine remained functional. Evidence of this is the fact that the Truth and Reconciliation Commission was led by clerics rather than by lawyers and judges.<sup>160</sup>

The relevant point is that, while expression similarly violative of the dignity of individuals as the “hate speech” described in terms of section 16(2)(c), based, for example, on sexual orientation, certainly existed in society, the dissemination of such expression was at no stage a primary facet of the struggle for the formation of a constitutional democracy. The historical reality is that, from a constitutional point of view, extreme views on race, ethnicity and gender, infused with religious doctrine, inspired undemocratic systems of government that denied women and black people the right to vote and infringed their dignity and equality by means of legislative measures. Religion served both to promote and to counter these views.

It is noteworthy in the context of this discussion that section 37(5) of the Constitution similarly applies to a selection of grounds prohibited in terms of section 9(3). It provides that no Act of Parliament that authorises a declaration of state of emergency, and no legislation enacted or other action taken in consequence of such declaration, may permit any derogation

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<sup>157</sup> *Freedom Front v South African Human Rights Commission and Another*: 1292.

<sup>158</sup> Chapman & Spong 2003: 3.

<sup>159</sup> Chapman & Spong 2003: 6-7.

<sup>160</sup> Chapman & Spong 2003: 7-8.2.

from, inter alia, the right to equality in terms of section 9 of the Constitution “with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language”.

Certainly, both sections 16(2)(c) and 37(5) do not by implication condone a hierarchy of grounds of discrimination in the context of the right to equality. The provisions specifically involve equality rights related to specific contexts and objectives. Section 37(5) involves rights that may foreseeably be violated by reason of such violation being “necessary to restore peace and order” when “the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency”.

The specific listed grounds singled out in section 16(2)(c) can furthermore be related to South Africa’s international obligations at the time of the formulation of the Constitution. The Preamble to the Constitution recognises the building of “a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations” as one of the aims of the Constitution. At the time of the formulation of the Constitution, the *ICCPR*, the *ICERD* and the *American Convention on Human Rights* contained explicit “hate speech” provisions that required the prohibition of expression in relation to respectively national, racial and religious hatred (*ICCPR*), race, colour, religion, language and national origin (*American Convention on Human Rights*), and race, colour and ethnic origin (*ICERD*).<sup>161</sup> It is submitted that the fact that the founders of the South African Constitution included gender in this context, even though it is not included in the “hate speech clauses” of the *ICCPR*, the *ICERD* or the *American Convention*, can be construed as an acknowledgment of the atrocities based on gender as an integral part of the human rights violations that had inspired these conventions.<sup>162</sup> At the time of the formulation of the Constitution, the International Criminal Tribunal for the former Yugoslavia (ICTY), a United Nations (UN) court of law established in 1993, was dealing with war crimes that took place during the conflicts in the Balkans in the 1990s. Judges of this court ruled that “rape was used by members of the Bosnian Serb armed forces as an instrument of terror”.<sup>163</sup> Although the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* does not contain an explicit “hate speech clause”, it in no uncertain terms condemns discrimination against women “in all its forms”

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<sup>161</sup> See Chapter III.

<sup>162</sup> See Russell-Brown 2003: 373-374.

<sup>163</sup> See UN ICTY: <<http://www.icty.org/sid/10312>> (accessed on 5-10-2013).

and requires states to pursue, by all appropriate means, a policy of eliminating discrimination against women and, to this end, to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation.<sup>164</sup> In the context of the accentuated recognition of atrocities against women at the time of the drafting of the Constitution, the inclusion of gender in section 16(2)(c) can be construed as an indication of a commitment to affirm the values promoted by the *CEDAW* at all levels.

From a different perspective, namely the constitutional obligation to protect the equality right, expression of the same nature, but on all the constitutionally protected grounds, is excluded from constitutional protection in terms of section 9(4) of the Constitution and section 10 of the *Equality Act*. Accordingly, there is no discrepancy and no need for a purposive interpretation of section 16(2)(c) to include all the prohibited grounds.

It is to be expected that expression contemplated in terms of section 16(2)(c) will not be subtle or indirect in its reference to the identity of the target group of the incitement as a racial, ethnic, cultural, gender or religious group. South African case law with respect to the term “Boer” has, however, illustrated that this may be a nuanced issue. The target group was referred to as “Boers”, a term that, in the South African context, has been used to refer to Afrikaners as a cultural group generally and to Afrikaner farmers more particularly.<sup>165</sup> The different grounds will now be discussed in more detail.

#### 2.2.6.5.1 Race

*Chambers 21<sup>st</sup> Century Dictionary* defines race as:

the descendants of a common ancestor; especially those who inherit a common set of characteristics; such a set of descendants, narrower than a species; a breed; ancestry, lineage, stock; the condition of belonging by descent to a particular group; inherited disposition; a class or group, defined otherwise than by descent.

Van Wyk contends that, if race is given a meaning in accordance with the definition of racial discrimination in article 19(1) of the *ICERD*, namely colour, descent, or national or ethnic

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<sup>164</sup> Chapter III: 5.

<sup>165</sup> *Afri-Forum and Another v Malema and Others*: par 61.

origin, it is clear that race is not confined to biological criteria, but includes elements of a social and cultural nature, and that it could be argued that language groups and groups of a specific national origin would be included under the category of “race”.<sup>166</sup>

#### 2.2.6.5.2 Ethnicity

*The Blackwell Dictionary of Sociology*<sup>167</sup> defines “ethnicity” as:

a concept referring to a shared culture and way of life, especially as reflected in language, folkways, religious and other institutional forms, material culture such as clothing and food, and cultural products such as music, literature, and art. The collection of people who share an ethnicity is often called an ethnic group, although technically the use of “group” is inappropriate in sociological usage because a group is a social system with some degree of regular interaction among its members. An ethnicity, however, typically includes far too many people for regular interaction. Therefore, a more accurate term would be ethnic collectivity or ethnic category.<sup>168</sup>

It is stated that nationalism as well as the oppression of minorities often have a strong ethnic base.

Culture is described as “the accumulated store of symbols, ideas, and material products associated with a social system, whether it be an entire society or a family”. It has both “material” and “nonmaterial” aspects:

Material culture includes everything that is made, fashioned, or transformed as part of collective social life, from the preparation of food to the manufacture of steel and computers to the landscaping that produces English country gardens. Nonmaterial culture includes symbols — from words to musical notation — as well as ideas that shape and inform people’s lives in relation to one another and the social systems in which they participate. The most important of these ideas are attitudes, beliefs, values, and norms.

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<sup>166</sup> Van Wyk 2002: par 5.1.

<sup>167</sup> *The Blackwell Dictionary of Sociology* 2000.

<sup>168</sup> For a consideration of these aspects, see *Afri-Forum and Another v Malema and Others*: par 2-5.



These ideas are “perceived and experienced as having an authority that transcends the thoughts of individuals”.<sup>169</sup>

Section 31(1)(a) of the Constitution “emphasises and protects the associational nature of cultural, religious and language rights”.<sup>170</sup> It provides as follows: “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community ... to enjoy their culture, practise their religion and use their language.” The potential interrelationship between ethnicity and religion in the context of section 16(2)(c) is apparent.

In *MEC for Education: KwaZulu-Natal and Others v Pillay*, it was stated that “culture generally relates to traditions and beliefs developed by a community”. It was remarked that culture extends the characteristics generally related to an ethnic group, namely a long-shared history and a cultural tradition of its own, including family and social customs and manners.<sup>171</sup> It appears that the concepts are interrelated to the extent that it is difficult to envisage that, where all the attributes that appear in the descriptions of culture can be ascribed to a group of people, such group will not be protected on the ground of ethnicity.

#### 2.2.6.5.3 Religion

In *MEC for Education: KwaZulu-Natal and Others v Pillay*, the Court held that, while culture generally relates to traditions and beliefs developed by a community, religion is ordinarily concerned with personal faith and belief. However:

religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community’s underlying religious

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<sup>169</sup> *The Blackwell Dictionary of Sociology*. *Collins English Dictionary* 2000 defines culture as: the total of the inherited ideas, beliefs, values, and knowledge, which constitute the shared bases of social action; the total range of activities and ideas of a group of people with shared traditions, which are transmitted and reinforced by members of the group: *the Mayan culture*; a particular civilization at a particular period; the artistic and social pursuits, expression, and tastes valued by a society or class, as in the arts, manners, dress, etc.

<sup>170</sup> *Prince v President of the Law Society of the Cape of Good Hope and Others* (CCT36/00) [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 (12 December 2000): par 39.

<sup>171</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC): par 47.

or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.<sup>172</sup>

Section 15 of the Constitution protects freedom of conscience, religion, thought, belief and opinion. It provides as follows: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.” In *Prince v President of the Law Society of the Cape of Good Hope and Others*, the Constitutional Court affirmed jurisprudence to the effect that the right to freedom of religion “at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one’s religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination”. The Court held that “freedom of religion may be impaired by measures that force people to act, or refrain from acting, in a manner contrary to their religious beliefs”.<sup>173</sup>

It does appear that personal faith is regarded as at least an essential element of religion. However, religious belief and practice are interrelated. Some religions may emphasise practice and others belief.<sup>174</sup> Expression based on religion may therefore involve reference to both these aspects. The opinion of an applicant that his or her conduct is a manifestation of religious belief may be determined to be of more or less relevance.<sup>175</sup> It should be kept in mind, though, that, as was held in *MEC for Education: KwaZulu-Natal and Others v Pillay*, voluntary practices are no less a part of a person’s identity and do not affect human dignity any less seriously than mandatory practices. *In casu*, the evidence confirmed that the wearing of a nose stud is a voluntary expression of South Indian Tamil Hindu culture, a culture that is intimately intertwined with Hindu religion, and that the respondent regarded it as such.<sup>176</sup> The Labour Appeal Court, in *Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and Others*,<sup>177</sup> stated that, when determining questions of equality or religious and cultural freedom, “the centrality or rationality of beliefs and

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<sup>172</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*: par 47. See also the minority judgment of O’Regan: par 141-157.

<sup>173</sup> *Prince v President of the Law Society of the Cape of Good Hope and Others*: par 38.

<sup>174</sup> Amoah & Bennett 2008-2009: 8.

<sup>175</sup> Evans 2010-2011: 349.

<sup>176</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*: par 52-57.

<sup>177</sup> *Department of Correctional Services and Another v POPCRU & Others* (CA 6/2010) [2011] ZALAC 21; (2011) 32 ILJ 2629 (LAC) (27 September 2011). An appeal to the Supreme Court of Appeal was dismissed. See *Department of Correctional Services & Another v POPCRU & Others* (107/12) [2013] ZASCA 40 (28 March 2013).

practices” in general or in terms of the prevailing orthodoxy is not a matter of concern. The subjective belief of an individual is protected, provided that it is sincerely held. The Court remarked that there may be room for a more objective approach to cultural practices of an associative nature.<sup>178</sup>

An offence of blasphemy does not exist in South African law. In principle, religious insult is treated on the very same basis as insult on the other enumerated grounds.<sup>179</sup>

#### 2.2.6.6 Harm

The term “harm” in section 16(2)(c) is substituted for the phrase “discrimination, hostility or violence” in article 20 of the *ICCPR*. The term is generally defined to include moderate injury and damage.<sup>180</sup> However, in order to make sense, it has to be interpreted in context, taking into account that it describes the effect of actions taken by individuals or groups spurred on by the advocacy of intense hatred based on the listed grounds.<sup>181</sup>

In *Freedom Front v South African Human Rights Commission*, the South African Human Rights Commission had to determine whether the slogan “Kill the Farmer, kill the Boer” chanted at a meeting of the ANC Youth League held in Kimberley and thereafter at the funeral of an ANC leader, Mr Peter Mokaba, in Polokwane, constituted “hate speech” in terms of section 16(2)(c) of the Constitution. The gatherings were public and the words were widely publicised. The Panel held that “harm” in terms of section 16(2)(c) of the Constitution could not be confined to physical harm, but should also be taken to include psychological and emotional harm. Govender, on behalf of the Panel, reasoned that section 16(2)(b) already prohibited the incitement of imminent violence. It therefore made no sense to additionally

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<sup>178</sup> *Department of Correctional Services and Another v POPCRU & Others*: par 26.

<sup>179</sup> This approach is followed by the European Court of Human Rights, and has been encouraged by the European Commission for Democracy through Law. It was reiterated by the Commission that the purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs and opinions, rather than to protect belief systems from criticism. The Commission did, however, allow member states a margin of appreciation based on the consideration that what is likely to cause offence may significantly vary from place to place and from time to time, creating the possibility that specific regulation may be regarded as “necessary in a democratic society”. It was categorically concluded that the offence of blasphemy should be abolished. See Report of the European Commission for Democracy through Law adopted by the Venice Commission at its 76<sup>th</sup> Plenary Session 17-18 October 2008: par 51 and 89(c).

<sup>180</sup> *The Shorter Oxford English Dictionary* defines “harm” as “evil (physical or otherwise) as done or suffered; hurt; injury; damage; mischief; grief; pain; trouble; affliction”.

<sup>181</sup> *Milo et al* in Woolman & Bishop 2008: 42-6.

restrict the incitement of violence to speech advocating hatred based on race, ethnicity, gender or religion. It was contended that the delicate balance intended by the framers of the Constitution was maintained by limiting the application of section 16(2)(c) to four categories. Moreover, the harm caused, or likely to be caused, had to be serious and significant. Govender found support for his reasoning in the decision of the Canadian Supreme Court in *R v Keegstra*, where it was stated that the derision, hostility and abuse encouraged by hate propaganda have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target-group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. These consequences "bear heavily in a nation that prides itself on tolerance and the fostering of human dignity".<sup>182</sup>

Milo *et al* point out that the harm in terms of section 16(2)(c) has to be capable of being incited, the implication being that it must be "concrete". This may include physical as well as psychological harm, but does not extend to expression which merely stirs up feelings of hatred in the audience, even though the expression may be experienced as extremely hurtful by the target group. As examples of "harm" as contemplated, they mention hateful statements at a neighbourhood meeting that call for the lynching of blacks, for harassing phone calls to be made to black neighbours, or for the conclusion of agreements not to sell houses in the neighbourhood to black persons.<sup>183</sup> This view corresponds with the views quoted in Chapter III on the incitement of "discrimination, hostility or violence" in terms of article 20 of the *ICERD*<sup>184</sup>. "Hostility", the vaguest of these terms, was described as "a manifested action", not just a state of mind, but "a state of mind which is acted upon".<sup>185</sup>

Currie and De Waal hold a contrary view. They contend that it is the speech itself that causes the social and psychological harm, and not the audience who may or may not be sufficiently fired up to translate the message into action.<sup>186</sup> However, speech as such cannot harm physically. Had their contention been correct, one would have expected a textual distinction

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<sup>182</sup> *Freedom Front v South African Human Rights Commission and Another*: 1292-1293; *Abramjee and Kamnies v Qwelane and Others*: par 4.5; Currie & De Waal 2005: 376-377; Rautenbach 2007: 554. See the discussion of *R v Keegstra* in Chapter IV: 4.3.1.3: par 5.

<sup>183</sup> Milo *et al* in Woolman & Bishop 2008: 42-83.

<sup>184</sup> See Chapter III: 3.3.2.

<sup>185</sup> See Chapter III: 3.3.2; Bukovska, Callamard & Parrmer for ARTICLE 19 2010: 7.

<sup>186</sup> Currie & De Waal 2005: 377.

between the cause of physical and psychological harm. The discussion of the element of incitement which follows, will further elaborate on this point.

It is contended that the above-mentioned consequences explain why the harm, in contrast to the violence contemplated in terms of section 16(2)(b), is not required to be imminent. It is significant in the South African context that it can be argued on this basis that the experience by the target group of emotions of inferiority, fear or despair as a result of the persistent and progressive stigmatisation of the group and its members as perpetrators undeserving of constitutional rights, qualifies as “harm” in terms of section 16(2)(c). This goes to the core of the unconstrained enjoyment and exercise of democratic rights. Engagement in, and promotion of, such stigmatisation can certainly be advocated and incited. Recent media reports on a picture of banners allegedly shown at the launch of a new political party, the Economic Freedom Fighters (EFF), may serve as an example. The picture showed large red banners with the words “A revolutionary must become a cold killing machine motivated by pure hate” and “Honeymoon is over for white people in South Africa”. It was alleged that a banner with the following words was also displayed: “We need to kill them like they killed us.”<sup>187</sup> It can be argued that, in concert, these banners, apart from more concrete harms, incite the above-described attitude of stigmatisation of white people. This introduces a circumstantial consideration. Harm of this nature will only ensue if the views and attitude of those incited to cause the harm are heeded by the target group and by society. If, for instance, the leader of a powerful political party with 100% black membership makes the above statements, it may certainly instil the emotions and mental state that were described. If he or she leads a small minority party with extreme views, the statements will probably rather provoke indignation and annoyed response. Moreover, the existing flow of ideas will also constitute a relevant circumstance. If statements of this nature are generally tolerated and even condoned, or remain unopposed in the media and in political discourse, in particular by those in power, the stigmatisation and consequent marginalisation of the target group may become an untenable feature of the constitutional democracy.

The fact that section 16(2)(c) is concerned with incitement to cause harm does not deny the effects of the expression contemplated by it on the target group. The expression will certainly

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<sup>187</sup> News 24:  
<<http://www.news24.com/SouthAfrica/News/EFF-killing-banner-causes-outrage-20131014>> (accessed on 26-10-2013).

be experienced by members of the target group as an attack on them, which, in reality, it is. This shifts the focus to the right to human dignity interrelated with equality. As was contended above, discriminatory expression of this nature will certainly in no foreseeable circumstances fall outside the ambit of the obligation in terms of sections 9(3) and (4) of the Constitution. The prohibition of hateful expression of this nature in terms of section 10 of the *Equality Act*, which will be discussed later in this chapter<sup>188</sup>, assumes this contention.

It has to be pointed out, without disputing the contention that “harm” in section 16(2)(c) includes psychological harm, that harm is not a definitional element of section 319(2) of the Canadian *Criminal Code*. It was considered by the Court in *R v Keegstra* as the anticipated consequence of the wilful promotion of hatred. This consideration was in the context of the analysis undertaken by the Court to determine whether the infringement of the right to freedom of expression by the criminalisation of the wilful promotion of hatred in terms of section 319(2) could, in terms of the Charter, be justified by the objective to prevent the ensuing harm to the target group and to society. Even though the requirement of criminal intent and the defences in terms of section 319(3) limit the ambit of section 319(2), the nature of the harm related to the “promotion of hatred” is potentially less specific than that of the advocacy of hatred and the related harm in terms of section 16(2)(c). Moreover, as appears from the above reference to *R v Keegstra*, section 319(2) involves both the direct effect on the target group and on society as a whole, and the incitement of harm based on the grounds that are specified.

#### 2.2.6.7 Application

The narrow ambit of section 16(2)(c) will next be illustrated by means of an application of the above interpretation to the factual scenario in *Freedom Front v South African Human Rights Commission and Another*.<sup>189</sup>

The following relevant questions and considerations will be entertained: (i) What is the meaning of the words to the relevant audience in the relevant context? (ii) Did the chanting of the words amount to advocacy of hatred? (iii) Was it based on one of the enumerated

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<sup>188</sup> See 4.7 below.

<sup>189</sup> This application is intended as an illustrative exercise, employing the case scenario in broad outline, and not as an analysis of the *Freedom Front* matter.

grounds? (iv) Did the expression, objectively assessed, have the potential to incite addressees to actually harm the target group?

As far as the advocacy requirement is concerned, there probably are grounds for convincingly arguing that chanting can be an effective way to demonstrate actual support and to spur on others joining in with the chant, as well as listeners outside the gathering, in this instance the television audience. Alternatively, if the chant is led by an individual, it can conceivably be viewed as an incitement tool or indicative of incitement.

Apart from the complexity of the related terms “farmer” and “boer”, the direct textual meaning of the words is unambiguous. It constitutes an appeal to kill the target group. Taking into account the extreme terminology as well as the fact that many members of the audience would not have had a frame of reference to relate the words concerned to a freedom song, it would be difficult to argue that the words should not, at the very least, be understood to advocate hatred. It can moreover even be argued that the fact that the actual killing of farmers is a public reality and an issue at the time of the uttering of the words would enhance an understanding of the words as inciting the infliction of serious harm on the target group. Neisser’s approach that historical experience based on association will affect the definition of “hate speech” in a particular culture, finds application. He explains that a history of violent repression, for example, will make a racial slur into a threat of physical violence when addressed to a member of the repressed minority, although it might not when addressed to a member of the same group in a different culture, or when a comparable slur is used against a member of the oppressing class.<sup>190</sup> The same line of reasoning will be relevant when the speech concerned is associated with a current situation where the target group, or maybe even a sector of the target group, or a group of which the target group is a predominant sector, or even a group to which the target group is sentimentally related, is in fact subjected to the threatened action.

The next question is whether the hatred is based on a prohibited ground. In *Freedom Front v South African Human Rights Commission and Another*, it was common cause that the slogans were based on race or ethnicity. The term “Boer” was defined as a descendant of the Dutch or Huguenot colonists who settled in South Africa. It was stated that, in the South African

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<sup>190</sup> Neisser 1994: 339.

context, the term had been used to refer to Afrikaners generally and to Afrikaner farmers more particularly.

The last interrelated question remains to be addressed. Is there a real likelihood that the expression concerned will indeed actively persuade or spur on the addressees to cause, whether in concert or individually, concrete harm to the relevant target group, namely Afrikaners? Even if it is unlikely that it will provoke the killing of, or the infliction of concrete harm on, Afrikaners who are not farmers, is it likely that it will provoke the killing of, or infliction of harm on, farmers on the basis that they are viewed as Afrikaners? Having confirmed the common-cause view of the meaning of “Boer”, these questions were not further explored in the *Freedom Front* case. However, if the answer is consistently “No”, the element of incitement will be lacking. If the expression is so far removed from a realistic appeal with prospects of being followed by addressees that reasonable listeners will regard it as mere emotional, figurative speech which does not really call for the actual killing or concrete harming of anyone, the answers will indeed be “No”.

If the answer is that there is a likelihood of provoking harm only in respect of farmers, but unrelated to their ethnic disposition, the incitement will likewise not fall within the ambit of section 16(2)(c). An expert analysis of the motivation for the present farm murders may assist in providing these answers.

It should be noted, with reference to the discussion of “harm” above, that a relevant consideration *in casu* would be whether the expression incites the concrete stigmatisation of Afrikaners as undeserving of constitutional rights because of the apartheid past. Such stigmatisation would contradict the constitutional pledge stated in the Preamble to the Constitution that “South Africa belongs to all who live in it, united in our diversity”. It negates a foundational aim of the Constitution, similarly articulated in the Preamble, namely to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.

Hence, if it can be established that the words were intended, and understood by the audience, to convey hatred for the past system of suppression and to urge people to escape from the remnants of the system by legitimate means, so that members of the audience would not in



response to the chanting of the words embark on a mission that would effectively deny the target group their foundational democratic rights, “hate speech” as contemplated will not be proved. On the other hand, if it is established that there is a reasonable risk that the expression of hatred will create or reinforce a notion that Afrikaners may and should be “punished” by other members of society by depriving them of their rights to dignity, equality, property and safety, and that the audience, or members of the audience, may be sufficiently persuaded by the call to embark on action in accordance with this notion, it will be proved. As was stated above, the primary focus is on the risk for the “open and democratic society” of which, in particular in the South African context, “democratic pluralism” is an essential feature.<sup>191</sup> With respect to the substantiation of the first scenario, the fact that even a passionate propagation of this viewpoint would be possible without invoking the extreme call to kill, would create an evidential problem. This observation is made because the expression does not serve the values that underlie the protection of freedom of expression and thus corroborates an inference that it falls under section 16(2)(c) of the Constitution.

A comparative analysis under section 10 of the *Equality Act* will illustrate the difference in focus of section 16(2)(c) of the Constitution and the prohibitions in terms of section 10. The broader ambit of section 10 primarily gives effect to the obligation in terms of sections 9(3) and (4) to prevent and prohibit unfair discrimination.<sup>192</sup> Under section 10, not only the impact on the audience, related to the consequences that will foreseeably ensue, will be relevant, but also the direct impact of the expression on the target group and its rights.

#### 2.2.6.8 Conclusion

It appears that the exclusions from constitutional protection in terms of section 16(2)(c) should be narrowly construed, as contended in the discussion above. Such interpretation appears well suited to the exclusions in sections 16(2)(a) and (b) and to the notion that the expression has been valued as putting foundational constitutional values at unacceptable risk. Furthermore, the necessity requirements in terms of article 19 of the *ICCPR* applied in the context of article 20 of the *ICCPR* have relevance. It has been contended in Chapter III that the distinctive nature of article 20 is that it obliges states parties to adopt the necessary legislative measures prohibiting the action referred to, while article 19(3) merely entitles

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<sup>191</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 29.

<sup>192</sup> See 4.3 below.

them to do so. Only expression under article 20 may, and should, be criminalised.<sup>193</sup> The prohibition of the advocacy of hatred on the specified grounds that constitutes incitement to harm should be necessary for the public order and for respect of the rights of others. The necessity has to be related and proportional to the sanction that applies.<sup>194</sup>

It is apparent that, in order to fully comply with the duties and responsibilities imposed in terms of some of the most significant international instruments, and to comprehensively accommodate the foundational values of the South African Constitution, it will be necessary to limit expression in excess of the ambit of section 16(2)(c) of the South African Constitution.<sup>195</sup> It is significant in this regard that “hate speech” regulation in Canada and Germany goes significantly further than provided for in terms of section 16(2)(c).<sup>196</sup> In *R v Keegstra*, in considering the importance of the objective of section 319(2) of the *Criminal Code*, the Court, in addition to the “collective historical knowledge of the potentially catastrophic effects of the promotion of hatred”, took into account the “stress placed upon equality and multiculturalism in the Charter”.<sup>197</sup> It has been indicated in the discussion of the theories that inform the protection of freedom of expression that both the democracy and the human-dignity theories in terms of the South African Constitution limit the scope of protection afforded free expression. Both, but in particular the latter, are interrelated with the right to equality.<sup>198</sup> As a matter of fact, as was remarked in Chapter II, hurtful or harmful expression based on group identity lies at the “intersection” of the rights to freedom of expression and equality. Against this background, the focus of the study now shifts to the obligation in terms of section 9 of the Constitution that requires the prohibition of unfair discrimination, read with the obligation on the state in terms of section 7(2) of the Constitution to promote equality and human dignity.

### 3. SECTION 9 OF THE CONSTITUTION

Section 9 protects the right to equality in the following terms:

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<sup>193</sup> See Chapter VI: 5(1).

<sup>194</sup> See Chapter III: 3.2.5.

<sup>195</sup> See Chapter III: 9.

<sup>196</sup> See Chapter IV: 3.6 & 4.3.

<sup>197</sup> *R v Keegstra*: VII C (iv).

<sup>198</sup> The discussion of the exclusion from protection of expression that is irreconcilable with the value of human dignity related to equality in Chapter II: 4.5 should be regarded as an introduction to the present discussion.

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Discrimination in terms of sections 9(3) and (4) of the Constitution is constituted by unequal treatment based on a ground listed in the section, or on a ground not specified but analogous to such ground in the sense that unequal treatment on such ground impairs the fundamental dignity of human beings who are inherently equal in dignity.<sup>199</sup> Discrimination on one of the grounds listed in section 9(3) is presumed to be unfair until the contrary is proved. The presumption holds “that differentiation on one of the listed grounds will impose burdens on people who have been victims of past patterns of discrimination or will impair the fundamental dignity of those affected”.<sup>200</sup>

In *Harksen v Lane NO and Others*, the test for unfair discrimination was summarised as follows:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does

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<sup>199</sup> Currie & De Waal 2005: 243-245; Devenish 1999: 42-43; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC): par 46; *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; 1997 (4) SA 1: par 41; *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*: par 19; *Prinsloo v Van Der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997): par 31; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936: par 35; *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000): par 42. See Albertyn: Equality in Cheadle, Davis & Haysom 2002: par 4.4.1.

<sup>200</sup> Currie & De Waal 2005: 245, 248-249; *Harksen v Lane NO and Others*: par 49.

not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
  - (b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause (section 33 of the interim Constitution).<sup>201</sup>

Albertyn and Goldblatt refer to the “contextual nature” and the “comparative features” of equality.<sup>202</sup> They emphasise that “substantive equality recognises that it is not the fact of the difference that matters, but the harm that may flow from lived inequalities in a given context”.<sup>203</sup> They furthermore distinguish between the approach that any different treatment on the basis of a prohibited ground constitutes discrimination, and the approach that the test for discrimination is whether the treatment based on the prohibited ground results in prejudice. They indicate that there is no suggestion in *Harksen v Lane NO and Others* that the required differentiation would need to entail some prejudice to the person complaining of discrimination. The majority in *City Council of Pretoria v Walker* likewise did not include disadvantage as a factor in its finding of indirect discrimination. Deputy President Langa stated that “it would be artificial to regard the differentiation as being based solely on the grounds of geographical area when its impact was clearly one which differentiated in

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<sup>201</sup> *Harksen v Lane NO and Others*: par 42-44, 53.

<sup>202</sup> Albertyn & Goldblatt in Woolman & Bishop 2008: 35-80; *City Council of Pretoria v Walker* 1998 (2) SA 363; 1998 (3) BCLR 257. The Court reasoned that the effect of apartheid laws was that race and geography were inextricably linked and that the application of a geographical standard, although seemingly neutral, might in fact be racially discriminatory. In this case, its impact was held to clearly be one which differentiated in substance between black residents and white residents.

<sup>203</sup> Albertyn & Goldblatt in Woolman & Bishop 2008: 35-7.

substance between black and white persons”.<sup>204</sup> Justice Sachs, in a minority judgment, disagreed. He reasoned that the mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not enough to constitute indirect discrimination on the grounds of race and does not provide a sufficient basis to invoke the presumption of unfairness.<sup>205</sup> In *Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and Others*,<sup>206</sup> indirect discrimination was held to be established on the basis that a seemingly neutral prohibition, policy or practice had a disparate impact that disproportionately and adversely affected people protected under a prohibited ground.<sup>207</sup> This approach corroborates the view expressed by Justice Sachs. In terms of both views, group-based disproportionate disadvantage will be indicative of unfair discrimination, whether the element of disadvantage is to be considered only in the fairness analysis or to a certain extent also in the context of the initial phase of the establishment of discrimination.

It is contended that, if it is necessary to establish “some actual negative impact” in order to constitute discrimination, then the suffering of hurt or harm as a result of the infringement of human dignity complies with this standard. Whether the disadvantage has an impact to the detriment of the complainant to the extent that the discrimination is unfair will then be determined in terms of the fairness standard.

### **3.1 The test for unfairness**

In the discussion in this chapter of “hate speech” prohibitions and related prohibitions on unfair discrimination in terms of the *Equality Act*, it will be highlighted that “hate speech” prohibitions essentially aim to address harm not only to an individual applicant, but also to society as a whole. Discriminatory expression based on grounds that enjoy constitutional protection is presumptively unfair. The material question in the context of a consequent fairness analysis will be whether the expression in fact promotes inequality in society.

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<sup>204</sup> *City Council of Pretoria v Walker*: par 32-33; Currie & De Waal 2005: par 9.4(f); Albertyn: Equality in Cheadle *et al* 2002: par 4.8.2.1; Davis, Cheadle & Haysom 1997: 57-58.

<sup>205</sup> *City Council of Pretoria v Walker*: 105-106.

<sup>206</sup> *Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and Others* (CA 6/2010) [2011] ZALAC 21.

<sup>207</sup> *Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and Others*: par 23, 28; *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1998) 19 ILJ 285 (LC).

Differently put, if the societal context is acknowledged, and expression will evidently promote inequality in society, it will and should not survive the fairness test. The focus of the discussion of the fairness analysis established by the Constitutional Court will hence be on the societal context.

The following *dictum* from *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* recognises that the relevant context can be society as a whole:

At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream.<sup>208</sup>

In *President of the Republic of South Africa and Another v Hugo*, the Constitutional Court remarked that section 8(3) of the interim Constitution expressly recognised that there was a need for measures that sought to alleviate the disadvantage which was the product of past discrimination. The Court reiterated that a substantive approach recognises that the goal of establishing a society which affords each human being equal treatment on the basis of equal worth and freedom cannot be achieved by insisting on identical treatment in all circumstances. Each case will require a careful and thorough understanding of the impact of the discriminatory action on the particular people concerned in order to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.<sup>209</sup>

The fundamental question in the fairness analysis is the impact of the discrimination on the complainant.<sup>210</sup> Factors to be considered are the position of the complainant in society, the nature of the provision or power and its purpose, and the extent to which the discrimination has affected the rights and interests of the complainant.<sup>211</sup> These factors do not constitute a

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<sup>208</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998): par 129.

<sup>209</sup> *President of the Republic of South Africa and Another v Hugo*: par 37, 43; *Harksen v Lane NO and Others*: par 41; *Albertyn: Equality in Cheadle et al* 2002: 4.8.3.1 fn 343, 344 & 355; *Harksen v Lane NO and Others*: par 51; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 19.

<sup>210</sup> *Jagwanth* 2005: 133; *Albertyn & Goldblatt in Woolman & Bishop* 2008: 35-75; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) 1125 (CC): par 27.

<sup>211</sup> *President of the Republic of South Africa and Another v Hugo*: par 43. See also *Harksen v Lane NO and*

closed list, and it is their cumulative effect that must be considered.<sup>212</sup> The most important aspect of the position of complainants in society is the “interplay between the discriminatory measure and the person or group affected by it”.<sup>213</sup>

The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.<sup>214</sup>

Moreover:

if its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.<sup>215</sup>

These factors will now be contextualised with respect to discriminatory expression.

### **3.2 Unfair discrimination constituted by expression**

According to Braun, “hate speech” at a social level is prohibited for four reasons:

1. To prevent disruption to public order and social peace stemming from retaliation by victims;
2. To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society;
3. To prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of ... society, and invisible exclusion that would prevent their being accepted as equals;
4. To prevent social conflagration and political disintegration.<sup>216</sup>

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*Others*: par 50; *City Council of Pretoria v Walker*: par 37.

<sup>212</sup> *Harksen v Lane NO and Others*: par 50.

<sup>213</sup> *City Council of Pretoria v Walker*: par 45.

<sup>214</sup> *President of the Republic of South Africa and Another v Hugo*: par 112.

<sup>215</sup> *Harksen v Lane NO and Others*: par 53(b).

<sup>216</sup> Braun 2004: 62.

While all these effects on society are relevant when considering the fairness of discriminatory expression, the substantive protection of the inherent human dignity of victims of discrimination, interrelated with the right to equality, informs a distinct focus on the hurt experienced by those who are humiliated and insulted by “hate speech”.<sup>217</sup> What is at stake is the victim’s sense of self-worth and right to be respected and accepted as a fellow human being by others. It is the guarantee in terms of section 10 of the Constitution that everyone has a right to human dignity.<sup>218</sup>

In a fairness analysis with respect to discriminatory expression, the vulnerability of the complainants in society with regard to the particular expression and its potential effects will involve the nature of the characteristic that is condemned, the nature of the condemnation, as well as the ability of those targeted, or others that support their case, to effectively respond to expression that humiliates the target group, reinforces labelling stereotypes, propagates against their acceptance in society, or advocates that they should be despised and harmed. The nature of the expression concerns its emotive intensity, its primary aim, as well as the means of its dissemination.<sup>219</sup> Access to the marketplace of ideas depends on the extent to which the target group and its members have been marginalised, on their resources, and on the availability of opportunities to respond. It certainly also depends on the level of protection that is provided against the violation of human dignity, for instance in terms of codes of conduct that apply to different spheres of the media.

It should be borne in mind that the interrelatedness of the rights to freedom of expression and equality manifests itself in the fairness analysis. The Constitutional Court has confirmed that the extent to which discrimination impacts on other rights is a significant consideration in the determination of the fairness of the discrimination.<sup>220</sup> The principle should cut both ways and also apply to the extent to which the prohibition of the discrimination will impact on other rights. In this regard, Alexy’s “second law of balancing” is of particular relevance.<sup>221</sup> This law, as interpreted by Bilchitz, requires that only relatively conclusive evidence be accepted

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<sup>217</sup> See Chapter II: 4.2.

<sup>218</sup> See Chapter II: 4.5.

<sup>219</sup> See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 120-129.

<sup>220</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*: par 94.

<sup>221</sup> Bilchitz 2010: 433. See also Pretorius 2010: 552 & 552 fn 96.



as the basis for the limitation of a constitutional right.<sup>222</sup> Accordingly, if it is not clear that the expression at issue will indeed violate the equality right, the right to freedom of expression should not be limited to protect the equality right. Using the terminology of the *ICCPR*, it should be “necessary” to limit the right to freedom of expression in order to protect the right to equality.<sup>223</sup> The discussion in Chapter II of the exclusion of expression that is irreconcilable with the value of human dignity related to equality is clearly of relevance in this context.<sup>224</sup> It has to be reiterated in this regard that the right to express views that may challenge constitutional values, offend and even shock, is intrinsic to the right to freedom of expression.<sup>225</sup> It follows that any categorical prohibition of unfair discrimination constituted by expression should fall within a narrow margin where such necessity is categorically substantiated. This will occur when there is no reasonable prospect that fairness or the promotion rather than the violation of equality will be established in any circumstances that may be covered by the prohibition.

Furthermore, the Constitutional Court’s finding that the fact that discrimination serves an important and worthy societal goal may “have a significant bearing on the question whether complainants have in fact suffered the impairment in question”, should be considered in context.<sup>226</sup> The implication is that the societal advantage to be generally gained by the protection of freedom of expression may relativise the impact of the harm inflicted on the individual or on society as a whole. The extent to which expression in a given context serves the values and interests discussed in Chapter II manifests as a determinative consideration in this regard. Hence, if the expression at issue will eventually promote rather than jeopardise equality, for instance by evoking a response that exposes and condemns stereotypes that prevail in society, the hurt or harm caused by it, and its tolerance in society, should be experienced as less violative of human dignity.

Lastly, the relevant context in which the discrimination occurs will impact on all the above-mentioned considerations. A narrow context will obviously reduce the risk that categorical prohibitions may unforeseeably jeopardise rather than promote equality. Discriminatory expression most often occurs within the broad societal environment. The ensuing “indignity

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<sup>222</sup> Bilchitz 2010: 433.

<sup>223</sup> See Chapter III: 3.2.5.

<sup>224</sup> See Chapter II: 4.5.

<sup>225</sup> See Chapter II: 1.

<sup>226</sup> See 3.1 above.

and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream”.<sup>227</sup> Such exclusion and powerlessness will especially ensue when the discriminatory expression is disseminated from a position of power in the marketplace of expression. These aspects will be specifically addressed in the discussion in Chapter VI of expression in the media.

These issues will be further explored and illustrated in the subsequent discussion of conditional and categorical provisions of the *Equality Act*, as well as in the discussion in Chapter VII of discriminatory expression in the media.

It has to be noted that only unfair discrimination constituted in terms of a law of general application is potentially justifiable in terms of the limitation clause of the Constitution, section 36, which will subsequently be discussed in a different context.<sup>228</sup> It is not conceivable that any South African law will be enacted or interpreted to prescribe or endorse the use of unfairly discriminatory expression. At the worst, it is imaginable that legislation may use terms that can be challenged as being unfairly discriminatory. Hence justification in terms of section 36 is not a relevant consideration in this context. It will, however, be relevant with respect to categorical prohibitions of expression in order to protect or promote the right to equality.

#### **4. THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (EQUALITY ACT)**

##### **4.1 The application of the Act**

Kok states that, by regulating discrimination by means of legislation, “Parliament may wish to send a strong moral message that it views it as a social evil<sup>229</sup>, a message that necessarily follows the enactment of law”.<sup>230</sup> Especially with respect to a goal to address and prevent systemic discrimination, which is indeed a primary aim of the Act, a case can be made out

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<sup>227</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par 129.

<sup>228</sup> See 4.10.1 below with respect to the issue of whether or not unfair discrimination can be justified in terms of section 36 at all.

<sup>229</sup> See the discussion, in Chapter II: 4.3.3, of human dignity as autonomy related to society’s character as manifested in the treatment of others.

<sup>230</sup> Kok 2008: 123.

that legislation has better prospects of achieving these goals than case-to-case application and development of a constitutional principle by the courts.<sup>231</sup> The following arguments have been advanced to support the view that legislation is a better “instrument” than the judiciary in developing the law. The law “develops from precedent”. It “must always wait upon events”. In this sense, its effect is retrospective. Especially in the short term, the scope for development of legal principles is very restricted “and there can be no organised systematic development”. In contrast, the effect of legislation is not dependent on the development of principles in individual cases. It “can make drastic speedy reforms”, and its “explicit or implicit theoretical base ... can ... point the way to further reform”.<sup>232</sup> Moreover, because court systems are complaints-driven, those who are oppressed or underrepresented as a result of internalised views emanating from systemic discrimination may not even realise that a claim exists, or the thought of approaching a court may not even enter their minds.<sup>233</sup> Categorical prohibitions and easy access to specialised courts may change this.

Section 6 of the Act, read with section 14, prohibits discrimination in general terms, subject to a fairness analysis to be applied on a case-by-case basis. Sections 7 to 9 provide examples of presumptively unfair discrimination, thereby providing the above-mentioned guidance for society.<sup>234</sup> Furthermore, two forms of discrimination are categorically prohibited,<sup>235</sup> namely “hate speech”<sup>236</sup> and harassment.<sup>237</sup>

The Act applies to the state and all persons, excluding any person to whom and to the extent to which the *Employment Equity Act*<sup>238</sup> applies.<sup>239</sup> “Person”, in terms of section 1 of the Act,

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<sup>231</sup> Kok 2008: 128.

<sup>232</sup> Kok 2008: 128.

<sup>233</sup> Kok 2008: 48-49.

<sup>234</sup> Roederer in Albertyn *et al* 2001: 33. The respective introductory clauses of sections 7, 8 and 9 create the impression that what follows are examples of unfair discrimination, which implies that fairness requirements in terms of sections 13 and 14 have been satisfied. From this perspective, one could argue that the legislator by means of these examples addresses contemporary social issues by explicitly indicating that the described conduct categorically falls within the scope of unfair discrimination as defined in the context of the Act. It is apparent that some of the acts referred to can indeed not conceivably be justified in any circumstances. On the other hand, however, as far as other “examples” are concerned, it is clear that circumstances may exist which render the discrimination fair. Discrimination on the ground of pregnancy may, for example, be fair in the light of job requirements. It is therefore accepted that the “examples” are indeed subject to the fairness assessment in section 14. See also Pityana 2003: par 6.

<sup>235</sup> *Equality Act*: section 15.

<sup>236</sup> *Equality Act*: section 10.

<sup>237</sup> *Equality Act*: section 11.

<sup>238</sup> *EEA* 55/1998. Sections 6(1) and 6(3) of the Act have been enacted exclusively with respect to the employment context and contain the very same principles that are established respectively in terms of sections 6 and 11 of the *Equality Act*. The study will not discuss these sections separately.

includes a juristic person, a non-juristic entity, a group, or a category of persons. It clearly applies to media bodies, in particular to broadcasters and broadcasting organisations.<sup>240</sup>

Justified by the public interest in ensuring that the right to equality is fully vindicated, the Equality Court may be approached on a broad basis.<sup>241</sup> Section 20(1) provides that proceedings may be instituted by: (a) any person acting in their own interest; (b) any person acting on behalf of another person who cannot act in their own name; (c) any person acting as a member of, or in the interest of, a group or class of persons; (d) any person acting in the public interest, and any association acting in the interest of its members; and (f) the South African Human Rights Commission or the Commission on Gender Equality. This allows for group actions, class actions and public-interest actions.<sup>242</sup>

## 4.2 The objects of the Act

The Preamble to the Act states that the Act “endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom”.<sup>243</sup>

The stipulated objectives of the Act are: (a) to enact legislation required by section 9 of the Constitution; and (b) to give effect to the letter and spirit of the Constitution. Particular objectives in terms of this object are then stipulated. These include the promotion of equality, the prevention of unfair discrimination and the protection of human dignity as contemplated in sections 9 and 10 of the Constitution, the prohibition of expression contemplated in section 16(2)(c) of the Constitution and section 12<sup>244</sup> of the Act, the provision of measures to

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<sup>239</sup> *Equality Act*: section 5.

<sup>240</sup> Cooper in *Albertyn et al* 2001: 8.

<sup>241</sup> Roederer in *Albertyn et al* 2001: 8. See section 38 of the Constitution.

<sup>242</sup> Roederer in *Albertyn et al* 2001: 9; Currie & De Waal 2005: 270-271.

<sup>243</sup> In *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000): par 37, the Constitutional Court made it clear that, in the new era of constitutional democracy, there is no place for institutionalised prejudice and stereotyping. In *President of the Republic of South Africa and Another v Hugo*: par 41, the Court described the equality goal of the Constitution in comprehensive, positive terms. The Court stated that the prohibition of unfair discrimination in the interim Constitution sought the achievement of a society in which all human beings would be accorded equal dignity and respect regardless of their membership of particular groups.

<sup>244</sup> The reference to section 12 can probably be related to the exclusion, from the ambit of the proviso, of expression that constitutes “hate speech” in terms of section 16(2)(c) of the Constitution.

facilitate the eradication of unfair discrimination, “hate speech” and harassment, particularly on the grounds of race, gender and disability, and the facilitation of further compliance with international law obligations, including treaty obligations in terms of, amongst others, the *ICERD* and the *CEDAW*.<sup>245</sup>

The two primary as well as the detailed objectives are clearly interrelated and overlapping. It appears that all the stipulated objectives in concert are aimed at facilitating the ideal society described in the Preamble.

The view that the constitutional commitment to human dignity is manifested, inter alia, in the principle that dignity implies the equality of all persons, has been highlighted.<sup>246</sup> Botha states that reliance on human dignity “often signals a break with a history of oppression, totalitarianism, colonialism and discrimination, and the wish to establish a new national or supranational order based on respect for human rights”.<sup>247</sup> The *Equality Act* serves this function by specifically stating that the protection of human dignity as contemplated in section 10 of the Constitution is one of its objects.<sup>248</sup> This perspective is a golden thread that interrelates the provisions of the Act. The discussion in Chapter II in particular of the

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<sup>245</sup> Section 2 of the Act provides as follows:

The objects of this Act are –

- (a) to enact legislation required by section 9 of the Constitution;
- (b) to give effect to the letter and spirit of the Constitution, in particular –
  - (i) the equal enjoyment of all rights and freedoms by every person;
  - (ii) the promotion of equality;
  - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
  - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
  - (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;
- (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
- (d) to provide for procedures for the determination of circumstances under which discrimination is unfair;
- (e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
- (f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;
- (g) to set out measures to advance persons disadvantaged by unfair discrimination;
- (h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>246</sup> Botha 2009: 188; Chapter II: 4.5.

<sup>247</sup> Botha 2009: 177.

<sup>248</sup> *Equality Act*: section 2(b)(iv).

exclusion from constitutional protection of expression that is irreconcilable with the value of human dignity related to equality is accordingly relevant to all the aspects of the present discussion.<sup>249</sup>

### **4.3 Compliance with obligations to regulate discriminatory expression**

Section 9(4) of the Constitution provides that “national legislation must be enacted to prevent or prohibit unfair discrimination”. It is important to reiterate that expression that should be prohibited in terms of section 9(4) does not enjoy constitutional protection. Its prohibition, therefore, will categorically not unjustifiably limit any constitutional right, including the right to freedom of expression.

It was indicated in Chapter III, and is recognised in the Preamble to the Act, that South Africa is bound to give effect to its international agreements. The Act endeavours to further compliance with these commitments in accordance with its primary aims and related remedies. It is noteworthy that the Act does not specifically refer to the *ICCPR* and, in particular, article 20 thereof, which, it has been argued, sets “the only time when speech should attract criminal penalties on the ground that it incites hatred”.<sup>250</sup> It also does not declare expression within the ambit of article 4(a) of the *ICERD* a “punishable offence” as required by article 4.<sup>251</sup> While the section 10 prohibition covers expression that falls under section 16(2)(c), apart from section 2(b)(v), which declares the prohibition of expression contemplated in terms of section 16(2)(c) to be an object of the Act, there is no distinct focus on expression of this nature. The Act does, however, specifically mention the *ICERD*, which deals with discriminatory expression as such, and the *CEDAW*<sup>252</sup>, which, as has been indicated, does not specifically require the regulation of “hate speech”, but prohibits discrimination in general. It is apparent that the premise of the Act is the obligation to prohibit and prevent unfair discrimination and not primarily to address the dangers of expression under section 16(2) that were highlighted above. This raises the question of whether additional legislation is required to comply fully with article 20 of the *ICCPR*, article

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<sup>249</sup> See Chapter II: 4.5.

<sup>250</sup> See Chapter III: 3.3.3.

<sup>251</sup> See Chapter III: 4.2.

<sup>252</sup> See Chapter III: 5.1.

4(a) of the *ICERD* and, for that matter, section 16(2) of the Constitution. This question will be addressed in the discussion of the *Draft Prohibition of Hate Speech Bill* of 2004.<sup>253</sup>

It follows that the definition of unfair discrimination in terms of the Constitution, the real risk of ensuing unfair discrimination, as well as the content and nature of relevant commitments in terms of international agreements delineate the ambit of the primary obligations that the Act aims to comply with. To determine whether or not discrimination constituted by expression falls within this scope requires appreciation of the fact that all the theories that inform the protection of freedom of expression are integrated with equality. Significant aspects include the risk that certain viewpoints, especially those of vulnerable groups, may be eliminated, and the fact that, depending on relevant circumstances, including the level of free discourse, discriminatory expression may expose systemic stereotypical ideas rather than jeopardise equality.<sup>254</sup> The importance of taking into consideration in this regard that the constitutional framework includes the right to challenge its values and principles, and the manner of their protection in law, has been highlighted.<sup>255</sup>

When analysing the Act, it should be kept in mind that the legislature, when enacting national legislation to give effect to the right to equality, may extend protection beyond what is conferred by the Constitution. As stated by Chief Justice Langa:

As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution. It would therefore not be a problem if the definition of discrimination in the Act included forms of conduct not covered by section 9, as long as the prohibition of those forms of conduct conformed to the Bill of Rights.<sup>256</sup>

On the other hand, to the extent that the prohibition is strictly giving effect to constitutional obligations, which implies that the conduct prohibited by it falls outside the scope of constitutional protection, it evidently cannot be held to infringe any constitutional right. It should furthermore at all times be taken into account that the nature of the *Equality Act* is to provide guidance and detail with respect to the implementation of the aims that it pursues.

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<sup>253</sup> See Chapter VI: 6.

<sup>254</sup> See Chapter II: 2.1, 2.5 & 4.5.

<sup>255</sup> Meyerson 1997: 80. See Chapter II: 3.2.

<sup>256</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*: par 43.

#### 4.4 The jurisdictional scope of the Act

The ambit of the Act is clearly related to its primary aim, namely, as articulated by Kok, “transforming South African society”.<sup>257</sup> This is, in particular, evident from the nature of the available remedies.<sup>258</sup> The Act does not impose criminal sanctions.<sup>259</sup> Section 10(2) makes provision for the reference of “a case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection 1” to the Director of Public Prosecutions for the institution of criminal proceedings. Such reference will not prejudice any remedies of a civil nature under the Act.<sup>260</sup> With respect to freedom of expression, the

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<sup>257</sup> Kok 2008: 124.

<sup>258</sup> Milo *et al* in Woolman & Bishop 2008: 42-86. Section 21 of the Act provides as follows:

- (2) After holding an inquiry, the court may make an appropriate order in the circumstances, including –
- (a) an interim order;
  - (b) a declaratory order;
  - (c) an order making a settlement between the parties to the proceedings an order of court;
  - (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
  - (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
  - (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
  - (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
  - (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
  - (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
  - (j) an order that an unconditional apology be made;
  - (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
  - (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
  - (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court’s order;
  - (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
  - (o) an appropriate order of costs against any party to the proceedings;
  - (p) an order to comply with any provision of the Act.

<sup>259</sup> Section 10(2) provides for the possibility of criminal prosecution on the basis of the common law or relevant legislation. See the discussions of criminal defamation, *crimen iniuria* and the relevant provisions of the *Publications Act* 42/1974 and the *Riotous Assemblies Act* 17/1956 below.

<sup>260</sup> See Bronstein 2006: 18. See also the discussion of *crimen iniuria* in Chapter VI: 3.2.



“chilling effect” of criminal prohibitions is thus not a relevant consideration in the context of the discussion of the Act.<sup>261</sup>

Delictual claims similarly fall outside the ambit of the Act. The requirements for a delict and for a violation of a constitutional right should be distinguished, although they may overlap. In the interpretation of the Act, while a clear conceptual distinction in this regard is required, an appreciation of the comparative value of the principles of the law of delict is nevertheless apposite.<sup>262</sup>

A delict is an unlawful, intentional or negligent act or omission which causes damage to the person or property, or injury to the personality, of another person, and for which a civil remedy for recovery of damages is available. It does not necessarily involve a constitutional right.<sup>263</sup> The requirements are related to the purpose of the delictual remedy, namely to enable one person to claim compensation from another for harm that has been suffered. Remedies tend to be retrospective in effect, rather than preventative of future loss.<sup>264</sup> Remedies for constitutional violations, on the other hand, even in the form of damages, address a harm not only to an individual applicant, but to society as a whole. The purpose is to vindicate the right and deter its further infringement.<sup>265</sup> While in the law of delict an award of damages is the primary remedy, in constitutional law such redress should be considered only in exceptional circumstances.<sup>266</sup> In constitutional law, fault is not a prerequisite<sup>267</sup>, but is a factor to be considered, in particular when determining an appropriate remedy. In a given situation, a delictual remedy which also vindicates the constitutional right and serves as a deterrence may eliminate the need for a constitutional remedy.<sup>268</sup> With respect to the criminal offence of *crimen iniuria*, which will be discussed in the next chapter<sup>269</sup>, the Court in the civil matter of *Ryan v Petrus*<sup>270</sup> stated that “it is clear that the elements of iniuria are the same ‘whether it be

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<sup>261</sup> Section 21(2)(n) of the Act makes provision for an order directing the clerk of the court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation. See also section 10(2).

<sup>262</sup> See Bronstein 2006: 18, 20.

<sup>263</sup> Burchell 1985: 10; Neethling *et al* 2005: 20.

<sup>264</sup> *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC): par 80; Currie & De Waal 196; Neethling *et al* 2005: 20-21.

<sup>265</sup> Van der Walt & Midgley 2005: 7; Currie & De Waal 2005: 196; Neethling *et al* 2005: 21.

<sup>266</sup> Van der Walt & Midgley 2005: 7.

<sup>267</sup> Currie & De Waal 2005: 198; *City Council of Pretoria v Walker*: par 43.

<sup>268</sup> Van der Walt & Midgley 2005: 48.

<sup>269</sup> See Chapter VI: 3.2.1.

<sup>270</sup> *Ryan v Petrus* (CA 165/2008) [2009] ZAECGHC 16; 2010 (1) SA 169 (ECG); 2010 (1) SACR 274 (ECG).

punished civilly or criminally’ ... although every insult to dignity which is serious enough to found a civil action will not necessarily be serious enough to warrant criminal prosecution”.

Kok contends that it is not necessarily open for a “hate speech action” to be brought, based on *iniuria*, in an ordinary civil court.<sup>271</sup> It is indeed so that the same insulting words may, but will not necessarily, constitute both “hate speech” and a delictual claim.<sup>272</sup> Similarly, the same insulting words may constitute “hate speech” as well as *crimen iniuria*. It should be noted, however, that an action for damages for *iniuria* by insult, based on the impairment of the *dignitas*, and specifically the right to subjective feelings of honour and self-respect, should rather not be described in constitutional terms as a “hate speech action”.

#### **4.5 The distinct focus and interrelated aim of the law of defamation**

The following *dictum* from *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* in the context of the law of defamation illustrates the interrelated aim with constitutional law to preserve human dignity, although with a distinct difference in focus:

The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual ... . The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity.

When considering the constitutionality of the law of defamation, it accordingly needs to be asked “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”.<sup>273</sup> As articulated by Baker, defamation law can be seen as “governing rules of civility” which protect the “respect (and self-respect) that arises from full membership of society”. Rules of civility operate to enforce society’s interest in “safeguarding the public good inherent in the maintenance of community identity” and, as such, “as a means of mapping the moral community”. The issue for the law is not so much whether the plaintiff has suffered, but

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<sup>271</sup> Kok 2009: 656.

<sup>272</sup> Van der Walt & Midgley 2005: 48.

<sup>273</sup> *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* (054/2003) [2004] ZASCA 67; [2004] 3 All SA 511 (SCA): par 98.

whether there has been a breach of the rules of civility that may have led to the dignity of the plaintiff or defendant being compromised.<sup>274</sup> Justice Cameron in *Khumalo and Others v Holomisa* stated this principle as follows: “The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings in our society.”<sup>275</sup> The reasonableness standard serves as a “tool” to achieve this, while at the same time giving recognition to the role that the Constitution accords free speech and expression.<sup>276</sup> This approach is illustrated in *Sindani v Van der Merwe and Others*<sup>277</sup> where the Court stated that the gratuitous use of racially derogatory language and racial vilification is regarded by right-minded members of South African society not only as conduct that is reprehensible, but also as something which must, in accordance with constitutional imperatives, be eradicated. It was held that it follows that the imputation of such conduct to another must be defamatory.<sup>278</sup> “Hate speech” prohibitions clearly pursue the same or similar sentiment in giving effect to the constitutional value of human dignity outside the judicial realm of the protection of personality rights. This explains why “hate speech” regulation generally applies to expression in public.<sup>279</sup>

## 4.6 The prohibition of unfair discrimination in terms of the Act

### 4.6.1 Sections 6, 13 and 14 of the Equality Act

Section 6 of the Act provides that neither the state nor any person may unfairly discriminate against any person.<sup>280</sup> Section 1 defines “discrimination” as meaning:

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

(a) imposes burdens, obligations or disadvantage on; or

<sup>274</sup> Baker 2003: 4-5; Milo 2008: 35-37, 78.

<sup>275</sup> *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771; par 27.

<sup>276</sup> *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588: 617.

<sup>277</sup> *Sindani v Van Der Merwe and Others* (212/2000) [2001] ZASCA 130; [2002] 1 All SA 311 (A).

<sup>278</sup> *Sindani v Van Der Merwe and Others*: par 15; *Mthembu-Mahanyele v Mail & Guardian Ltd and Another*: par 25; *Argus Printing and Publishing Co Ltd v Esselen’s Estate* [1993] ZASCA 205; 1994 (2) SA 1 (A): 20E-G; *Botha and Another v Mthiyane and Another* [2001] JOL 8478 (W): par 49. See Milo *et al* in Woolman & Bishop 2008: 42-91–42-92.

<sup>279</sup> See 4.7.2.3.1 below.

<sup>280</sup> Subsections 14(3)(a) to (d) essentially reflect the *Harksen* test for determining fairness, while subsections 14(3)(f) to (i), similar to section 36, focus on justification. See *MEC for Education: KwaZulu-Natal and Others v Pillay*: par 37.

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

“Prohibited grounds” are defined as:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground –
  - (i) causes or perpetuates systemic disadvantage;
  - (ii) undermines human dignity; or
  - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

It is contended that hurt and violation of human dignity caused by discriminatory expression constitute prima facie disadvantage as contemplated in terms of the definition. This is in accordance with the view that the definition “seeks to indicate that the hidden barriers that cause unfair discrimination, as well as the failure to address an ongoing discriminatory situation, can amount to unfair discrimination”.<sup>281</sup>

Section 13 provides that the complainant bears the onus of making out a prima facie case of discrimination on a prohibited ground. The onus will then shift to the respondent to prove that the discrimination was fair.

Section 14 embodies the principles in the determination of fairness that have been discussed above. The section provides as follows:

- (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
- (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
  - (a) The context;
  - (b) the factors referred to in subsection (3);

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<sup>281</sup> Alibertyn *et al* 2001: 32; Alibertyn *et al* in Woolman & Bishop 2008: 35-44; *MEC for Education: KwaZulu-Natal v Pillay*: par 45-46, 163-165. The Act adopts the second approach indicated in 2.1 above.

- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (3) The factors referred to in subsection (2)(b) include the following:
- (a) Whether the discrimination impairs or is likely to impair human dignity;
  - (b) the impact or likely impact of the discrimination on the complainant;
  - (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
  - (d) the nature and extent of the discrimination;
  - (e) whether the discrimination is systemic in nature;
  - (f) whether the discrimination has a legitimate purpose;
  - (g) whether and to what extent the discrimination achieves its purpose;
  - (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
  - (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
    - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
    - (ii) accommodate diversity.

Subsections 14(f) to (h) have been described as involving factors that focus on justifications presented by the respondent, and an assessment of purpose with respect to the legitimacy of the purpose of the discriminatory act, and the relationship between the act and the purpose.<sup>282</sup> This clearly requires a balancing exercise within the context of the application of section 14.

While it is apparent that section 14 focuses, on the one hand, on the complainant and, on the other hand, on the respondent, no strict line should be drawn between impact and justification.<sup>283</sup> The nature and purpose of the objective of the discrimination, including whether or not the less restrictive means might have been used to achieve the purpose, and the extent to which the purpose is achieved, are all relevant considerations in the determination of the impact on the applicant with reference to the violation of his or her human dignity.<sup>284</sup> The interrelatedness is especially significant in the context of discrimination constituted by expression. Freedom of expression as such is a constitutional right and its protection is in principle a worthy societal goal. The hurt caused by the discriminatory expression may be relativised by the advantage that the protection of freedom

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<sup>282</sup> Roederer in *Albertyn et al* 2001: 43.

<sup>283</sup> *President of the Republic of South Africa and Another v Hugo*: par 47.

<sup>284</sup> See 3.1 above.

of expression holds for society, an advantage that the complainant shares. Furthermore, the impact of the condonation of the discrimination with respect to the dignity of the complainant will be less because the goal that is served is worthy. The worthiness of the goal in a given context will be affected by the value of the expression at issue in context.

The majority judgment in *R v Keegstra* illustrates the determination of speech value, although not in a fairness analysis, but in a justification analysis in the context of section 1 of the Charter.<sup>285</sup> The first stage of the section 1 analysis is employed to determine whether the objective of a limit on a right or freedom can be demonstrably justified in a free and democratic society. The second stage entails a proportionality analysis. The majority significantly initiated its second-stage analysis by extending the first-stage analysis to consider at threshold level the extent to which the values basic to a free and democratic society would be furthered “by permitting the exposition of such expressive activity”. It was remarked that “it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of section 2(b)”.<sup>286</sup> The majority reasoned that the truth argument does not provide convincing support for the protection of hate propaganda, because the chance that statements intended to promote hatred against an identifiable group are true, or that the vision of society that they convey will lead to a better world, is small.<sup>287</sup> In relation to the value of democracy, it was reasoned that hate propaganda is inimical to the democratic aspirations of the free-expression guarantee. It operates to undermine a commitment to democracy. Furthermore, it argues for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics.<sup>288</sup> In relation to expression as a means of affording individuals the ability to gain self-fulfilment by developing and articulating thoughts and ideas as they see fit, the argument was that, to the extent that “hate speech” represents a most extreme opposition to the idea that members of identifiable groups should enjoy the benefit of articulating and nurturing an identity derived from membership of a cultural or religious group, the unhindered promotion of this message must be tempered. This was because such self-autonomy stems largely from this idea.<sup>289</sup> In the light of “the unparalleled vigour with which

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<sup>285</sup> See Chapter IV: 4.1.

<sup>286</sup> *R v Keegstra*: par VII D (i).

<sup>287</sup> *R v Keegstra*: par VII D (i).

<sup>288</sup> *R v Keegstra*: par VII D (i).

<sup>289</sup> *R v Keegstra*: par VII D (i).

hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful”, the majority did not regard its protection as “integral to the democratic ideal so central to the section 2(b) rationale”.<sup>290</sup> The majority awarded the expression a low level of constitutional protection, based on the “tenuous link between communications covered by section 319(2) and other values at the core of the free expression guarantee”. It then, from this premise, proceeded with the proportionality analysis.<sup>291</sup> It concluded that section 319(2), by “furthering an immensely important objective” and being “directed at expression distant from the core of free expression values”, satisfied each of the components of the inquiry.<sup>292</sup>

#### ***4.6.2 Examples provided by the Act of unfair discrimination constituted by expression***

As was indicated above, sections 7, 8 and 9 of the Act provide examples of unfair discrimination, subject to a section 14 analysis. Subsections 7(a) and (b) are examples of unfair discrimination constituted by expression.

##### *4.6.2.1 Subsection 7(a)*

Section 7 provides as follows:

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence.

Teichner contends that the prohibition in subsection 7(a) exceeds the ambit of section 16(2)(c) of the Constitution on the basis that the first part of the paragraph that reads “dissemination of any propaganda or idea” does not require that, in all instances, the propaganda or idea should constitute incitement to cause harm. It also does not require the advocacy of hatred. He contends that the justifiability of such impingement on section 16(1)

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<sup>290</sup> *R v Keegstra*: par VII D (i).

<sup>291</sup> *R v Keegstra*: par VII D (i).

<sup>292</sup> *R v Keegstra*: par VII E.

has to be assessed in terms of section 36.<sup>293</sup> However, a prohibition in compliance with the constitutional obligation in terms of section 9(4) of the Constitution, of discrimination subject to the constitutional fairness standard, clearly cannot infringe any constitutional right, including the constitutional right to freedom of expression.<sup>294</sup> The significance of section 7 is that it identifies and draws attention to instances of systemic discrimination which may not readily be perceived as such. It requires proof of the fairness of these occurrences of discrimination in society.

There is an apparent relation between subsection 7(a) and the obligations imposed in terms of the *ICERD*. In terms of article 1 of the Convention:

The term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 4 of the Convention provides as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof... .

The obligations in terms of article 4(a) extend to the criminalisation of certain conduct. Moreover, the article should be read together with the conviction stated in the Preamble to the

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<sup>293</sup> Teichner 2003: 353.

<sup>294</sup> See the discussion of the application of section 36 in 4.10 below.



*ICERD*<sup>295</sup> that any doctrine of superiority based on racial differentiation is “scientifically false, morally condemnable, socially unjust and dangerous”. It appears that expression, or an organisation, which cannot be described in these terms will not meet the requirements for propaganda or organisations covered by article 4. The phrase “dissemination of ideas” should be related to the “condemnation” of the propaganda concerned. Langton contends that the “hate speech” contemplated in terms of article 4 is speech with effects on hearers’ attitudes.<sup>296</sup> The discussion above of the terms “propaganda” and “incitement” respectively in the context of sections 16(2)(b) and 16(2)(c) of the Constitution, accordingly applies to the interpretation of the concepts in terms of article 4.<sup>297</sup>

In the light of the above considerations, the question arises why expression under subsection 7(a) is presented as an example of discrimination under section 6, and not as “hate speech” under section 10 of the Act.

Roederer contends that, “at first glance, section 7(a) creates a partial duplication of section 10 of the Act, which prohibits hate speech on any of the prohibited grounds”. He regards the fact that section 15 provides that the determination of fairness in section 14 does not apply to “hate speech”, yet “hate speech” in terms of section 7 does require a determination of fairness, as a problem of incoherence. He suggests that “the only coherent interpretation of these drafting problems” is that section 7(a) “creates an alternative avenue to section 10 for claims of hate speech based on race”.<sup>298</sup>

However, not all expression under article 4(1)(a) of the *ICERD* necessarily constitutes “hate speech” contemplated in terms of section 16(2)(c) of the Constitution or section 10 of the Act. It is significant that the propaganda and ideas contemplated in terms of subsection 7(a) “propound” the racial superiority or inferiority of a person. “Propound” means “to suggest or put forward for consideration”.<sup>299</sup> Incitement to, or participation in, any form of racial violence will constitute such engagement and will certainly manifest itself as expression within the ambit of the prohibition in terms of section 10. However, expression under

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<sup>295</sup> Chapter III: 4.2.2.

<sup>296</sup> Langton in Maitra & McGowan 2012: 75.

<sup>297</sup> See 2.2.4 & 2.2.6.3 above.

<sup>298</sup> Roederer in Albertyn *et al* 2001: 58.

<sup>299</sup> *Collins English Dictionary* 2000. *Chambers 21<sup>st</sup> Century Dictionary* 2001 defines it as “to put forward (an idea or theory, etc.) for consideration or discussion”.

subsection 7(a) may also not be intended to hurt, harm or propagate hatred, or may be covered by the proviso in terms of section 12, which excludes bona fide engagement in certain forms of expression from the ambit of the prohibition.<sup>300</sup> The dissemination of the propaganda or idea may, for example, constitute bona fide publication in the media, the bona fide statement of an academic viewpoint, or the bona fide presentation of a drama, poem or painting. The presentation of subsection 7(a) as an example of unfair discrimination suggests that, in a contextual section 14 analysis involving engagement in expression under subsection 7(a), the international commitment in terms of article 4 of the *ICERD* as such, including its premise that “any doctrine of superiority based on racial differentiation is ‘scientifically false, morally condemnable, socially unjust and dangerous’”, will be a relevant and weighty consideration.

Similar to the observation with respect to the compliance with article 20 of the *ICCPR*, it is apparent that the focus of the *Equality Act* is not on full compliance with the obligations in terms of article 4(1)(a), but rather on compliance within the context of its transformational aims to which its available remedies are related. Whether or not further compliance with the obligations in terms of article 4(a) is advisable will also be addressed in the discussion of the *Draft Prohibition of Hate Speech Bill of 2004*.<sup>301</sup>

#### 4.6.2.2 Subsection 7(b)

Subsection 7(b) provides as another example of discrimination “the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race”. It is clear from the broad understanding of the concept “expression” that the activity contemplated in the subsection can be in the form of expression.

Albertyn, Goldblatt and Roederer remark that the inclusion of a requirement of intention is rather strange, as intention is not generally a requirement of either direct or indirect discrimination in South African and comparative law.<sup>302</sup> However, the aim of the publication should be distinguished from the intention of the publisher to unfairly discriminate or not.<sup>303</sup>

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<sup>300</sup> See 4.7.2.2 below.

<sup>301</sup> See Chapter VI: 6.3.

<sup>302</sup> Albertyn *et al* 2001: 58.

<sup>303</sup> The discussion of bona fide engagement in expressive activity in the context of section 10 highlights perspectives that also have relevance in this context. See 4.7.2.2 below.

The following example illustrates the distinction as well as the relevance in context of the reference to the aim or intention of the engagement in an activity. The display of a painting in an art museum of white people throwing stones at a black person will fall outside the ambit of subsection 7(b), because the display is evidently not intended to promote exclusivity based on race, but probably rather to expose racism. The display of the same painting at a demonstration promoting the exclusion of black people from, for example, teaching positions in public schools, or from a church or cultural association, will, on the other hand, *prima facie* be covered, regardless of whether the displayer intended to unfairly discriminate or not. A fairness analysis will determine whether, in the given context, the demonstration, and, in particular, the display of the painting, was unfair.

#### ***4.6.3 Unfair discrimination constituted by expression in terms of international law***

The discussion of international law in Chapter III indicated that international law generally recognises that the need to restrict discriminatory expression exceeds the ambit of “hate speech” provisions. The discussion highlighted especially the sensitivity to race and gender stereotyping that is evident from the terms of certain treaties. This aspect will be addressed and illustrated specifically in the discussion of media publication in Chapter VII of the study.

The requirements established by article 19 of the *ICCPR* apply, *inter alia*, to restrictions of expression aimed at the prevention or prohibition of discrimination. In a fairness analysis with respect to discrimination constituted by expression, the necessity of the restriction of freedom of expression in order to prevent discrimination should, in particular, be a relevant consideration.<sup>304</sup>

The matter of *Hagan v Australia* provides an example of the distinction between “hate speech” and discriminatory speech under the *ICERD*.<sup>305</sup> The Committee held that the impugned words were not so offensive as to amount to a racial vilification contrary to article 4(a) of the *ICERD*, but recommended that the states party take the necessary measures to secure the removal of the offending term. The remark that the *ICERD*, as a living instrument, must be interpreted and applied by taking into consideration the circumstances, including the sensitivities, of contemporary society, is of particular relevance.

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<sup>304</sup> See Chapter III: 3.2.5.

<sup>305</sup> See Chapter III: 4.2.4.

#### 4.6.4 South African case law

The judgment of Justice Hartzenberg in *Strydom v Chiloane*<sup>306</sup> provides an example of a case where the same incident was held to constitute “hate speech” in terms of section 10 of the *Equality Act* as well as discrimination in terms of section 6 of the *Employment Equity Act (EEA)* 55/1998. Section 6 prohibits discrimination in the labour context, and provides as follows:

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

The respondent in the matter, a shop steward at a mine, instituted action in the Equality Court under section 20 of the *Equality Act* against the appellant, who was a mine captain. The complaint concerned an incident in which the appellant had referred to him as a “baboon”.<sup>307</sup> On appeal to the High Court, it was held that the magistrate was correct in finding that the utterance constituted “hate speech” as defined in section 10 of the *Equality Act*.<sup>308</sup> In reaching this conclusion, the Court referred to the view expressed in *Mangope v Asmal and Another*<sup>309</sup> that, if a person is called a baboon when severely criticised, the purpose is to indicate that he is base and of extremely low intelligence, which may rightfully be perceived to be hurtful by the person described as a baboon in those circumstances. It was further held that the utterance complained of was racially discriminatory in terms of section 6 of the *EEA* and therefore the respondent could have instituted action against the appellant in the Labour Court. In concluding that the incident constituted discrimination, the Court took into account relevant circumstances. The Court accepted that when the words were uttered “by the appellant, a white man, of and concerning the respondent, a black man, they had a racial connotation and a discriminatory import”.<sup>310</sup>

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<sup>306</sup> *Strydom v Chiloane* 2008 (2) SA 247 (T).

<sup>307</sup> Section 5(3) of the *Equality Act* provides that the Act does not apply to any person to whom and to the extent to which the *EEA* applies.

<sup>308</sup> *Strydom v Chiloane*: par 10-11.

<sup>309</sup> *Mangope v Asmal and Another* 1997 (4) SA 277 (T): 286J-287A.

<sup>310</sup> *Strydom v Chiloane*: par 13-15.

The issue that then had to be considered was whether the Equality Court had jurisdiction in the matter. Section 3 of the *Equality Act* provides that the Act does not apply to any person to whom and to the extent to which the *EEA* applies. The Court reasoned that the answer to this question “lies therein that racially discriminatory conduct is more serious than hate speech, but that the hate speech is one of the elements of the discriminatory conduct”.<sup>311</sup> It continued by expressing the view that, “where the conduct constitutes the more serious of more than one complaint, and that conduct falls within the ambit of section 6 of the *EEA* the correct *forum* to deal with the matter is the *EEA*”.<sup>312</sup>

The distinction drawn by the Court based on the seriousness of the conduct cannot be supported. It is contended that the answer in the case instead lies in the fact that the very same evidence that was presented to prove unfair discrimination in terms of section 6 of the *EEA* simultaneously proved “hate speech” in terms of section 10. Section 10 requires proof that a clear intention to hurt, harm or promote hatred can reasonably be construed. Section 6 requires proof that the infliction of hurt or harm, or the promotion of hatred, indeed occurred and was unfair. Contextual evidence of the latter was presented in order to prove the former. It could indeed be inferred from this evidence that the speech did constitute “hate speech”. However, to pursue two different claims for unfair discrimination based on the same set of facts will constitute a duplication of actions.<sup>313</sup> Therefore, because the claim is covered by section 6 of the *EEA*, it should be based on section 6 and should be heard by the Labour Court. The sanction imposed with respect to the act of unfair discrimination would at the same time address society’s claim for the acknowledgment of equality and human dignity that underlies the prohibition of “hate speech” in terms of section 10 of the *Equality Act*.

Kok criticises the Court’s finding of discrimination. He comments that it could perhaps be argued that the use of a word such as “baboon” by a white person to refer to a black person does amount to discrimination, because it inflicts psychological harm on the black person who was described as a “baboon”, as opposed to a white person who would not have experienced the same psychological harm when referred to as a “baboon” by either a white or

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<sup>311</sup> *Strydom v Chiloane*: par 16.

<sup>312</sup> *Strydom v Chiloane*: par 17.

<sup>313</sup> Compare with the criminal law tests in *H and S v Maneli* 2009 (1) SACR 509 (SCA): par 8 and *S v Whitehead and Others* (197/07) [2007] ZASCA 171; [2007] SCA 171 (RSA); [2008] 2 All SA 257 (SCA) ; 2008 (1) SACR 431 (SCA) (30 November 2007): par 39.

black person. It can also be argued that calling only black workers “baboons”, while white workers were not similarly insulted, constituted discrimination based on race, causing psychological harm to the black workers. However, in his view, these scenarios introduce specific context-related circumstances that are distinguishable from the dissemination of hateful expression as such. He criticises the Court’s reliance on the decision in *Lebowa Platinum Mines Ltd v Hill*<sup>314</sup> in reaching its discrimination conclusion. The issue in the *Lebowa* matter was the fairness of the dismissal of the respondent, who had been found guilty at a disciplinary hearing of using the word “baboon”, was given a final warning, and was eventually dismissed at the insistence of the majority union. The judgment nowhere referred to section 6 of the *EEA*. The use of the word “baboon” was found to be “insulting and abusive”, “racist in its connotation”, “derogatory and racist language”, as well as “serious misconduct which, specifically, embraced racism and racial abuse”. Kok contends that these findings give support rather to the argument that the particular use of the word “baboon” constituted hate speech in terms of the Act, not discrimination.<sup>315</sup>

However, the presence of “specific context-related circumstances” cannot be separated from “the dissemination of hateful expression as such”. If the expression differentiates based on group characteristics, and this differentiation evidently in any relevant context hurts or harms members of the relevant group, the elements of discrimination are present, both as contemplated in terms of the Constitution and the *Equality Act*, as well as, if the differentiation occurs in the employment context, the *EEA*. It will be indicated that “hate speech” in terms of section 10 of the Act applies to a narrow field of expression. It provides a basis for a claim typically where contextual disadvantage is not related to a narrowly defined context, but rather concerns the reinforcement of stereotypes or other manifestations of inequality in society. It can be perceived as categorising the expression contemplated by it as unjustifiably unfair, considering the predictable effect of the expression on society as a whole and the groups targeted by it, and the certainty that it will promote inequality. Examples of contextual factors relevant in determining whether or not the expression concerned could reasonably be construed to comply with the requirements for “hate speech” will be highlighted in the subsequent discussion of the elements of section 10.

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<sup>314</sup> *Lebowa Platinum Mines Ltd v Hill* (1998) 7 BLLR 666 (LAC).

<sup>315</sup> Kok 2009: 653-656.

In *Woodways CC v Vallie*,<sup>316</sup> the Western Cape High Court, in an appeal against the judgment of the Equality Court, confirmed a finding of unfair discrimination where the discrimination was constituted by a request uttered by a shop assistant. It was common cause that the appellant was trading as a wholesale supplier of wood and wood products. The respondent, a devout and practising Muslim who wore a fez as an expression of his religious belief, walked into the appellant's premises looking for skirting boards. He approached an employee to assist him. At the time, he was wearing a fez. The employee asked him to remove his fez. He asked her why she had requested him to do that, whereupon she replied "this is a Christian company", or words to that effect. Thereupon, the respondent turned around and left, uttering words to the effect that "you can keep your wood".<sup>317</sup> It was in dispute whether the assistant conveyed to him that such removal was a precondition for her assisting him. It was also in dispute whether she had advised him that it was the appellant's policy to ask Muslim customers to remove their headgear.<sup>318</sup> The finding of the court *a quo* was ultimately based on the alternative claim raised by the respondent, namely that, even if the appellant had not stated the request for him to remove his fez as a precondition for service, the mere request for him to remove his fez constituted discrimination.<sup>319</sup>

The High Court, in accordance with the approach that a discrimination analysis should focus "not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society",<sup>320</sup> relied on the given context to substantiate its finding of unfair discrimination. The contextual circumstances were relevant in the determination of both the existence of discrimination in terms of section 6, and its fairness in terms of section 14 of the Act.

The Court concluded that the request to remove the fez was addressed in such a way that it indirectly imposed a precondition for assistance. This conclusion was based on testimony that it had occurred on a number of occasions in the past that, where staff members had asked persons of the Muslim faith to remove their headgear while on the appellant's premises, they had refused to do so. They instead walked away without doing what they had come to do.

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<sup>316</sup> *Woodways CC v Vallie* (A251/06) [2009] ZAWCHC 155; 2010 (6) SA 136 (WCC) (31 August 2009).

<sup>317</sup> *Woodways CC v Vallie*: par 6-17.

<sup>318</sup> *Woodways CC v Vallie*: par 15-16.

<sup>319</sup> *Woodways CC v Vallie*: par 25-26.

<sup>320</sup> *Woodways CC v Vallie*: par 58.

Others became aggressive and had to be told to leave the premises.<sup>321</sup> The Court stated that it was clear that, on all of these occasions, the request had attracted a negative reaction from persons of the Islamic faith who intended to do business with the appellant. They refused to comply with the request and took their business somewhere else. The request thus imposed a burden, obligation or disadvantage on them, in that it called upon them to make hard choices.<sup>322</sup>

In rebuttal of the onus of proving that the discrimination was fair, it was submitted, on behalf of the appellant, that the question was whether the assistant, speaking as an employee of the appellant as a so-called Christian company, and also expressing her own personal belief, had exercised her rights of religion and freedom of speech under the Constitution, and, if so, whether those rights in the circumstances were outweighed by the respondent's rights to religion and freedom of expression.<sup>323</sup> The Court rejected this submission based on the view that expression of religious beliefs was irrelevant and inappropriate in the commercial context in which the communication at issue had occurred. The reasoning was that, when the respondent stepped into the appellant's premises to buy a product, he had no idea that religious beliefs would come up for discussion.<sup>324</sup> The Court referred to the finding of the Constitutional Court in *South African National Defence Union v Minister of Defence and Another* that freedom of expression is closely related to freedom of religion and belief and that "the corollary of the freedom of expression and its related rights is tolerance by society of different views".<sup>325</sup> In consequence, the Court in the *Woodways* matter concluded that the assistant should not have exercised her freedom of expression and religious rights in a manner inconsistent with the provisions of the Constitution or which was violative of other persons' rights.<sup>326</sup>

The illustration of the significance of context is of substantial importance in the context of the study. Both the appellant and the respondent had the right to express their religious convictions, and had the concomitant obligation to tolerate the other's convictions. In the context of a public-store environment, "tolerance of different views" was held to imply that

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<sup>321</sup> *Woodways CC v Vallie*: par 57-59.

<sup>322</sup> *Woodways CC v Vallie*: par 57-59.

<sup>323</sup> *Woodways CC v Vallie*: par 66-68.

<sup>324</sup> *Woodways CC v Vallie*: par 69.

<sup>325</sup> *Woodways CC v Vallie*: par 67.

<sup>326</sup> *Woodways CC v Vallie*: par 69.



both would refrain from expecting the other to forfeit his or her views. Moreover, the expressive value of the utterance of the appellant would only carry negligible weight in the fairness analysis. The discriminatory remark to an individual Muslim customer in the context of a public place of business did not contribute to humankind's search for the truth.<sup>327</sup> It did not in any way serve the idea of democracy.<sup>328</sup> It fell outside the ambit of dignity as autonomy as limited by the foundational values of human dignity and equality.<sup>329</sup> In contrast, had the appellant in the media or in a public debate argued for the right to exclude people from his store based on their religion or religious practices, or any other ground, even if specifically to exclude Muslims, or to require them to remove their headgear, the right to freedom of expression would arguably require tolerance of the expression of this viewpoint. This would be the position even if individual members of the Muslim group experienced the argument and its publication as violations of their human dignity. Relevant arguments in defence of the constitutionality of the publication are that the viewpoint will be at the mercy of the marketplace of ideas, that society, including the target group, will have the opportunity to affirm the inherent human dignity of Muslims, and that, accordingly, the publication will probably ultimately expose systemic discrimination against Muslims and promote equality. The "chilling effect" and related risks of prohibiting the publication will be much more substantial in this context.

From the analysis and interpretation of section 10 of the Act, it will be apparent that it could be argued that the remarks uttered by the appellant fell within the ambit of the section, unless the request was indeed bona fide directed at expressing a viewpoint and not primarily at hurting or harming the respondent based on his religion, which would place it within the ambit of the section 12 proviso. The relevant question that was addressed in the present discussion was if the remarks, irrespective of whether they complied with the section 10 requirements, constituted unfair discrimination.

In conclusion, it should be noted that, in *Afri-Forum and Another v Malema and Others*, the complaint was based on section 10 of the Act. It is contended that the complainants rightly made no alternative claim of unfair discrimination. The expression at issue was disseminated

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<sup>327</sup> See Chapter II: 2.1.

<sup>328</sup> See Chapter II: 3.1.

<sup>329</sup> This statement refers to the discussion in Chapter II: 4.4 of the study of the exclusion from constitutional protection of expression that is irreconcilable with the value of human dignity related to equality.

to the public at large. Could it not be established to constitute “hate speech” in terms of section 10, there would be no contextual aspects that would outbalance the weight of the right to freedom of expression in a fairness analysis.<sup>330</sup>

The question that will subsequently be considered is whether the categorical prohibition of “hate speech” in terms of section 10 of the Act is constitutional.

#### 4.7 Section 10

Section 10(1) prohibits “hate speech” in the following terms:

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.

The respective ambits of sections 10 and 12 to a substantial extent depend on the interpretation of the proviso in section 12, which also applies to section 10. The proviso reads as follows:

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.

Section 10 is categorical in the sense that it is not subject to a fairness analysis in terms of section 14. Section 15 of the Act provides that “in cases of hate speech and harassment section 14 does not apply”.

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<sup>330</sup> *Afri-Forum and Another v Malema and Others*: par 109. The Court held that “publication of words at a political rally must be treated as publication to the nation”.

#### 4.7.1 Views on the general interpretation of section 10

Currie and De Waal, Roederer, Teichner, Kok, Haigh, and Milo *et al* express the view that section 10 was drafted as an attempt to widen the definitional basis of “hate speech” as defined in the Constitution. Roederer contends that one may read the Act as defining “hate speech” as the use of words based on one or more of the prohibited grounds that a reasonable person could interpret as intentionally being hurtful, harmful, inciting harm, or promoting or propagating hatred. Not only are grounds added, but publishing, propagation and communication of words are also added to the constitutional requirement of advocacy. Instead of incitement to cause harm, the requirement is merely that a reasonable perception can be construed that an intention to be hurtful, harmful, or to incite harm or promote or propagate hatred is demonstrated. In his view, the implication is that section 10 may be contravened by a private communication of words against anyone, and based on any of the prohibited grounds, that may cause hurt or harm.<sup>331</sup> He then “narrows down” this ambit by subjecting section 10 to the proviso in section 12. He relates the proviso to the forms of expression stipulated in section 16(1) of the Constitution. He specifically describes “*bona fide* engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest” as “an expanded version of sections 16(1)(a), (c) and (d) of the Constitution which protects freedom of the press and media, artistic freedom and academic and scientific enquiry”. He then links “the publication of any information, advertisement or notice” to section 16(1)(b) of the Constitution, which protects the freedom to receive or impart information or ideas. He takes into account that expression within the ambit of section 16(2) of the Constitution is excluded from protection in terms of section 16(1).<sup>332</sup> It follows, according to him, that the proviso excludes from the ambit of sections 10 and 11 of the Act expression within the ambit of sections 16(1)(a), (b), (c) and (d) of the Constitution, but not within the ambit of section 16(2). He concludes that this interpretation leaves little scope for the Act to move beyond the constitutional provisions. As a matter of fact, only expression which does not fall within the “freedom to impart information or ideas” will fall within this scope. In relation to such expression, the problem will remain that section 10, as previously indicated, is overly broad.<sup>333</sup>

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<sup>331</sup> Roederer in Albertyn *et al* 2001: 92-93.

<sup>332</sup> Roederer in Albertyn *et al* 2001: 92-93. See also Teichner 2003: 357.

<sup>333</sup> Roederer in Albertyn *et al* 2001: 93-94. The reasoning is based on the interpretation that the first clause of the proviso to section 12 protects “*bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest” and can be read as an expanded version of section

Teichner criticises Roederer's interpretation on the basis that it has the effect of narrowing down the ambit of the "hate speech" provisions in the Act to the extent that they apply only to the unprotected categories of expression set out in section 16(2). His interpretation is that the proviso applies only to the dissemination and publication of information that unfairly discriminates, with the reference to section 12 in section 10 simply being an indication that section 12 supersedes section 10 when dealing with the aforesaid category of expression.<sup>334</sup>

Milo *et al* point out that section 10 does not envisage that the "hate speech" must incite or persuade others. It prohibits speech that itself gives rise to the harms envisaged in the section. In their view, this extension would in itself be reasonable and justifiable and would thus survive constitutional scrutiny.<sup>335</sup> However, overall, the prohibition in their view either collapses into an enquiry of whether speech falls within section 16(2)(c) of the Constitution, or into an exclusion of constitutionally protected speech, but only to the extent that the infringement of that speech would not amount to a reasonable and justifiable infringement of the right to freedom of expression under section 36 of the Constitution. This, in their view, would be a most unsatisfactory result, as it would lead to great uncertainty and would mean that the legislature would effectively have to put in place an overbroad prohibition on expression and then require courts to draw the boundaries of the prohibition.<sup>336</sup> They accordingly agree with other views that the drafting of the "hate speech" prohibition leaves much to be desired<sup>337</sup> and submit that it is imperative that the legislature intervene to remedy the matter by producing a more coherent "hate speech" prohibition.<sup>338</sup>

Some aspects of the above views will be confirmed in the subsequent analysis. With respect to others, alternative interpretations will be suggested. It will be concluded that the section in

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16(1)(a), (c) and (d) of the Constitution, which protects freedom of the press and media, artistic freedom and academic and scientific enquiry. The reasoning proceeds on the basis that the second clause of the proviso protects "the publication of any information, advertisement or notice" and is similar to section 16(1)(b) of the Constitution, which protects "freedom to receive or impart information or ideas".

<sup>334</sup> Teichner 2003: 357. However, the proviso in section 12 can be clearly distinguished from the section as such, and the reference to it in section 10 is straightforward. Teichner's interpretation in this regard therefore seems to be forced and will not be further considered.

<sup>335</sup> Milo *et al* in Woolman & Bishop 2008: 42-87.

<sup>336</sup> Milo *et al* in Woolman & Bishop 2008: 42-88.

<sup>337</sup> See also Currie & De Waal 2005: par 16.4, 378-379; Kok 2001: 299-300; Haigh 2006: 200-202; Teichner 2003: 353-357; Albertyn *et al* 2001: 95. Haigh contends that the only way to reconcile the Act and the Constitution is to interpret "incitement" in section 16(2)(c) of the Constitution to mean "intended", therefore enabling speech which may not actually result in violence to be prohibited under the Constitution.

<sup>338</sup> Milo *et al* in Woolman & Bishop 2008: 42-87-42-88.

terms of these conceptual interpretations survives constitutional scrutiny. The analysis will separately focus on each of the different elements of the sections. It will commence with an assessment of the content of the proviso.

#### ***4.7.2 The proviso***

Drawing a link between the proviso and section 16(1) of the Constitution, as suggested by Roederer and others, finds textual support and makes interpretive sense. While the qualified basis on which the expression falling under the proviso is excluded from the prohibitions in terms of sections 10 and 12 could have been formulated in more general terms, the enumeration of the different forms of expression in terms of the proviso acknowledges the distinct focus of the Constitution on each of the various forms of expression. It has to be noted that this acknowledgement should be taken into account in the application of section 14 to expression that falls under the proviso.

It does, however, appear that the connection between the proviso and section 16(1) of the Constitution does not call for a rigid textual relation of the different elements of the proviso to specific subsections of section 16(1). “Reporting” is, for example, conceptually much more limited than “freedom of the press and other media”. The specific inclusion of “publication” in the phrase “publication of any information, advertisement or notice”, on the other hand, may indicate that the proviso does not only involve press freedom under “reporting”, but also in the context of the “publication of any information”. Moreover, the absence in the proviso of the freedom to receive or impart ideas should specifically be addressed. These and other aspects will be scrutinised in the subsequent discussion of each of the aspects of the proviso.

##### *4.7.2.1 “provided that ... is not precluded by this section”*

Similar to the relationship between subsections 16(1) and (2) of the Constitution, the proviso serves as an internal modifier of sections 10 and 12 of the Act. A party relying on sections 10 and 12 will have to establish that the claim falls within the definitional ambit of the respective sections, which excludes expression covered by the proviso.<sup>339</sup> This requirement should be distinguished from defences, for example in the context of the law of defamation. It is not an

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<sup>339</sup> *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 77: par 92.

element of the delict of defamation that the statement be false. Unlawfulness can, however, be rebutted and liability avoided by raising the defence of truth in the public interest.<sup>340</sup> The Court, in *Khumalo and Others v Holomisa*, stated that “once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional”. It was held that the defence of reasonable publication by permitting a publisher who can establish truth in the public interest to avoid liability, strikes a balance between the constitutional interests of plaintiffs and defendants.<sup>341</sup> No similar presumption ensues from proof of the elements stipulated in section 10(1). The proviso is definitional in the sense that it categorically restricts the ambit of the relevant prohibitions.<sup>342</sup>

The approach followed in *Islamic Unity Convention v Independent Broadcasting Authority and Others* with respect to the determination of the scope of section 16(1) of the Constitution illustrates the proper approach. No prima facie finding of an infringement was made at the outset, and the assessment of whether or not the expression concerned fell within the ambit of section 16(2)(c) was not made in terms of a defence, but to establish whether or not the regulation concerned encroached on the terrain of protected speech.<sup>343</sup> The Constitutional Court held that the expression covered by the clause at issue did not fall under section 16(2)(c). As it was not in dispute that the clause regulated expression, the Court concluded that it infringed section 16(1).<sup>344</sup>

Accordingly, only expression which is not excluded in terms of the proviso and which complies with the definitional elements of sections 10 and 12 is prohibited in terms of these sections.

#### 4.7.2.2 “bona fide engagement in”

The fact that the bona fide requirement in the proviso describes not the expression as such, but engagement in the different forms of expression, is of material significance. It will be contended that the implication is that the bona fide qualification entails that the purpose for

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<sup>340</sup> *Khumalo and Others v Holomisa*: par 18.

<sup>341</sup> *Khumalo and Others v Holomisa*: par 36-45.

<sup>342</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 30.

<sup>343</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 32.

<sup>344</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 33-34.

which a specific form of expression is being utilised should correlate with the integral purpose of the form of expression.

It is suggested that the bona fide requirement in the proviso qualifies engagement in every form of expression mentioned in it.<sup>345</sup> This interpretation is textually sound and to a material extent addresses the problematic effect of Roederer's interpretation, namely that of narrowing down the ambit of sections 10 and 12 to the extent that they apply only to the unprotected categories of expression set out in section 16(2).<sup>346</sup>

*Black's Law Dictionary* defines bona fide as "made in good faith, without fraud or deceit, sincere, genuine".<sup>347</sup> Sealy, in the context of corporate decisions, contends that the first meaning of "in good faith" is more naturally used in relation to human beings in the sense of "honestly, with the best of intentions". In contrast, and more objectively, an act, activity or state of affairs may be described as "bona fide", meaning "genuine". A shareholders' resolution can, for example, be described as a bona fide expression of corporate opinion when it has not been distorted by some irregularity such as the manipulation of votes or the bribery, intimidation or improper bias of some of the members.<sup>348</sup> A decision of a corporate organ can normally be attacked only by impugning the integrity or regularity of the process, and not the reasonableness of the result. However, in exceptional cases, a result may be so unreasonable that the court is entitled to infer that it has not been reached by way of a proper process. In this way, an element of objectivity can be introduced into an inquiry that is basically determined by subjective considerations.<sup>349</sup>

It is contended that the bona fide requirement should accordingly be interpreted to include a positive conviction and commitment that the expressive act or activity concerned will achieve its purpose. The act or activity should furthermore, when objectively assessed, maintain the character of the form of expression that is employed. Accordingly, engagement in a form of expression listed in the proviso, and directed at the outcomes contemplated in sections 10 and

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<sup>345</sup> The formulation of section 2(3) of the *Draft Prohibition of Hate Speech Bill*, 2004, indicates that the drafters of the Bill followed the same approach. Bronstein 2006: 24 follows the same approach with the exception of "publication of any information, advertisement or notice...".

<sup>346</sup> See 4.7.1 above.

<sup>347</sup> *The Shorter Oxford English Dictionary on Historical Principles* 1993: 215; *Concise Oxford Thesaurus* 2002: 91.

<sup>348</sup> Sealy 1989: 269.

<sup>349</sup> Sealy 1989: 269.

12, and not at achieving the inherent purpose which is part of the defining characteristics of the form of expression, will not be excluded in terms of the proviso. Hence, while the display in an art gallery of a painting of a crowd jeering at a homosexual person will presumptively fall under the proviso, the display of the same painting during a protest march calling for gay people to be driven from the neighbourhood will presumptively not fall under the proviso. The principle that the manner of utilisation of a form of expression may destroy its character to the extent that, objectively determined, the expression will no longer constitute, for example, art, information, reporting in the public interest or scientific or academic inquiry, should also apply if aspects of the expression are intended to hurt or harm as contemplated, while not promoting the legitimate purpose of the expression. Hence, if a scientific article contending that females are genetically less intelligent than males contains hurtful, sexist remarks that are not essential in stating the point that is being made, the inclusion of those remarks in the article may render its publication not bona fide, both objectively and subjectively speaking. The implication is that both sections 10 and 12 require that expression which will inevitably hurt or harm should be carefully articulated or designed so as to strictly serve its legitimate aim.

The discussion below of the recent judgment of the Canadian Supreme Court in *Saskatchewan (Human Rights Commission) v Whatcott* will further explore this contention.<sup>350</sup>

#### 4.7.2.3 “publication of any information, advertisement or notice”

##### 4.7.2.3.1 Publication

Section 10(1), subject to the proviso, prohibits the publication as well as the propagation, advocacy and communication of the “words” contemplated by it. The proviso excludes the “publication” only of information.

*Collins English Dictionary* defines “publication” as: “the act or process of publishing a printed work”, “any printed work offered for sale or distribution”, “the act or an instance of making information public”, and “the act of disseminating defamatory matter, especially by communicating it to a third person”. The meaning of “advocacy” has been discussed

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<sup>350</sup> See 4.8.4 below.



above.<sup>351</sup> “Propagate” is defined in *Chambers 21<sup>st</sup> Century Dictionary* as, inter alia, “to spread or popularize (ideas, etc.)”. “Communicate” is defined as, inter alia, “1. to impart (knowledge) or exchange (thoughts, feelings, or ideas) by speech, writing, gestures, etc. 2. (transitive; usually followed by “to”) to allow (a feeling, emotion, etc.) to be sensed (by), willingly or unwillingly; transmit (to): the dog communicated his fear to the other animals. 3. (intransitive) to have a sympathetic mutual understanding”.

The question arises whether, with respect to information, the scope of section 10(1) exceeds that of the proviso. The problem, even with the formulation of such a question, is that the textual construction of subsection 10(1) is problematic. The term “words” does not fit comfortably. Words can be published, but not advocated or propagated. Even if words can conceivably be communicated, the contextual setting of the term “communicate” in conjunction with the aforementioned terms suggests that such meaning is not contemplated. As is apparent from the definitions quoted above and elsewhere in this chapter, the relevant terms typically apply to ideas, feelings, opinions and knowledge. It is accordingly contended that section 10(1) should be purposively interpreted, or, if such interpretation will not be viable, amended to prohibit the publication of words (or expression) that propagate, advocate or communicate ideas based on one or more of the prohibited grounds, against any person, and that could reasonably be construed to demonstrate the intention that is described. The term “communicate” introduces into the scope of the prohibition the infliction of hurt on the target group by means of discriminatory expression directed at members of the group in person.

The interpretation of the term “publication” calls for further deliberation.<sup>352</sup> The “hate speech” prohibitions in the jurisdictions that were discussed in Chapter IV provide significant guidelines.

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<sup>351</sup> See 2.2.6.2 above.

<sup>352</sup> *The Bloomsbury Thesaurus* 1997 defines it as:  
publishing, dissemination, circulation, ventilation, divulgence (or divulgency), divulgation, disclosure, promulgation, broadcasting, public-address system, ... spreading the word, spreading abroad, broadcast, announcement, declaration, proclamation, pronouncement, public notice, speech, statement, sermon, notification, official notice, report, communiqué, bulletin, manifesto, pronunciamiento, edict, decree, encyclical, ukase, ban, unconfirmed report, rumour, hearsay, gossip, trial balloon.

“Hate speech” provisions in German law are explicitly related to the maintenance of public peace.<sup>353</sup> Significantly, they refer to disturbance of the public peace “publicly or in a meeting”, Certainly, a meeting at a private residence of one of the attendees may involve the planning and initiation of a process of the promotion of hatred in society, or may be the forum for incitement to disturb the public peace, and should not be protected on the basis that the setting is private.

Canadian jurisprudence, in particular on the meaning of “private conversation” in the context of section 319(2) of the Canadian *Criminal Code*, provides valuable insights. As was highlighted in Chapter IV, section 319(1) of the *Code* explicitly applies to conversation in a “public place”, while section 319(2) explicitly excludes “private conversation” from its ambit.<sup>354</sup> The Court in *Keegstra* commented on the concept in context. When considering the remarks of the Court, it has to be kept in mind that the provision is specifically concerned with criminalised expression and therefore requires proof of intent. The Court stated that the fact that “section 319(2) did not prohibit views expressed with an intention to promote hatred if made privately” indicated “Parliament’s concern not to intrude upon the privacy of the individual”.<sup>355</sup> The Court inferred “a subjective *mens rea* requirement regarding the type of conversation covered by section 319(2)”. It was held that this inference was supported by the definition of “private communication” contained in section 183 of the *Criminal Code*. Section 183 defines a “private communication” as one that is made in circumstances “in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it”. “Consequently, a conversation or communication intended to be private does not satisfy the requirements of the provision if, by accident or negligence, an individual’s expression of hatred for an identifiable group is made public.” The Court found that the exclusion in section 319(2) of “private conversation”, rather than “communications made in a public forum”, “suggests that the expression of hatred in a place accessible to the public is not sufficient to activate the legislation”. A private conversation can take place in a public area.<sup>356</sup> In *R v Ahenakew*,<sup>357</sup> the Court interpreted conversation in terms of section 319(2) as “a conversation not open to, or intended for, the public”. It was

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<sup>353</sup> Chapter IV: 3.6.1.1–3.6.1.6.

<sup>354</sup> Chapter IV: 4.3.1.2.

<sup>355</sup> *R v Keegstra*: VII D (iii)(a).

<sup>356</sup> *R v Keegstra*: VII D (iii)(a).

<sup>357</sup> *R v Ahenakew* 2006 SKQB 110. The case dealt with an individual who expressed allegedly hateful statements to a reporter during an interview.

held that the number of persons present is irrelevant to the determination of whether a conversation is private.<sup>358</sup> In *R v Noble*,<sup>359</sup> a case decided in the Supreme Court of British Columbia, it was affirmed that whether or not the statement is communicated in a setting that is private does not determine the issue of whether or not it is made “in private conversation”.<sup>360</sup> In *R v Elms*,<sup>361</sup> it was held that the issue is not “whether the statement is communicated in a setting that is private, but rather whether it is made ‘other than in private conversation’”.<sup>362</sup> *In casu*, the finding that the setting was a private party was held to be irrelevant to the analysis. The implication of these findings is that a “public” conversation can take place in private.

Justice Sachs, in the South African Constitutional Court in his judgment in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*, stated that an “invasion of privacy can be regarded as reducing any possible justification for the violation of the right to free expression. At the same time, the infringement of privacy becomes harder to countenance when it targets communicative matter...”.<sup>363</sup> Justice Didcott, in the same matter, in his assessment of the right to privacy with respect to the possession of erotic material, considered the purpose of the possession as a relevant aspect of the right. He distinguished personal use or business from “the business of society or the state”.<sup>364</sup> These observations were regarded by the Court as relevant considerations in the application of the justification analysis in terms of section 33 of the interim Constitution.<sup>365</sup>

In the light of the above observations, it is contended that “publish” in the context of section 10(1) and “publication” in the context of the section 12 proviso should be interpreted to exclude the expression of discriminatory ideas, including the expression of hatred related to group identity, in circumstances where the purpose of the conversation, consistent with its private nature, is not the promotion of hatred in society, the incitement of people to cause

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<sup>358</sup> *R v Ahenakew*: 17-18. See also *R v Bahr* 2006 ABPC 360: par 30 and *R v Noble* 2008 BCSC 215.

<sup>359</sup> *R v Noble*: 215.

<sup>360</sup> *R v Noble*: par 12-19, 3.

<sup>361</sup> *R v Elms* 2006 CanLII 31446 (ON CA).

<sup>362</sup> *R v Elms*: par 12-13.

<sup>363</sup> *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: par 112.

<sup>364</sup> *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: par 91.

<sup>365</sup> *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: par 65.

harm to others related to their group identity, or direct hurt or harm to people related to their group identity. Accordingly, the sharing in private amongst friends or between a husband and wife of discriminatory feelings of hatred, or of the detestation of others based on their group identity, that does not have these effects will not constitute the publication of “hate speech” as contemplated by the Act. On the other hand, a discussion at a meeting of a group of people who plan an event where the audience will be incited to harm homosexual inhabitants of the neighbourhood will certainly be the “business of society or the state” and will not be a private conversation contemplated by section 10, even if the meeting is closed and takes place at the private home of one of the attendees. Racist insults by white people who attend a birthday party at a private residence, directed at a black person who also attends the party, will similarly not constitute “private communication”. To the extent that this distinction in context violates the rights to privacy and freedom of expression, it is contended that this is justifiable on the same basis that the section 10 prohibition is generally justified.

In conclusion, it should be stated that it is a reality that legislation cannot remove feelings of hatred and detestation from people’s hearts and homes and social relationships. It may be that these emotions originate from deep psychological hurt related to personal experiences. It may even have a healing effect when people verbalise these feelings in private. Legislation can and should only regulate the manifestation of these feelings to the extent that it is necessary for the conservation of the democratic society and the protection of the right of others to be treated with respect and with consideration of their right to equality.<sup>366</sup>

It has to be noted that the contended interpretation addresses the concern that underlies the contention by Milo *et al* that a restrictive approach in interpreting the ambit of the exclusions in terms of section 16(2) of the Constitution is particularly apposite in the light of the fact that, inter alia, no exclusion is made for speech uttered in private conversation.<sup>367</sup> It is furthermore in accordance with international law.

#### 4.7.2.3.2 Information

It has been suggested above that section 10 should be interpreted to apply to the publication of ideas rather than “words”. The suggestion was based on the broadest expressive content to

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<sup>366</sup> See Chapter III: 1.

<sup>367</sup> Milo *et al* in Woolman & Bishop 2008: 42-69.

be captured by “words” or other forms of expression. “Idea” is broadly defined as “any content of the mind”<sup>368</sup> or as “a thought, image, notion or concept formed by the mind, a plan or intention, a main aim, purpose or feature, and an opinion or belief”<sup>369</sup>.

Both the terms “information” and “ideas” are included in various relevant comparable formulations.<sup>370</sup> The apparent implication is that the respective terms have distinct meanings. The further implication is that, when one of the terms is omitted, the coverage of the relevant phrase should be limited accordingly. The following definitions, however, indicate that the concepts are greatly interrelated.

“Information” is defined as “knowledge gained or given, facts, news and the communicating or receiving of knowledge”<sup>371</sup> and as “particulars, facts, figures, statistics, data, knowledge, intelligence, instruction, advice, guidance, direction, counsel, enlightenment and news”.<sup>372</sup> “Knowledge” can be defined as including “understanding”.<sup>373</sup> To “inform someone about or of something” means “to give them knowledge or information about it” or “to tell them about it”.<sup>374</sup> It follows that information can be about ideas and can be in the form of reporting, comment or opinion. One person can, for example, inform or tell another of or about his or her reasons for supporting, or his or her opinion with respect to, racial segregation, male superiority in marriage or the condemnation of a homosexual lifestyle. It has been mentioned that the Constitutional Court has held that the right to inform includes the right to “offend, shock or disturb”.<sup>375</sup> Moreover, the view that free expression includes the dissemination of incorrect information or of an understanding or view based on misconceptions should be considered in the present context. The United Nations Human Rights Committee (UNHRC) in *General Comment 34* in this regard reiterates that the *ICCPR* does not permit general prohibitions on expression of historical views, nor does it prohibit a person’s entitlement to be wrong or to incorrectly interpret past events.<sup>376</sup> It is apparent that information can be

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<sup>368</sup> *Collins English Dictionary* 2000.

<sup>369</sup> *Chambers 21<sup>st</sup> Century Dictionary* 2001.

<sup>370</sup> See, for example, article 19 of the *Universal Declaration of Human Rights (UDHR)*, article 19 of the *ICCPR* and article 10(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* discussed in Chapter III: par 3.2 & 6.

<sup>371</sup> *Chambers 21<sup>st</sup> Century Dictionary* 2001.

<sup>372</sup> *Concise Oxford Thesaurus* 2002.

<sup>373</sup> *Chambers 21<sup>st</sup> Century Dictionary* 2001.

<sup>374</sup> *Chambers 21<sup>st</sup> Century Dictionary* 2001.

<sup>375</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 49. See also *Milo et al* in Woolman & Bishop 2008: 42-34.

<sup>376</sup> *General Comment 34*: par 49.

communicated in the form of serious discourse, but also in different forms of humour, including satire and jest.<sup>377</sup> The effect of conversation in these forms in the context of “hate speech” is explored separately.

As was indicated in Chapter IV, German law has attempted to distinguish opinion from fact. The focus is different, namely to determine to what extent the protection of opinion in terms of the Basic Law extends to facts. It has been held that the protection of opinion covers factual assertions that contribute to the formation of an opinion. The protection of opinions, however, extends to “the subjective attitude and personal judgment of the person expressing himself with regard to the object of the statement [independent] of whether the statement is rational or emotional, well founded or groundless, or regarded by others as useful or harmful, valuable or valueless”.<sup>378</sup> In accordance with this line of thought, it can be reasoned that the exclusion of “information” in the context of the proviso indicates that the section 10 prohibition is concerned with the “subjective attitude and personal judgment” of the person expressing himself or herself about another person with the aim of hurting or harming the other person, based on that person’s protected characteristics. It is not concerned with the bona fide communication of perceived facts or with the expression of an opinion, whether discriminatory or not, informed by factual assertions, whether objectively correct or not. Hence, to use an unfortunate example, if someone were to express the bona fide view that homosexuality is a psychological condition that can and should be cured, the expression will not fall within the ambit of section 10, although, in a specific context, and subjected to a section 14 analysis, it may conceivably be held to constitute unfair discrimination.

A limited field of expression has been identified as being “not primarily informational, but [an] instrumental means of keeping others down”.<sup>379</sup> Delgado and Stefancic point out that what they describe as “demeaning remarks” cannot readily be improved by further communication. Racist insult serves as an example. The statement: “Nigger, go back to Africa, you don’t belong on this campus”, conveys little information. It is more like an “instrument of oppression”, “a power move drawing on a history of similar remarks and treatment”. They respond as follows to the argument that minority victims of hate speech should talk back:

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<sup>377</sup> See 2.1.4.5 above.

<sup>378</sup> See Chapter IV: 3.5.1.1.

<sup>379</sup> Delgado & Stefancic 1996: 104. See also Wright 2000-2001: 999.

But how can one talk back to a power move? Would one say, “Excuse me, sir. I, an African American, have an equal right, under prevailing standards of morality and constitutional law, to attend this university?” The speaker already knows this. Or would the response be: “Sir, did you realize that I, an African American citizen, find your use of the term ‘Nigger’ offensive?” Again the speaker already knows this. Calling the speaker a bigot or ignoramus is an invitation to a fight and scarcely cures the harm inflicted by the first message.”<sup>380</sup>

Ghanea’s remarks, quoted above,<sup>381</sup> in which she distinguishes speech which reflects bias and harmful stereotyping from “hate speech” which employs “traditional epithets or symbols of derision to vilify on the basis of group membership”, reflect the same approach. Langton describes expression of this nature as “hate speech aimed directly at a member of the target race: speech that is not propaganda, but assault, insult, threat”. The discussion of the prohibition of insult in terms of section 185 of the German *Criminal Code* highlights relevant considerations in this regard.<sup>382</sup> In the South African context, subjection to treatment of this nature, either publicly or privately, may constitute the offence of *crimen iniuria*.<sup>383</sup>

Expression which is not “primarily informational”, but instrumental to the suppression of others, can be described as stated in the Canadian cases of *Irwin Toy Limited v Quebec* and *R v Keegstra* as expression that “threatens vulnerable members of society”, “attacks” people’s “most important associations” and propagates hatred, contributes little with respect to the quest for truth and the promotion of individual self-development, is “wholly inimical to the democratic aspirations of the free expression guarantee”, and is not to be accorded “the greatest of weight in the section 1 analysis”.<sup>384</sup> In conclusion, it can be stated that statements outside the ambit of the proviso can, similarly, be contrasted with “debate about an issue”.<sup>385</sup>

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<sup>380</sup> Delgado & Stefancic 1996: 104-105.

<sup>381</sup> See Chapter III: 3.3.1.

<sup>382</sup> Langton: Beyond Belief in Maitra & McGowan 2012: 77.

<sup>383</sup> See Chapter VI: 3.2.1.

<sup>384</sup> See Chapter IV: 4.2.

<sup>385</sup> Compare with the decision in *Soldiers Are Murderers* BVerfGE 93, 266-312I (10 October 1995), where it was stated that the prominent feature of an abusive statement is defamation of the person rather than debate about the issue. See Chapter IV: 3.3.1.

#### 4.7.2.4 “artistic creativity, academic and scientific inquiry”

The discussion of artistic creativity and humour in the context of section 16(1)(c) applies.<sup>386</sup>

#### 4.7.2.5 “fair and accurate reporting in the public interest” and “bona fide publication of any information” in the media

The contention that the first-mentioned phrase is related to the protection in terms of section 16(1)(a) of the Constitution of freedom of the press and other media was mentioned above. Bronstein compares these exclusions with the common law defences in defamation cases. She refers to the defences of fair comment, truth and public benefit, and qualified privilege, as well as to the finding in *National Media Limited and Others v Bogoshi* that publication of “false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time”. She points out that this formulation differs from the proviso, which requires that reports must be accurate in order for liability to be avoided under the Act. On this basis, she contends that it can be argued that the Act aims to protect groups against hurt more than the common law protects particular individuals whose dignity has been specifically assailed.<sup>387</sup>

However, it is contended that not only “reporting” should be linked to media freedom as suggested. “*Bona fide* publication of any information” can certainly also involve media publication and extends to a much broader area of media expression than the specific area described as reporting. The concept “fair comment in the public interest” will accordingly be discussed on the basis of this premise.

It should be borne in mind that the aforementioned categories of expression not only concern specific requirements with respect to the way in which the media comply with duties, but also affirm the privilege of the media to disseminate information even on illegal or unlawful activities, including different forms of “hate speech”. The decision of the European Court of Human Rights in *Jersild v Denmark*<sup>388</sup> is relevant in this regard. Moreover, outside the ambit

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<sup>386</sup> See 2.1.4.5 above.

<sup>387</sup> Bronstein 2006: 25.

<sup>388</sup> See Chapter III: 6.4.2.



of these particular categories of media publication, the very same freedom of, and conditions with respect to, acceptable expression that apply to everyone else also apply to the media.

*Chambers 21<sup>st</sup> Century Dictionary* defines “report” as, inter alia:

to bring back (information, etc.) as an answer, news or account; to give a formal or official account or description of (findings, information, etc.), especially after an investigation; to give an account of (some matter of news, etc.), especially for a newspaper, or TV or radio broadcast; to act as a newspaper, TV or radio reporter; to make a complaint about someone, especially to a person in authority; to take down or record the details of a legal case, proceedings, etc.

The phrase “fair and accurate reporting in the public interest” is reminiscent of the American common law privilege known as the “fair report” or “record” privilege. This privilege was first codified in section 611 of the original Restatement of Torts, captioned Reports of Judicial, Legislative, and Executive Proceedings. The privilege applied to reports of proceedings within its ambit if the report constituted an (a) accurate and complete or a fair abridgment of such proceedings, and (b) was not made solely for the purpose of causing harm to the person defamed.<sup>389</sup> It was developed to accommodate constitutional principles as, inter alia, interpreted in *New York Times v Sullivan*.<sup>390</sup> The modern view, embodied in section 611 of the Second Restatement of Torts, removes the malice requirement. The effect is that the privilege is lost by merely a “showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment”. The section provides as follows:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.<sup>391</sup>

According to Cox and Callaghan, provided that the account presents a fair and accurate summary of the proceedings, the law abandons the assumption that the reporter adopts the

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<sup>389</sup> Cox & Callaghan 2002-2003: 30.

<sup>390</sup> See Chapter IV: 2.4.1.1.

<sup>391</sup> Cox & Callaghan 2002-2003: 35.

defamatory remarks as his or her own. Thus the privilege allows the press to relieve itself of liability without establishing the truth of the substance of the statement reported.<sup>392</sup>

The interpretation in the aforementioned context of the concepts “fair”, “accurate” and “public interest” has further relevance with respect to the meaning of these concepts in the section 12 proviso. With regard to the accuracy and fairness of the report, it has been held that it is enough that it conveys a substantially correct account of the proceedings. The accuracy requirement relates to what transpired at the proceedings, not to the objective truth of alleged defamatory charges. Although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression. The fair-report privilege applies “even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false”. Unfettered, accurate and fair publication of records does not forfeit protection if the information contained therein later turns out to be incorrect.<sup>393</sup>

With regard to the public-interest aspect of the privilege, it was stated in *Moreno v Crookston Times Printing Co*<sup>394</sup> that the purpose of the “fair and accurate reporting” privilege is to ensure that the public interest is served by the dissemination of information about events occurring at public proceedings and public meetings. The privilege rests on two basic principles. Firstly, because the meeting is public, a fair and accurate report will simply relay information to the reader that he or she would have seen or heard himself or herself were he or she present at the meeting. The second principle is the “obvious public interest in having public affairs made known to all”. Accordingly, as pointed out by Cox and Callaghan, provided that the accuracy and fairness tests have been met, both the publication’s truth and the publisher’s knowledge of its truth and motivation for publishing it are irrelevant.<sup>395</sup>

In *National Media Limited and Others v Bogoshi*, the Supreme Court of Appeal described “matters of public interest to the community” as matters relating to the public life of the community and those who take part in it, including “public life” activities such as the conduct of government and political life, elections and public administration, as well as matters such

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<sup>392</sup> Cox & Callaghan 2002-2003: 35.

<sup>393</sup> Cox & Callaghan 2002-2003: 36.

<sup>394</sup> Discussed in Cox & Callaghan 2002-2003: 37 fn 112.

<sup>395</sup> Cox & Callaghan 2002-2003: 37.

as the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure.<sup>396</sup>

The concept “comment” is often used in the media context.<sup>397</sup> The application and interpretation in the law of defamation of the defence of fair comment in the public interest have relevance with respect to the requirements for comment in the media context as contemplated in terms of the section 12 proviso. The approach articulated in *Khumalo and Others v Holomisa* that the media has a duty to be “scrupulous and reliable in the performance of their constitutional obligations” and “to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture” is reflected in the application of the defence.<sup>398</sup> In *The Citizen 1978 (Pty) Ltd and Others v McBride*,<sup>399</sup> the Constitutional Court stated that the defence of protected or “fair” comment requires, at the outset, that the facts be “truly stated”. This means that, to receive the benefit of the defence, it must be clear to those reading a publication “what the facts are and what comments are made upon them”. A commentator is not protected if he or she “chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact before the reader”.<sup>400</sup> The defendant must “justify the facts, but needs not justify the comment”. The comment or criticism will be protected “even if extreme, unjust, unbalanced, exaggerated and prejudiced”, provided that it is on a matter of public interest and expresses an honestly held opinion without malice.<sup>401</sup> The legal criterion of reasonableness, informed by the values of the Constitution, determines the boundaries of what is protected.<sup>402</sup> The Court stated that “malice indicates an abuse of right, which makes unlawful that which would otherwise have been lawful”. *In casu*, it was argued that the comments at issue were malicious on the basis that the articles were published out of personal

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<sup>396</sup> *National Media Limited and Others v Bogoshi* (579/96) [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A) (29 September 1998): par 24.

<sup>397</sup> Clauses 35 and 12 respectively of the previous and new broadcasting codes, which will be discussed in the next chapter, regulate “comment”.

<sup>398</sup> *Khumalo and Others v Holomisa*: par 24.

<sup>399</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride* (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC).

<sup>400</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride*: par 88.

<sup>401</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride*: par 83. In *Delta Motor Corporation (Pty) Ltd v Van Der Merwe* [2004] ZASCA 61; [2004] 4 All SA 365 (SCA) (31 May 2004), it was similarly stated that the use of the word “fair” in the context of the defence does not imply that the criticism for which protection is sought must be impartial or well balanced. It merely means that the comment must be a genuine expression of opinion, it must be relevant, and it may not be expressed maliciously.

<sup>402</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride*: par 84.

spite and ill-will towards the respondent, and not out of any wish to engage in public debate. The argument was rejected on the evidence.<sup>403</sup> In the context of the proviso, the parallel argument will be that the agenda was not any bona fide wish to engage in public debate, but, instead, to hurt or harm people based on their group identity.

#### 4.7.2.6 “in accordance with section 16 of the Constitution”

Roederer as well as Bronstein link the phrase “in accordance with section 16 of the Constitution” only to the publication of any information, advertisement or notice.<sup>404</sup> However, the phrase should, similar to the “bona fide” qualification, rather be construed as a qualification to engagement in all the forms of expression within the ambit of the proviso. The proviso only concerns expression which prima facie enjoys constitutional protection in terms of section 16. Expression contemplated under section 16(2) falls outside this ambit, whether it is in the form of art, media publication or any of the other forms of expression mentioned in the proviso.

#### 4.7.2.7 Concluding remarks

Emanating from the connection that was made between the proviso and section 16(1), together with the interpretation of the different concepts of the proviso, it is apparent that the proviso limits the potential application of section 10 to: firstly, non-bona fide engagement in expression that enjoys prima facie constitutional protection; to, secondly, the expression of ideas that are not primarily informational or directed at debating any issues; and, thirdly, to expression contemplated by section 16(2) of the Constitution. This interpretation to a substantial extent addresses the criticism of structural “collapse” of sections 10 and 12 referred to above. Having said this, to eventually fall within the prohibited category of expression contemplated by the respective sections, the expression at issue will also have to comply with the requirements that will subsequently be discussed.

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<sup>403</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride*: par 105.

<sup>404</sup> Roederer in *Albertyn et al* 2001: 101; Bronstein 2006: 24.

### 4.7.3 *Specific aspects of section 10*

#### 4.7.3.1 *“Words”*

Roederer points out that section 10 may be said to have a narrower scope than section 16(2) of the Constitution, in that expression in order to be captured by it has to be in the form of words.<sup>405</sup> To restrict the prohibition of “hate speech” to the medium of words, however, seems paradoxical. It can firstly be argued that there is an obligation on the legislator to regulate expression excluded from protection in terms of section 16(2) of the Constitution. To enact legislation restricting expression by means of words exceeding the ambit of section 16(2)(c), while expression by other means falling within its ambit remains unrestricted, makes no sense. It is moreover an explicit objective of the Act to prohibit the “advocacy of hatred based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act”.<sup>406</sup>

It should also be considered that the term “hate speech” is generally used to include symbolic expression. Even the American Supreme Court has protected symbolic speech in terms of the *First Amendment* by overturning state and federal statutes that prohibited the burning of the American flag.<sup>407</sup> The fact is that communication is not only achieved through speech, but also by means of expressive conduct.

#### 4.7.3.2 *“publish, propagate, advocate or communicate”*

The discussions above of these concepts in related contexts apply.

#### 4.7.3.3 *“against any person”*

“Person” is defined in section 1 of the Act as including a juristic person, a non-juristic entity, a group, or a category of persons. The Act thus acknowledges that the harm contemplated may be caused by expression based on a prohibited ground against a juristic person.

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<sup>405</sup> Roederer in *Albertyn et al* 2001: 92.

<sup>406</sup> Section 12 is apparently referred to because the section 12 proviso excludes expression covered by section 16(2) of the Constitution from its ambit. The implication is that both sections 10 and 12 cover expression contemplated in section 16(2) of the Constitution.

<sup>407</sup> See *Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990).

However, the harm suffered will be the suffering of a group related to the juristic person and protected under the prohibited ground concerned.<sup>408</sup>

The fact that statements under section 10 have to be against anyone is in accordance with the interpretation that the prohibition is not concerned with the bona fide communication of information or viewpoints, but with the employment of expression as a tool to directly, or indirectly, hurt or harm people by violating their human dignity, or to incite others to do so.

#### 4.7.3.4 *“based on one or more of the prohibited grounds”*

In terms of the Act, “prohibited grounds” are: (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable with discrimination on a ground in paragraph (a).<sup>409</sup>

#### 4.7.3.5 *“(a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred”*

Moon identifies two kinds of harm caused by “hate speech”. The first kind is suffered by the members of a protected group which is both the audience and the subject of the expression. “This form of harm includes fear, intimidation, insult and emotional trauma.” The second kind of harm is the spread of hateful views and the instilling of hateful attitudes to minority groups in society. “The same speech act may contribute to both kinds of harm.”<sup>410</sup> It is apparent that section 10 prohibits both these forms. Section 16(2)(c), in contrast, prohibits the incitement of others to cause harm of this nature.

Similar to “harm” in section 16(2)(c) of the Constitution, the concept “hurt” is broadly defined to include physical injury and pain as well as mental pain, distress and offence. “Hurtful” means causing such injury, pain or distress.<sup>411</sup> The inclusion of “hurt” is related to

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<sup>408</sup> Roederer in Albertyn *et al* 2001: 8-10.

<sup>409</sup> *Equality Act*: section 1(1).

<sup>410</sup> Moon 2008-2009: 79.

<sup>411</sup> *Collins English Dictionary* 2000.

the fact that “hate speech” in terms of section 10, in contrast to section 16(2)(c) of the Constitution, is concerned not only with incitement to harm others, but also with the direct infliction of hurt on those targeted by the expression.<sup>412</sup>

It is apparent that the relevant context for the determination of compliance with the requirements of section 10 may be society as a whole. Justice Lamont, in *Afri-Forum and Another v Malema and Others*, rejected the argument that words which, in terms of section 10 of the Act, would constitute “hate speech” for a portion of society will not constitute “hate speech” if that portion of society is shielded from the words and their meaning. He stated the effect of “hate speech” on society in broad terms, namely that:

all hate speech has an effect, not only upon the target group, but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory, members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words.<sup>413</sup>

The concern evidently is with the corruption of society’s commitment, stated in the Preamble to the Constitution, to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights”. Moreover, the toleration or condemnation of “hate speech” as such may have harmful consequences. The healing of wounds requires an enhanced level of empathy. The hurt that target groups experience should also distress those who are not directly targeted, but have identified themselves with the aforementioned constitutional goal. The discussions in Chapter II of the study of “human dignity as autonomy related to a collective goal to preserve humanity” and “human dignity as autonomy related to society’s character as manifested in the treatment of others” apply in this context. The statement in *S v Makwanyane and Another* that the refusal of respect and dignity to black people diminished the dignity of all South Africans, summarises the approach.<sup>414</sup> Lastly, the way in which the Act deals with those who do project their emotions of hatred is significant. Punishment and condemnation may enhance hatred and frustration, while mediation, exposure to the effect on victims as individuals, and even apologies made and

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<sup>412</sup> See the contradictory view of Milo *et al* in Woolman & Bishop 2008: 42-87.

<sup>413</sup> *Afri-Forum and Another v Malema and Others*: par 94.

<sup>414</sup> *S v Makwanyane and Another*: par 329.

accepted, may enhance reconciliation and healing. This approach is in line with the view expressed in the discussion of article 20 of the *ICCPR*, namely that the criminalisation of “hate speech” should only be considered if no other available means will sufficiently protect society against the violation of individual rights and the destruction of the public order.<sup>415</sup>

Milo *et al* express the concern that the harms contemplated by the section, especially by the term “hurtful”, are wide to the extent that, if they are interpreted literally, expression such as robust opinions on racial issues or gender-insensitive jokes will be prohibited.<sup>416</sup> However, the hurt and harm has to be inflicted not, for example, in the bona fide communication of information or an opinion, or in the course of bona fide joking, or in private conversation, but with the primary aim to hurt or harm a person on the basis that he or she is a member of a protected group. Hence even the endorsement of humiliating stereotypes will not be construed to demonstrate a clear intention to hurt or harm people as contemplated in terms of the section, unless it was demonstrably so aimed. It is rather difficult to conceive that such aim can be motivated other than by some form of hatred, whether described as detestation, loathing, revenge or intense disrespect. What is prohibited is what Langton describes as assaultive, insulting or threatening speech based on the group membership of those targeted by the speech.<sup>417</sup> He employs the scenario where a copy of *Der Stürmer*, featuring the “Holy Hate”, is deliberately left where a Jewish colleague will find it, to illustrate how propaganda that advocates or incites hatred can be used to “assault” an individual.<sup>418</sup>

As far as the “promotion of hatred” is concerned, Justice Dickson’s above-quoted *dictum* in *R v Keegstra* comes to mind. He reiterated the extreme nature of “hatred” and stated that “to promote hatred is to instil detestation, enmity, ill-will and malevolence in another...”.<sup>419</sup> Hatred may conceivably also be promoted by discriminatory speech uttered by speakers in a position of authority which, for example, disempowers, humiliates or frustrates members of

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<sup>415</sup> See Chapter III: 3.3.3.

<sup>416</sup> Milo *et al* in Woolman & Bishop: 42-87. The decisions of the Broadcasting Complaints Commission of South Africa (BCCSA) Broadcasting Tribunal in *Marais v Jacaranda 94.2FM 40/A/2012* (BCTSA), and the Canadian Broadcast Standards Council (CBSC) in *SRC re Bye Bye 08/09-0620/2008* (CBSC) are noteworthy in this regard.

<sup>417</sup> Langton in Maitra & McGowan 2012: 77.

<sup>418</sup> Langton in Maitra & McGowan 2012: 77.

<sup>419</sup> See 2.2.6.4 above.



the target group to the extent that it causes them to hate the speaker and the institution that he or she represents.<sup>420</sup>

#### 4.7.3.6 “that could reasonably be construed to demonstrate a clear intention to”

The reasonableness standard is comparable with the application of a criterion of reasonableness in an action for *iniuria* to determine whether or not the act complained of is wrongful. The test enquires whether a “reasonable person of ordinary intelligence might reasonably understand the words to convey a meaning defamatory of the plaintiff”.<sup>421</sup> In *Delange v Costa*,<sup>422</sup> the Court stated that the test is objective. It requires the conduct complained of “to be tested against the prevailing norms of society, that is, the current values and thinking of the community”.<sup>423</sup> The values of the Constitution, including the right to freedom of expression, now inform these convictions.<sup>424</sup> It has to be emphasised, however, that, while in the case of defamatory speech the focus is on the response of addressees to the speech, the response of addressees of speech prohibited in terms of sections 10 and 12 does not as such determine whether or not expression falls within the ambit of the sections. It is the meaning conveyed by the expression and the consequential potential impact of the expression that matter. The focus is on the protection of human dignity and equality, not on compensation for actual damage.<sup>425</sup>

The following approaches in terms of the law of defamation should be considered. It has been held that the reasonable person of ordinary intelligence is taken to understand the words in their natural and ordinary meaning. In determining the natural and ordinary meaning, the Court must take account not only what the words expressly say, but also what they imply.<sup>426</sup> Where persons with knowledge of special circumstances will attribute an innuendo or secondary defamatory meaning to a publication, such meaning will be relevant.<sup>427</sup> In

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<sup>420</sup> Mengistu in Herz & Molnar 2012: 352-353.

<sup>421</sup> *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*: par 25. See also *Argus Printing and Publishing Co Ltd v Esselen’s Estate*: 20E-G; *Milo et al* in Woolman & Bishop: 42-91-42-92.

<sup>422</sup> *Delange v Costa* (433/87) [1989] ZASCA 6; [1989] 2 All SA 267 (A).

<sup>423</sup> *Delange v Costa*: par 16-17.

<sup>424</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC): par 43.

<sup>425</sup> See 4.5 above.

<sup>426</sup> *Sindani v Van Der Merwe and Others*: par 11; *Argus Printing and Publishing Co Ltd v Esselen’s Estate*: 20E-21B; *Afri-Forum and Another v Malema and Others*: par 41.

<sup>427</sup> *Burchell* 1985: 94-95; *Sindani v Van Der Merwe and Others*: par 9; *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*: par 25.

*Mohamed v Jassiem*,<sup>428</sup> the Appellate Division applied the applicable test not to society as a whole, but to the particular Muslim community of which the plaintiff was a member.<sup>429</sup> In *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*, the Court applied the test to the ordinary reader of the particular publication.<sup>430</sup> In *Afri-Forum and Another v Malema and Others*, the Court similarly pointed out that words can have different meanings to different people. If a member of the target group, based on his or her understanding of the expression, would reasonably construe the expression to convey the required intention, there will be compliance with the reasonableness standard.<sup>431</sup>

It is significant to note that the intention that is demonstrated should be “clear”. This excludes even reasonable possibilities that the expression is, or may be, primarily directed at harming and hurting people, and not, for example, at conveying a viewpoint or at practising bona fide humour or art.

#### 4.7.3.7 Application of section 10

The ambit of section 10 includes, and exceeds, expression contemplated by section 16(2)(c) of the Constitution. The subsequent application of section 10, again with reference to the matter of *Afri-Forum and Another v Malema and Others*,<sup>432</sup> will illustrate the extended application of section 10 of the Act in relation to section 16(2)(c) of the Constitution.

The relevant questions in terms of section 10 are as follows: Did the expression of the words amount to bona fide engagement in any of the forms of expression precluded in terms of the proviso? Were the words published by means of advocacy, communication or propagation of ideas? Were the ideas based on a prohibited ground? Was the expression directed “against any person”? Could the words be reasonably construed to demonstrate a clear intention to be hurtful, harmful, incite harm or promote or propagate hatred? There is no essential order in which the questions should be asked. A positive answer to the first question, or a negative answer to any of the other questions would be the end of the matter.

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<sup>428</sup> *Mohamed v Jassiem* 1996 (1) SA 673 (A).

<sup>429</sup> *Mohamed v Jassiem*: 702; Milo 2008: 18.

<sup>430</sup> *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*: par 26.

<sup>431</sup> *Afri-Forum and Another v Malema and Others*: par 6-9.

<sup>432</sup> *Afri-Forum and Another v Malema and Others*: par 49-55.

Whether or not the expression *in casu* advocated hatred and incited harm was addressed in the application of section 16(2)(c) of the Constitution. Of relevance in the further application of section 10, if called for, is that the ideas that were expressed were published and were directed “against” the farmer and/or the Boer. The Court held that “Boer” referred to white Afrikaners. This would be the position even if the alleged “true meaning” of the words was to be accepted.<sup>433</sup> Although the Court did not expressly state the relevant grounds, this finding implied the grounds of race, culture and ethnic or social origin.

The respondents’ arguments required a consideration of whether or not the expression concerned constituted engagement in the publication of information, and in artistic creativity. The right to sing the words was argued to be based on the alleged fact that the words were contained within a liberation song and were intended to symbolise the destruction of white oppression by the former regime, rather than to indicate the literal intention to shoot the farmers and Boers. The submission was made that the song formed part of South African heritage and should be retained in the interests of the preservation of a complete history. Liberation songs, it was argued, fulfil the prime requirement of a people’s song, because they are easy to sing, convey a feeling of solidarity which emanates from a situation of common experience, and use words which form a powerful expression of the emotional feelings of the persons who sing it. It was contended that song is a form of verbal art which people use both for emotional release and also for manipulation of others.<sup>434</sup>

There was evidence that the song was presented in the form of a chant, and not in its original form as a song with composed music. Whether or not a song in this form can be described as complying with the intrinsic bona fide element of art is a theoretical question requiring expert evidence. If not, the song would not fall under the proviso.

If the true meaning of the song was indeed a reminder of the past struggle, singing it could arguably constitute publication of information. In this regard, an objective finding would have to be made in terms of a contextual linguistic analysis. The objective question would be whether the proffered meaning could be accepted as a meaning of the words. The Court in the *Malema* matter accepted that it could.<sup>435</sup>

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<sup>433</sup> *Afri-Forum and Another v Malema and Others*: par 2, 61, 82, 102, 105 & 108.

<sup>434</sup> *Afri-Forum and Another v Malema and Others*: par 54.

<sup>435</sup> *Afri-Forum and Another v Malema and Others*: par 61.

Both with respect to the publication of information and artistic creativity, a positive finding would still require an assessment of whether the engagement in singing the song was bona fide, that is, as indicated above<sup>436</sup>, primarily directed at engaging in these forms of expression. The context and manner in which the song was sung or chanted are relevant considerations in this regard. If sung at a closed meeting where the true meaning of the words would be understood, and the singing of struggle songs as a reminder of the struggle was not an extraordinary activity, the engagement in singing or chanting the song could conceivably be regarded as bona fide. By contrast, if presented in circumstances where a substantial number of those participating or involved, or invited to be involved, or exposed to the singing or chanting, including the audience, would clearly not be conscious of the true nature of the performance and the “true meaning” of the words, substantial doubt would be shed on a contention that the engagement was bona fide aimed at artistic creativity or the publication of information. *In casu*, these circumstances were established. The doubt was enhanced in the light of the obviously foreseeable general interpretation to be given to the presentation by members of society who were not informed about the “true meaning” of the words and the true nature of the song or chant. It was further reinforced by the fact that the press was invited to report on the activities.

Malema’s contradictory evidence in which he related the words “Boer” and “farmer” to white Afrikaners presently living in South Africa<sup>437</sup> seriously jeopardised a conclusion that the singing or chanting of the words after the previous regime had been substituted with the constitutional dispensation constituted bona fide engagement in artistic creativity or the publication of information. Engagement in the expression at issue should far rather be described in the above-mentioned terms used by Delgado and Stefancic as an “instrumental means of keeping others down” or, as described by Langton, an “attack” or “assault”. The very same considerations would be relevant in the determination of whether or not the expression could reasonably be construed to demonstrate the required intention.

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<sup>436</sup> See 4.7.2.2 above.

<sup>437</sup> *Afri-Forum and Another v Malema and Others*: par 105.

## 4.8 Section 12

### 4.8.1 *Specific aspects of section 12*

The dictionary definitions<sup>438</sup> of the following terms may assist in determining the scope of the prohibition. “Disseminate” is described as: “to distribute or scatter about” or “to diffuse”. “Broadcast” means “to make widely known throughout an area”. “Information” is seen as: “knowledge, intelligence given, data” or as an “act of providing knowledge”. “Display”, *inter alia*, means “to show or make visible” or “to disclose or make evident”. “Advertisement” is viewed as: “any public notice, as a printed display in a newspaper, short film on television, announcement on radio, etc., designed to sell goods, publicize an event, etc.”. “Notice” is, *inter alia*, defined as: “information about a future event”, “warning”, “announcement”, “a displayed placard or announcement giving information”. “Announcement” is defined as: “a public statement”, “a brief item or advertisement, as in a newspaper”, “a formal printed or written invitation” or “the act of announcing”. “Publish” has been defined above. The primary focus appears to be on facts, including facts concerning decisions that have been reached, actions that have been, or are intended to, or are being advised to be taken, as well as facts substantiating ideas or opinions that are being promoted. It is contended that perceived facts are included. It is apparent that the means of expression fall within the ambit of the means stipulated in terms of section 10.

The term “demonstrate” is defined, *inter alia*, as “to show, manifest, or prove, especially by reasoning, evidence, etc.”; “to evince; reveal the existence of”; “to explain or illustrate by experiment”. The phrase “that could reasonably be construed or reasonably be understood to” was discussed in the context of section 10. The reasonableness test in the context of section 12 similarly enquires whether a “reasonable person of ordinary intelligence” might reasonably construe or understand disseminated information or the publication or display of an advertisement or notice to provide evidence of or to constitute unfair discrimination.

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<sup>438</sup> See *Collins English Dictionary* 2000.

#### 4.8.2 *The proviso in the context of section 12*

Roederer, in interpreting section 12, contends that, to follow the analysis suggested by the proviso is a waste of time, because all of the conduct that the main section seeks to prohibit, except conduct within the parameters of section 16(2), will be protected under the proviso.<sup>439</sup> However, as was contended above, the proviso covers engagement in expression explicitly protected in terms of section 16(1) only to the extent that the engagement is bona fide. It moreover prevents the dissemination of “hate speech” contemplated in terms of section 16(2)(c) of the Constitution by any of the means stipulated by it.<sup>440</sup>

The proviso specifically excludes bona fide engagement in the publication of any information, advertisement or notice from the ambit of section 12. Similar to its effect in the context of section 10, this exclusion significantly limits the scope of the section. Publications contemplated by the section will not be subjectively bona fide if they contain information that is not in context exclusively related to valid objective criteria, intrinsic to the product or activity concerned,<sup>441</sup> but is aimed rather at furthering an unfairly discriminatory aim. Hence, to use commercial advertising as an example,<sup>442</sup> if a cosmetics company displays an advertisement targeting only white women, promoting its new skin foundation for fair skins, the advertisement will not be reasonably construed to reflect an intention to unfairly discriminate, and the bona fides of the advertising will be apparent. If the same company promotes a new perfume in the same way, it will be reasonable to construe the advertisement as demonstrating that the company gives preference to white customers, which, were this to be the case, would constitute unfair discrimination. It will, furthermore, be arguable that engagement in the publication of the advertisement is not bona fide in terms of the proviso. The position will be more problematic if the company, in the first example, did not reveal that the new foundation was intended for fair skins, and also did not have a policy of giving preference to white customers. It would clearly be reasonable to construe that the advertisement demonstrated a clear intention to unfairly discriminate by giving preference to white customers. The fairness analysis in this context will be concerned with the reasonably

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<sup>439</sup> Roederer in Albertyn *et al* 2001: 101.

<sup>440</sup> It can be accepted that “hate speech” of this nature will undoubtedly be reasonably construed to clearly demonstrate the required intentions.

<sup>441</sup> Pretorius, Klinck & Ngwenya 2001: 8.1.3.1.

<sup>442</sup> See the discussion of the *ASA Code* in Chapter VII: 3.2.

perceived facts and not with the true situation. It will, however, be arguable that the conduct of the advertiser or publisher was bona fide. This issue will subsequently be discussed further in conjunction with other aspects of section 12.

#### ***4.8.3 Unfair discrimination as contemplated by section 12***

The question arises whether or not, independently of the fairness assessment intrinsic to its terms, section 12 is subject to a fairness analysis. Should the publisher be afforded an opportunity to justify a publication or advertisement that can reasonably be construed as contemplated, for example by relying on the right to freedom of expression or on arguments that no unfair discrimination will in fact materialise? On the one hand, the structure of the Act seems to indicate that section 12, similar to sections 7, 8 and 9, provides an example of unfair discrimination, subject to a fairness analysis in terms of section 14. The section is similarly described as a prohibition of unfair discrimination and is not, in terms of section 15, excluded from the application of section 14. It has to be taken into account, though, that to include it in the terms of section 15 would be confusing in the light of the fact that a fairness analysis in terms of section 14 is intrinsic to the terms of section 12. On the other hand, unlike sections 7, 8 and 9, section 12 does not state that it is subject to section 6, the general prohibition of “hate speech”, which has to be read with section 14. Like section 10, it covers only conduct which is not bona fide.

Section 12 of the *Canadian Human Rights Act* contains a comparable provision. It provides:

- (i) It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that (a) expresses or implies discrimination or an intention to discriminate, or (b) incites or is calculated to incite others to discriminate if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.<sup>443</sup>

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<sup>443</sup> All provincial and territorial human rights laws, except for those in the Yukon Territory, include a provision similar to section 12 of the *Canadian Human Rights Act (CHRA)*. According to Moon:

when this provision was first enacted in Ontario, its purpose was to prohibit signs in store windows that indicated that the members of certain racial or ethnic groups would not be served. However, in those jurisdictions that do not have a section 13 equivalent in their code, the discriminatory sign provision has sometimes been interpreted broadly so that it extends to discriminatory speech that appears on signs, and in some provinces, that occurs in publications

The analysis contemplated by both section 12 of the *Equality Act* and section 12 of the *Canadian Human Rights Act* can be described as a hypothetical fairness analysis. It should, however, be noted that discriminatory practices in terms of sections 5 to 11 and 14 of the Canadian Act are concerned with narrowly defined, context-related discriminatory practices and are limited in terms of intrinsic justifications and exceptions stipulated by section 15(1) of the Act, while fairness in terms of the *Equality Act* is generally determined on a case-by-case basis in terms of a broad fairness analysis.

The approach followed in the matter of *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, which was adjudicated by the Court of Justice of the European Union, also has comparative relevance.<sup>444</sup> The facts were that a co-director of a firm stated publicly during an interview with a newspaper that his company's customers did not want immigrants to install up-and-over doors in their homes, because customers were reluctant to give them access to their private residences for the period of the work. The Court held that the statement constituted direct discrimination in respect of recruitment. The discrimination was constituted by the likelihood that the statement would dissuade candidates of a certain race or ethnicity from submitting their candidature. It was held that the employer could prove that there was no breach of the principle of equal treatment by showing that the undertaking's actual recruitment practice did not correspond to those statements.<sup>445</sup> It is apparent that this approach does not in any way address the detrimental effects of the statement per se in the broader societal context.

It is contended that the answer to the question raised above, namely whether or not the section 12 prohibition is subject to a comprehensive fairness analysis in addition to the fairness analysis intrinsic to terms of the publication, lies in the fact that, if it is in fact subject to both analyses, the proviso would not have been necessary.

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... [W]hen broadly interpreted, this provision limits "conduct similar in nature to that at which broader hate speech laws are directed. See Moon 2008-2009: 16.

See also Chapter IV: 4.3.2.

<sup>444</sup> See Chapter III: 7.2.

<sup>445</sup> *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* C-54/07; 2008 (ECR) 5187: par 41.



The implication of the conclusion that no further fairness assessment is required is that, if in terms of the section 12 proviso engagement in a publication is not bona fide, and the publication appears to reveal intended unfair discrimination, regardless of whether unfair discrimination is in fact intended or will in fact pursue, the prohibition of the act of publication will nonetheless give effect to the obligation in terms of sections 9(3) and (4) of the Constitution to prohibit and prevent unfair discrimination. The principles established in the application of section 6 of the *EEA* to advertisements, which is briefly discussed below, will serve to illustrate this.

A noteworthy observation is that, after a publisher has been alerted to the fact that an advertisement, notice or broadcast could reasonably be construed to demonstrate the required intention, its continued dissemination or display in the same form will certainly not readily be viewed as bona fide. As a matter of fact, it is arguable that, in the light of the broad powers of the Equality Court, a declaratory order in terms of section 21(2)(a) of the Act to the effect that the continuous display of the advertisement will be subject to amendments to address its susceptibility to erroneous interpretation, may be appropriate at the time of the initial assessment of the publication.

Pretorius, Klinck and Ngwena provide enlightening examples of discriminatory advertisements in the employment context. The examples include advertisements that contain statements which expressly or by implication indicate a limitation, specification or preference based on any prohibited ground of discrimination. Illustrations which suggest that only members of a particular group are targeted, may have the same effect. Examples of statements of this nature are:

the use of sex-specific job titles, specifications or requirements such as “waitress salesman/patrolman/meter maid wanted” or “male help wanted”, “young man with a college degree wanted”, “recently graduated university or college student wanted”, “salesperson wanted .... due to extensive travelling, preferably single”; or “person under 32 years of age wanted”.<sup>446</sup>

They point out that formulations of this nature may, by creating the impression amongst certain groups that applying for positions would be fruitless, directly or indirectly exclude or

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<sup>446</sup> Pretorius *et al* 2001: 8.1.3.1.

discourage candidates from applying on the basis of a prohibited ground. The accessibility of the media, and the demographic, geographic, language or other target selection of an advertisement may also have a discriminatory effect. It can therefore be concluded that, in order to be free of any discriminatory content, a job advertisement should include only the most specific and relevant functions of, and qualifications for, the job. If a specific job requirement specification is adopted, the specification will have to be justified as being validly related to the inherent requirements of the job or some other legitimate, job-related interest.<sup>447</sup> The same consideration in the context of section 12 will determine the bona fides of the dissemination, publication, broadcast or display at issue.

The following situations provide examples of expression that may conceivably be covered by section 12. A local shop owner in a neighbourhood where xenophobia thrives, offers for sale posters portraying the name of the neighbourhood and an image of a foreigner with a circle and slash, the universal symbol for forbidden, not allowed or not wanted, printed over the image.<sup>448</sup> It will certainly be reasonable to infer that the posters are clearly intended for use by residents to convey to foreigners that they are not welcome in their places of business. A hypothetical analysis in terms of section 14 of the fairness of such display of the posters will certainly substantiate a conclusion of unfairness. It is contended that section 12 can be employed to obtain an interdict against the sale of the posters. No evidence that the posters had been or would indeed be displayed with harmful effects will be required.

Another example is the dissemination of a questionnaire to be completed by students interested in attending a language course in preparation for university education. The questionnaire requests an indication of the sexual orientation of the prospective student. It can evidently be reasonably inferred that the questionnaire implies that the sexual orientation of the applicant will be a consideration in deciding whether or not he or she will be accepted for the course.

It is apparent that, similar to section 10, the most significant effect of section 12 is in the broader societal context. Section 12 firstly prevents intended unfair discrimination. It also prevents the creation of an erroneous perception that intended unfair discrimination is

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<sup>447</sup> Pretorius *et al* 2001: 8.1.3.1.

<sup>448</sup> A similar situation was adjudicated in *Saskatchewan (Human Rights Commission) v Bell (c.o.b. Chop Shop Motorcycle Parts)* 1994 CanLII 4699 (SK CA): <<http://canlii.ca/t/1nqr5>>.

tolerated. The detrimental effect of tolerating the dissemination or display of publications or advertisements of this nature may conceivably, firstly, be the direct impact on those who may respond to the expectation of unfair discrimination to their disadvantage, for example by not applying for a position.<sup>449</sup> Secondly, in a broader societal context, it may be the reinforcement of stereotypes or the creation of an impression that society, and government for that matter, condones unfair discrimination. Section 12 should entail that those who bona fide disseminate or publish information will take care not to unintentionally create the impression that unfair discrimination will occur. As far as the right to freedom of expression is concerned, this obligation does not bar the dissemination of legitimate information in an accountable and unambiguous way.

Finally it is suggested that section 12 may serve to give effect to the obligations in terms of article 4 of the *ICERD* to the extent that it proscribes “assistance to racist activities” by means of advertising or facilitating financial or other support for such activities.

#### **4.8.4 Comparison with Saskatchewan (Human Rights Commission) v Whatcott**

Recently, the Supreme Court of Canada, in the matter of *Saskatchewan (Human Rights Commission) v Whatcott*, upheld key provisions against “hate speech” in the *Saskatchewan Human Rights Code*, but struck down some of the *Code’s* wording.<sup>450</sup> The judgment deals with concepts similar to those relevant to the present discussion. The judgment also promptly received serious criticism in the media for its generalised views on “hate speech” and the effects of “hate speech” in the context of freedom of expression.<sup>451</sup>

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<sup>449</sup> Pretorius *et al* 2001: 8.1.3.1.

<sup>450</sup> The human rights codes of several other federal states of Canada have comparable provisions, namely Alberta under section 2 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., 2000, c. H-14; British Columbia under section 7 of the *Human Rights Code*, R.S.B.C., 1996, c. 210; Northwest Territories under section 13 of the *Consolidation of Human Rights Act*, R.S.N.W.T., 2002, c. 18. See Moon 2008-2009: 16 fn 32.

<sup>451</sup> See as examples:

National Post 27-02-2013: <<http://fullcomment.nationalpost.com/2013/02/27/andrew-coyne-supreme-court-twists-the-charter-of-rights-in-its-haste-to-limit-free-speech/>>;

CBC News 27-02-2013: <<http://www.cbc.ca/news/politics/top-court-upholds-key-part-of-sask-anti-hate-law-1.1068276>>;

*The Globe & Mail* 28-02-2013: <<http://www.theglobeandmail.com/commentary/whatcott-ruling-is-a-very-real-burden-on-some-speech/article9133370/>>;

Macleans 27-02-2013: <<http://www2.macleans.ca/2013/02/27/the-whatcott-case-drawing-a-line-between-free-speech-and-hate/>> (accessed on 6-10-2013).

The Court had to decide an appeal by the Saskatchewan Human Rights Commission against a court decision that overturned its original ruling against William Whatcott, who published and distributed four anti-gay flyers in towns and cities in Saskatchewan in 2001 and 2002. Four people filed complaints with the Commission concerning the flyers. The first two sets of flyers were titled “Keep homosexuality out of Saskatoon’s public schools” (flyer D) and “Sodomites in our public schools” (flyer E)<sup>452</sup> Relevant phrases from the first flyer read as follows:

... children ... learning how wonderful it is for two men to sodomize each other; Now the homosexuals want to share their filth and propaganda with Saskatchewan’s children; degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience; ex-Sodomites and other types of sex addicts who have been able to break free of their sexual bondage and develop wholesome and healthy relationships; sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them; Our children will pay the price in disease, death, abuse ...if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong.<sup>453</sup>

Relevant phrases from the second flyer read as follows:

Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!; Born Gay? No Way! Homosexual sex is about risky and addictive behaviour!; If Saskatchewan’s sodomites have their way, your school board will be celebrating buggery too!; Don’t kid your selves; homosexuality is going to be taught to your children and it won’t be the media stereotypes of two monogamous men holding hands; The Bible is clear that homosexuality is an abomination; Sodom and Gomorrah was given over completely to homosexual perversion and as a result destroyed by God’s wrath; Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children.<sup>454</sup>

The other two sets of flyers were held not to constitute “hate speech”.

The relevant section of the *Code* reads as follows:

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<sup>452</sup> *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11: par 8.

<sup>453</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 182.

<sup>454</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 183.

- 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:
- (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
  - (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
- (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

In terms of the *Code*, a court may order positive measures to be taken to remedy a contravention of the *Code*, and may order compensation of the injured person.<sup>455</sup> There is no provision for criminal sanctions, except with respect to a contravention of, or failure to comply with, an order made.

The Court confirmed that section 14(1)(b) infringed the rights to freedom of expression and freedom of conscience and religion as guaranteed under section 2(a) of the Charter. The question was whether the limitation was prescribed by law within the meaning of section 1 of the Charter. In the Court's view, the only expression captured by section 14(1)(b) of the *Code* was "hate-inspiring expression that adds little value to the political discourse or to the quest for truth, self-fulfilment, and an embracing marketplace of ideas".<sup>456</sup> The Court related its interpretation of "hatred" to the interpretation of Chief Justice Dickson in *Canada (Human Rights Commission) v Taylor* that hatred "refers to unusually strong and deep-felt emotions of detestation, calumny and vilification".<sup>457</sup> It was held that the term "hatred" should be applied objectively to determine "whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination".<sup>458</sup> The Court further held that whether or not the author of the expression had the intention to incite hatred or discriminatory treatment is irrelevant. "The key is to determine the likely effect of

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<sup>455</sup> Sections 31.3 & 31.4 of the *Code*.

<sup>456</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 177.

<sup>457</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 24. See also Chapter IV: 4.3.2.2.

<sup>458</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 35.

the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.”<sup>459</sup> Expression which, while repugnant and offensive, “does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects” does not comply.<sup>460</sup> On this basis, expression in terms of section 14 that “ridicules, belittles or otherwise affronts the dignity of” does not rise to the required level. In contrast, expression that “exposes or tends to expose to hatred” captures expression which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent.<sup>461</sup>

Proceeding from the premise that “hate speech” stifles rather than promotes public discourse, the Court held that section 14, absent the unconstitutional phrase, “provides an appropriate means by which to protect almost the entirety of political discourse as a vital part of freedom of expression. It extricates only an extreme and marginal type of expression which contributes little to the values underlying freedom of expression and whose restriction is therefore easier to justify.”<sup>462</sup> In considering the alleged overly broad nature of the provision, the Court stated:

[W]here the conduct targeted by speech is a crucial aspect of the identity of a vulnerable group, attacks on this conduct stand as a proxy for attack on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It clearly targets the vulnerable group.<sup>463</sup>

The Court held that the lack of defences did not render the provision overly broad. “Allowing the dissemination of hate speech to be excused by a sincerely held belief would provide an absolute defence and would gut the prohibition of effectiveness.”<sup>464</sup> Moreover:

the fact that a person circulates a hate publication in the furtherance of a sincere religious belief goes to the question of the subjective view of the publisher, which is irrelevant to the objective application of the definition of hatred. Allowing the dissemination of hate speech to be excused

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<sup>459</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 58.

<sup>460</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 57.

<sup>461</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 111.

<sup>462</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 120.

<sup>463</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 124.

<sup>464</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 136.

by a sincerely held belief would, in effect, provide an absolute defence and would gut the prohibition of effectiveness.<sup>465</sup>

*In casu*, it was not in dispute that Whatcott sincerely believed that his religion required him to proselytise homosexuals.

The Court held that the flyers were discriminatory based on sexual orientation<sup>466</sup> and would objectively be seen as exposing homosexuals to detestation and vilification.<sup>467</sup> Moreover, the flyers included expression promoting the discriminatory treatment of homosexuals. It was not unreasonable to conclude that this expression would, more likely than not, expose homosexuals to hatred.<sup>468</sup>

Some of the above-mentioned findings of the Court were questioned based on the following considerations.

It was argued that, in effect, the Court's conclusion was essentially based on an objective assessment of whether unusually strong and deep-felt emotions of detestation, calumny and vilification were expressed. The other considerations concerned inferences drawn from an affirmative outcome of this assessment. The problem with this approach is, firstly, that the term "hatred" is inherently subjective, and its meaning "capable of different interpretations depending on the subjective experience of both the author and recipient of expression".<sup>469</sup>

Secondly, as far as the consequences of expression that is found to convey the above-mentioned emotions are concerned, it should be considered that, rather than stifling public discourse, the right to expression on controversial issues, even in passionate terms, maybe born from humiliation and hatred, is often an important tool in the promotion of equality.<sup>470</sup>

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<sup>465</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 143.

<sup>466</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 176.

<sup>467</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 191.

<sup>468</sup> *Saskatchewan (Human Rights Commission) v Whatcott*: par 192.

<sup>469</sup> See the Memorandum of Argument of the Canadian Civil Liberties Association, an intervener in the *Whatcott* case: par 8.

<sup>470</sup> See the Memorandum of Argument of the Canadian Civil Liberties Association, an intervener in the *Whatcott* case: par 3.

Lastly, granting an order of compensation “solely on the basis of the subjective effect of the expressive activity, without regard to the intention of the author, or their sincere belief in the content of the expression”, exacerbates the chilling effect of the section.<sup>471</sup>

In contrast to section 14 of the *Code*, section 10 of the *Equality Act* does not cover bona fide engagement in expressive activities, which are protected in terms of the Constitution. A statement will not be held to constitute “hate speech” in terms of section 10 on the sole basis that its stereotypical and emotional content could be construed to reflect or instil feelings of hatred. To determine whether or not expression is bona fide requires an interrelated subjective as well as objective analysis.<sup>472</sup> The analysis distinguishes expression that, in context, serves the values of freedom of expression, from expression that instead primarily serves to hurt or harm people based on their group identity or to promote hatred. Hence, instead of relying on an assumption that the values that inform the protection of expression cannot be served when expression can reasonably be seen as, for example, exposing homosexuals to detestation and vilification, section 10 in terms of the bona fide qualification excludes from its ambit expression that can reasonably be seen as engagement in a protected form of expression. In this way, the risk of prohibiting expression that has significant value is minimal.

It is contended that the expression *in casu* would be found to constitute “hate speech” in terms of section 10 of the Act. While some of the remarks on the flyers may be informational and aimed at articulating the viewpoint of the author, others can undoubtedly reasonably be construed to demonstrate a clear intention to be hurtful or harmful or to incite harm or promote or propagate hatred. In determining whether or not the dissemination of the flyers constitutes bona fide engagement in the publication of information, it will be considered whether the author sincerely holds the religious view that homosexuality can be cured and that a homosexual lifestyle, including sexual practices, is sinful. However, it will also be considered whether this view could be conveyed, even passionately so, without resorting to degrading and humiliating expression with regard to homosexual people. The inference will be that the flyers are not objectively bona fide informational. It may furthermore, on the same basis, be held to be evident that the inclusion of the hurtful remarks was not subjectively bona

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<sup>471</sup> See the Memorandum of Argument of the Canadian Civil Liberties Association, an intervener in the *Whatcott* case: par 9.

<sup>472</sup> See the discussion in 4.7.2.2 of the phrase “*bona fide* engagement in”.



vide but was primarily directed at hurting or harming homosexual people, or at the promotion of hatred in society.

## 4.9 Harassment

### 4.9.1 *Definitional aspects*

As was stated above, section 15 provides that, in cases of harassment, as in cases of “hate speech”, section 14 does not apply. Section 10 defines a narrow field of discriminatory expression which is categorically assumed to promote inequality. It was contended above that this assumption can be substantiated. The question arises whether the same assumption applies to all forms of expression within the ambit of the prohibition of harassment in terms of section 11.

It will appear from the subsequent discussion that, unlike definitions of “hate speech” which are primarily concerned with the constitutional society’s autonomous choice and commitment to promote a culture of human dignity and equality for all, the apparent premise of the prohibition of harassment in terms of section 11 is concern with harm to individual complainants, although protection against harassment certainly serves to generally promote equality.

Section 1 of the Act defines “harassment” as:

unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

- (a) sex, gender or sexual orientation, or
- (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

Roederer points out that a number of small acts that individually are not serious may together constitute harassment. Alternatively, a single serious act can constitute harassment.<sup>473</sup> “Conduct” constituting harassment can obviously include expression. The implication is that

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<sup>473</sup> Roederer in Albertyn *et al* 2001: 99.

the prohibition of harassment may infringe the right to freedom of expression to the extent that expressive conduct within its ambit exceeds the ambit of section 16(2) of the Constitution.

“To demean or humiliate” means to disgrace or dishonour or shame someone. It is apparent that to prove that conduct was unwanted and has demeaned or humiliated will essentially require objective evidence with respect to the nature of the conduct, as well as evidence on the subjective experience of the victim. The creation of a hostile or intimidating environment, or calculated conduct to induce submission, may conceivably be substantiated by objective, context-related evidence. However, even in the latter instance, evidence with respect to the subjective experience of alleged victims will be relevant.

Other definitions and descriptions that will subsequently be quoted will, even if only by implication, corroborate this approach.<sup>474</sup> Joubert, Van Wyk and Rothman describe sexual harassment as an “intrapersonal phenomenon”. They emphasise that, as a result of “the diversity of the parties involved in sexual harassment, their backgrounds, cultures and perceptions it is a nearly impossible task to define what exactly constitutes sexual harassment”, What is harassment to one person may not be to another.<sup>475</sup> Depending on the form it takes, “harassment” in many jurisdictions constitutes a criminal offence or a delict, and various delictual and criminal remedies are in place.<sup>476</sup>

The South African *Protection from Harassment Act 17/2011*, which came into operation on 27 April 2013,<sup>477</sup> provides for the issuing by a magistrate’s court of a protection order against

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<sup>474</sup> Also see the definitions referred to by Abe 2012: 213-214.

<sup>475</sup> Joubert *et al* 2011: 172.

<sup>476</sup> See, for example, the Canadian *Criminal Code* RSC 1985 c C-46 section 264: <<http://canlii.ca/t/lf1r>> which provides as follows:

- (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
- (2) The conduct mentioned in subsection (1) consists of (a) repeatedly following from place to place the other person or anyone known to them; (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or (d) engaging in threatening conduct directed at the other person or any member of their family.

A further example is the *Protection from Harassment Act 1997*(UK) c 40.

<sup>477</sup> See Pretorius *et al* 2001: 6.7.

harassment. The broad definition of “harassment” in terms of section 1 of the Act reads as follows:

“harassment” means directly or indirectly engaging in conduct that the respondent knows or ought to know –

- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –
  - (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
  - (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
  - (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or
- (b) amounts to sexual harassment of the complainant or a related person . . . .

“sexual harassment” means any –

- (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;
- (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
- (c) implied or expressed promise of reward for complying with a sexually-oriented request; or
- (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.

“Harm” is defined as “ any mental, psychological, physical or economic harm.

It appears that the definition includes harassment by means of abusive electronic communication via social-media platforms such as Twitter, Facebook and Mxit, as well as stalking and bullying.

Harassment in the workplace is generally regarded as an unjustifiable form of discrimination. It has been prohibited and regulated in many jurisdictions in terms of employment legislation

and codes of conduct. While sexual harassment in particular is more generally explicitly prohibited,<sup>478</sup> other forms of workplace harassment are also recognised and prohibited in terms of general harassment clauses and/or discrimination prohibitions.<sup>479</sup>

The *EEA*<sup>480</sup> specifically states under its prohibition of unfair discrimination clause that “harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection 1”.<sup>481</sup> In *J v M Limited*<sup>482</sup>, a case which has been followed in numerous sexual-harassment cases, sexual harassment was defined broadly as “unwanted sexual attention in the employment environment ... which has a negative effect on the recipient”. The *NEDLAC Harassment Code*<sup>483</sup> defines sexual harassment as “unwanted conduct of a sexual nature”.<sup>484</sup> The 2005 *Amended Code of Good Practice on the Handling of Sexual Harassment Cases*, which was issued in terms of the *Labour Relations Act 66/1995*, defines sexual harassment as follows:

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<sup>478</sup> The *EU Code of Practice on Measures to Combat Sexual Harassment* for example focuses on sexual harassment as a form of employment discrimination that prevents “the proper integration of women into the labour market”, The *Code* aims both at preventing sexual harassment and ensuring that adequate procedures are available to deal with sexual harassment should it occur. Sexual harassment is defined as unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct. It is unacceptable if such conduct is “unwanted, unreasonable and offensive to the recipient; a person’s rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person’s access to vocational training or to employment, continued employment, promotion, salary or any other employment decisions; and/or such conduct creates an intimidating, hostile or humiliating working environment for the recipient. EU: <[http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992H0131&model=guichett](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992H0131&model=guichett)> (accessed on 3-04-2013).

<sup>479</sup> Mason 2002: 597-598. Sex-based harassment, as distinguished from sexual harassment, has, for example, been defined in the employment context as: “adverse or demeaning language or conduct generally indicating hostility in the presence of persons in the workplace because of their sex”. It includes derogatory remarks such as “women are hysterical”, “this is a man’s job” and “only a stupid female”. See *Institute Cleaning Co Ltd v Heads* [1995] IRLR 4 EAT. *Price Waterhouse v Hopkins* (1989) 109 SCt 1775, where a complainant alleging sex discrimination was denied a partnership, could serve as a further example. It was suggested to her that she try charm school, a different dress style and improved manners for “a more feminine approach”. See Chew & Kelley 2006: 51-52 where racial harassment is defined as “a particular form of racism and of harassment which occurs when individuals are intimidated, insulted, bullied, excessively monitored or otherwise harassed because of their race”.

<sup>480</sup> The *EEA* outlaws harassment as a form of unfair discrimination, and case law explaining the concept mostly concerns harassment in the employment context. The term “harassment” is not defined in the Act. See Pretorius *et al* 2001: 6.2.2.

<sup>481</sup> *EEA*: section 6(3).

<sup>482</sup> *J v M Limited* (1989) 10 ILJ 755 (IC): 757 D-G.

<sup>483</sup> *Code of Good Practice on the Handling of Sexual Harassment Cases* issued by the National Economic Development and Labour Council (NEDLAC) under the *Labour Relations Act 66/1995*: Notice 1367 of 1998. The *Canada Labour Code*: section 247(1) defines “sexual harassment” as “any conduct, comment, gesture or contact of a sexual nature (a) that is likely to cause offence or humiliation to any employee; or (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion”.

<sup>484</sup> For a discussion of the reasonableness and fault requirements implicit in the definition of harassment, see Campanella 1994: 491-500.

Sexual harassment is unwanted conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- (a) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- (b) whether the sexual conduct was unwelcome;
- (c) the nature and extent of the sexual conduct; and
- (d) the impact of the sexual conduct on the employee.

Crocker, in an analogy between sexual harassment in employment and in education, states that just as it is discriminatory to require women, and not men, to meet sex-based demands unrelated to work performance in order to obtain or maintain the benefits of a job, so it is discriminatory to make a student's access to educational benefits depend on her compliance with extra-educational, sex-based demands. The same reasoning will apply to a working or educational environment where the working or educational experience of an employee or student is jeopardised based on protected attributes.<sup>485</sup>

It is apparent that harassment can be constituted by expression. Even in American law, Title VII of the *Civil Rights Act* of 1964 exists along with the *First Amendment*. In *Meritor Savings Bank v Vinson*,<sup>486</sup> the Court however reiterated that utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII.<sup>487</sup> The discussion of *R.A.V. v City of St Paul* and *Virginia v Black* in Chapter IV concluded that the explicit exception of Title VII hostile work environment claims from the application of the doctrine of content neutrality allowed the state to restrict low-value speech associated with a specific message, as long as the state was motivated by legitimate state interests, in this instance “associated with particular ‘secondary effects’ of the speech”, and not by the desire to suppress ideas.<sup>488</sup>

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<sup>485</sup> Crocker 1981: 553.

<sup>486</sup> *Meritor Savings Bank v Vinson* 477 US 57 (1986).

<sup>487</sup> *Meritor Savings Bank v Vinson*: 67. See also, with respect to racial harassment, *Rogers v EEOC* 454 F.2d 234 (CA5 1971).

<sup>488</sup> Chapter IV: 2.5.1.

Prohibitions of harassment are generally restricted to specific spheres of life. The following provisions refer to spheres outside the employment context.

Section 14(1) of the *Canadian Human Rights Act*<sup>489</sup> provides that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination (a) in the provision of goods, services, facilities or accommodation customarily available to the general public, (b) in the provision of commercial premises or residential accommodation, or (c) in matters related to employment.

The *Australian Sex Discrimination Act*<sup>490</sup> defines sexual harassment as follows:

- (1) For the purposes of this Division<sup>491</sup> a person sexually harasses another person ... if:
  - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
  - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

It is stipulated that conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing. The application of the section is then confined to the employment environment, educational institutions, clubs, and functions performed or powers exercised in terms of Commonwealth laws and programmes.

The relevance of the environmental context of harassment within discrimination law is related to the unfair discrimination requirement of disproportional consequential harm to individuals protected in terms of a prohibited ground of discrimination.

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<sup>489</sup> *Canadian Human Rights Act* – R.S.C. 1985.

<sup>490</sup> *Australian Sex Discrimination Act* 4/1984 as amended:

<[http://www.comlaw.gov.au/Details/C2012C00313/Html/Text#\\_Toc320024499](http://www.comlaw.gov.au/Details/C2012C00313/Html/Text#_Toc320024499)>.

<sup>491</sup> Division 3.

#### ***4.9.2 Harassment in contrast to protected rude expression***

The primary question in the context of the study remains where to draw the line between harassment and protected crude, offensive expressions of ideas. Even within the context of Title VII, Ruescher regards this distinction as a problem. He acknowledges the fact that even speech touching on political, religious or social issues has the potential of being used as a means by employers or co-employees to make others uncomfortable on the job.<sup>492</sup> The same concern with respect to university speech codes was pointed out and discussed in Chapter IV.<sup>493</sup>

It is contended that, even though section 11 of the Act is excluded from the application of section 14, fairness considerations are implied in its inherent requirements. A situation where typical justifications for presumptively unfair discriminatory conduct, for example inherent job requirements<sup>494</sup> or reasonable and justifiable differentiation between persons according to objectively determinable criteria intrinsic to the activity concerned,<sup>495</sup> apply will not constitute harassment. Similarly, the vulnerability, powerlessness and the consequent susceptibility to intimidation of victims, related to membership of a group protected in terms of the equality provisions of the Constitution, will be a relevant consideration in determining the existence of harassment. The following example of harassment in the employment context illustrates the contention. The scenario is a predominantly female environment where art works demonstrating sexism and acts of discrimination against women are displayed, and seminars providing information on the subject of gender inequality and reasonable ways to combat it are held on a daily basis. A sole male cleaning-staff member experiences the environment as hostile and intimidating.<sup>496</sup> If the employer is a society with the primary aim of promoting gender equality, the worker will hardly establish a reasonable basis for not wanting the conduct. In contrast, if the employer's business is, for example, architecture, the worker may have an arguable claim that he is harassed on the basis that he is subjected to unwanted, persistent conduct that creates an intimidating environment which deprives him of a secure work environment where he can reach his full potential.<sup>497</sup> In a fairness analysis with

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<sup>492</sup> Ruescher 2004: 375.

<sup>493</sup> See Chapter IV: 2.5.3.

<sup>494</sup> Pretorius *et al* 2001: 5.2.

<sup>495</sup> Section 14 of the *Equality Act*.

<sup>496</sup> The scenario is based on an example provided by Roederer in Albertyn *et al* 2001: 102.

<sup>497</sup> Roederer in Albertyn *et al* 2001: 102.

respect to the first scenario, the right to freedom of expression would weigh against prohibiting the relevant conduct. In the second scenario, if it was established that the environment was indeed intimidatory vis-à-vis the employee's gender, the speech value would be minimised by the fact that, in context, the employee will be disempowered to respond to the expression in a meaningful way.

Against this background, the application of section 11 to public speech in the matter of *Sonke Gender Justice Network v Malema* is problematic. The matter concerned the following statement made by the respondent when he addressed members of the public at a political rally.

When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, [and request] breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask [for] taxi money from somebody who raped you.<sup>498</sup>

The Court interpreted this remark as constituting "hate speech" in terms of section 10 of the Act.<sup>499</sup> It in addition held that it constituted harassment in terms of section 11.<sup>500</sup>

With respect to the harassment claim, the Court based its conclusion on its finding that the utterances made by the respondent seriously humiliated and demeaned women in general, and, more specifically, alleged rape survivors.<sup>501</sup> These very same facts and considerations had constituted the basis for the Court's finding of "hate speech". In the absence of consideration either of exclusions similar to those in the section 12 proviso or a fairness analysis, the approach followed by the Court not only resulted in a duplication of claims, but also allowed section 11 to completely supersede section 10.<sup>502</sup> It is contended that, in the absence of evidence that the utterances did humiliate, demean or intimidate individual complainants, causing them mental, psychological, physical or economic harm, and, furthermore, in the absence of evidence that a hostile or intimidating environment was

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<sup>498</sup> *Sonke Gender Justice Network v Malema* [2010] ZAEQC 2: par 2.

<sup>499</sup> *Sonke Gender Justice Network v Malema*: par 17.

<sup>500</sup> *Sonke Gender Justice Network v Malema*: par 22.

<sup>501</sup> *Sonke Gender Justice Network v Malema*: par 22.

<sup>502</sup> The Equality Court concluded that, on the very same basis, section 12 was also contravened. This finding can, however, be criticised in terms of the Court's interpretation of section 12 and will therefore not serve to corroborate the present argument.



created or that the utterances were calculated and had the potential to induce submission by actual or threatened adverse circumstances, harassment in terms of section 11 was not proved. Many women probably experienced indignation rather than humiliation when the utterances came to their knowledge. Moreover, the utterances of a single politician do not represent the character of society as a whole. As a matter of fact, the utterances were vehemently condemned by members of society as well as by various associations.

#### ***4.9.3 Conclusion***

It is submitted that harassment as defined in terms of the Act should be regarded, and should be purposively interpreted and applied, as a form of unfair discrimination.

### **4.10 The application of section 36 of the Constitution**

#### ***4.10.1 The need for justification***

Section 36 provides:

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

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

Pretorius points out that members of the Constitutional Court have raised doubts whether the fairness and proportionality inquiries are distinguishable. He observes that the Court, “more often than not, ends its fairness inquiry with a conclusion typical of the balancing analysis of the proportionality test”. He contends that this is because, “as a relational concept, fairness necessarily involves a weighing and balancing of competing interests and considerations”. It

is the “cumulative effect of these competing factors that must be examined in order to come to a conclusion on unfairness”.<sup>503</sup>

In accordance with the above approach, only the categorical provisions of the Act, namely section 10 and section 12 to the limited extent that they are categorical, will next be subjected to a limitation analysis. Section 11 is excluded in the light of the above interpretation that a determination of harassment in terms of the section does in fact involve fairness and justification considerations on a case-by-case basis.

Theoretically, it can be argued that, if it is established that the expression contemplated by the categorical prohibitions does threaten the equality and human dignity rights to the extent that the prohibition gives due effect to the obligation in terms of sections 9(3) and (4) of the Constitution, there will be no limitation of the right to freedom of expression. It follows that justification for the prohibition of the expression is not required. A comparison between the importance of the values underlying the right allegedly being infringed and the importance of a competing right or interest is also not required.<sup>504</sup> The relevant considerations will be “what values underlie the right and then, in turn, what practices serve those values”.<sup>505</sup> However, as a result of the inherent tension between the values that inform the right to freedom of expression, and the fact that unfairness is a definitional element of the expression that is prohibited, a “definitional or threshold”<sup>506</sup> inquiry will in fact nevertheless effectively involve a proportionality analysis that considers the very factors enumerated in section 36(1).<sup>507</sup> Notwithstanding the approach that is followed, the assessment of the nature of the right that is limited by the prohibition, and of the extent of the limitation, will require an analysis on the basis of the discussion in Chapter II.

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<sup>503</sup> Pretorius 2010: 552-553. In *MEC for Education: KwaZulu-Natal and Others v Pillay*, it was pointed out, with reference to section 14(d), (f), (g) and (h) of the *Equality Act*, that the list of factors in the fairness analysis of the Act includes issues that traditionally were relevant to a limitation analysis under section 36(1) of the Constitution. The Court raised, but did not address, the question of whether or not that approach was consistent with the Constitution.

<sup>504</sup> Woolman & Botha in Woolman & Bishop 2008: 34-20; Iles 2007: 72-75.

<sup>505</sup> Woolman & Botha in Woolman & Bishop 2008: 34-20; Iles 2007: 72-75.

<sup>506</sup> *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC): par 21; *Prinsloo v Van der Linde* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997): par 35; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1: par 82.

<sup>507</sup> *Khumalo v Holomisa*: par 33.

The application of section 36 by the Constitutional Court in *Khumalo and Others v Holomisa* illustrates the integration of normative analysis of the value of the expression at stake in the proportionality assessment exercised in terms of section 36. The Court stated that “there can be no doubt that the law of defamation does affect the right to freedom of expression”. In the subsequent justification analysis, it stated that “there can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements”.<sup>508</sup> In corroboration of this observation, the following *dictum* from the Canadian case of *Hill v Church of Scientology of Toronto* was quoted with approval:

False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.

It was observed that, “similarly, no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation”.<sup>509</sup> The restriction was held to be constitutional on this basis.<sup>510</sup> In *De Reuck and Others v Director of Public Prosecutions (Witwatersrand Local Division) and Others*, an argument that the materials at issue did not serve any of the values traditionally considered as underlying freedom of expression, namely truth-seeking, free political activity and self-fulfilment, and that no justification for any infringement of freedom of expression was therefore needed, was rejected. The Court held that the argument must fail on the basis that section 16(1) expressly protects the freedom of expression in a manner that does not warrant a narrow reading, and that limitations of rights are dealt with under section 36 of the Constitution and not at the threshold level.<sup>511</sup> The Court then proceeded to assess, in terms of section 36(1)(a) and (c), “what values underlie the right and then, in turn, what practices serve those values”. In considering the nature of the right and the extent of the limitation, the Court determined the value of the particular expression at issue, relative to the general normative value of constitutionally protected freedom of

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<sup>508</sup> *Khumalo and Others v Holomisa*: par 35.

<sup>509</sup> *Khumalo and Others v Holomisa*: par 35. The conclusion in *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 was reached after a proportionality exercise weighing up the right to the protection of reputation against the right to freedom of expression.

<sup>510</sup> The balancing exercise that was subsequently conducted by the Court concerned the “chilling effect” on freedom of expression as a consequence of the common law requirement that places the burden of proving truth on the defendant. The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit: *Khumalo and Others v Holomisa*: par 37-43.

<sup>511</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 48-50.

expression. It concluded that the expression was “expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of the freedom of expression in many democratic societies”.<sup>512</sup> The Court found that, in the light of the fact that the provisions at issue were concerned with “the narrow area of child pornography and the material connected with a market in which children are abused and which poses a reasonable risk of harm in the hands of the average possessor”, the nature and extent of the limitation were not severe.<sup>513</sup> Reference was made to the case of *New York v Ferber* where the Supreme Court ruled unanimously that the right to free speech did not forbid states from banning the sale of material depicting children engaged in sexual activity.<sup>514</sup> In the light of these considerations, the Court held that the limitation of the right *in casu* did not “implicate the core values” of the right to freedom of expression, but restricted expression which, for the most part, was expression of little value. The analysis of the relationship between the limitation and its purpose that followed primarily addressed allegations that specific categories of the prohibition were overly broad.<sup>515</sup>

An analogy can be drawn with the extension in *R v Keegstra* of the second-stage analysis in terms of section 1 of the Charter to also consider the right at stake at threshold level. This approach culminated in the expression being awarded a “low level of constitutional protection”.<sup>516</sup> The following statement of the majority in *R v Keegstra* articulates the importance of a value-based assessment by the Court prior to its section 1 proportionality analysis:

Obviously, one’s conception of the freedom of expression provides a crucial backdrop to any section 2(b) inquiry; the values promoted by the freedom help not only to define the ambit of section 2(b), but also come to the forefront when discussing how competing interests might co-exist with the freedom under section 1 of the Charter.

It was regarded as “destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of section 2(b)”.<sup>517</sup> The Court confirmed that analysing the conflicting

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<sup>512</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 59.

<sup>513</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 79.

<sup>514</sup> See Chapter IV: 2.4.2.4.

<sup>515</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 60 & 61-88.

<sup>516</sup> *R v Keegstra*: par VII D (i). See Chapter IV: 4.3.1.3.

<sup>517</sup> *R v Keegstra*: par VII D.(i).

values in their factual and social context “permits the courts to have regard to special features of the expression in question”. As indicated in Chapter IV, a similar approach was followed in the context of step 3 of the proportionality test applied in German jurisprudence.<sup>518</sup>

What is clear is that the value of expression determined at threshold level is a crucial aspect in the justification of limitations of freedom of expression. When expression is found to be of low value, mere legitimate reasons for its limitation may be readily accepted.<sup>519</sup>

The ruling of the Constitutional Court that all expression outside the ambit of section 16(2)(c) enjoys constitutional protection under section 16(1) is in accordance with the above considerations. In the context of freedom of expression, it is of particular significance that the state will be held accountable in terms of the constitutional justification standard.<sup>520</sup> The discussion of the democracy theory as rationale for the constitutional protection of the right to freedom of expression has pointed out the dangers of the manipulation of expression by the state to serve political motives. The complexity of determining the scope of expression that should be excluded on the basis that it is irreconcilable with democracy has also been highlighted<sup>521</sup> Meyerson’s caution that, because of the availability of ostensibly neutral justifications for what in fact are content-based restrictions aimed at the pursuit of non-neutral aims, policy considerations should be carefully scrutinised in determining the scope of the right to freedom of expression,<sup>522</sup> is relevant in this context.

#### **4.10.2 Application to sections 10, 11 and 12 of the Act**

To the extent that section 10 prohibits expression within the ambit of section 16(2) of the Constitution, no justification in terms of section 36 is required.<sup>523</sup> Within its limited field of application, section 10 exceeds this ambit in the following respects. Firstly, the provision “could reasonably be construed to demonstrate a clear intention ... to incite harm” exceeds section 16(2)(c) on the basis that the Constitution, in contrast to section 10, requires actual

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<sup>518</sup> See Chapter IV: 3.4.

<sup>519</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 40.

<sup>520</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 32; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 47; *Print Media South Africa and Another v Minister of Home Affairs and Another* (14343/2010) [2011] ZAGPJHC: par 48.

<sup>521</sup> See Chapter II: 3.2.

<sup>522</sup> Meyerson 1997: 90-91.

<sup>523</sup> The nature of the available sanctions does not require justification in this context.

constitution of incitement, which implies a likelihood that the intended aims of the expression will be realised. Secondly, section 16(2)(c) restricts the mode of expression to the advocacy of hatred, in contrast to the much less restricted modes of expression in terms of section 10. Thirdly, in contrast to the four grounds for “hate speech” in terms of section 16(2)(c), all the prohibited grounds in terms of the *Equality Act* are included in terms of section 10. Fourthly, section 10 not only involves expression that incites to cause harm, but also expression that directly harms or hurts.

Section 12 exceeds the ambit of unfair discrimination to the extent that it prohibits the creation of a reasonable perception that unfair discrimination will occur, regardless of whether the perception is correct or not.

An assessment of the values informing the protection of the right, as well as an affirmation of specific limitations to the right set by the Constitution, involves the following considerations.

It is relevant that the sections do not criminalise the expression that they prohibit. In both instances, remedies are available that aim to positively address the negative emotions that inspire the hateful expression or to set right the erroneous perception.

It is clear that the expression concerned has the potential to demean persons in their inherent humanity and dignity. However, if the expression is informed by the values that underlie the protection of freedom of expression, it may nevertheless promote equality rather than the opposite. Its protection will then serve an important societal goal which will diminish the detrimental effect. The achievement of this goal may furthermore outbalance the detrimental impact. As was contended above, the consideration of these matters requires a determination of the value of the expression that is prohibited.

Section 10 has been interpreted above as prohibiting the advocacy of hatred, based on any of the prohibited grounds, as well as expression not bona fide aimed at the communication of information, but primarily concerned with hurting or harming people or inciting harm on the basis of the group characteristics stipulated in section 1(1)(xxii) of the Act, or with the promotion of hatred on these grounds. It has been contended that this includes so-called “assaultive speech” and the promotion of hatred by means such as the humiliation of

vulnerable people on the aforementioned grounds. Oversensitivity is eliminated in terms of a reasonableness standard. This standard provides flexibility so as to accommodate society's level of tolerance at a given time. The "chilling effect" on free expression in general is minimised by the nature of the potential consequences of a transgression of the prohibition.

The capacity to hurt by means of discriminatory expression is enhanced in the context of South African history. The description of the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority and Others* of the constitutional obligation in terms of section 192 to regulate broadcasting to "ensure fairness and a diversity of views broadly representing South African society" as "a mandate which is hardly surprising in a country still riddled with a legacy of inequalities, and in which not all have equal access to and control of resources, including the electronic media", is noteworthy in this regard.<sup>524</sup> The Court remarked that "South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear".<sup>525</sup> Rautenbach cautions that South Africa cannot afford to allow unrestrained speech to destroy what has been achieved and to rekindle the divisions of the past.<sup>526</sup> The fact is that there are real prospects that the effect of speech of the nature contemplated in terms of sections 10 and 12 of the Act may deepen the feelings of inferiority and disempowerment that have infected groups and group members who have been, or still are, humiliated and disempowered by systemic discrimination on any of these grounds. These feelings may be enhanced by the non-regulation of expression of this nature. The tolerance may create or reinforce an impression that the legislator and society do not regard the dignity of vulnerable groups as an important imperative. Homophobia, for example, is an appalling reality in South Africa. Expression within the ambit of section 10 may predictably be employed to deny these groups and individuals access to the benefits of the free flow of ideas. This effect will be in stark contrast to the values and theories informing the protection of freedom of expression. Its prevention undoubtedly prima facie constitutes a legitimate government objective.

That said, the general complexity of judging the impact of discriminatory expression should be addressed. Is there a possibility that the proscription of the expression contemplated may nevertheless jeopardise rather than promote equality? Does the expression potentially

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<sup>524</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 43.

<sup>525</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 43.

<sup>526</sup> Rautenbach 2007: 560.

contribute to the marketplace of ideas, or the establishment or maintenance of democracy, or the autonomy of the speaker, to the extent that its contribution in these respects may outweigh the harm resulting from the discrimination? The discussion of the different theories underlying the protection of freedom of expression in Chapter II of the study is of direct relevance in this context. The following considerations are relevant.

Overall, section 12, inclusive of all its aspects, is aimed at the eradication of unfair discrimination from the composition of society. If applied in accordance with this essential requirement, it per definition gives effect to the relevant obligation in terms of sections 9(3) and (4) to prevent and prohibit unfair discrimination. Its requirements furthermore do not restrict “the free and open exchange of ideas”. The relevant information, if legitimate, can still be disseminated.

Apart from its limited “chilling effect”, section 10 similarly does not prevent the speaker or disseminator of information from using legitimate forms of expression to expose and communicate the very views and ideas that have inspired his or her desire to hurt or harm others based on their group identity, to incite harm, or to promote hatred. As a matter of fact, it can be expected that someone prepared to employ expression of the nature proscribed in terms of section 10 will use all available means to disseminate the views underlying his or her hatred and disrespect.<sup>527</sup>

It emerged from the discussion in Chapter II that the value of freedom of expression for democracy lies in its instrumental contribution to the establishment and maintenance of a “representative democracy”<sup>528</sup> as well as its “implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally”.<sup>529</sup> The discussion highlighted that sections 7<sup>530</sup>, 39 and 36<sup>531</sup> of the

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<sup>527</sup> See Chapter II: 2.

<sup>528</sup> See the discussion of the concept “representative democracy” by Roux in Woolman & Bishop 2008: 10-08–10-11.

<sup>529</sup> *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC): par 7-8. See also *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others*: par 27.

<sup>530</sup> Section 7(1) provides that the Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>531</sup> Section 39(1)(a) provides that, when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and section 39(2) provides that, when interpreting any legislation, and when developing the common law or



Constitution require the state to promote the constitutionally mandated objective of building a non-racial and non-sexist society based on human dignity and the achievement of equality. They furthermore place a duty on the courts to be guided by the founding values of the Constitution in their decision-making about the legal meaning of rights, as well as the justification of their limitation.<sup>532</sup> The following statement of the Constitutional Court in *F v Minister of Safety and Security and Another* was referred to: Thus “reasonable proscription of activity and expression that pose a real and substantial threat to the founding values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and to the constitutional order itself”, is permitted.<sup>533</sup> It was reiterated that harm in this context should be “neutral harm” to foundational constitutional values and the constitutional order, with “neutral harm” being understood as harm which cannot, in any circumstances, reasonably be contemplated to be justifiable in terms of the constitutional standard.<sup>534</sup>

The only positive contribution that the expression contemplated in terms of section 10 can conceivably make in this context is to expose the mind of the speaker. This may be relevant in particular in the political field. However, as was contended above, the attitude of the speaker will most probably become known when he or she expresses his or her views in other legitimate ways which will invite response instead of marginalise, intimidate and disrespect those who are targeted. In the light of these considerations, it is contended that the potential of the expression contemplated in terms of sections 10 and 12 to facilitate democracy or to contribute to the maintenance of the ideal society described above is negligible.

Whether the harm should nevertheless be tolerated in the constitutional society therefore depends on whether the expression promotes the constitutional value of dignity as autonomy, and, if so, to what extent. It is apparent from the discussion in Chapter II of human dignity as underlying the right to freedom of expression that the essential question in this regard is whether or not the expression enhances self-development. The approach of the Court in *AfriForum and Another v Malema and Others* mentioned above, namely that those who use “hate

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customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

<sup>532</sup> Cowen 2001: 47. Roux in Woolman & Bishop 2008: 10-33 observes that the rights in the Bill of Rights lie at the very heart of the Constitution’s vision for South African democracy. Section 7(1) implies that the purpose underlying the commitment to democracy is the “promotion of a value-laden system of government based on human dignity, equality and freedom”.

<sup>533</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 27.

<sup>534</sup> See Meyerson 1997: 57.

speech” participate in a “morally corrupt activity which detracts from their own dignity” answers this question.<sup>535</sup> It was moreover stated that tolerating expression of this nature contradicts the nation’s commitment to heal the divisions of the past.<sup>536</sup> Furthermore, it was highlighted in Chapter II that the South African Constitution recognises a broader concept of human dignity as including self-esteem and respect for the esteem of others<sup>537</sup> and that the substantive approach entails that “the quest for equal worth or dignity in terms of the concept of substantive equality is in fact a quest to eliminate the disadvantages and inferior status that attach to membership of particular groups”.<sup>538</sup>

Lastly, the prohibition of expression of the nature contemplated in section 10 in fact makes a statement, namely that the founding values of the South African Constitution require South African citizens to treat every other citizen with equal and due respect. The reality is that the Constitution within its Preamble purposely recognises the injustices of the past and states that “South Africa belongs to all who live in it, united in our diversity”. This ideal is jeopardised when the freedom of expression is abused in order to promote hatred and to hurt and harm by means of discriminatory speech. However, it will also be jeopardised if the rights to freedom of conscience, religion, thought, belief, opinion and expression are not diligently guarded. To achieve the latter while condemning the former, without resorting to criminalisation, reflects the spirit of the Preamble when it states that the Constitution is adopted to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.

#### **4.10.3 Conclusion**

It is accordingly concluded that the limitation of the right to freedom of expression in terms of sections 10 and 12 is justifiable in terms of section 36 of the Constitution.

Furthermore, it is contended that the above discussion has also indicated that the limitations are necessary as contemplated in article 19 of the *ICCPR*.<sup>539</sup> To allow the expression concerned would indeed endanger “pressing community interests with a proximate and direct

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<sup>535</sup> *Afri-Forum and Another v Malema and Others*: par 94.

<sup>536</sup> Chapter II: 4.3.2.

<sup>537</sup> See Chapter II: 4.4.

<sup>538</sup> See Chapter II: 4.5.

<sup>539</sup> See Chapter III: 3.2.5.

nexus with the expression”. This conclusion is not based on the balancing of freedom of expression with another interest, but is based on an evaluation of the values and ideas that inform the protection and the related limitation of freedom of expression.<sup>540</sup> The provisions are imposed by an independent court and respect the principles that no one should be penalised for statements which are true, or be criminally penalised for the dissemination of “hate speech”, unless it has been proven that they did so with the intention of inciting discrimination, hostility or violence. The Act makes provision for innovative and appropriate orders to address and remedy inequality, excluding criminal penalties. It is clear that the purpose of the provisions is to protect vulnerable groups and individuals from humiliation and not to “protect belief systems from criticism”.<sup>541</sup>

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<sup>540</sup> See Chapter III: 3.2.5 for the view of Jajawickrama.

<sup>541</sup> See Chapter III: 3.2.5 for the view of Schmidt.

## CHAPTER VI

# FREEDOM OF EXPRESSION IN SOUTH AFRICA: OTHER LEGISLATIVE PROVISIONS AND COMMON LAW CRIMES PERTAINING TO FREEDOM OF EXPRESSION

### 1. INTRODUCTION

This chapter discusses the relevant provisions of the *Films and Publications Act* 65/1996, the *Riotous Assemblies Act* 17/1956, the criminal law offences of criminal defamation, *crimen iniuria* and incitement to commit a crime, and the *Draft Prohibition of Hate Speech Bill* 2004. The discussion includes comments on the constitutionality of the provisions. While the primary focus of some of these provisions is not the regulation of hurtful and harmful discriminatory expression, it is necessary to take notice of the extent to which they may cover expression of this nature. One reason for this is that the prosecution and sanctioning of discriminatory expression under these provisions may, in a given situation, sufficiently address and satisfy the interrelated aims of “hate speech” regulation, which may render additional complaints, particularly in terms of section 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000 (*Equality Act*), superfluous.<sup>1</sup> That said, it will be contended that, as far as the criminalisation of “hate speech” is concerned, there is a need for the creation of a consolidating offence that at least captures, and requires proof of, the essential elements of expression contemplated in terms of section 16(2)(c) of the Constitution. It will furthermore be contended that, arguably, there exists a compelling need that requires, and will justify, the criminalisation in terms of this offence of the advocacy of hatred on the grounds of sexual orientation and nationality that constitutes incitement to harm.

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<sup>1</sup> See Chapter V: 4.5.

## **2. THE FILMS AND PUBLICATIONS ACT**

### **2.1 The objectives of the Act**

The *Films and Publications Act* seeks to provide adults with consumer advice, and to regulate the distribution, exhibition and possession of films, interactive computer games and publications with due regard to the protection of children from sexual exploitation and degradation, and from exposure to potentially disturbing, harmful and age-inappropriate materials.<sup>2</sup>

The Act regulates, inter alia, age restrictions, required consumer advice, and conditions pertaining to classifications. Publications, films and games which contain child pornography, advocate war, incite violence or advocate hatred based on any identifiable group characteristic, and constitute incitement to cause harm are categorised as “refused classification” and are categorically prohibited.<sup>3</sup>

### **2.2 The application of the Act**

A bona fide newspaper that is published by a member of a body recognised by the Press Ombudsman, and which subscribes and adheres to a code of conduct that must be enforced by that body, and broadcasters who are subject to regulation by the Independent Communications Authority of South Africa (ICASA), are respectively exempted from the obligation to submit publications for classification, and from any classification made or condition laid down by the Board.<sup>4</sup> In *Print Media South Africa and Another v Minister of Home Affairs and Another*<sup>5</sup>, the Constitutional Court confirmed the declaration of the South Gauteng High Court<sup>6</sup> that magazines should be afforded the same exemption as newspapers.<sup>7</sup> The implication of these exemptions is that the media in South Africa is to a great extent self-regulatory. This important aspect is separately addressed in the next chapter.

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<sup>2</sup> Mills 2007: par 3.

<sup>3</sup> Mills 2007: par 4.

<sup>4</sup> *Films and Publications Act*: sections 16(1) and (2), 18(3) and (6), and 24A. Section 1 defines “Board” as the Film and Publication Board, established by section 3.

<sup>5</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22.

<sup>6</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another* (14343/2010) [2011] ZAGPJHC 149. See the definitions of “publication”, “film” and “game” in section 1 of the Act.

<sup>7</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 90.4 and 90.5.

The subsequent discussion focuses on those provisions of the Act that specifically apply to “hate speech”. The Act contains no other prohibitions dealing with harmful expression based on group characteristics. The Constitutional Court in *Print Media South Africa and Another v Minister of Home Affairs and Another* recently declared certain provisions of section 16(1) and 24A(2) of the Act unconstitutional. References to these sections will be to the provisions inclusive of the severance and reading-in ordered by the Court.

### 2.3 Relevant provisions of the Act

Section 16, in the terms declared by the Constitutional Court, provides as follows:

- (1) Any person may request, in the prescribed manner, that a publication, other than a *bona fide* newspaper or magazine that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.
- (2) Any person, except the publisher of a newspaper or magazine contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that ... (b) advocates propaganda for war; (c) incites violence; or (d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.<sup>8</sup>

“Identifiable group characteristic” means a characteristic that identifies an individual as a member of a group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality.<sup>9</sup>

Subject to a proviso<sup>10</sup>, a publication submitted in terms of section 16(1) or (2) will, in terms of section 16(4)(a), be classified as “refused classification” if it contains (i) child pornography, propaganda for war or incitement of imminent violence; or (ii) the advocacy of

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<sup>8</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 88.

<sup>9</sup> *Films and Publications Act*: section 1.

<sup>10</sup> *Films and Publications Act*: section 16(4)(a)(ii).

hatred based on any identifiable group characteristic and that constitutes incitement to cause harm. Subject to a similar proviso<sup>11</sup>, films and games submitted in terms of section 18(3)(a) will be similarly classified if the film or game contains (i) child pornography, propaganda for war or incitement of imminent violence; or (ii) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm. The proviso with respect to publications excepts publications which, judged within context, and with the explicit exception of child pornography, are bona fide documentaries, are of scientific, dramatic or artistic merit, or deal with a matter of public interest. With respect to films and games, a similar proviso applies.<sup>12</sup> In contrast to the section 12 proviso of the *Equality Act*, the proviso does not except publications from its ambit on the basis that they constitute “hate speech” in terms of section 16(2)(c) of the Constitution.

In his decision in the Broadcasting Complaints Commission of South Africa (BCCSA) matter, *Suliman and Others v 5FM*<sup>13</sup>, Chairperson Van Rooyen responded to the fact that, in terms of the *Films and Publications Act* as formulated at the time, prohibitions of the advocacy of hatred did not apply to bona fide drama, art and science.<sup>14</sup> He contended that the Bill of Rights apparently gave less protection to bona fide drama, art and science than the Act did.<sup>15</sup> He reasoned that a similar provision in the *Broadcasting Code*<sup>16</sup>, it being common law, could, and should, be developed in terms of section 39(2) of the Constitution to give recognition to the principles of the Constitution. On this basis, even art, if it constituted hate speech, would be denied protection in terms of the *Code*.<sup>17</sup> Milo, Penfold and Stein expressed

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<sup>11</sup> *Films and Publications Act*: section 18(3)(a).

<sup>12</sup> Section 1 defines “matters of public interest” as “discussions, debates or opinions on matters pertaining to the well-being or general welfare of the public or serving the interests of the public and includes discussions, debates and opinions”.

<sup>13</sup> *Suliman & Others v 5FM* [2006] JOL 17677 (BCTSA).

<sup>14</sup> Subsections (1), (2) and (3) of section 29 of the Act, as amended in 2004, at the time provided that any person who knowingly broadcasts or distributes a publication or a film or presents an entertainment or play in public which, judged within context (a) amounts to propaganda for war; (b) incites to imminent violence; or (c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm, shall be guilty of an offence. Subsection (4) provided that subsections (1), (2) and (3) shall not apply to (a) a bona fide scientific, documentary, dramatic, artistic, literary or religious publication, film, entertainment or play, or any part thereof which, judged within context, is of such nature; (b) a publication, film, entertainment or play which amounts to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or (c) a publication, film, entertainment or play which amounts to a bona fide discussion, argument or opinion on a matter of public interest. See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333: par 10.

<sup>15</sup> *Suliman and Others v 5FM*: par 7.

<sup>16</sup> See *BCCSA Broadcasting Code of Conduct for Free to Air Licensees*:

[http://bccsa.co.za/index.php?option=com\\_content&task=view&id=535&Itemid=35](http://bccsa.co.za/index.php?option=com_content&task=view&id=535&Itemid=35).

<sup>17</sup> *Suliman and Others v 5FM*: par 7.

the opposite view that, for the very reason that section 29 prohibited a narrower range of expression as a result of excepting the relevant forms of expression, it should survive constitutional challenge.<sup>18</sup> The situation in terms of the amended Act remains the same. The Film and Publication Board is not empowered to classify as “refused” a bona fide documentary, a publication of scientific, literary or artistic merit, or a publication dealing with a matter of public interest, whether or not it arguably advocates hatred.<sup>19</sup>

Section 18(1) provides that distributors or exhibitors of films and games must register with the Board and must submit for examination and classification all films that have not been exempted, classified or approved. Section 18(3)(a), applied in context, is similar to section 16(4).

Section 24A(2), as declared by the Constitutional Court, provides as follows:

Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication, which has—

(a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper or magazine contemplated in section 16(1), not been classified by the Board, provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act;

...

shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.<sup>20</sup>

### **2.3.1 Sections 16(4) and 18(3)**

When it is found that a publication referred in terms of section 16(1) “contains the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm” as contemplated by section 16(4)(ii), and it is accordingly classified as a “refused classification”, its continued publication will invoke penalties under section 24A(2)(a). Similarly, when it is found that a film referred in terms of section 18(1)<sup>21</sup>

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<sup>18</sup> Milo, Penfold & Stein in Woolman & Bishop 2008: 42-85.

<sup>19</sup> See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*: par 10.

<sup>20</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 88.

<sup>21</sup> In contrast to referral in terms of section 16(1), referral in terms of section 18(1) is prior to distribution and is compulsory with respect to all films.



“advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm” as contemplated by section 18(3)(ii), its distribution or exhibition in public will invoke penalties under section 24A(2)(b).

Firstly, the term “contains” in section 16(4)(ii) requires comment. The High Court in *Print Media South Africa and Another v Minister of Home Affairs and Another* considered the term in the context of section 16(2)(a) of the Act, which was eventually completely declared unconstitutional by the Constitutional Court. The subject matter of the section was violative sexual conduct. The Court regarded the term as overbroad and replaced it with “advocates or promotes”.<sup>22</sup> The Constitutional Court overruled the replacement, inter alia, on the basis that it would completely change the meaning and apparent objectives of the provision. The criminal offence established in terms of section 24B(1)(d) correspondingly applies to any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children. The position with respect to “hate speech” should be distinguished. Certainly, the prohibition of the mere appearance in a publication of the sexual conduct contemplated by the Act will serve the objectives of the Act. In contrast, the advocacy of hatred and the incitement to cause harm are essential elements of “hate speech” as contemplated by section 16(4)(ii) of the Act. A description of an incident of “hate speech” will not necessarily constitute “hate speech”. Moreover, even in terms of section 10 of the *Equality Act*, a publication will not be prohibited on the basis that it “contains” “hate speech”. There is also no rational explanation for the distinction in this respect between sections 16(4)(ii) and 18(3)(ii), which applies to films and games and requires that the film or game should advocate hatred.

Secondly, the focus is on the consistency of the Act with the Constitution and with legislation that gives effect to the Constitution. The question has been raised above why only “hate speech” in publications that fall outside the ambit of the proviso, is regulated. It seems contradictory that the Act, in the light of its aim to advise consumers, will be more concerned with the constitutionality of publications that, judged within context, are not bona fide documentaries, are not of scientific, dramatic or artistic merit, or are not on a matter of public interest, than with those that are. A further question arises, namely why the basis for the

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<sup>22</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another* ZAGPJHC: par 51-53.

refusal of the publication of “hate speech” should be the advocacy of hatred contemplated by section 16(2)(c) of the Constitution, extended to all the prohibited grounds. This approach overlooks the relevant provisions of the *Equality Act*, in particular section 10, which give effect to the constitutional obligation to prevent unfair discrimination and promote equality in less restrictive terms. Moreover, the proviso in terms of section 12 of the *Equality Act* does not exclude expression within the ambit of section 16(2) of the Constitution from the ambit of section 10. It is furthermore narrower than the proviso of the Act in that it excludes only bona fide engagement in all the forms of expression mentioned by it. On the other hand, it covers the bona fide publication of information, regardless of whether or not such publication is in the form of, or constitutes, a bona fide documentary, a publication of scientific, literary or artistic merit, or a publication which deals with a matter of public interest.

It is accordingly contended that, for the sake of consistency, the Act should either explicitly refer or entrust the regulation of “hate speech” to other authorised forums or should be amended to regulate publications under its jurisdiction in accordance with the Constitution and the *Equality Act*.

### **2.3.2 Section 16(2)**

In *Print Media South Africa and Another v Minister of Home Affairs and Another*, the constitutionality of section 16(2)(a) of the Act, as formulated at the time, was challenged. It required the submission to the Board, as described above, of any publication that falls under the Act that “contains sexual conduct which – (i) violates or shows disrespect for the right to human dignity of any person; (ii) degrades a person; or (iii) constitutes incitement to cause harm”.<sup>23</sup> The Court described the classification scheme initiated by section 16(2) of the Act as a “model of prior classification” under which “control is exercised before publication by an administrative body under the control of the executive branch of government”.<sup>24</sup> The Court observed that the fact that a person seeking to publish is required to submit the material to the administrative body, which decides whether to grant or deny permission to publish, “amounts to a form of prior restraint, which is an inhibition on expression before it is disseminated”. It was affirmed that the implication of the Act was that breach of the obligation in terms of section 16(2) to submit the relevant publications for prior classification

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<sup>23</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 44.

<sup>24</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 16.

will attract criminal penalties of a fine or up to five years' imprisonment, or both, irrespective of the publication's ultimate fate after having been classified.<sup>25</sup> The Court held that court interdicts, even though admittedly narrower in their range of application than their administrative equivalent, also serve the relevant purposes of the Act, while an exclusive preference for court interdicts "still facilitates anticipatory prevention of breach of the law and preserves the state's existing law enforcement duties to detect, investigate and prevent or prosecute the publication of unlawful material". It pointed out that "a prominent, distinguishing characteristic of a court interdict from its administrative counterpart is the allocation of the burden of proof on the party seeking to restrain the expression, rather than on the party seeking to vindicate the right".<sup>26</sup> Furthermore, it remains open to any publisher who is uncertain about whether a publication that he or she wishes to distribute falls to be classified, to obtain legal certainty by submitting of his or her own accord that publication for classification in terms of section 16(1). This opportunity "restores to publishers the discretion to make informed choices about whether or not to publish". Should a publisher choose not to make use of the opportunity to gain certainty about the lawfulness of an intended publication, he or she must bear the risks of the decision to publish.<sup>27</sup> The Court declared the inclusion in terms of section 16(2)(a) of publications that contain certain forms of sexual conduct unconstitutional on the basis that the prior restraint of publication is a drastic interference with freedom of speech and should not be ordered in circumstances where there are less restrictive alternatives for achieving important legislative purposes.<sup>28</sup>

The required submission for classification in terms of section 16(1)(d) of publications that contain the advocacy of hatred might arguably have been distinguished on the basis that the advocacy of hatred is excluded from protection in terms of section 16(1) of the Constitution. However, apart from the broad scope of the term "contains", the advocacy of hatred contemplated in section 16(2)(d) of the Act exceeds the ambit of section 16(2)(c) of the Constitution, as more grounds are included. Moreover, the discrepancy that bona fide publications under the proviso that contain the advocacy of hatred cannot be classified, but that their non-submission for classification before publication will attract criminal penalties of a fine or up to five years' imprisonment, or both, "irrespective of the publication's ultimate

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<sup>25</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 15(b) and 44.

<sup>26</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 57.

<sup>27</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 70-71.

<sup>28</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 49 and 72.

fate after having been classified”, similarly applies. This exposes protected expression to the same administrative restraint that was, in principle, rejected by the Court in *Print Media South Africa and Another v Minister of Home Affairs and Another*. It is accordingly submitted that the same considerations that informed the Constitutional Court’s findings with respect to the prior classification of “sexual conduct” apply with respect to subsection 16(2)(d) of the Act.

In principle, the same reasoning applies with respect to the application of sections 18 and 24A(2) to films and games. However, the more extensive need for different levels of classification in the light of the purposes of the Act provides a valid argument in support of the submission of all films and games for prior classification. Moreover, the violation of freedom of expression by the delay in “bringing important information to the public’s attention”<sup>29</sup> will probably be less than in the case of publications.

The Constitutional Court in the *Print Media* case pointed out that the dissemination of child pornography and the exposure of children to pornography remain offences under sections 24B and 24A(4)(b). Hence, even without section 16(2)(a), the Act’s stated purposes with respect to child pornography are capable of satisfaction.<sup>30</sup> No similar offence with respect to the publication of “hate speech” exists independently of section 16(2)(d). As was contended above, either a comparable provision should be included in the Act or publications that fall under the Act and constitute “hate speech” should be regulated in terms of the Constitution and applicable legislation giving effect to the Constitution. It is contended in the next chapter that, in order to comply with the implied obligation in terms of section 16(2)(c) of the Constitution and South Africa’s international obligations, “hate speech” as contemplated in terms of section 16(2)(c) of the Constitution should be criminalised.

It has to be noted, in conclusion, that section 33 of the Constitution and applicable legislation giving effect to it, in particular the *Promotion of Administrative Justice Act (PAJA)*<sup>31</sup>, apply to decisions in terms of the *Films and Publications Act*. Review in terms of the *PAJA* allows for consideration of whether the administrative action at issue was rational and reasonable.<sup>32</sup>

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<sup>29</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 23, 50 and 54.

<sup>30</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another*: par 77.

<sup>31</sup> *Promotion of Administrative Justice Act 3/2000*.

<sup>32</sup> *Promotion of Administrative Justice Act*: sections 6(2)(f) and (h).

This serves to justify the criminalisation of the intentional breach of the conditions of a classification of the Film and Publication Board.

### 3. COMMON LAW CRIMES

Apart from the above-mentioned offences in terms of the *Films and Publications Act*, South African law does not criminalise harmful expression related to group identity as such. However, expression of this nature may to a certain extent be covered in terms of broader or differently focused criminal offences. These offences are now briefly discussed.

#### 3.1 Criminal defamation

While harmful expression related to group characteristics does not as such typically constitute defamation, the evaluation of arguments concerning the constitutionality of the criminalisation of this form of expression has relevance with respect to the offence of *crimen iniuria*, which does potentially apply to expression with overtones of, for example, racism or sexism, and will subsequently be discussed.

The crime of defamation was defined in the recent matter of *S v Hoho* as consisting of “the unlawful and intentional publication of matter concerning another which tends to injure his reputation”. The state must prove these elements beyond reasonable doubt.<sup>33</sup>

The Supreme Court of Appeal confirmed that the offence has not been abrogated by disuse and is consonant with the Constitution. The Court based its conclusion on the view that the protection of the reputation of people by means of the criminal offence of defamation strikes an “appropriate balance ... between the protection of freedom of expression on the one hand, and the value of human dignity on the other”.<sup>34</sup> The Court considered the contentions of Burchell and Milton<sup>35</sup>, Snyman<sup>36</sup>, Van der Berg<sup>37</sup> and Milton<sup>38</sup> that a criminal sanction for defamatory words may be too drastic a means of regulating free speech. Arguments by these

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<sup>33</sup> *S v Hoho* [2008] ZASCA 98; 2009 (1) SACR 276 (SCA): par 16; Milton 1996: 471; Snyman 2008: 477.

<sup>34</sup> *S v Hoho*: par 31.

<sup>35</sup> Burchell & Milton 2005: 325.

<sup>36</sup> Snyman 2008: 476.

<sup>37</sup> Van der Berg 1989: 289-290.

<sup>38</sup> Milton 1996: 520.

authors include the existence of a relatively well-developed civil law remedy, the small number of prosecutions, the limited redress which a victim may achieve through a criminal prosecution, and trends in other jurisdictions.<sup>39</sup> The Court reasoned that the fact that a criminal sanction is a more drastic remedy than the civil remedy is counterbalanced by the fact that the requirements for succeeding in a criminal defamation matter “are much more onerous than in a civil matter”. To expose a person to a criminal conviction if it is proved beyond reasonable doubt, not only that he or she acted unlawfully, that is, without justification, but also that he or she knew that he or she was acting unlawfully, “constitutes a reasonable and not too drastic a limitation on the right to freedom of expression”. In the view of the Court, these onerous requirements are probably a reason for the small number of prosecutions for defamation compared with civil defamation actions.<sup>40</sup>

The Court could envisage no reason why the state should prosecute in the case of a complaint in respect of an injury to a person’s physical integrity, but not in the case of a complaint in respect of an injury to reputation, which may have more serious and lasting effects than a physical assault. It concluded that “the offence was reasonably required to protect people’s reputations, and that it did not go further than was necessary to accomplish that objective”.<sup>41</sup> It described the importance of protecting an individual’s reputation in the words of Lord Nicholls in *Birkenhead in Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201:

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one’s reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.

It is noteworthy that this statement relates the reasons for the prohibition of the expression concerned to the very values and interests that inform the protection of the right to freedom of

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<sup>39</sup> *S v Hoho*: par 32.

<sup>40</sup> *S v Hoho*: par 33-34.

<sup>41</sup> *S v Hoho*: par 36.

expression. This relation is acknowledged by the previously quoted statement<sup>42</sup> of Supreme Court Justice Cory in the Canadian matter of *R v Lucas*<sup>43</sup> that defamatory libel was “so far removed from the core values of freedom of expression that it merits but scant protection”.<sup>44</sup> However, by implying that the prohibition of the expression *in casu* would in fact enhance these values and interests, the Supreme Court of Appeal in *S v Hoho* took the argument significantly further. The Court nevertheless recognised that the potential risk that a publication may be found to constitute a crime is undeniably “offensive to the right to free speech”.<sup>45</sup> “To suppress the publication of erroneous statements on pain of penalty would of necessity have a stifling effect on the free flow of information.”<sup>46</sup>

Van der Berg, having studied the crime of defamation in other jurisdictions, states that the trend has been for criminal defamation to be restricted, if not abolished. Even though he regards the requirement of seriousness as an element of the crime as unscientific, a view shared by the Court in *S v Hoho*<sup>47</sup>, he suggests that, as only serious cases should be prosecuted, and to diminish the danger of a wrong judgment in this regard, the decision to prosecute should be made by the prosecuting authority.<sup>48</sup>

Bhardwaj and Winks argue that the decision in *S v Hoho* failed to consider the vital differences in criminal and civil liability. They express the view that “civil law exists to provide relief and restitution when one person harms or threatens to harm another’s private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending.” The criminalisation of assault may be essential to protect the victims and the public at large. The analogy between assault and defamation is, however, “an unreliable guide to finding an appropriate balance between the rights to dignity and free speech”. Different considerations are at stake. While “to wield fists and firearms” can claim no constitutional protection, freedom of expression “is constitutionally enshrined and encouraged, as the lifeblood of democracy”. In particular, the “chilling effect” of the criminalisation of expression could “cow courageous journalists” and

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<sup>42</sup> See Chapter IV: 4.3.1.7.

<sup>43</sup> *R v Lucas* [1998] 1 SCR 439.

<sup>44</sup> Hogg 2007: 277.

<sup>45</sup> Van der Berg 1989: 291.

<sup>46</sup> *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588: 616I-J; *National Media Ltd and Others v Bogoshi* (579/96) [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A) (29 September 1998): 1210G-I; *S v Hoho*: par 29.

<sup>47</sup> See the discussion in this regard in *S v Hoho*: par 17-22.

<sup>48</sup> Van der Berg 1989: 291.

consequently deprive citizens of their right to be informed. The authors point out that, “even if the state does not discharge its onerous burden of proof, the very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal”. Criminal liability “stains every sphere” of the convicted person’s life. “He becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account.” They contend that the same public disapproval that the criminal law casts on murderers, rapists and thieves, “precisely for its deterrent potency”, does not apply to injurious speech. They refer to the resolution on repealing criminal defamation laws in Africa that was adopted by the African Commission on Human and Peoples’ Rights and provides as follows: “Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners [from] practising their profession without fear and in good faith.” They comment that this is particularly so when less restrictive remedies are available in the form of civil defamation and the right of reply.<sup>49</sup>

It is contended that, for as long as the crime is recognised, the balance should be found in the interpretation and application of the requirements of lawfulness and intention. In *National Media Ltd and Others v Bogoshi*, Justice Hefer stated that “the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court’s perception of the legal convictions of the community”.<sup>50</sup> The Court accordingly concluded that “the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time”.<sup>51</sup> As noted before, the values of the Constitution, including the right to freedom of expression, now inform these convictions.<sup>52</sup>

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<sup>49</sup> Bhardwaj & Winks 2013.

<sup>50</sup> *National Media Ltd and Others v Bogoshi*: 1204D-E; *S v Hoho*: par 24.

<sup>51</sup> *National Media Ltd and Others v Bogoshi*: 1212G-H; *S v Hoho*: par 24.

<sup>52</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC): par 43.



## 3.2 *Crimen iniuria*

### 3.2.1 *The elements of the offence*

Snyman defines *crimen iniuria* as “the unlawful, intentional and serious violation of the dignity or privacy of another”.<sup>53</sup> The offence can be related to the Roman law concept *dignitas*, the violation of which could substantiate liability in terms of the *actio iniuriarum*. *Dignitas* was described as “that valued and serene condition in [a person’s] social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt”.<sup>54</sup> The courts have accepted that expressive conduct “of an insulting, humiliating or vulgar nature, or those with racial overtones” can potentially have this effect.<sup>55</sup>

The element of seriousness is controversial and is not consistently included in definitions of *crimen iniuria*.<sup>56</sup> In *S v Bugwandeem*<sup>57</sup>, the view was expressed that the requirement of seriousness is “so nebulous as to lead to arbitrariness in its application”. As noted above, this view was endorsed by the Supreme Court of Appeal in *S v Hoho*.<sup>58</sup>

The crime can be committed intentionally only.<sup>59</sup> In *Van der Merwe and Others v S*, a plea of guilty on the basis of *dolus eventualis* was accepted. The Court, however, described the case as “a very rare inurious matter”, and remarked that the lack of direct intention distinguished it from the vast majority of classic cases of *crimen iniuria*.<sup>60</sup>

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<sup>53</sup> Snyman 2008: 469; Milton 1996: 492. See Snyman’s explanation for the inclusion of both dignity and privacy, while traditionally the interests protected by this crime were designated by the Latin term “*dignitas*”: Snyman 2008: 469. With respect to the term “*dignitas*”, see also Bhamjee & Hoor 2006: 670.

<sup>54</sup> Neethling, Potgieter & Visser 1996: 48 quoting De Villiers *The Roman Dutch Law of Injuries* (1899): 24 fn 19. See also Milton 1996: 493.

<sup>55</sup> Bhamjee & Hoor 2006: 671.

<sup>56</sup> Burchell & Milton 2005: 746.

<sup>57</sup> *S v Bugwandeem* 1987 (1) SA 787 (N).

<sup>58</sup> *S v Bugwandeem*: 796A-C; *S v Hoho*: par 22; *S v Steenberg* 1999 (1) SACR 594 (N): 596 e-f; *S v Mostert* (AR 842/03) [2005] ZAKZHC; Bhamjee & Hoor 2006: 670. In the civil matter of *Ryan v Petrus* (CA 165/2008) [2009] ZAECGHC 16; 2010 (1) SA 169 (ECG); 2010 (1) SACR 274 (ECG), it was stated that “it is clear that the elements of iniuria are the same ‘whether it be punished civilly or criminally’... although every insult to dignity which is serious enough to found a civil action will not necessarily be serious enough to warrant criminal prosecution”.

<sup>59</sup> Snyman 2008: 475.

<sup>60</sup> *Van der Merwe and Others v S* (A366/10) [2011] ZAFSHC 88; 2011 (2) SACR 509 (FB): par 66.

In order to determine the infringement of another's *dignitas*, both a subjective and an objective test are applied. With some exceptions, the addressee must be aware of the conduct and must feel humiliated by it. Objectively speaking, the conduct has to be of such a nature that it would offend the feelings of a reasonable person. While it is usually assumed that conduct which will offend a reasonable person will subjectively offend every person, this is not necessarily the case.<sup>61</sup> Burchell summarises the general test for determining the impairment of dignity under the common law, as laid down by the Supreme Court of Appeal in *Delange v Costa*<sup>62</sup>, as follows: "(a) The plaintiff's self-esteem must have been actually impaired and (b) a person of ordinary sensibilities would have regarded the conduct as offensive, tested by the general criterion of unlawfulness, namely objective unreasonableness". This requires the conduct complained of "to be tested against the prevailing norms of society".<sup>63</sup> The values and principles established in terms of the Constitution represent these norms.<sup>64</sup>

### 3.2.2 *Crimen iniuria and freedom of expression*

A general consensus to not readily criminalise expression has been indicated in Chapters II and III of this study. It was illustrated that criminal prohibitions of the expression of hatred are generally primarily directed at protecting the interest of society in "fostering harmonious social relations in a community dedicated to equality and multiculturalism" or protecting "against disturbance of the public peace".<sup>65</sup> Section 319(2) of the *Canadian Criminal Code*, for example, prohibits expression that "promotes hatred against any identifiable group". The section does not apply to private speech, and proof of the subjective impairment of the dignity of individual complainants is therefore not required. In *R v Keegstra*, it was described as serving to illustrate to the public "the severe reprobation with which society holds messages of hate directed towards racial and religious groups".<sup>66</sup> Section 185 of the German *Criminal Code* does, however, generally criminalise insult<sup>67</sup> and is comparable to the offence of *crimen iniuria* to the extent that the latter may be constituted by expressive conduct. The

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<sup>61</sup> Snyman 2008: 471-472.

<sup>62</sup> *Delange v Costa* (433/87) [1989] ZASCA 6; [1989] 2 All SA 267 (A): par 15-17; Burchell & Milton 2005: 749.

<sup>63</sup> Burchell & Milton 2005: 749; *S v Bugwandeem*: 796A-C; *S v Steenberg*: 596 e-f.

<sup>64</sup> *Carmichele v Minister of Safety and Security*: par 56.

<sup>65</sup> See Chapter III: 3.3.3 and 3.4 and Chapter IV: 3.6.1, 4.3.1 and 4.3.2.1.1.

<sup>66</sup> *R v Keegstra* [1990] 3 SCR 697: par VIII A.

<sup>67</sup> See Chapter IV: 3.6.1.7.

view of the Court in the *Soldiers Are Murderers* decision that the larger the collective to which a disparaging statement refers, the weaker the extent to which an individual member can be personally affected, should be considered. The Court also distinguished between a speaker's views of the demerits of a group, and violating the personal honour of an individual member of the group.<sup>68</sup>

In *S v Mostert*, the KwaZulu-Natal High Court was satisfied that calling a black person "pickannin" has negative racial connotations associated with it, is offensive and may constitute a violation of the *dignitas* of the person that is addressed.<sup>69</sup> The Court stated that, provided that the required intention is proved, in our constitutional dispensation expressions with racial overtones, like the one used by the appellant, have to be eliminated if we are to protect the right to dignity as rooted in our Constitution. Bronstein comments that, as South African society transforms, expression of this nature may be experienced as less insulting.<sup>70</sup> It is contended that the level of healing of the divisions of the past will indeed be a relevant consideration in determining whether a remark with racial overtones is, for example, intended to be, and is experienced as, humorous or humiliating. Moreover, the less vulnerable the target group, the greater the access of members of the group to the marketplace of ideas, and the greater will be their confidence to express their indignation. There will accordingly be less reason to protect individuals, related to their group membership, by means of the criminalisation of the expression. It has to be reiterated that, in *S v Mostert*, the context within which the words were uttered was explicitly considered in the determination of guilt. Both the complainant and the appellant were traffic officers, and both were clad in their uniforms, in full view of the public, with the appellant dragging the complainant to a vehicle.

### ***3.2.3 The reasonableness standard***

The question arises whether the direct and "chilling" effects of the criminalisation of expression for freedom of expression should be taken into account in the formulation and application of the objective reasonableness standard. To do so will, without being arbitrary, accommodate the quest for seriousness as an element of *crimen iniuria*. The fact that the

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<sup>68</sup> It has to be considered that the group *in casu* was not characterised based on any of the listed grounds in terms of sections 9 or 16(2)(c) of the South African Constitution.

<sup>69</sup> *S v Mostert*: 17-18. See also *Mbatha v Van Staden* 1982 (2) SA 260 (N): 262 H-263A.

<sup>70</sup> Bronstein 2006: 18.

*Equality Act* is in place is a relevant consideration in this context. The Act is designed to deal with incidences of hurtful and degrading expression based on group characteristics, in ways that do not punish and do not leave perpetrators with criminal records, but rather “educate”, “facilitate”, “raise public awareness”, “promote”, “advance” and “reconcile”.<sup>71</sup> This approach gives effect to the undertakings in the context of the Preamble of the Constitution, inter alia, to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.

A textual interpretation of the definition of the offence may potentially result in its application to all instances of degrading expression based on group characteristics where members of the target group are prepared to testify to their subjective feelings of hurt. The following example serves to illustrate the above reasoning. Female committee members feel humiliated when a male committee member voices his opinion that females do not have the qualities of logical thinking and authority needed to chair a meeting. The speaker foresees that they will feel degraded by his view, but nevertheless voices it. It can certainly be argued that the offence taken is not oversensitive. Yet, it is contended that the conduct should not be held to constitute the offence of *crimen iniuria*. It is clear from the previous chapters that an objective reasonableness standard should accommodate views that may be abusive and degrading to certain members of society.

In the example, the speaker’s primary intention is to express his view on a subject of interest. Care should be taken that the incidental violation of dignity where the expression concerned warrants constitutional protection is not held to establish the required intention for *crimen iniuria*. Such extension of the required intention is an even greater risk when the form of intent is *dolus eventualis*. The fact that the opinion is based on false stereotypes, and that the speaker foresees that the female members will experience humiliation, should not as such deny the speaker the right to express his opinion.

Accordingly, successful prosecution of *crimen iniuria* should require proof of a direct and predominant intention to unreasonably hurt a specific individual or individuals, and of the reasonable and subjective suffering of humiliation by the individual or individuals. It is submitted that a purposive interpretation of the offence of *crimen iniuria*, infused by the

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<sup>71</sup> Preamble to, and section 2 of, the *Equality Act*.

values of the Constitution, allows for this interpretation. Consideration of the reasons for the protection of freedom of expression will be essential in the determination of the reasonableness of the hurt that was caused in context.

The practical reality is that South African *crimen iniuria* cases concerning expression related to group characteristics did, without exception, and often in conjunction with assault charges, concern individualised situations where the alleged insult was intentional and face to face, and did not in any way constitute the expression of a view other than disrespect for the addressee.<sup>72</sup> It will create certainty with respect to the proper recognition of the freedom of expression guarantee if these realities are theoretically articulated in terms of a required reasonableness standard.

### ***3.2.4 Appropriate sentences***

In *S v Henning*, it was common cause that the appellant, a white male, swore at the complainant, a black male, by, inter alia, calling him a “kaffir”. The Eastern Cape High Court described this as a serious incident of *crimen iniuria*, but nevertheless regarded the sentence of 4 months’ imprisonment imposed by the Court *a quo* as inappropriate. It was stipulated that no High Court case record, including records of unreported decisions as far back as 1998, could be found in which an effective term of imprisonment was imposed or confirmed on review or appeal in a case of *crimen iniuria* of a similar nature. Taking into account the sentences imposed in recently decided similar matters, as well as the fact that the current matter, as a result of the circumstances of the case, warranted a heavier sentence, the Court set aside the sentence and substituted it with a fine of R3 000 or 6 months’ imprisonment, of which R1 500 or 3 months’ imprisonment was conditionally suspended for 5 years.

The approach followed by the courts with respect to sentence certainly minimises the “chilling effect” of the offence of *crimen iniuria*. The fact that, generally, much heavier sentences are imposed for the offence of assault with the intent to cause serious bodily harm, however, on the other hand, strengthens the argument of those not in favour of the criminalisation of defamation and *iniuria*. If the different considerations that were highlighted above in the discussion of the crime of defamation have the effect that the imposition of

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<sup>72</sup> See, for example, *S v Henning* (ECJ 2004/008) [2004] ZAECHC 14 and *S v Mostert*.

direct imprisonment is avoided, these same considerations inform against criminalisation as such. From this perspective, the civil law should rather be employed as protection that proportionately balances the right to freedom of expression and the right to human dignity.

### 3.3 Incitement to commit a crime

Incitement to commit any crime is an independent offence under South African common law.<sup>73</sup> Expression within the ambit of section 16(2)(c) of the Constitution will constitute the offence to the extent that the incitement is intentional, and the infliction of the incited harm will constitute a criminal offence. If the “hate speech” is intended to incite the audience to harm the target group by means of discrimination, hostility and the infliction of psychological harm, it will generally not constitute the offence.

There is broad consensus that the narrowly defined criminalisation of the deliberate and imminent incitement to commit a criminal offence, including violence in the sense of using physical force, does not violate or unduly restrict the right to freedom of expression.<sup>74</sup> Malik points out that, in criminal cases, a direct link between speech and action, as well as intent on the part of the speaker for that particular act to be carried out, are required. He reiterates that incitement to violence in the context of “hate speech” should be “as tightly defined” as in other criminal cases.<sup>75</sup> The discussion above of “incitement” in the context of section 16(2)(c) of the Constitution applies.<sup>76</sup>

How strictly the elements of intention and imminence should be applied is well illustrated by the following question articulated by Meyerson:

Suppose ... that the law were to outlaw abortion in almost all circumstances, and suppose also that denunciations of the law would encourage women to seek illegal abortions. Could the state now prevent the expression of pro-choice views on the grounds that their airing might encourage people to act illegally?

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<sup>73</sup> Van der Merwe & Du Plessis 2004: 468; *Rex v Nhlovu*: 1921 AD 485: 492.

<sup>74</sup> Meyerson 1997: 121-122.

<sup>75</sup> Malik in Herz & Molnar: 2012: 85.

<sup>76</sup> See 3.2.6.6 above. See also Chapter IV: 2.4.1.

She warns that to allow the state to suppress the expression of alleged dangerous views opens the door to the restriction of freedom of expression in the pursuit of non-neutral aims.<sup>77</sup> The answer lies in a distinction between the expression of opinion, which may possibly influence the autonomous decisions that people make, even if to transgress the law, and the intentional use of words to encourage imminent illegal behaviour which will probably ensue.<sup>78</sup> The expression in the example does not meet the requirement of an intended direct connection between expression and conduct.

The example also serves to indicate the great, potentially restrictive effect on freedom of expression that the criminalisation of the incitement of discrimination will have if the aforementioned elements are not strictly applied. Those who passionately campaign for the legalisation of discrimination, or for the termination of affirmative action, or for certain discrimination grounds to be removed or added, will be at risk of overstepping a line where their advocacy may, or may be construed to, incite acts of discrimination, while in fact they are exercising their protected right to freedom of expression.<sup>79</sup>

#### **4. PUBLIC VIOLENCE**

Milton defines the public law offence of public violence as follows: “Public violence consists in the unlawful commission, by a number of people acting in concert, of acts of sufficiently serious dimension which are intended violently to disturb the public peace or security or to invade the rights of others.”<sup>80</sup> Violence involves “the exercise of force so as to inflict injury or damage to persons or property” and includes threats of violence.<sup>81</sup> The incitement of public violence by means of discriminatory expression will therefore constitute incitement to commit a crime.

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<sup>77</sup> Meyerson 1997: 124-125.

<sup>78</sup> Meyerson 1997: 122-125. See also Chapter IV: 2.4.1.

<sup>79</sup> See Baker in Herz & Molnar: 2012: 65, 69. See also the minority judgment in *R v Keegstra*.

<sup>80</sup> Milton 1996: 74.

<sup>81</sup> Milton 1996: 85.

## 5. THE RIOTOUS ASSEMBLIES ACT

Sections 17 and 18 of the *Riotous Assemblies Act* 17/1956 also potentially apply to expression. Only sections 16, 17 and 18 have not been repealed. Section 17 provides as follows:

A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.<sup>82</sup>

Section 18 provides as follows:

- (1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.
- (2) Any person who (a) conspires with any other person to aid or procure the commission of or to commit; or (b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

Currie and De Waal point out that the Act was never intended to protect against hate speech, but rather to inhibit opposition to apartheid.<sup>83</sup> Section 17 envisages that the “public generally” may be incited, which is much broader than an incitement to imminent violence, and that intention is not required.<sup>84</sup> Meyerson similarly contends that section 17 is unconstitutional because it criminalises speech “even if the speaker is not actually inciting people to commit public violence, even if the danger is not imminent, and even if the public violence which might be committed would be committed by people with whom the speaker never intended to

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<sup>82</sup> See Milton 1996: 92-95.

<sup>83</sup> Currie & De Waal 2005: 374 fn 79.

<sup>84</sup> Currie & De Waal 2005: 374. See *R v Segale and Others* 1960(1) SA 721 (A): 730.



communicate, let alone incite”.<sup>85</sup> It is accordingly contended that, if the Act does serve any legitimate purpose, it should not be invoked to protect against “hate speech”.

## 6. THE CRIMINALISATION OF “HATE SPEECH”

### 6.1 “Hate speech” in terms of section 16(2)(c)

Van der Walt, Cronje and Smit define a crime as “conduct which common or statute law prohibits and expressly or impliedly subjects to punishment remissible by the state alone and which the offender cannot avoid by his own act once he has been convicted”.<sup>86</sup> It has been indicated that, apart from the criminalisation of the publication of “hate speech” in terms of the *Films and Publications Act*<sup>87</sup>, South African law does not specifically criminalise “hate speech”. The *Equality Act* does not criminalise any conduct that it prohibits,<sup>88</sup> including expression excluded in terms of section 16(2).<sup>89</sup> The question that should be addressed is whether expression, in particular expression contemplated by section 16(2)(c), should be criminalised.

The discussion in Chapter III of the study led to the observation that there is broad international consensus that the criminalisation of expression should apply only in situations where individual rights and the public order are intentionally put at risk by the incitement or propagation of hatred to the extent that its effective protection is only possible by means of criminal sanction.<sup>90</sup> Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* obligates the criminalisation of expression defined by it, while article 20 of the *International Covenant on Civil and Political Rights (ICCPR)* merely allows for the criminalisation of expression within its ambit. Strong views that expression under article 20 should be criminalised have been highlighted.<sup>91</sup>

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<sup>85</sup> Meyerson 1997: 126.

<sup>86</sup> Van der Walt, Cronje & Smit 1985: 24. See also Burchell & Milton 2005: 97-10 on statutory crimes.

<sup>87</sup> See 2.3.1 above.

<sup>88</sup> See sections 10(2), 21(2) and 21(3). Section 19(1)(d) provides for the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court.

<sup>89</sup> See Chapter V: 2.2.3.

<sup>90</sup> See Schmidt’s views: Chapter III: 3.2.5. See also the relevant *dictum* of Chief Justice Dickson in *Canada (Human Rights Commission) v Taylor*: Chapter IV: 4.3.2.1.1.

<sup>91</sup> See Chapter III: 3.3.3.

It has been contended that the expression contemplated by section 16(2) has been explicitly and categorically excluded from constitutional protection because it is instrumental to the destruction rather than the establishment and maintenance of a “representative democracy”.<sup>92</sup> The nature of the expression is extreme. The state should arguably be equipped to use the most effective and legitimate means to combat conduct that intends to cause, and is capable of causing, this effect. This calls for the criminalisation of expression contemplated by section 16(2)(c) of the Constitution.

It has been pointed out that, in particular circumstances, common law crimes may cover expression that also constitutes “hate speech” within the ambit of section 16(2)(c). The essential violative nature of “hate speech” in its constitutional context is, however, not a defining requirement of such incidental criminalisation. Moreover, the advocacy of hatred, based on the listed grounds, that constitutes incitement to cause harm, not in the form of violence or a criminal act, but in the form of “discrimination” or “hostility”, is not covered.<sup>93</sup>

It is accordingly contended that, in order to comply with South Africa’s international commitments as well as with the implied and related obligation in terms of section 16(2)(c) of the Constitution, expression as contemplated and articulated by section 16(2)(c) should be criminalised in terms of an exclusive provision that takes account of, and requires proof of, all the essential elements that informed the specific exclusion of “hate speech” in terms of section 16(2)(c).<sup>94</sup> The presence of these elements should be a relevant consideration not only with respect to the determination of guilt, but also as regards an appropriate sentence. This can be achieved by means of a criminal prohibition in the exact terms of section 16(2)(c), with the requirement of intent.<sup>95</sup> The position will then be that, if expression of any nature can be proved to incite imminent violence or the commitment of a crime, there will be compliance with the requirements of the applicable common law offences. If the incitement entails the affliction of concrete harm by other relevant means, it will only constitute an offence if it can be proved that the expression was in the form of the advocacy of hatred based on the selected grounds. If the incitement is in the form of the advocacy of hatred contemplated by section 16(2)(c) and entails that harm in the form of a criminal offence or

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<sup>92</sup> See the discussion of the concept “representative democracy” by Roux in Woolman & Bishop 2008: 10-08–10-11.

<sup>93</sup> See Chapter III: 3.4: Camden principle 12.1.

<sup>94</sup> The same reasoning applies to expression contemplated by section 16(2)(a) of the Constitution.

<sup>95</sup> See the discussion in Chapter III: 4.2.2 of intent in the context of article 4 of the *ICERD*.

violence should be afflicted on a target group, the appropriate, and probably more serious, main charge in a prosecution will be the “hate speech” offence and not the applicable common law offence. An example may be that where, by means of the advocacy of hatred, an audience is incited to litter a street in a neighbourhood where black families live, with the aim to drive them out.

## **6.2 “Hate speech” on the grounds of sexual orientation and nationality**

The question arises whether the criminalisation of “hate speech” may, and should, be extended to include grounds other than those listed in terms of section 16(2)(c). The comparative analysis in Chapter IV has highlighted that criminal prohibitions are generally related to the preservation of the public peace and the protection of society against the promotion of hatred related to real atrocities with deleterious effects that violate the character of the democratic society. This formulation in essence relates the above-mentioned requirement that the criminalisation of expression should apply only in situations where individual rights and the public order are intentionally put at risk by the incitement or propagation of hatred to the extent that their effective protection is only possible by means of criminal sanction, to a specific context. The extension in 2004 of the definition of “identifiable group” in section 319(2) of the Canadian *Criminal Code* illustrates the application of this principle.<sup>96</sup> It is accordingly contended that, if “hate speech” is criminalised in accordance with section 16(2)(c), in the light of recent and ongoing homophobic and xenophobic atrocities in South Africa the grounds should be extended to include sexual orientation and nationality. The above example of incitement to litter a street where black people live is certainly conceivable with respect to homosexual people or foreigners. As a matter of fact, the example does not illustrate the extremity of the atrocities that regularly occur.<sup>97</sup>

The *Draft Prohibition of Hate Speech Bill* is now assessed in the light of the above considerations.

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<sup>96</sup> See Chapter V: 2.2.2.

<sup>97</sup> See Nel & Judge 2008: 19-36; Jost, Popp, Schuster & Ziebarth 2012.

### 6.3 Analysis of the *Draft Prohibition of Hate Speech Bill*

The Bill was already submitted in 2004, but has as yet not been enacted. It explicitly aims to give effect to article 4(a) of the *ICERD*, and, in this regard, quotes the requirement in terms of article 4(a):

to declare, amongst others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.

It furthermore recognises the obligation on the state in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights, which is the cornerstone of democracy in South Africa.

The following offences relating to “hate speech” are created:

2. (1) Any person who in public advocates hatred that is based on race, ethnicity, gender or religion against any other person or group of persons that could, in the circumstances, reasonably be construed to demonstrate an intention to (a) be hurtful; (b) be harmful or to incite harm; (c) intimidate or threaten; (d) promote or propagate racial, ethnic, gender or religious superiority; (e) incite imminent violence; (f) cause or perpetuate systemic disadvantage; (g) undermine human dignity; or (h) adversely affect the equal enjoyment of any person’s or group of person’s rights and freedoms in a serious manner, is guilty of an offence.
3. Section 2(1) does not apply to any *bona fide* engagement in (a) artistic creativity; (b) academic and scientific inquiry; (c) fair and accurate reporting in the public interest; or (d) publication of any information, advertisement or notice that is in accordance with section 16 of the Constitution of the Republic of South Africa, 1996.

Appropriate sentences include imprisonment for a period of up to 6 years in the case of a second or subsequent conviction.

The following observations are relevant:

The exclusions in terms of section 2(1) of the Bill limit its potential scope to the same extent that the proviso in terms of section 12 of the *Equality Act* limits the application of sections 10 and 12 of the *Equality Act*.<sup>98</sup> Within this narrow scope, section 2(1) explicitly only applies to expression in public<sup>99</sup>, only to the advocacy of hatred, and only to the stipulated prohibited grounds.

The Bill criminalises the expression within its ambit without requiring intention. Moreover, while the relevant provisions of the *Equality Act* require the prohibited expression to demonstrate a clear intention, the Bill merely requires demonstration of an intention.<sup>100</sup> It can be argued, though, that “advocacy of hatred” in the narrow context to the exclusion of bona fide engagement in constitutionally protected speech, implies intention at least to hurt or harm or violate human dignity as contemplated in the section.<sup>101</sup>

This highlights the significant absence of the essential requirement in terms of section 16(2)(c) of the Constitution that the advocacy of hatred on the prohibited grounds should also constitute incitement to cause harm.<sup>102</sup>

In the absence of this requirement, the application of the prohibition only to the grounds listed by it becomes problematic. The explanation provided with respect to section 16(2)(c) no longer applies.<sup>103</sup> To enact legislation to protect the selected groups against expressive conduct that, for example, hurts or threatens them or adversely affects their equal enjoyment of rights and freedoms in a serious manner, at a time when the suffering of other groups protected in terms of section 9(3) of the Constitution is a prominent issue, appears to be undeniably and unfairly discriminatory.<sup>104</sup>

Moreover, in contrast to the effect of the criminalisation of the incitement of clearly definable, concrete common law offences, or the incitement to cause harm contemplated by

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<sup>98</sup> See Chapter V: 4.7.2.7.

<sup>99</sup> The phrase “in public” is broadly defined as (i) in the sight or hearing or presence of the public; (ii) in a public place; or (iii) in the sight or hearing of people who are in a public place; and “public place” includes any place to which the public has access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

<sup>100</sup> See the discussion of intention in the context of article 4 of the *ICERD*: Chapter III: 4.2.2.

<sup>101</sup> See Chapter V: 2.2.6.2.

<sup>102</sup> See Chapter V: 2.2.5 and 2.2.6.2.

<sup>103</sup> See Chapter V: 2.2.2 and 2.2.6.4.

<sup>104</sup> See Chapter V: 2.2.2.

section 16(2)(c) of the Constitution as interpreted in Chapter V of the study<sup>105</sup>, the “chilling effect” of the criminalisation of causing or inciting context-sensitive and variable harms like discrimination, hostility, psychological distress and emotional hurt will be substantial.<sup>106</sup> The risk is that challenging, which includes “shocking” and “disturbing”, views and concerns on equality, freedom, human dignity and other constitutional values will be silenced or intimidated.<sup>107</sup> Those who passionately preach that sin should be hated and abolished from people’s lives, and believe racial integration and the approach that husband and wife have equal status in marriage to be religious sins, may, for example, fear incarceration. Theoretically speaking, they should of course rely on the exclusion of bona fide engagement in the publication of information.

The implication of enacting the Bill will be that the design of the provisions of the *Equality Act* directed at achieving the promotion of equality and the prevention of unfair discrimination by means calculatedly sheering away from criminalisation<sup>108</sup>, will be wasted to a substantial extent. It has to be mentioned in this regard that the focus of the *Equality Act* on mediation, conciliation, negotiation and orders directed at solution rather than punishment<sup>109</sup> does not mean that the Act does not have “teeth” to effectively discourage “hate speech”. Appropriate orders include payment of damages in respect of impairment of dignity, pain and suffering, or emotional and psychological suffering as a result of the unfair discrimination, hate speech or harassment in question,<sup>110</sup> and non-compliance with an order of the Equality Court may warrant imprisonment.<sup>111</sup>

It is noteworthy that the punctuation and enumeration of the exclusions in terms of section 2(a) of the Bill correspond to the interpretation in Chapter V of the proviso in section 12 of the *Equality Act* as far as the application of the “bona fide” element is concerned. The phrase “in accordance with the Constitution” does, however, not appear to apply to all the listed instances of expression. If not, the implication will be that bona fide engagement in the forms of expression enumerated as (a), (b) and (c) that constitute “hate speech” in terms of section

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<sup>105</sup> See Chapter V: 2.2.6.5.

<sup>106</sup> Baker in Herz & Molnar: 2012: 65, 69.

<sup>107</sup> See Malik in Herz & Molnar 2012: 89-91.

<sup>108</sup> See Schmidt’s views on the criminalisation of “hate speech”: Chapter III: 3.2.5. See also the relevant *dictum* of Chief Justice Dickson in *Canada (Human Rights Commission) v Taylor*: Chapter IV: 4.3.2.1.1.

<sup>109</sup> *Equality Act*: section 21(4)(b).

<sup>110</sup> *Equality Act*: section 21(2)(d).

<sup>111</sup> *Equality Act*: section 30(1)(3).

16(2)(c) of the Constitution will not be prohibited by the Bill. The untenable effect will be that “hate speech” contemplated by section 16(2)(c) will not be completely criminalised, while forms of “hate speech” outside this ambit will be.

It is accordingly contended that the Bill does not comply with the principles that were set out in the previous paragraph.

#### 6.4 Conclusion

There is a need for consolidating legislation that creates an offence that protects society against the effects of “hate speech” contemplated in terms of section 16(2)(c) of the Constitution. Furthermore, in the light of ongoing atrocities against homosexual people and foreigners, consideration should be given to extending this offence to “hate speech” of the same nature against homosexual people and foreigners. Such extension will be in accord with the aforementioned aim of protecting society against conduct that jeopardises the constitutional democracy.

Outside this ambit, the constitutional commitment to heal the divisions of the past rather than punish those who are still provoked by those divisions, should be diligently considered.<sup>112</sup> The distinct approach of South African law in this regard is of material significance, in particular with respect to expression that hurts or harms based on group identity. The following remarks of Justice Mokgoro, although *obiter* and dealing with the determination of an appropriate remedy in defamation law, applied in context, aptly articulate this point:

A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed monetary award ... . The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social inter-dependence. It is an area where courts should be pro-active in encouraging apology and mutual understanding wherever possible.<sup>113</sup>

In the context of “hate speech”, this is exactly the goal of the *Equality Act*.

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<sup>112</sup> See the Preamble to the Constitution, 1996.

<sup>113</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006): par 68-69.

## CHAPTER VII

### SELF-REGULATORY MEDIA BODIES AND THEIR CODES

*Broadcasting is really too important to be left to broadcasters.*

*Tony Benn*<sup>1</sup>

#### 1. INTRODUCTION

##### 1.1 The relationship between media freedom and freedom of expression

Section 16(1) of the Constitution explicitly lists freedom of the press and other media as included in the right to freedom of expression. This raises the question whether media freedom occupies a special position in the context of the right to freedom of expression.

Three perspectives on the relationship of media freedom to freedom of expression have been formulated. The first is the “expression model”, which regards the two freedoms as equivalent. In terms of this model, freedom of the media simply refers to the free-speech rights of owners, editors and journalists. It does not extend to the protection of newsgathering or other non-expressive acts. It has been argued that, in accordance with this approach, any explicit mention of freedom of the media in a constitution which protects freedom of expression will be redundant.<sup>2</sup> However, whilst the *First Amendment* of the American Constitution does explicitly protect freedom of the press, the American Supreme Court has generally followed this perspective.<sup>3</sup>

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<sup>1</sup> Tony Benn was the Minister for Information in the United Kingdom in the 1960s. The statement made by him in 1968 suggested that television and radio were destined to be the people’s medium. See Briggs 1995: 787.

<sup>2</sup> Barendt 2005: 419; Ugland 2009: 388-389.

<sup>3</sup> Barendt 2005: 422. For a somewhat different view, see Ugland 2009: 421.



The second approach<sup>4</sup> is a “special-rights model” that reserves the protection of freedom of the media for those communicators who possess certain professional attributes or institutional affiliations. From this perspective, “freedom of the media” bears a meaning distinct from “freedom of expression”. The media, as a private institution, is given constitutional protection in recognition of its role as a check on government.<sup>5</sup> There are, however, in principle serious objections to conferring on the media special rights which are not shared by individual writers, artists and providers of information. Moreover, a constitutional guarantee for the institutional media may be interpreted as allowing them to act incompatibly with the right to free expression itself.<sup>6</sup>

The third approach is an “autonomy model” in which media freedom is regarded as an instrumental rather than a primary or fundamental right. This model provides at least some protection against, for example, government encroachments into newsrooms or interference with source relationships, and its protections are available to anyone who seeks to gather and report news. Media freedom is protected “only to the degree to which it promotes certain values at the core of our interest in freedom of expression generally”.<sup>7</sup>

South African courts have on a number of occasions rejected a strict doctrine of so-called “press exceptionalism”, which demands that special or greater protection be extended to the press, or for that matter, the media, under the right to freedom of expression. On the other hand, one of the premises which usually substantiates press exceptionalism, “namely that the press occupies a position of singular importance in protecting the expressive right on the community’s behalf”, has repeatedly been endorsed by the courts.<sup>8</sup> In accordance with this approach, the specific enumeration in section 16(1)(a) of the Constitution of a right to freedom of the press and media implies that there are distinct considerations involved in this field of expression, and that any regulation of the media should duly consider the specific responsibilities and challenges of the media. Milo, Penfold and Stein contend that this recognition of the importance of the media in the protection of expressive freedom in a democratic society may be regarded as an “endorsement by our courts of a weak form of press

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<sup>4</sup> Umland mentions this approach thirdly.

<sup>5</sup> Barendt 2005: 420; Umland 2009: 388-389.

<sup>6</sup> Barendt 2005: 421.

<sup>7</sup> Barendt 2005: 420-422; Umland 2009.

<sup>8</sup> Milo, Penfold & Stein in Woolman & Bishop 2008: 42-34-42-35. 2.

exceptionalism implicating that in relation to freedom of expression the press is not identically situated to the ordinary citizen”.<sup>9</sup>

The South African Constitutional Court in *Khumalo and Others v Holomisa* confirmed the instrumental role of the media in giving effect to the constitutional right to freedom of expression. It described the media as “primary agents” of the dissemination of information and ideas<sup>10</sup>, and, as such, as “extremely powerful institutions in a democracy” with a “constitutional duty to act with vigour, courage, integrity and responsibility”.<sup>11</sup> The Court assigned particular duties to the media in a democratic society. These include an obligation to provide citizens both with information and with a platform for the exchange of ideas, which are crucial to the development of a democratic culture. “The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.”<sup>12</sup> This approach corresponds with the third perspective described above.

In *Government of the Republic of South Africa v Sunday Times Newspaper and Another*, Justice Joffe articulated the watchdog function and obligation of the press as follows:

It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration ... It must advance the communication between the governed and those who govern.<sup>13</sup>

The fact is that the institution of the media is best positioned to serve and maintain the values and interests that inform the protection of freedom of expression on a broad societal scale. It has the capacity to provide readers, listeners and viewers with knowledge and with information and opinions that enable them to participate actively in a political democracy. In addition, it has the capacity to provide them with opportunities for self-fulfilment through the

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<sup>9</sup> Milo *et al* in Woolman & Bishop 2008: 42-34–42-35.

<sup>10</sup> *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771: par 22. See also *Print Media South Africa and Another v Minister of Home Affairs and Another* (14343/2010) [2011] ZAGPJHC: par 40; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; 2007 (5) SA 540 (SCA): par 22.

<sup>11</sup> *Khumalo and Others v Holomisa*: par 24.

<sup>12</sup> *Khumalo and Others v Holomisa*: par 23-24.

<sup>13</sup> *Government of the Republic of South Africa v Sunday Times Newspaper and Another* 1995 (2) SA 221 (T): 227H 2-228A.

dissemination and promotion of their views, cultures, religion, passions and interests by mouth of their chosen leaders and representatives, as well as by personally participating in letter columns, actuality and talk programmes.<sup>14</sup> From this perspective, protection of the media, provided that the media indeed serves these values and interests, can be viewed as a worthy societal goal. Significantly, though, these values will not be served if the rights to human dignity and equality are jeopardised in context in a manner that will not survive constitutional scrutiny. Relevant legislative provisions that give effect to the Constitution provide the considerations that should be taken into account to determine whether or not this is the case.

## **1.2 The special regulation of broadcasting**

The Constitution, in terms of section 192, singles out broadcasting to comply with specific obligations. It provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

A number of arguments have been used to justify the special regulation of broadcasting. Historically, the most important was the scarcity of frequencies, which rendered licence conditions reasonable.<sup>15</sup> This argument became outdated as a result of the introduction of cable and satellite and, more recently, digital broadcasting. Owing to the availability of multiple channels, radio and television broadcasting are no longer public monopolies on which listeners and viewers have to rely for objective news and for exposure to knowledge and ideas.<sup>16</sup>

The importance of pluralism presents a more convincing argument. From this perspective, the special regulation of broadcasting is concerned with the fact that it is the primary medium employed by the state to communicate information and ideas. The argument is that, had the press been similarly employed, there would have been a need for provisions similar to section

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<sup>14</sup> Barendt 2005: 417, 424. See also *Jersild v Denmark* 15890/89 (1993) (ECHR): par 31. See also ARTICLE 19 2010: Commentary on The Regulation of “Hate Speech” in Kenya: 14 fn 38: <<http://www.article19.org/pdfs/analysis/kenya-commentary-on-the-regulation-of-hate-speech-pdf>> (accessed on 1-04-2013).

<sup>15</sup> See Chapter IV: 2.3.2.2.

<sup>16</sup> Fourie 2003: 148-149, 151-152; Thierer 2007: 433.

192 of the Constitution to ensure that biased promotion of political views would not occur.<sup>17</sup> This argument should be related to the initial scarcity of frequencies and to the consequent different traditions of regulation of the press and broadcasting institutions that have been established.<sup>18</sup>

The following indications are noteworthy in this context. Brand refers to the statistics provided by the All Media Products Survey 2008 of the South African Advertising Research Foundation, according to which radio is the medium with the broadest reach in South Africa, with 93,5 of South Africans having access, while television reaches 83% of South African households, and 47% of South Africans regularly read a daily or weekly newspaper.<sup>19</sup> It is further indicated that the South African Broadcasting Corporation (SABC) accounts for 66% of the total radio audience.<sup>20</sup>

While there is room for an argument that section 192, by requiring regulation by an independent body in the public interest, restricts the right to freedom of expression, the Constitutional Court in *Radio Pretoria v Chairperson of Independent Authority of South Africa*<sup>21</sup> held that the *Broadcasting Act 4/1999* and the *Independent Communications Authority of South Africa Act (ICASA Act) 13/2000* comprise the legislative framework that gives practical effect not only to section 192 as such, but also to the protection of the fundamental right of freedom of expression.<sup>22</sup> It can be argued that regulation in terms of section 192 improves the marketplace of ideas, thereby not restricting the right to freedom of expression, but rather creating circumstances in which the right may most fairly and effectively be enjoyed.<sup>23</sup>

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<sup>17</sup> Barendt 2005: 446-447; Fourie 2003: 152-153, 161-164.

<sup>18</sup> Berger 2011: 50.

<sup>19</sup> Brand 2011: 20.

<sup>20</sup> Brand 2011: 22.

<sup>21</sup> *Radio Pretoria v Chairperson of Independent Authority of South Africa* (CCT 38/04) [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC).

<sup>22</sup> *Radio Pretoria v Chairperson of Independent Authority of South Africa*: par 20. In fulfilling this regulatory function, the broadcasting authority is bound to respect the provisions of the Bill of Rights. See *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433: par 35.

<sup>23</sup> See the remarks on the skewness of the marketplace: Chapter II: 2.3.

### 1.3 Media codes

The establishment of and commitment to recognised self-regulatory media codes reflect the media's acceptance of its institutional responsibilities and obligations set out above. The nature of these codes appears from the following *dictum*:

Members of the NAB<sup>24</sup> and their legal representatives must have certainty as to what they may broadcast, and the viewers and listeners of broadcasts and their legal representatives must know against what broadcasting material they can lodge complaints because of alleged contraventions of the Code. A code of this nature enjoins and also prohibits certain things. It must therefore be couched in legal language and must be worded in such a way that broadcasters can know with reasonable certainty what is expected of them.<sup>25</sup>

The statement applies specifically to broadcasting. The provision of certainty as well as the implicit requirement of legality however apply to the media in general. The shared aim is to ensure that the expression, in the particular context, will conform with constitutional principles, applicable legislation, and the common law. It is contended that to only partly cover unconstitutional and illegal expression may create a perception that what is in fact unconstitutional expression is allowed.

The following statement of the Chairperson of the Press Council of South Africa, Raymond Louw, quoted by the *Mail & Guardian* newspaper, provides a relevant perspective on the issue of the effective enforcement and general approach of the press codes:

In regard to penalties, the Ombudsman imposes what is regarded by the media as one embodying serious sanction. If found wanting, a paper can be called upon to publish a correction and an apology prominently. This punishment strikes at the heart of a newspaper's operations. It tells readers that the newspaper was not only inaccurate but that it behaved unprofessionally or even dishonestly. Nothing damages a newspaper more than a finding against its credibility and trustworthiness. If the public lose its trust in a newspaper in regard to its methods of operation and accuracy it can go out of business, thus enduring the ultimate sanction.<sup>26</sup>

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<sup>24</sup> The NAB is the National Association of Broadcasters; see 4.1 below.

<sup>25</sup> *94.7 Highveld Stereo v Du Plessis, Pastor Venter, Orchison, Wallis, Suskin, Cotton and Byrne* (hereafter "94.7 Highveld Stereo v Du Plessis") 27/2004 (BCTSA): par 7.

<sup>26</sup> *Mail & Guardian*: <<http://mg.co.za/article/2010-08-02-press-council-warns-against-media-tribunal>> (accessed on 29-10-2013).

In the broadcasting context, to maintain this trust is an explicit constitutional obligation.

#### **1.4 The objectives of the chapter**

Against this background, the chapter highlights those provisions of media codes that deal with hurtful and harmful expression based on group identity. The question is raised whether the codes duly acknowledge the relevant provisions of the Constitution and of the *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) 4/2000* with respect to discriminatory expression. It is contended that the codes of the Press Council of South Africa and of the Advertising Standards Authority (ASA) of South Africa accommodate these principles to a more satisfactory extent than the codes of the Broadcasting Complaints Commission of South Africa (BCCSA). The discussion of a recent decision of the Press Council of South Africa and the more extensive discussion of decisions of the BCCSA is employed not only to substantiate this criticism, but also to illustrate the principles that were highlighted and scrutinised in preceding chapters. Relevant provisions of comparable Canadian broadcasting codes are highlighted. A selection of decisions of Canadian broadcasting tribunals is then discussed. The purpose is to illustrate how shared constitutional principles that affect free expression in the broadcasting context are applied in Canada. The distinct focus on broadcasting is related to the explicit obligation in terms of the Constitution to regulate broadcasting in the public interest.

## **2. THE PRESS COUNCIL OF SOUTH AFRICA (PCSA)**

### **2.1 The PCSA Constitution**

The aims and objectives of the PCSA, stipulated in the PCSA Constitution, include the promotion and preservation of the right to freedom of expression, including freedom of the press as guaranteed in section 16 of the Constitution, the promotion of the concept of press self-regulation, and the acceptance of a press code of conduct enforced by an independent non-statutory, mediating and adjudicating structure aimed at introducing procedures for the

expeditious and cost-effective adjudication of complaints against publications published by members of Print Media South Africa (PMSA)<sup>27</sup> and other subscribers to the press code.<sup>28</sup>

An amended PCSA Constitution was announced on 9 October 2012. While maintaining the idea of “self-regulation”, it rather describes the system established by it as “a voluntary independent co-regulatory system involving exclusively representatives of the press and representatives of the public with the aims and objectives set out in this Constitution”. A “shift toward stronger public representation is a theme running through the newly announced constitution of the Press Council”. This includes the addition of an independent chairperson in the person of a retired judge to the 12 individuals representing members of the public and members of the media, which adds another public voice.<sup>29</sup>

The PCSA Constitution provides that six of the Council members must be representative of the press, and six representative of the public. Each of the following institutions must appoint one press member: the Newspaper Association of South Africa (NASA), the Magazine Publishers Association of South Africa (MPASA), the Association of Independent Publishers (AIP) and the Forum of Community Journalists (FCJ). The South African National Editors’ Forum (SANEF) must appoint two members, and, in the event of a journalists’ association being formed, the SANEF must relinquish one seat to the journalists’ association.<sup>30</sup>

Provision is made for the appointment of an Ombudsman and an appeal panel, the South African Press Appeals Panel (SAPAP).<sup>31</sup> The Ombudsman independently deals with and attempts to settle or otherwise adjudicate (in the latter case, together with two members as defined) complaints against publications that fall under the Ombudsman’s jurisdiction, as determined from time to time by the PCSA.<sup>32</sup> The Ombudsman may grant leave to appeal to the appeal panel.<sup>33</sup>

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<sup>27</sup> Print Media South Africa (PMSA): <<http://www.printmedia.org.za/>> (accessed on 2-04-2013).

<sup>28</sup> Press Council of South Africa (PCSA) Constitution: clause 1: <<http://www.presscouncil.org.za/ContentPage?code=CONSTITUTION>> (accessed on 2-04-2013). More than 640 publications, mainly members of PMSA, subscribe to the South African Press Code adopted by the PCSA.

<sup>29</sup> PCSA: <<http://www.presscouncil.org.za/News/View/south-africas-press--a-new-start-for-old-values-72>> (accessed on 2-04-2013).

<sup>30</sup> PCSA Constitution: clause 4.

<sup>31</sup> PCSA Constitution: clauses 9 and 10.

<sup>32</sup> PCSA Constitution: item 9.

<sup>33</sup> PCSA Constitution: item 9; PCSA Complaints Procedures: items 2.8 and 3:

The Council has adopted the *South African Press Code* to guide journalists in their daily practice of gathering and distributing news and opinions, and to guide the Ombudsman and the appeals panel to reach decisions on complaints from the public. The Council is the custodian of the *Code* and may amend it from time to time, depending on the needs concerned.

## 2.2 The PCSA *Code*<sup>34</sup>

The Preamble to the *Code* gives recognition to sections 16(1) and (2) of the Constitution. It confirms the essential role of the press in realising the promise of democracy in enabling citizens to make informed judgements on issues of the day. It is stated that the centrality of this role is recognised in section 16 of the Bill of Rights, that the press holds these rights in trust for the country's citizens, and that the press is subject to the same rights and duties as the individual.

Clause 4.2 provides that the press must exercise exceptional care and consideration in matters involving dignity and reputation.

Clause 5 provides as follows:

- 5.1. Except where it is strictly relevant to the matter reported and it is in the public interest to do so, the press shall avoid discriminatory or denigratory references to people's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or other status, nor shall it refer to people's status in a prejudicial or pejorative context.
- 5.2. The press has the right and indeed the duty to report and comment on all matters of legitimate public interest. This right and duty must, however, be balanced against the obligation not to publish material that amounts to:
  - 5.2.1. Propaganda for war;
  - 5.2.2. Incitement of imminent violence; or
  - 5.2.3. Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

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<<http://www.presscouncil.org.za/Complaints?prev=http%3A%2F%2Fwww.presscouncil.org.za%2F>> (accessed on 2-04-2013).

<sup>34</sup> PCSA: <<http://www.presscouncil.org.za/ContentPage/Index/8>> (accessed on 2-04-2013).



It is contended that clauses 4.2 and 5.1 should be perceived as directed at avoiding the promotion of inequality as contemplated by sections 9(3) and (4) of the Constitution and the related provisions of the *Equality Act*. A determination of whether expression falls under these clauses, in particular clause 5.1, will require an assessment along the very lines of sections 6, 10 and 12 of the Act. Violations of the Constitution and of legislative provisions giving effect to the Constitution will certainly not serve the public interest. Moreover, the requirement of strict relevance to the matter reported is concerned with the bona fides of the publication.

It has to be noted that clause 5.2 is problematic in the sense that expression within the ambit of section 16(2) of the Constitution is, by implication, categorically prohibited in terms of section 10 of the *Equality Act*. A balancing exercise will therefore not be appropriate.

The application of relevant provisions of the *Code* by the SAPAP in *Ziyad Motala v Sunday Times*<sup>35</sup> will now be assessed in the light of the above contentions.

The matter concerned complaints of racism and the stereotyping of Indians based on the following portions from a column in the *Sunday Times* newspaper:

... a kind-hearted businessman by the name of Gupta (an Indian), who has his fingers in many business pies, has bought the president's son, Duduzane, a house in one of the leafy suburbs in the north of Johannesburg ... . In fact the media should be commending poor Duduzane for being a fast learner: he realized that his good father became quite a comfortable man thanks to his friendship with Shabir Shaik, who just happens to be an Indian and a businessman. So Duduzane figured: "ah, let me get myself my own Indian as well." This was nothing new, an Indian businessman finding a politically powerful darkie or vice versa. "Nelson Mandela has his own Indians. You remember those chaps who started selling some pieces of paper with doodles on them to art galleries under the pretext that the Old Man was the original artist? If such a powerful, reputable darkie-with-political power could have his Indians, why couldn't a Zuma have his own Indian?"<sup>36</sup>

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<sup>35</sup> *Ziyad Motala v Sunday Times*: PCSA Appeal Hearing, Wednesday 29 February 2012.

<sup>36</sup> *Ziyad Motala v Sunday Times*: see the minority ruling, par 3.

The complaint was founded, firstly, on clauses 2.1, 2.2 and 2.3 of the previous *Code*. These clauses correspond with clauses 5.1 and 5.2 of the current *Code* quoted above. The complainant argued that clause 2 “contains an outright prohibition on referring to a racial group in a manner which is prejudicial. It prohibits mentioning the race of an individual being discussed unless absolutely necessary.” The columnist, it was argued, transgressed this prohibition when he published statements:

draw[ing] from the infamous stereotype of Indians as unethical and dishonest, referring to cases where Indians abused political connections for financial gain, to reinforce a secondary stereotype ... namely Indians in general – owing to their corrupt and corrupting behaviour – seek and exploit politically connected blacks to enrich themselves.

Secondly, the complainant argued that the statements contravened section 16(2)(c) of the Constitution. It was alternatively contended that the publication was in breach of section 10 of such Constitution and that it was contrary to international norms and rulings of other press councils.<sup>37</sup>

The *Sunday Times* argued that it was of no consequence that some people might be offended by the article. The columnist, it said, was free to write whatever he liked, so long as he did not breach the constitutional limitations on the freedom of expression. The article by no means fell under section 16(2) of the Constitution. Furthermore, the column was written in a satirical tone. The author, it was pointed out, often wrote about ethnic foibles and stereotypes or poked fun at the various races and ethnic identities of South Africans. The vast majority of his readers understood that the views he expressed in such columns were not to be taken seriously.<sup>38</sup>

The *Sunday Times* also contended that the newspaper had published, prominently, a letter from the complainant under the heading: “Dignity should be protected”, with the subhead: “Khumalo’s column was offensive, says Ziyad Motala”. Further, the newspaper had also published two other letters of complaint.<sup>39</sup>

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<sup>37</sup> *Ziyad Motala v Sunday Times*: “The complaint”.

<sup>38</sup> *Ziyad Motala v Sunday Times*: “The response of the *Sunday Times*”.

<sup>39</sup> *Ziyad Motala v Sunday Times*: “The response of the *Sunday Times*”.

The majority of the SAPAP held that the column undoubtedly contained much offensive material, but rejected the reliance by the complainant on clause 2 of the *Code* on the basis that the column constituted opinion as contemplated by clause 4 of the *Code*. Clause 4 provided as follows:<sup>40</sup>

**4. Comment**

- 4.1 The press shall be entitled to comment upon or criticise any actions or events of public importance provided such comments or criticisms are fairly and honestly made.
- 4.2 Comment by the press shall be presented in such manner that it appears clearly that it is comment, and shall be made on facts truly stated or fairly indicated and referred to.
- 4.3 Comment by the press shall be an honest expression of opinion, without malice or dishonest motives, and shall take fair account of all available facts which are material to the matter commented upon.

The Panel held that the column was clearly identified as comment. Regardless of the motive behind the commentary, and putting aside any discussion as to its journalistic merits, the issue that was raised was of crucial and legitimate public interest, namely the tendency for South Africans pejoratively to stereotype people of Indian descent. The Panel expressed the belief that “given our country’s history ... this is a subject of national importance that should be aired, not concealed”. Moreover, “what is offensive to one section of society today, may not be offensive tomorrow – or may not ever have been offensive to another section of society”.<sup>41</sup>

The Panel then stated that section 16 of the Constitution, which was cited by both parties, relieves the Panel of the burden to be the arbiter of “the line” which defines “the acceptable norm” in comment, as it explicitly states that freedom of speech “is only prescribed (by Section 2), viz it should not be: (a) Propaganda for war; (b) Incitement of imminent violence; or (c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. It was concluded that “while the Khumalo column might be considered by many to be hate speech, it is not obviously incitement to cause harm”. The complaint was accordingly dismissed. A note was added that editors and journalists should observe great sensitivity when dealing with topics spelt out in clause 2 of the *Code*,

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<sup>40</sup> The corresponding clause of the current *Code* is clause 7.

<sup>41</sup> *Ziyad Motala v Sunday Times*: “The finding of the majority of the Press Appeals Panel”.

and that “there is a danger that ‘fair comment’ is used as the justification for hate speech that, deliberately or not, has the potential for incitement to cause harm”.<sup>42</sup>

In the dissenting minority ruling, it was found that the statements contravened clause 2 of the *Code* because they contained “discriminatory or denigratory references to people, race and ethnicity”. The fact that the article may be satirical or humorous or amount to a statement of opinion was held to be no excuse.<sup>43</sup> Its import drew from an “infamous stereotype” of Indians as “unethical and dishonest”.<sup>44</sup>

It was further stated that section 16 of the Constitution “is also of relevance”. The statements were held to constitute advocacy of hatred based on the race or ethnicity of Indians.<sup>45</sup>

The minority ruling finally referred to clause 4.3,<sup>46</sup> which requires that comment by the press be an honest expression of opinion, without malice or dishonest motives. The view was expressed that the fair inference to be drawn was that the statements were made with malice.<sup>47</sup>

The ruling does not provide detailed information on the contextual presentation of the relevant statements. However, the following comments concern not so much the outcome on the merits, but rather the analysis in both the majority and minority rulings, of the relevant provisions of the *Code*, and the relation of these provisions to the Constitution. It should be noted that the concept “comment” in the media context is specifically highlighted later in the chapter. The focus of the current discussion, however, is on other aspects of the rulings.

Firstly, the apparent approach in the majority ruling that a contravention of clause 2 is subject to the expression concerned being “hate speech” as contemplated by section 16(2)(c) of the Constitution gives no recognition to the fact that expression that does not constitute “hate speech” in these terms can nevertheless be unconstitutional in terms of sections 9(3) and (4) of such Constitution, read with legislation that gives effect to the obligation that these sections

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<sup>42</sup> *Ziyad Motala v Sunday Times*: “The finding of the majority of the Press Appeals Panel”.

<sup>43</sup> *Ziyad Motala v Sunday Times*: “Dissenting minority ruling”, par 2.

<sup>44</sup> *Ziyad Motala v Sunday Times*: “Dissenting minority ruling”, par 3.

<sup>45</sup> *Ziyad Motala v Sunday Times*: “Dissenting minority ruling”, par 5.

<sup>46</sup> Clause 7.3 of the current *Code*.

<sup>47</sup> *Ziyad Motala v Sunday Times*: “Dissenting minority ruling”, par 6.

impose. The finding of the minority that the expression at issue did constitute “hate speech” as contemplated negates the requirement of incitement.

Secondly, the majority’s approach that the motive behind the commentary, its journalistic merit and whether a section of society found it offensive have no relevance when comment on a subject of national importance is considered, calls for criticism. Comment, also on a subject of national importance, can certainly be presented in a manner that unjustifiably violates people’s constitutional rights. The minority’s focus on the requirement stipulated in clause 3.4 that comment “shall be an honest expression of opinion, without malice or dishonest motives” is more satisfactory. In terms of the *Equality Act*, what is at stake is whether engagement in the expression amounts to “bona fide” publication of information. The discussion in Chapter V of the concepts “bona fide”,<sup>48</sup> “publication of information,”<sup>49</sup> and “fair and accurate reporting in the public interest”<sup>50</sup> are directly relevant to the present discussion. Ultimately, the question is whether the discriminatory remarks were objectively necessary in a debate about an issue, and whether they were subjectively made for that purpose.

Thirdly, the focus on the fact that what is offensive to one section of society may not be offensive to another does not address the essential consideration of whether the remarks offended a section of society to the extent that they constituted unlawful “hate speech”. The reasonableness standard discussed in Chapter V applies.<sup>51</sup> In the application of this standard, the understanding of the “vast majority” of the readers will not necessarily represent the reasonable understanding of a member of the target group.<sup>52</sup>

Despite the fact that the decisions of Canadian tribunals discussed later in this chapter were made with respect to broadcasting, it will be apparent that various aspects of the reasoning in those decisions can be related to the aspects that were highlighted in this analysis.

In conclusion of this discussion, it is reiterated that section 10 of the *Equality Act* was designed to comply with the constitutional obligation to prohibit and prevent unfair discrimination in the broad societal context. This is precisely the context in which the press

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<sup>48</sup> See Chapter V: 4.7.2.2.

<sup>49</sup> See Chapter V: 4.7.2.3.

<sup>50</sup> See Chapter V: 4.7.2.5.

<sup>51</sup> See Chapter V: 4.7.3.6.

<sup>52</sup> See Chapter V: 4.7.3.6.

operates. With respect to expression outside the ambit of section 16(2) of the Constitution, whether or not an article in the press that contains discriminatory remarks is acceptable will ultimately be reduced to a determination of the objective and subjective bona fides of the publication as contemplated by the Act. Considerations of the motive, the journalistic merit and the nature of the statements at issue, be it comment, satire, humour, the publication of information, or reporting on an event, will be relevant. Of further substantial relevance will be to construe and take account of the impact of the statements on society as a whole, and target groups in particular, related to the aforementioned considerations. It is contended that clauses 5.1 and 5.2 in conjunction can and should be interpreted to incorporate all these considerations, and should be applied accordingly.

### **3. THE ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA (ASA)**

#### **3.1 The ASA Constitution**

The ASA is an independent body set up and paid for by the marketing communications industry to regulate advertising in the public interest through a system of self-regulation. It works closely with government, statutory bodies, consumer organisations and the media industry to ensure that the content of advertising meets the requirements of the *Code of Advertising Practice* of the ASA.<sup>53</sup>

The ASA Code was duly acknowledged inter alia by the *Independent Broadcasting Authority Act 153/1993*, which was superseded by the *Electronic Communications Act 35/2005*. Section 55(1) of this latter Act provides as follows:

- (1) All broadcasting service licensees must adhere to the Code (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa.
- (2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the ICASA Act [*Independent Communications Authority of South Africa Act 13/2000*].

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<sup>53</sup> Advertising Standards Authority of South Africa (ASA) *Code of Advertising Practice*: <[http://www.asasa.org.za/Default.aspx?mnu\\_id=11](http://www.asasa.org.za/Default.aspx?mnu_id=11)> (accessed on 2-04-2013).

- (3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority, is found to have breached the Code, such broadcasting licensee must be dealt with in accordance with applicable provisions of the ICASA Act.

### **3.2 The ASA Code**

The Preamble to the *Code* states that the primary object of the *Code* is the regulation of commercial advertising. It therefore generally applies to advertisements for the supply of goods or services or the provision of facilities by way of trade, and also to advertisements other than those for specific products which are placed in the course of trade by or on behalf of any trader. In addition, the *Code* applies to advertisements by government departments and agencies and to those by other non-commercial organisations and individuals to the extent that it is “appropriate”. “Political advertisements” fall outside the sphere of the ASA’s functions.

In terms of clause 4.1 of the *Code*, “advertisement” means “any visual or aural communication, representation, reference or notification of any kind ... which is intended to promote the sale, leasing or use of any goods or services; or ... which appeals for or promotes the support of any cause”. It is stipulated that the “promotional content of display material, menus, labels, and packaging” also falls within the definition, and that “editorial material” is not an advertisement, unless consideration has been given or received for it. Furthermore, the word “advertisement” applies to published advertising wherever it may appear, but not to “editorial or programming publicity”.

The *Code* prohibits “offensive advertising” in the following terms: “No advertising may offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>54</sup>

The *Code* prohibits “unacceptable advertising” in the following terms:

#### *3.1 Fear*

Advertisements should not without justifiable reason play on fear.

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<sup>54</sup> ASA *Code of Advertising Practice*: section II, 1.1.

### 3.2 *Violence*

Advertisements should not contain anything which might lead or lend support to acts of violence, including gender-based violence, nor should they appear to condone such acts.

### 3.3 *Legality*

Advertisements should not contain anything which might lead or lend support to criminal or illegal activities, nor should they appear to condone such activities.

### 3.4 *Discrimination*

No advertisements shall contain content of any description that is discriminatory, unless, in the opinion of the ASA, such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

### 3.5 *Gender*

Gender stereotyping or negative gender portrayal shall not be permitted in advertising, unless in the opinion of the ASA, such stereotyping or portrayal is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>55</sup>

“Discrimination” is defined as:

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- imposes burdens, obligations or disadvantage on; or
- withholds benefits, opportunities or advantages from,
- any person on one or more of the following grounds:
  - 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 analogous ground.<sup>56</sup>

“Gender stereotyping” is defined as advertising that portrays a person or persons of a certain gender in a manner that exploits, objectifies or demeans.<sup>57</sup>

It is contended that these guidelines, if followed, will, in giving effect to the relevant constitutional principles, as well as the prohibitions that were discussed in Chapter VI, effectively steer advertisers away from those forms of discriminatory expression that are prohibited in terms of sections 6, 10, 11 and 12 of the *Equality Act*. It should be noted that clause 3.4 of the *Code* arguably does not cover the categorical aspect of section 12 of the Act

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<sup>55</sup> *ASA Code of Advertising Practice*: section II, 3.

<sup>56</sup> *ASA Code of Advertising Practice*: section I, 4.17.

<sup>57</sup> *ASA Code of Advertising Practice*: section I, 4.19.



that was discussed in Chapter V.<sup>58</sup> However, to avoid complaints in terms of clause 3.4, an advertiser will in all probability, if it will be reasonably construable that unfair discrimination or stereotyping is intended while in fact the discrimination or stereotyping is justifiable, make sure that the advertisement reflects the true position.

### 3.3 The *Canadian Code of Advertising Standards*

The similar approach of the *Canadian Code of Advertising Standards*<sup>59</sup> is noteworthy, especially in the light of the fact, which is highlighted in the discussion of broadcasting, that the same observation does not apply to Canadian and South African broadcasting codes.

Clause 14 of the *Canadian Code* recognises that advertisements may be distasteful without necessarily conflicting with the provisions of clause 14, and acknowledges that the fact that a particular product or service may be offensive to some people is not sufficient grounds for objecting to an advertisement for that product or service. The clause then continues as follows:

Advertisements shall not:

- (a) condone any form of personal discrimination, including that based upon race, national origin, religion, sex or age;
- (b) appear in a realistic manner to exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, unlawful behaviour;
- (c) demean, denigrate or disparage any identifiable person, group of persons, firm, organization, industrial or commercial activity, profession, product or service or attempt to bring it or them into public contempt or ridicule;
- (d) undermine human dignity; or display obvious indifference to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population.

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<sup>58</sup> See Chapter V: 4.8.3.

<sup>59</sup> Advertising Standards Canada (ASC) *Canadian Code of Advertising Standards*: <<http://www.adstandards.com/en/index.aspx>>. This code as well as the *Broadcast Code for Advertising to Children* and the *Code for Broadcast Advertising of Alcoholic Beverages* are administered by the ASC – see: ASC: <<http://www.adstandards.com/en/AboutASC/aboutASC.aspx>>. Complaints that raise a potential issue under the advertising codes are reviewed by independent, volunteer bodies – see: ASC: <<http://www.adstandards.com/en/ConsumerComplaints/theConsumerComplaintsProcess.aspx>> (these web pages were accessed on 2-04-2013).

## 4. BROADCASTING

### 4.1 Broadcasting legislation

In South Africa, as in Germany and Canada<sup>60</sup>, broadcasting legislation prescribes certain goals to be achieved in terms of objective news coverage, as well as the coverage of different fields of interest and culture.<sup>61</sup>

Prior to the formation of the South African constitutional democracy, the broadcasting and telecommunication sectors were regulated by statutes that facilitated control by government over telecommunications and broadcasting activities.<sup>62</sup> During the multiparty negotiation process which resulted in South Africa's transition to democracy, it was decided to set up various bodies that would facilitate that transition. These bodies included the Independent Media Commission, the Transitional Executive Council and the Independent Broadcasting Authority (IBA).<sup>63</sup>

The IBA was established by the *Independent Broadcasting Authority Act 153/1993* (the *IBA Act*). The *IBA Act* made the IBA responsible for the formulation of broadcasting policy and for the regulation of broadcasting activities. The IBA was also mandated to supervise the expansion and diversification of the broadcasting industry by means of the privatisation of some sound-broadcasting services of the public broadcaster, being the SABC<sup>64</sup>, and the licensing of new sound- and television broadcasting services. Section 2 of the *IBA Act* enjoined the IBA to ensure that broadcasting licensees adhered to a code of conduct acceptable to the Authority. In terms of section 56(1) of the *IBA Act*, the applicable code was

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<sup>60</sup> See respectively Chapter IV: 4.3.3.2-4.3.3.3 and 3.6.4.

<sup>61</sup> In Canada, the government has used public broadcasting to create a sense of nationhood. The Federal Republic of Germany has always considered public broadcasting a cultural space, the governance of which should include political parties and members of civil society. See Eko 2000: 86; Barendt 2005: 425; Fourie 2003: 162-163.

<sup>62</sup> NAB: <<http://www.nab.org.za/broadcast.asp>>: par 2(a) (accessed on 2-04-2013).

<sup>63</sup> Bowman Gilfillan Attorneys: 2; NAB: <<http://www.nab.org.za/broadcast.asp>>: par 1(a) (accessed on 2-04-2013).

<sup>64</sup> The SABC is a public broadcasting organisation established in 1936 out of the merger of three separate broadcasting stations formed in the early 1920s. Currently, the SABC's core business is formulated as to deliver a variety of high-quality programmes and services through television and radio that inform, educate, entertain and support the public at large:

SABC: <<http://www.sabc.co.za/portal/site/sabc/menuitem.7ddb6388f2d6e524bc5194f0064daeb9/>> (accessed on 2-04-2013).

the *Code of Conduct for Broadcasting Services* as set out in Schedule 1 to the Act.<sup>65</sup> The Act established the Broadcasting Monitoring and Complaints Committee (BMCC), a standing committee, to apply the *Code*. A body which had proved to the satisfaction of the Authority that its members subscribed and adhered to a code of conduct enforced by that body by means of its own disciplinary mechanism, which code of conduct and disciplinary mechanisms were acceptable to the Authority, would however be allowed to enforce such *Code* instead.<sup>66</sup>

In 1995, the National Association of Broadcasters (NAB), a non-profit organisation funded entirely by its members, was recognised by the IBA in terms of section 56(2) of the *IBA Act* as an independent judicial tribunal with the jurisdiction to adjudicate complaints from the public against broadcasters which are members of the NAB. Presently, NAB membership includes the 3 television public-broadcasting services and the 18 sound public-broadcasting services of the SABC<sup>67</sup>, all commercial television and sound-broadcasting licensees, both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors, over 30 community sound-broadcasting licensees, and one community-television broadcasting licensee, Trinity Broadcasting Network (TBN).<sup>68</sup> All the public and privately owned broadcasting licensees as well as the vast majority of community-broadcasting licensees are signatories to the BCCSA and accordingly fall under its jurisdiction.

In 1993, the NAB had established the BCCSA to adjudicate complaints from the public against its members. The BCCSA is not in any manner accountable to the NAB. It must reach its decisions on the broadcasting codes independently. Possible sanctions that may be imposed

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<sup>65</sup> *Independent Broadcasting Authority Act 153/1993*: Schedule I.

<sup>66</sup> Broadcasting Complaints Commission of South Africa (BCCSA) Constitution, Appendix II, *Code of the BCCSA* item 1: (BCCSA):  
<[http://bccsaneu.co.za/index.php?option=com\\_content&task=view&id=18&Itemid=32](http://bccsaneu.co.za/index.php?option=com_content&task=view&id=18&Itemid=32)> (accessed on 2-04-2013).

<sup>67</sup> The SABC is responsible for public-service broadcasting in South Africa. While wholly owned by the state, the corporation is financially independent of taxpayers' money, deriving its income from advertising and licence fees in a ratio of four to one. The corporation's public-broadcasting arm includes cultural services in all 11 official languages, as well as stations for South Africa's Indian (Lotus FM) and San (XK FM) communities. By far the largest radio station in South Africa is Ukhozi FM, the SABC's isiZulu cultural service, with 6,38 million listeners a week:  
<[http://www.medioclubsouthafrica.com/index.php?option=com\\_content&view=article&id=120%3APublic+broadcasting+radio+stations&catid=36%3Amedia\\_bg&Itemid=54](http://www.medioclubsouthafrica.com/index.php?option=com_content&view=article&id=120%3APublic+broadcasting+radio+stations&catid=36%3Amedia_bg&Itemid=54)> (accessed on 2-04-2013).

<sup>68</sup> NAB: <<http://www.nab.org.za/>>;  
<[http://www.doc.gov.za/index.php?option=com\\_docman&task=doc\\_view&gid=126](http://www.doc.gov.za/index.php?option=com_docman&task=doc_view&gid=126)> (accessed on 2-04-2013).

by the BCCSA include a reprimand, a directive calling upon the broadcaster to broadcast a correction, and/or a fine of up to R60 000.<sup>69</sup>

Election complaints, and complaints other than those which relate to the content of broadcasts, fall under the jurisdiction of the Complaints and Compliance Committee (CCC) of the Independent Communications Authority of South Africa (ICASA). The CCC also has jurisdiction to hear complaints about content against broadcasters which are not members of the NAB. The CCC of the ASA deals with complaints regarding advertisements.<sup>70</sup>

At the time of the recognition of the NAB by the IBA, the BCCSA applied the *Schedule 1 Code*. Clause 2 (a) of the *Schedule 1 Code* determined that broadcasting licensees would not broadcast any material which was indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population or likely to prejudice the safety of the state or the public order or relations between sections of the population. The “advocacy of hatred” was not explicitly mentioned in the *Code*.<sup>71</sup>

When the Constitution came into effect, section 192 thereof gave constitutional recognition to the IBA. It also entrenched the principle of the independence of the IBA.

The *Broadcasting Act 4/1999* established a broad framework for the regulation of the broadcasting industry and supplemented the provisions of the *IBA Act*. A substantial part of the *Broadcasting Act* is devoted to the restructuring of the SABC and, in particular, its conversion from a statutory body into a public company of which the state is the sole shareholder. The Act requires the Minister to adhere to certain general principles in developing policy and issuing policy directives to the IBA, but provides that he or she is ultimately responsible for the development of broadcasting policy. By conferring this power on the Minister, the power of the regulatory authority to determine broadcasting policy has been diluted.<sup>72</sup>

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<sup>69</sup> BCCSA: <[http://www.bccsa.co.za/index.php?option=com\\_content&view=article&id=18&Itemid=32](http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32)> (accessed on 2-04-2013).

<sup>70</sup> BCCSA: <[http://www.bccsa.co.za/index.php?option=com\\_content&view=article&id=18&Itemid=32](http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32)> (accessed on 2-04-2013).

<sup>71</sup> BCCSA: <[http://www.bccsa.co.za/index.php?option=com\\_content&view=article&id=18&Itemid=32](http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32)> (accessed on 2-04-2013).

<sup>72</sup> *Broadcasting Act 4/1999*: section 3(2).

Section 3(5) of the *Broadcasting Act* determines that the programming provided by the South African broadcasting system must, inter alia, provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern, and must comply with a code of conduct for broadcasting services as prescribed in terms of the *Electronic Communications Act*.<sup>73</sup>

The *ICASA Act* provided for the dissolution of the IBA and the South African Telecommunications Regulatory Authority (SATRA) and for the creation, in their place, of a regulatory body known as the Independent Communications Authority of South Africa (ICASA). The *ICASA Act* recognises that technological and other developments in the fields of broadcasting and telecommunications have caused a rapid convergence of these fields and acknowledges the need to establish a single body to regulate broadcasting and telecommunications matters. The Act provides that the Minister of Communications is responsible for developing policy for the communications sector and may issue policy directives to the ICASA in this regard. The ICASA is required by the Act to function without any political or commercial interference. It is an “organ of state”, and its conduct in considering licence applications and performing other regulatory functions constitutes administrative action. This means that the ICASA must act lawfully and rationally and with procedural fairness<sup>74</sup>

In 2002, the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority and Others* declared clause 2(a) of the *Schedule 1 Code* to be inconsistent with section 16 of the Constitution and invalid to the extent that it prohibited the broadcasting of material that was “likely to prejudice relations between sections of the population”, provided that such order did not apply to: (i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred based on race, ethnicity, gender or religion and that constituted incitement to cause harm. The Court noted that it would be open to the legislature to decide to keep regulation at this minimal level or to regulate further, subject to the provisions of section 36 of the Constitution.<sup>75</sup>

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<sup>73</sup> Paragraph (f) substituted by section 3(b) of Act 64/2002; paragraph (f) amended by section 97 of Act 36/2005.

<sup>74</sup> NAB: <<http://www.nab.org.za/broadcast.asp>> (accessed on 2-04-2013): par 1(a).

<sup>75</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others*: par 55.

The *Broadcasting Amendment Act 64/2002* granted the ICASA the authority to repeal and replace the *Broadcasting Code*. The *Code* was replaced with what has become known as the *ICASA Code*. In 2003, the new *Broadcasting Code* was published by the ICASA and was accepted by the BCCSA as the *Code* which would be applied in regard to broadcasters under its jurisdiction in terms of section 56(2) of the *IBA Act* of 1993.<sup>76</sup> The NAB accepted this *Code* and *Procedure* as respectively set out in Appendices II and I to the Constitution of the BCCSA. The *Code* contained more detail on the protection of women and children against violence on television. Apart from the inclusion of section 16 of the Constitution in the Preamble, no “hate speech” clause was, however, included in the *Code*, neither were dignity and equality articulated.<sup>77</sup>

In 2004, the BCCSA approached the ICASA to rectify these omissions in the *Code*. As a result, clause 16.3, relating to “hate speech”, and clause 38, which resembled clause 38 of the previous *Code*, but with the inclusion in context of the right to dignity, were included. The amended *Code* was approved by the ICASA, was accepted by the NAB and has been applicable since May 2005.<sup>78</sup>

Regulation 6 of the *Subscription Broadcasting Services Regulations*<sup>79</sup> required subscription broadcasting service licensees, or a body representing such licensees, to present to the NBA a code for subscription broadcasters. A special code for subscription broadcasters was developed by the NAB at the request of the ICASA, and was approved by the BCCSA.<sup>80</sup> Broadcasters may choose regulation by the Independent Communications Authority of South Africa (ICASA) or by the self-regulatory body, the BCCSA, which has devolved powers from the ICASA. The ICASA has a similar status to a body established in terms of Chapter 9 of the Constitution. Councillors are nominated by Parliament.<sup>81</sup>

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<sup>76</sup> General Notice 446 in *Government Gazette* 24394 of 14 February 2003.

<sup>77</sup> BCCSA: <<http://www.bccsa.co.za/>> (accessed on 2-04-2013).

<sup>78</sup> Venter 2007: 38; BCCSA: <<http://www.bccsa.co.za/>> (accessed on 2-04-2013); BCSA Constitution, Article 3, Appendices I and II; Chairperson’s Report 2004-2006: par I.

<sup>79</sup> *Government Gazette* 28452 of 31 January 2006.

<sup>80</sup> BCCSA: <<http://www.bccsa.co.za/>> (accessed on 2-04-2013). This *Code* does not include the Preamble to the 2005 *Code*. The violence prohibition in section 14 of the 2005 *Code* is limited to the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm. The *Code* contains detailed provisions regarding programme classification and parental control mechanisms.

<sup>81</sup> Berger 2011: 48.

The *Electronic Communications Act* of 2005 (the *EC Act*)<sup>82</sup> repealed and replaced the *IBA Act* and the *Telecommunications Act* with effect from 19 July 2006. Electronic communications and broadcasting are now governed by the *EC Act*. The ICASA administers the Act and is primarily responsible for the regulation of the communications sector generally. The Act takes account of the convergence of telecommunications and broadcasting technology, which allows for a variety of different services to be provided over a single platform, and establishes a regulatory framework in line with new communications methods and technologies. The Act provides that electronic communications services and broadcasting services are required to be licensed, unless exempted from these licensing requirements. In addition, network operators providing electronic communications network services, by making available physical network capacity for the conveyance of communications or the transmission of a broadcast signal, require licences to provide such services. Services and networks may be authorised in terms of either an individual or a class licence. The type of licence that is required depends on the scope of the service. Individual licences are generally required in respect of services that have a significant impact on socio-economic development, and will be granted pursuant to a relatively intensive adjudication process. Class licences, on the other hand, are required in respect of services that the ICASA finds do not have a significant impact on socio-economic development, thus necessitating less intensive regulation. Service providers requiring class licence authorisation are only required to register with the ICASA in respect of such services. The ICASA has very limited power to refuse such registration.<sup>83</sup>

Section 54 of the *EC Act* determined that, as soon as reasonably possible after the coming into effect of this Act, and subject to the Act, the ICASA should review existing regulations, and should prescribe regulations setting out a code of conduct for broadcasting service licensees. All broadcasting service licensees should adhere to the prescribed code. This provision did not apply to a broadcasting service licensee who was a member of a body which had proved to the satisfaction of the Authority that its members subscribed and adhered to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided that such code of conduct and disciplinary mechanisms were acceptable to the Authority. The Act

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<sup>82</sup> *Electronic Communications Act* 36/2005.

<sup>83</sup> Bowman Gilfillan Attorneys: *Electronic Communication and Broadcasting Brochure*: 1-9: <<http://services.bowman.co.za/Brochures/PracticeAreas/Broadcasting/eBook/index.html?pageNumber=4>> (accessed on 21-03-2013); Chapter 3 of the *EC Act*; Broadcasting Policy Green Paper published by the Ministry for Posts, Telecommunications & Broadcasting, November 1997: South African Government Information: <<http://www.info.gov.za/greenpapers/1997/broadcast.htm>> (accessed on 3-04-2013): Chapter 1.

provided for the dissolution of the BMCC and its replacement by the CCC. Regulations in terms of the Act prescribed the *ICASA Code of Conduct for Broadcasting Service Licensees*.<sup>84</sup>

In July 2009, the ICASA, after consultation with the industry, published a new broadcasting code that applies to South African free-to-air broadcasting service licensees which have agreed to the jurisdiction of the BCCSA.<sup>85</sup> This *Code*, “the new *Code*”, came into effect on 1 January 2011. In *94.7 Highveld Stereo v Du Plessis*, the *Code of Conduct* was described as “a legal document, deriving its legitimacy from the contract between the NAB and the BCCSA”, which “has to be interpreted as such”.<sup>86</sup>

## 4.2 The Preamble to the *Broadcasting Act*

The Preamble to the Act reads as follows:

**NOTING** that the South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity;

**ACKNOWLEDGING** that the South African broadcasting services are owned and controlled by South Africans;

**REALISING** that the broadcasting system must reflect the identity and diverse nature of South Africa, is controlled and managed by persons or groups of persons from a diverse range of communities, including persons from previously disadvantaged groups, and must reflect the multilingual and diverse nature of South Africa by promoting the entire spectrum of cultural backgrounds and official languages in the Republic;

**ENCOURAGING** the development of South African expression by providing a wide range of programming that refers to South African opinions, ideas, values and artistic creativity by displaying South African talent in radio and television programming and by making use of radio frequencies that are public property and that provide a public service necessary for the maintenance of national identity, universal access, equality, unity and diversity; and

**RESOLVING** to align the broadcasting system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens: . . . .

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<sup>84</sup> General Notice 958 in *Government Gazette* 32381 of 6 July 2009.

<sup>85</sup> The *Code* excludes the provision in section 12 of the 2005 *Code* that gaps in the *Code* could be filled in by the adjudicating authorities, and adds a standardised system of advisories and age restrictions. See BCCSA: <<http://www.bccsa.co.za/>>: Chairperson’s Report 2008-2009: par 6.

<sup>86</sup> *94.7 Highveld Stereo v Du Plessis*: par 7.



Sections 2, 3 and 10 of the Act provide for the implementation of these aims.

### 4.3 Public and private broadcasting distinguished

The South African broadcasting scene is dominated by the public broadcaster, the SABC. It is the only broadcaster tasked in terms of the law with making its services available throughout South Africa. Other broadcasters have their respective coverage areas prescribed through their licence conditions.<sup>87</sup>

Public-service broadcasting is informed by the idea that the public interest will best be served by a model that is “neither commercial, nor State-controlled”.<sup>88</sup> The World Radio and Television Council has stated that public-service broadcasting is based on the principles of “universality”, “diversity”, “independence” and “distinctiveness”. The latter term has been interpreted to indicate that the service offered by public broadcasting “is not merely a matter of producing the type of programs other services are not interested in, ... or dealing with subjects ignored by others”, but of requiring public broadcasters “to innovate, create new slots, new genres, set the pace in the audiovisual world and pull other broadcasting networks in their wake”.<sup>89</sup> Public-service broadcasting by definition:

has an obligation to provide sufficient amount of news and public affairs coverage, which is pluralist in terms of both issue content and coverage of political actors. It has to be accessible to a large spectrum of the society, not least in terms of socio-economic status and political orientations.<sup>90</sup>

Its mandate is not restricted to the provision of information and education, but includes offering entertainment.<sup>91</sup> The Council cautions that particular missions entrusted to public broadcasting, for example to strengthen national identity, should be approached cautiously, at all times assuring the public broadcaster’s independence.<sup>92</sup>

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<sup>87</sup> Lloyd, Duncan, Minnie & Bussiek 2009: 65-66. The survey gives an overview with statistical data on South African broadcasting.

<sup>88</sup> Juneau 2000: par I.

<sup>89</sup> Juneau 2000: par II. A.

<sup>90</sup> Popescu & Tóka 2009: 6.

<sup>91</sup> Juneau 2000: par II. B.

<sup>92</sup> Juneau 2000: par II. B.

Barendt contends that, in the first instance, the public should have access to a wide variety of types of programmes and a range of diverse opinion within the public-broadcasting channels. Thus “internal pluralism” is particularly important when these channels enjoy a dominant position within the overall system. He submits that, once private commercial broadcasting is permitted, “external pluralism”, imposed in terms of competition law, must supplement programme regulation to ensure the access of viewers and listeners to a multiplicity of voices within that sector.<sup>93</sup>

It has to be noted that section 192 of the South African Constitution does not distinguish between public and private broadcasting. The *Broadcasting Act* accordingly gives recognition to public and private broadcasting as a single system, while emphasising the public broadcaster’s positive obligations in terms of the Constitution. The broadcasting codes of the BCCSA do not distinguish between public and private broadcasters, but between free-to air and subscription broadcasting licensees. The codes correspond with respect to the regulation of discriminatory expression and “hate speech” in particular.<sup>94</sup>

It furthermore has to be taken into account that the right to freedom of expression entails that broadcasters must take care not only that protected expression which should be tolerated is not proscribed, but also that expression which should not be tolerated in the South African constitutional democracy is not allowed. The quests for diversity and independence are relevant considerations in the application of set standards in order to determine to what extent and on what basis the use of discriminatory expression, for example stereotypes, should be proscribed. Hence, in a fairness analysis with respect to publicly broadcasted discriminatory expression, the fact that the expression constitutes a preference or derision based on group characteristics will carry particular weight in relation to the responsibilities of the public broadcaster. Moreover, the dominance of the public broadcaster, and, for that matter, the media in general, with regard to the “marketplace of ideas” is a further relevant consideration. The capacity to counter the impact of the endorsement of stereotypes or the reinforcement of systemic discrimination is low. The point is that, in accordance with the above-quoted commitment in terms of the Preamble to the *Broadcasting Act* to “enhance and protect the fundamental rights of citizens”, the media, in particular the broadcasting media, should

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<sup>93</sup> Barendt 2005: 446-447. For a description of the concept “external pluralism” see Valcke 2009: 2. See also Popescu & Tóka 2009: 5-6; Collins 2010: 1-5.

<sup>94</sup> See Chapter VI: 5.1.

provide the platform for the exposure and condemnation of unfair stereotyping and other forms of unfairly discriminatory expression, and not for the promotion thereof. These observations are further deliberated when the different media codes are discussed.

#### **4.4 The codes of the Broadcasting Complaints Commission of South Africa (BCCSA)**

##### ***4.4.1 Introduction***

The broadcasting codes of the BCCSA explicitly proscribe discriminatory expression exclusively to the extent that it constitutes “hate speech” as described in terms of section 16(2)(c) of the Constitution. This is inconsistent with the codes of the PCSA and the ASA. It is noteworthy that, in Canada, broadcasting codes give extensive guidance on the avoidance of unduly discriminatory expression. This includes the prohibition of “negative portrayal” in different forms, including unduly negative stereotypical material. Relevant provisions of these codes are referred to later in the chapter.

It will be indicated that the BCCSA tribunals nonetheless do occasionally rule against unduly discriminatory expression which falls outside the ambit of section 16(2)(c) of the Constitution. Clauses dealing with related issues are employed to accommodate these findings. This leads to uncertainty with respect to the acceptability of discriminatory expression, as well as with respect to the precise ambit of the clauses thus employed. In the light of the dominant and powerful position of broadcasting in constructing the marketplace of ideas, and in the light of the constitutional obligation to regulate broadcasting in the public interest, it is contended that broadcasting codes should provide guidelines to distinguish between constitutionally and legally acceptable discriminatory expression that communicates a diversity of views, and unfairly discriminatory expression which should not be tolerated.

The “violence” and “hate speech” clauses<sup>95</sup> of the *Code of Conduct for Subscription Broadcasting Service Licensees* are similar to those of the free-to-air codes. The free-to-air codes will therefore be the focus of the subsequent discussion.

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<sup>95</sup> Clauses 10 and 11. Clause 28 is comparable to clauses 35 and 36 of the free-to-air codes.

A new *Free-to Air Code* was recently accepted.<sup>96</sup> To be able to evaluate relevant decisions of the BCCSA, it will be necessary to first scrutinise the previous *Code*. The different provisions of the respective codes that will be referred to later in the chapter will next be highlighted, also for the purpose of easy reference.

The Preamble to the 2003 *Code*, as amended, referred to as “the previous *Code*”, read as follows:

4. Freedom of expression lies at the foundation of a democratic South Africa and is one of the basic pre-requisites for this country’s progress and the development in liberty of every person. Freedom of expression is a condition indispensable to the attainment of all other freedoms. The premium our Constitution attaches to freedom of expression is not novel, it is an article of faith, in the democracies of the kind we are venturing to create.
5. Constitutional protection is afforded to freedom of expression in section 16 of the Constitution which provides:  
“(1) Everyone has the right to freedom of expression, which includes –
  - (a) freedom of the press and other media;
  - (b) freedom to receive or impart information or ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.(2) The right in subsection (1) does not extend to –
  - (a) propaganda for war;
  - (b) incitement of imminent violence; or
  - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”
6. Whilst in most democratic societies freedom of expression is recognised as being absolutely central to democracy, in no country is freedom of expression absolute. Like all rights freedom of expression is subject to limitation under section 36 of the Constitution.
7. The outcome of disputes turning on the guarantee of freedom of expression will depend upon the value the courts are prepared to place on that freedom and the extent to which they will be inclined to subordinate other rights and interests to free expression. Rights of free expression will have to be weighed up against many other rights, including the rights to equality, dignity, privacy, political campaigning, fair trial, economic activity, workplace democracy, property and most significantly the rights of children and women.

The following clauses in the previous *Code* explicitly involved protected groups:

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<sup>96</sup> The new *Code* was accepted in 2011.

*Previous Code: clause 15*

Clause 15 of the *Code* read as follows:

Broadcasters shall:-

- (i) not broadcast material which, judged within context, sanctions, promotes or glamorizes any aspect of violence against women;
- (ii) ensure that women are not depicted as victims of violence unless the violence is integral to the story being told;
- (iii) be particularly sensitive not to perpetuate the link between women in a sexual context and women as victims of violence.

*Previous Code: clause 16.1*

Clause 16.1 read as follows:

Licensees shall not broadcast material which, judged within context, sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.

*Previous Code: clause 16.3(c)*

Clause 16.3(c) read:

Licensees shall not broadcast ... advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

*Previous Code: clause 17*

Clause 17 excluded certain broadcasts from the application of the above-mentioned clauses of the *Code*. It read:

The abovementioned prohibitions shall not apply to –

- (i) a bona fide scientific, documentary, dramatic, artistic, or religious broadcast which, judged within context, is of such nature;

- (ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (iii) broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.

*Previous Code: clause 35*

Clause 35 provided:

- 35.1 Licensees shall be entitled to broadcast comment on and criticism of any actions or events of public importance.
- 35.2 Comment shall be an honest expression of opinion and shall be presented in such manner that it appears clearly to be comment, and shall be made on facts truly stated or fairly indicated and referred to.

*Previous Code: clause 38*

Clause 38 read as follows:

Insofar as both news and comment are concerned, broadcasting licensees shall exercise exceptional care and consideration in matters involving the dignity or private lives and private concerns of individuals, bearing in mind that the rights to dignity and privacy may be overridden by a legitimate public interest.

A comparison between the previous and the new free-to-air codes reveals material changes. The following clauses of the new *Code* correspond with the above-mentioned clauses of the previous *Code*.

*New Code: clause 3*

In terms of the new *Code*, the broadcasting of material which in terms of clause 16.1 of the previous *Code* “sanctions, promotes or glamorises violence” is extended to also cover the broadcasting of material which “sanctions, promotes or glamorises unlawful conduct”.<sup>97</sup> Clause 3 of the new *Code* reads as follows:

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<sup>97</sup> See also *BCCSA Free-to-Air Code of Conduct for Broadcasting Service Licensees* 2003: clause 14.

Broadcasting service licensees must not broadcast material which, judged within context –

- (a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or
- (b) sanctions, promotes or glamorises violence or unlawful conduct.

*New Code: clause 4*

Clause 4(1) adds unlawful conduct based on the listed grounds to violence. Clause 4(2) of the new *Code* incorporates clause 16.3, the “hate speech clause”, of the previous *Code*. Clause 4 reads as follows:

- (1) Broadcasting service licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.
- (2) Broadcasting service licensees must not broadcast material which, judged within context, amounts to (a) propaganda for war, (b) incitement of imminent violence or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.

*New Code: clause 5*

Clause 5 provides as follows:

Clauses 3 and 4 do not apply to:

- (1) a broadcast which, judged within context, amounts to a *bona fide* scientific, documentary, dramatic, artistic or religious broadcast;
- (2) a broadcast which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (3) a broadcast which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

*New Code: clause 15*

Clause 15 of the new *Code* is headed: “Privacy, Dignity and Reputation”. It reads as follows:

- (1) Broadcasting service licensees must exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that the said rights may be overridden by a legitimate public interest.
- (2) In the protection of privacy, dignity and reputation special weight must be afforded to South African cultural customs concerning the privacy and dignity of people who are bereaved and their respect for those who have passed away.
- (3) In the protection of privacy, dignity and reputation special weight must be afforded to the privacy, dignity and reputation of children, the aged and the physically and mentally disabled.

It should be noted that, in contrast to clause 38 of the 2003 *Code*, clause 15 of the new *Code* is not limited to news and comment. The phrase “the dignity or private lives and private concerns of individuals” is substituted with “the privacy, dignity and reputation of individuals”. Two subsections are added, requiring special weight to be afforded to the privacy and dignity of the bereaved, and to the privacy, dignity and reputation of children and the mentally disabled.

*New Code: clause 12*

Clause 12 incorporates clause 35 of the previous *Code*.

#### ***4.4.2 The application of specific clauses of the respective broadcasting codes in the light of provisions of the Equality Act***

In this analysis, the interpretation and application of specific clauses of the respective codes will be scrutinised in the light of relevant provisions of the *Equality Act*.

##### ***4.4.2.1 The exclusions in terms of clauses 17 and 5 of the respective codes***

It has been indicated that expression in terms of section 16(2) of the Constitution is categorically excluded from constitutional protection and is prohibited in terms of the *Equality Act*. The respective codes can thus not legalise expression of this nature by means of the exclusions respectively in terms of clauses 17 and 5. However, the exclusions appear to include expression that constitutes “hate speech” in terms of the relevant *Code*. The reasoning



of the Tribunal in *Rev FE Stanley & Others v e-tv*<sup>98</sup> illustrates the discrepancy inherent in the latter interpretation. The previous *Code* was applicable.

Having found a violation of the *Code* “because the broadcast amounted to the advocacy of hatred based on religion and incitement to cause harm”, the Tribunal proceeded to consider whether the film at issue passed the test of bona fide drama. This was done on the understanding that clause 17(i) of the *Code* “excludes the hate speech limitation on freedom of expression in the case of, *inter alia*, bona fide drama”.<sup>99</sup>

It is submitted that the exception of a “*bona fide* dramatic broadcast” from the application of the “hate speech” prohibition should, in the context of engagement in broadcasting, rather be construed as that a broadcast of such nature, and “hate speech” in terms of the *Code*, are mutually exclusive. A finding that a broadcast constitutes “hate speech” in terms of clause 16 of the *Code* should be conclusive.<sup>100</sup> The finding should be made taking the nature of the expression into account. Similarly, a finding that a broadcast constitutes a “*bona fide* dramatic broadcast” should entail that it does not constitute “hate speech” in terms of the *Code*, even though the drama concerned may contain scenes of the advocacy of hatred.

This highlights a further aspect that exacerbates the basic problem. The bona fide condition is absent in clauses 17(ii) of the previous *Code* and 5(2) of the new *Code*. A broadcast “which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience” most certainly has the potential to constitute “hate speech” as defined. The exclusions in terms of these respective subclauses thus seems to allow “hate speech” in contradiction of the aim of the *Code* to implement section 16(2)(c) of the Constitution. This also, by implication, permits a transgression of section 10 of the *Equality Act*. It is noteworthy that the corresponding provision of the *Code of Conduct for Subscription Broadcasting Service Licensees* does require expression of this nature to be bona fide.<sup>101</sup> It is accordingly submitted that the “bona fide” qualification should be read into the clause.

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<sup>98</sup> *Rev FE Stanley & Others v e-tv* 17/2007(BCTSA).

<sup>99</sup> *Rev FE Stanley & Others v e-tv*: par 17.

<sup>100</sup> See the minority judgment of Van Rooyen in *Rev FE Stanley & Others v e-tv*: par 41. See also *Polakow v Radio Islam* 14/2009(BCTSA): par 6-7.

<sup>101</sup> *Code of Conduct for Subscription Broadcasting Service Licensees*: clause 11.2.

#### 4.4.2.2 Clause 16.3 of the previous Code and clause 4(2) of the new Code

It has been consistently reiterated in decisions of the Tribunal that “hate speech” claims have to comply with all the elements of section 16.3 of the *Code*, and, accordingly, section 16(2)(c) of the Constitution.<sup>102</sup> It has been held that bona fide news reporting on “hate speech” may include a verbatim report of what transpired, even though the words quoted in the news report in themselves amounted to “hate speech”.<sup>103</sup> The annual review of the Chairperson of the BCCSA for September 2011 to September 2012 inter alia referred to a judgment concerning a derogatory slogan that had been drawn in the sky by a light aeroplane, in order to illustrate “the generous approach to freedom of expression”. The Chairperson pointed out that the Tribunal had held that the words complained of “were so defiant towards the Christian deity that they constituted the advocacy of hatred, but that the context in which the words were published did not amount to the incitement to cause harm”. In so far as expression under section 16.3 of the *Code* is concerned, this approach cannot be faulted.

However, the subsequent references to decisions of the BCCSA Tribunal will highlight the impact of the fact that the *Code* exclusively prohibits “hate speech” contemplated by section 16(2)(c) of the Constitution, while other unconstitutional and prohibited forms of discriminatory expression are in effect condoned.

In *Engelbrecht v 5fm*<sup>104</sup>, the complaint concerned a radio promotion of “Will and Grace”, a popular comedy programme in which two homosexuals play the lead roles. The programme itself pokes fun at homosexuals. The complaint was phrased as follows: “I find these jokes offensive as they enforce stereotypes of homosexuals. This advertisement is offensive and does not encourage tolerance in the country. I strongly believe that it should be removed from the air.” The complainant clearly alleged unfair discrimination or, from the perspective of the *Equality Act*, harmful expression based on sexual orientation as contemplated in terms of section 10 of the Act. The Chairperson gave recognition to the fact that (unfair) discrimination has been outlawed.<sup>105</sup> He then stated that the only clause of the *Code of Conduct* that he could

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<sup>102</sup> *Barreira v 94.7 Highveld Stereo* 16/2010 (BCTSA).

<sup>103</sup> *Williams, Snyman, Logie and Others v SABC* 54/2003 (BCTSA); Chairperson’s Report 2009-2010: par 6.

<sup>104</sup> *Engelbrecht v 5fm* 50/2004 (BCTSA).

<sup>105</sup> *Engelbrecht v 5fm*: par 5.

think of which could possibly apply to this broadcast was the one contained in clause 16.1<sup>106</sup>. Having considered that the material concerned was “lighthearted banter”, he concluded that “by no stretch of the imagination can one say that the broadcast sanctions, promotes or glamorizes violence against homosexuals”. On this basis, he held that there was no contravention of the *Code*.<sup>107</sup>

Without necessarily disputing the correctness of the outcome of the judgment, the concern is that there was no room for a finding on the grounds that were forwarded in terms of the complaint.<sup>108</sup>

The complaint in the matter of *Visser, Thomson & Others v 94.7 Highveld Stereo*<sup>109</sup> was based on the provisions of clause 4(2) of the new *Code*. Clause 4(2), as was indicated above, resembles clause 16.3 of the previous *Code* and, similar to clause 16.3, gives direct effect to section 16(2)(c) of the Constitution. The case concerned a broadcast on Highveld Stereo on 11 April 2012 during which presenters had an exchange about the Miss Universe Competition. The Competition included a competitor called Jenna, who was born a man but had undergone gender reassignment surgery, after which she was a woman. The following comments were at issue:

About the Miss Universe competition ... now allows transgender... . Jenna was a man is now a woman. Has changed her name. She still has some parts down there. Extra parts girls don't have... . They first were upset and they took her out of the competition and now ... they have decided to let her back in... . Did she have to disclose her extra bits or did someone see them? ... You can't hide that. She hid it in the beginning ... . And then she was hey guys guess what? ... She is beautiful... . She looks like a woman. There isn't a committee that checks out everyone's nether regions... . They believe you are a woman. They believe they have already been checked... . She could even win. Balls to the wall. Good luck to “It”.<sup>110</sup>

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<sup>106</sup> At the time, clause 16(1) had not been amended to include the reference to “hate speech”, and clause 16(3) had not been inserted. This does not affect the illustration of the contention that no provision was made for the consideration of discriminatory expression outside the narrow boundaries of the relevant clauses of the previous *Code*.

<sup>107</sup> *Engelbrecht v 5fm*: par 6-7.

<sup>108</sup> See also *Smit v 94.7 Highveld Stereo* 31/2010 (BCTSA).

<sup>109</sup> *Visser, Thomson & Others v 94.7 Highveld Stereo* 27/2012 (BCTSA).

<sup>110</sup> *Visser, Thomson & Others v 94.7 Highveld Stereo*: par 1.

The complainants pointed out that “Jenna” had undergone complete gender reassignment surgery to make her completely female five years before. She had a female birth certificate, ID book and driver’s licence. Legally she was a woman. They contended that the comments at issue amounted to discrimination and “hate speech”. The comments, according to them, created an image that was far from the truth. By doing so, the comments reinforced systemic discrimination against the transgender community.<sup>111</sup>

The respondents submitted that the impugned statements neither advocated hatred nor publicly supported or recommended or pleaded for any action, thereby advocating any action of whatever nature against the transgender community or any of its members. It was also argued that the statements complained of “did not constitute hatred” and “did not in any way instill or promote or provoke or urge any detestation or ill-will or violence against the Transgender Community or any of its members”. It was further submitted that, on the wording of the clause, there has to be a causal nexus between advocacy of hatred based on any of the listed grounds and the incitement to cause harm, whether the harm is physical or psychological harm. Reference was made to the Commission’s words in *C Eatock v 94.7 Highveld Stereo* (2004/22 BCTSA) that the statements at issue “did not go so far that the likely reasonable listener who is not overtly sensitive would conclude that the statements advocated hatred ... and [constituted] incitement to cause harm”. It was contended that “a reasonable 94.7 Highveld Stereo listener who heard the said statements would not have understood the statements as advocating hatred against the Transgender Community or any members”.<sup>112</sup>

However, the expression raises other serious concerns. Does the expression not constitute unfair discrimination or promote inequality in society, in which case it will be unconstitutional? Is it conceivable that expression of this nature complies with the obligation in terms of section 192 of the Constitution to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society? Will it not instead scare off an extremely vulnerable group of people from exposing themselves to the malevolence of this powerful public marketplace of ideas and from participating in its activities, even by voicing feelings of indignation? How should they, or others concerned with

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<sup>111</sup> *Visser, Thomson & Others v 94.7 Highveld Stereo*: par 2.

<sup>112</sup> *Visser, Thomson & Others v 94.7 Highveld Stereo*: par 3.

their plight, effectively respond? Will the remarks not inevitably reinforce stereotypes regarding homosexual people to the extent that they will be ridiculed even more vigorously, especially by those members of society more interested in hurting others than in reasonable debate? Do the remarks not cross the line where the societal value of free expression no longer outweighs the hurt of a group of people which is guaranteed constitutional protection, as well as the shame of other empathetic members of society? Is there any chance that, ultimately, the expression will heal rather than divide? Can it be perceived to “align the broadcasting system with the democratic values of the Constitution and to enhance and protect the fundamental rights of citizens” as contemplated in terms of the *Broadcasting Act*?

Section 10 of the *Equality Act* gives guidance in answering these constitutionally relevant questions. It is contended that, in the application of section 10, it will be considered that the remarks discriminate based on sexual orientation, and can be reasonably construed to demonstrate a clear intention to hurt or harm.<sup>113</sup> This consideration already takes into account the context and nature of the expression. It is further contended that the remarks are an example of instances where a jovial tone in fact enhances the ensuing psychological hurt.<sup>114</sup> The best chance of establishing that the remarks constitute bona fide engagement in any of the forms of expression stipulated in terms of the proviso will probably be to argue that they constitute bona fide humour or bona fide engagement in the expression of an opinion or comment. However, the remarks are cruelly personal, crude and invasive of the core privacy of the target, with these negative effects being enhanced in the context of their broad publication by means of broadcasting. At least some of the remarks appear to be primarily directed at hurting and harming members of the target group, in particular Jenna, rather than at contributing to the expression of an opinion on the approach of the Miss Universe Competition with respect to transgender competitors. The derogatory remarks clearly were not necessary for the effective communication of such opinion. All these aspects contradict the essential characteristics of bona fide humour, both objectively and subjectively assessed.<sup>115</sup>

The Tribunal stated that the BCCSA had a legal responsibility to interpret the *Code* in the light of the Constitution. On this basis, it was concluded that the argument that the broadcast

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<sup>113</sup> See the discussion of section 10 in Chapter V: 4.7.3.5-4.7.3.6.

<sup>114</sup> See the discussion of humour in Chapter V: 2.1.4.5.

<sup>115</sup> See Chapter V: 4.5.2.6.

complained of was “hate speech” “must fail at the first hurdle”. Taking into account that “the term ‘hatred’ connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation”, the Tribunal held that the broadcast complained of did not constitute hatred as contemplated by the *Code*. The complaint was accordingly dismissed. The *Code*, as contended before, failed to provide a basis for the consideration of the above-mentioned constitutional issues.

The recent matter of *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*<sup>116</sup> concerned a complaint that comments made by a presenter during a discussion on a breakfast show amounted to incitement to xenophobia and hatred in terms of clauses 3 and 4 of the *Code*. Another of the presenters was a Zimbabwean. The first-mentioned presenter began by establishing the second’s national origin. As observed by the Tribunal, the sensitivity of the topic of foreign nationals in South Africa was highlighted at the outset, as the second presenter said: “I hope you don’t say anything about Zimbabweans on radio.” The topic was not laid to rest, however, as the first presenter went on to raise issues of work permits and job scarcity, and went so far as to say that a South African who is unemployed might resent the material benefits enjoyed by the Zimbabwean presenter who had “taken away” as many as 10 jobs from South Africans. In the view of the Tribunal, the remarks came across as “mischievous and provocative”, and the first presenter’s disclaimers, for example “I love Tapfuma” and “I’m not judging him”, were, said the Tribunal, “patently disingenuous”.<sup>117</sup>

The response of the broadcaster is noteworthy. It was stated that the comments did not have any malicious intent and did not amount to “hate speech”. It was further stated that the topic was a sensitive one that “may have negative social impact”. It was then conceded that the presenter had showed poor judgement, which required an apology.<sup>118</sup>

In considering whether the presenter’s remarks could be said to amount to comment in terms of clause 12 of the *Code*<sup>119</sup>, the Commissioner reiterated that comment had to be fair. She

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<sup>116</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show* 022/A/2013(BCTSA).

<sup>117</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*: par 7.

<sup>118</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*: par 3.

<sup>119</sup> Clause 12 provides as follows: “(1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance. (2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to.”

then described the remarks as “[coming] across as provocative”, as “[smacking] of a personal attack”, and as being “sugared over with disclaimers”.<sup>120</sup> From this, it seems that her view was that the remarks did constitute comment, but that the comment *in casu* was not fair.

It was then considered whether the presenter’s remarks “incited xenophobia which amounts to a hate crime”. It was held that the remarks were “provocative and perhaps even inflammatory, yet there is no actual advocacy to commit acts of violence against Zimbabweans or any other racial or ethnic group”. The Commissioner remarked that, nevertheless, the Zimbabwean presenter was all too aware of the potential for violence when, during the discussion, he cautioned that people may “get angry”. She added:

Anger is frequently a prelude to violence, and South Africa’s high unemployment rate is a seedbed for xenophobic violence. In recent years, ever since the xenophobic outbreak in May 2008, many people have lost their lives, and their property has been attacked by South Africans who allegedly feel aggrieved that foreigners are taking their jobs.

It was concluded that the remarks were ill-advised, but did not go so far as to have the potential to inflame violence. The Commissioner reiterated that the case was a borderline case, and that “broadcasters who sail close to the wind in this manner should be aware that they are literally playing with fire when uttering comments to the effect that foreign nationals are taking jobs from local people”.<sup>121</sup>

Advocacy to commit acts of violence is a definitional requirement only of the prohibition of the incitement of imminent violence in terms of clause 4(2)(b) of the *Code*. As far as compliance with this clause is concerned, the reasoning of the Tribunal cannot be criticised. Apparently, the Tribunal also held the view that, in the absence of advocacy, there was not compliance with the “hate speech” provision in terms of clauses 3 and 4(1) of the *Code*.<sup>122</sup> Be that as it may, the point of the present discussion is illustrated by the subsequent remark of the Commissioner, which will now be discussed.

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<sup>120</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*: par 8.

<sup>121</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*: par 9.

<sup>122</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*: par 11.

The Commissioner formulated the crucial question as being “whether a reasonable listener would have regarded the presenter’s remarks as tolerable in the context of xenophobic violence and the ensuing trauma frequently endured by victims”. She then stated that the principle of freedom of expression should be borne in mind. This principle “guarantees the broadcaster’s right to express opinion and make comment on matters of public interest. ... The Code guarantees it, as long as it does not result in the advocacy of violence, which, in the present instance, is absent, as found above.”<sup>123</sup>

It is contended that the question as formulated is indeed a crucial question to be answered in deciding the case. The Constitution and legislation giving effect to such Constitution as explicitly required in sections 9(3) and (4) however require other considerations too. It has to be asked whether the expression jeopardises the equality right, interrelated with the right to human dignity, to the extent that it should not be tolerated. In answering this question, only fair comment will be excluded, unless it constitutes “hate speech” as contemplated in terms of section 16(2) of the Constitution. *In casu*, it is arguable that the remarks can reasonably be construed to promote hatred in society. An application of the principles that were highlighted in Chapter V<sup>124</sup> to establish whether the comments in context were fair will probably lead to a conclusion that they were not. The facts commented on were not clearly stated. Moreover, it is not easy to perceive as fair comment discriminatory utterances made by a radio presenter and described as “provocative”, “[smacking] of a personal attack” and “sugared over with disclaimers”. The description rather supports an inference that the utterances were not informational, but malicious. It is further contended that expression of this nature and its implied condonation are not acceptable to reasonable listeners and should not be acceptable to the body responsible for giving effect to the obligation in terms of section 192 of the Constitution. In the absence of provisions in the codes that protect the equality right, the position will, however, remain that expression of this nature is tolerated.

The Tribunal in certain instances has invoked clauses 35 and 38 of the *Code* to proscribe discriminatory expression. This approach and its effects will now be discussed.

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<sup>123</sup> *The Trauma Centre, Cape Town and Heart 104.9 Breakfast Show*: par 10.

<sup>124</sup> Chapter V: 4.7.2.5, the last paragraph.



#### 4.4.2.3 Clauses 35 and 38 of the previous Code

In *SAPS v e-tv*<sup>125</sup>, the following *dictum* was quoted with approval:

It has constantly been our approach to clause 35 that only where it is unequivocally clear that there was an unfair comment on a matter of public importance, would we find against a broadcaster under this clause. Balance and fairness are difficult aims to meet and so as not to stifle freedom of expression, we would in a case of doubt, rather find a programme to have not contravened this clause of the Code than chill necessary speech, though it might not have been that sensitive or balanced. Freedom of expression is too precious an asset in our new democracy to chip away at its core without a very good reason.<sup>126</sup>

*Labuschagne v YFM*<sup>127</sup> illustrates the intended application of clause 35. The case concerned a comment made by a presenter during a news report. The Tribunal accepted that what was said clearly amounted to comment and an honest expression of opinion. The comment, however, was held to have substantially misrepresented the facts. On the basis that “what is fair is determined by those objective standards of reasonableness the modern Constitutional community would tolerate”, the Tribunal concluded that the mistake was simply too substantial to be tolerated.<sup>128</sup> The comment, according to the Tribunal, “had no objective relevance to what truly happened or even what is alleged to have happened”.<sup>129</sup>

In *High Commissioner of the Federal Republic of Nigeria and The President of the Republic of South Africa v 94.7 Highveld Stereo*<sup>130</sup> (hereafter “*High Commissioner of the Federal Republic of Nigeria*”), more factors were taken into account. Two presenters of the respondent, during a light-hearted, jocular discussion of an event that had occurred the previous day, namely the inauguration of President Thabo Mbeki, had made disparaging remarks about the President of the Federal Republic of Nigeria as having brought cocaine into the country on his visit to attend the inauguration. Having held that the remark did not constitute “hate speech”, the Tribunal considered whether it contravened clause 35. An

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<sup>125</sup> *SAPS vs e-tv* 12/2008 (BCTSA).

<sup>126</sup> *SAPS vs e-tv*: par 7.

<sup>127</sup> *Labuschagne v YFM* 21(2)/2003(BCTSA).

<sup>128</sup> *Labuschagne v YFM*: par 11.

<sup>129</sup> *Labuschagne v YFM*: par 11.

<sup>130</sup> *High Commissioner of the Federal Republic of Nigeria and The President of the Republic of South Africa v 94.7 Highveld Stereo* (hereafter “*High Commissioner of the Federal Republic of Nigeria*”): 16/2004(BCTSA).

argument that the term “comment” required a certain degree of seriousness, was rejected. It was held that, in context, the term could be interpreted to include satirical or jocular comment.<sup>131</sup> The Tribunal found that the presenters had probably based their comment on stereotyping of the following nature: “Because he is Nigerian, he must be involved in drug trafficking.” On the basis that the remark at issue was “utterly unreasonable, not based on fact at all and a remark that the South African community would not tolerate within the ambit of free speech”, it was held that the respondent had failed to pass both tests contained in clause 35 of the *Code of Conduct*.<sup>132</sup>

In the following two matters, by contrast, there was no consideration of the truthfulness or fairness of the indication of facts related to an action or event of public importance.

In *94.7 Highveld Stereo v Du Plessis*, the Appeal Tribunal considered appeals against findings of “hate speech” with respect to complaints concerning the mocking on air of fasting Jews on Yom Kippur by way of prank telephone calls, and the ridiculing of the “Jesus Project” of the Reverend Jannie Pelser.<sup>133</sup> Relying on the above-mentioned finding in *High Commissioner of the Federal Republic of Nigeria* that “comment” in clause 35.1 could be interpreted to include satirical or jocular comment, it was held that when satire and jokes, as *in casu*, amount to an “outrageous ridiculing of values that are fundamental to a group’s deepest religious convictions, they cannot pass the test of honest expression of opinion”. The Tribunal remarked as follows:

One can, of course, not require the same degree of honesty of opinion in the case of satirical or jocular comment as one is required to do in the case of serious comment. However, in this case we are dealing with a matter of improbity, in the sense of lack of moral integrity, rather than a case of bad taste that ought not to have been broadcast...<sup>134</sup>

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<sup>131</sup> *High Commissioner of the Federal Republic of Nigeria*: par 13.

<sup>132</sup> *High Commissioner of the Federal Republic of Nigeria*: par 15.

<sup>133</sup> The Appeal Tribunal addressed the problematic situation that the 2003 *Code*, prior to its amendment, quoted section 16 of the Constitution in its Preamble, but did not contain a “hate speech” clause. The finding of the Tribunal *a quo* that the prohibition of “hate speech” in accordance with section 16(2)(c) of the Constitution should be “read into” the *Code*, and, accordingly, also the finding that the expression at issue constituted “hate speech”, was overruled. Alternative grounds for the complaint in terms of clause 35 of the *Code* were then submitted and considered by the Tribunal. See *94.7 Highveld Stereo v Du Plessis*: par 11.

<sup>134</sup> *94.7 Highveld Stereo v Du Plessis*: par 16.

The Tribunal did not make any findings with respect to the truthfulness or fairness of the reference to facts related to the opinions that were expressed. The expression was considered and held to be unacceptable based on the manner and extent to which it ridiculed people based on their religion.

At issue in *Gay & Lesbian Alliance v 5FM*<sup>135</sup> was a joke told on air by a presenter on 5FM which referred to the mating of male scorpions as “moffie shit”. The Tribunal stated that the right not to be unfairly discriminated against was protected in terms of clause 35 of the *Code*.<sup>136</sup> Sexual orientation, according to the Tribunal, was a matter of “public importance” in terms of clause 35 of the *Code*, and, when a presenter commented on it, even in a joke, he or she should do so fairly. It was reiterated that section 9 of the Constitution explicitly guarantees the protection of sexual orientation against unfair discrimination. It was reasoned that, although the term might be an aspect of the often provocative style of the presenter, its use on air was likely to have been tremendously hurtful to gays. The expression concerned was held to be unfair in that it “attacked the right which gays have to equality”. It was stated that “by no stretch of the imagination could the joke told on air be regarded as having any value in improving the plight of gays”. In conclusion it was held that the “public airwaves may not be abused for the purpose of unfair discrimination”.

It should be considered that sexual orientation, although it certainly is a matter of public importance, can hardly be described in terms of clause 35 of the *Code* as an action or event. The same observation applies to the general character of Afrikaner males, which was the subject of a statement at issue in *Torline v YFM*<sup>137</sup>.

The statement made was as follows: “Behind every beaten and abused woman is a big Afrikaner male.” It was made in the course of a breakfast show which the Tribunal described as “typified by controversy, confrontation, humour, etcetera”. Taking into account the nature of the show, the Tribunal accepted that the words were not said with the intention to sanction or promote violence against a specific race or ethnic group within the ambit of clause 16.1 of the *Code*. The Tribunal then proceeded to apply clause 35.<sup>138</sup>

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<sup>135</sup> *Gay and Lesbian Alliance vs 5fm* 45/2004(BCTSA).

<sup>136</sup> *Gay and Lesbian Alliance vs 5fm*: par 6.

<sup>137</sup> *Torline v YFM* 27/2005 (BCTSA).

<sup>138</sup> *Torline v YFM*: par 1.

The analysis amounted to the following: “In this context we think that the words do amount to a contravention of clause 35.2. This statement was made without any factual basis and if there were any factual basis, it was not truly stated or fairly indicated and referred to.”<sup>139</sup>

It is contended that these observations rather indicated that clause 35.1 did not apply. The Tribunal, however, continued under clause 35.2, stating:

Should statements like this one be allowed over the airwaves under the guise of freedom of expression, nothing would stop other presenters [from making] the same kind of statement about the males of the English, Xhosa, Indian, Zulu or any other racial or ethnic group. There are limits to freedom of expression and this is an example where a limit should be imposed.<sup>140</sup>

It was therefore held that there had been a contravention of clause 35.2 of the *Code* and the complaint was upheld.

It is a concern that the application of clause 35.2 without requiring the existence of an action or event, and of comment on the facts of such action or event, may subject expression that does not have to comply with the requirements of fair comment, to an assessment of the “correctness” or “fair indication” of facts. On this basis, constitutionally protected statements may be excluded on the basis of inaccuracy or untruthfulness. The discussion of the German views on the separation of facts and opinion in Chapter IV is relevant in this regard.<sup>141</sup> The only facts involved in, for example, *Torline v YFM*, were perceived facts. The perception of facts constituted the opinion. The statement was not unconstitutional because it was inaccurate or not true. Its constitutionality depended on whether or not it unfairly discriminated or, for that matter, constituted “hate speech” as contemplated in terms of section 10 of the *Equality Act*.

The judgment in *Lakhi & Others v 94.7 Highveld Stereo*<sup>142</sup> also calls for comment in the context of this discussion. The Tribunal considered a complaint with respect to the following joke: “What do you call a Bangladeshi cricketer with a piece of ham on his head? Hammed.

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<sup>139</sup> *Torline v YFM*: par 6.

<sup>140</sup> *Torline v YFM*: par 6.

<sup>141</sup> See Chapter IV: 3.5.1.1.

<sup>142</sup> *Lakhi & Others v 94.7 Highveld Stereo* 41-2004 (BCTSA).

What do you call a Bangladeshi cricketer with two pieces of ham on his head? Mohammed. What do you call a Bangladeshi cricketer with two pieces of ham and a vibrator on his head? Sheikh Mohammed.” Having found that the joke did not constitute “hate speech” in terms of clause 16, the Tribunal considered the complaint under clause 35.2. The question considered was “whether the fundamental right to free speech outweighed the discriminatory, unfair stereotyping of the religious dictate at issue”. The balancing was done with reference to section 36 of the Constitution. The Tribunal found “the informative value – and indeed the entertainment value – of the joke to be nil.” It was held: “If the joke is meant to be satirical, its impact is outweighed by the depth of respect that Muslims feel for the religious dictate that has been satirised.”<sup>143</sup> The Tribunal, before imposing a sanction, remarked that it did not believe that the participant in the programme was acting *mala fide* when he told the joke. In fact, the joke was not intended or calculated to be one that had a bearing on religion at all.<sup>144</sup> It fitted the mould of his usual sports jokes. Its intention was to poke fun at Bangladeshi Cricket players. The complaint was nevertheless upheld in terms of clause 35.

It is contended that the approach of the Tribunal confirms the need for discrimination and “hate speech” clauses in accordance with the relevant provisions of the Constitution and the *Equality Act*. The remarks of the Tribunal indicate that, if assessed in terms of section 10(1) of the Act, the expression would probably not have been held to construe or demonstrate a clear intention to hurt or harm based on a prohibited ground, and would rather have been held to fall under the proviso.<sup>145</sup>

In *Bell v Jacaranda FM*<sup>146</sup>, the complaint was articulated as follows: “I would like to lodge a formal complaint regarding the content and context of the recent broadcast concerned as I found the homophobic discussion which ensued to be discriminatory, unacceptable and not in keeping with the spirit or letter of our Constitution.” The complaint referred to remarks made by a “medium” who regularly featured on the relevant programme to give advice to listeners who were experiencing problems in their personal lives. The remarks at issue included references to homosexuality as “a perversion” and “not normal”. The complainant also indicated that his personal human dignity had been violated. The complaint was considered

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<sup>143</sup> *Lakhi & Others v 94.7 Highveld Stereo*: par 7.

<sup>144</sup> Cf the reasoning of the Tribunal in *Van Den Heever vs Multichoice Channel 122* 46/2012(BCTSA).

<sup>145</sup> See the discussion of humour in Chapter V: 4.5.2.6.

<sup>146</sup> *Bell v Jacaranda FM* 04/2008 (BCTSA).

under clauses 16.1, 16.3 and 35.2, together with 36.1 and 38, of the *Code*. It was held that clause 16.1 was not applicable, as it was clear that the broadcast had not sanctioned, promoted or glamorised violence based on sexual orientation as contemplated in such clause.<sup>147</sup> With respect to clause 16.3, the Tribunal considered the definitional elements of “hate speech” in terms of section 16(2)(c) of the Constitution and clause 16.3 of the *Code*. It was noted that both these definitions limit the advocacy of hatred to four grounds only, of which sexual orientation is not one. It was added that, even if it were included as a ground, nothing in the programme could be described as the advocacy of hatred or the incitement to cause harm.<sup>148</sup>

The Tribunal then considered the complaint in terms of clause 35.2 together with clause 36.1 of the *Code*. Clause 36.1 states that, in the case of programmes in which controversial issues of public importance are discussed, the broadcaster should make a reasonable effort to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series. It was concluded that the programme contained comment which constituted an honest expression of opinion, and that there was some balance in the opinion. Moreover, a further opportunity to create balance existed since the segment formed part of a call-in programme during which the public had the opportunity to call in and present opposing views.<sup>149</sup> In the application of clause 38, it was concluded that the likely reasonable listener would not find the contents of the programme beyond the contemporary standard of tolerance.<sup>150</sup> The claim was accordingly dismissed.<sup>151</sup>

While the entertainment of the above considerations is not criticised, it has to be pointed out that the primary basis of the complaint was never directly addressed, namely whether or not the remarks constituted unfair discrimination. While the above considerations would also have relevance in the determination of fairness, additional considerations would come into play. Whether or not the speaker engaged in the bona fide “publication of information” would be scrutinised with respect to the subjective and objective aspects of the remarks. The reasoning of the Canadian Broadcast Standards Council (CBSC) in *CFYI-AM and CJCH-AM*

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<sup>147</sup> *Bell v Jacaranda FM*: par 5.

<sup>148</sup> *Bell v Jacaranda FM*: par 5.

<sup>149</sup> *Bell v Jacaranda FM*: par 7.

<sup>150</sup> *Bell v Jacaranda FM*: par 9.

<sup>151</sup> *CFYI-AM re the Dr. Laura Schlessinger Show* 99/00-0005/2000 (CBSC). See also *CITS-TV (CTS) re John Hagee Today* (“Diamonds for Successful Living”) 04/05-0177/2005 (CBSC).

*re the Dr. Laura Schlessinger Show*<sup>152</sup> in the discussion below of Canadian cases has direct application. Similar comments were described by the panel that decided the matter as flying in the face of Canadian human rights provisions. While, owing to the obviously different circumstances, a similar outcome would not necessarily have followed in *Bell v Jacaranda FM*, it is contended that the BCCSA codes should provide for similar considerations to be entertained.

*Bell v Jacaranda FM* can also be employed to illustrate the effect of using the correctness of facts informing an opinion as a criterion in the determination of the permissibility of the expression. It can be argued that, based on scientific research, homosexuality is not a “perversion”. Had the statements been regarded as comment in terms of clause 35(1), and had the Tribunal considered the “facts” which constituted the subject of the opinion to be untruthfully stated, the judgment would probably have denied the speaker the right to express her opinion, and the broadcaster the right to broadcast it.

It is contended that the discussion has illustrated the need for explicit recognition in the codes of limitations of freedom of expression required by the obligation to promote equality as contemplated by the Constitution and the *Equality Act*.

#### 4.4.2.4 Clause 38 of the previous Code

Clause 38 was initially interpreted as including the dignity of a group. Hence, where discriminatory expression did not qualify as “hate speech”, clause 38 was held to have been contravened when the infringement of dignity was serious, for example in cases where people in a certain area were called “white trash”<sup>153</sup>, Indians were stereotyped as dishonest<sup>154</sup>, and a lesbian was referred to as a “carpet muncher”.<sup>155</sup> The standard applied in the clause 38 analyses was articulated as follows in *Lubbe & Moyise v 94.7 Highveld Stereo*<sup>156</sup>: “The test is, of course, an objective one measured against the standard of reasonableness in our society.

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<sup>152</sup> *CFYI-AM and CJCH-AM re the Dr. Laura Schlessinger Show* 99/00-0005/2000 (CBSC).

<sup>153</sup> *Lubbe & Moyise v 94.7 Highveld Stereo* 53/2005 (BCTSA).

<sup>154</sup> *Gengan v 94.2 Jacaranda FM* 30/2007 (BCTSA).

<sup>155</sup> BCCSA Chairperson’s Report 2007-2008: par 5:

<[http://www.bccsa.co.za/index.php?option=com\\_content&view=article&id=16&Itemid=30](http://www.bccsa.co.za/index.php?option=com_content&view=article&id=16&Itemid=30)> (accessed on 2-04-2013). See *Clark v 5fm* 06/2007 (BCTSA): par 5.

<sup>156</sup> *Lubbe & Moyise v 94.7 Highveld Stereo*: par 8.

This standard is also defined by the ideals of the Constitution. Non-racialism is stated to be a founding provision in section one of the Constitution.”

However, the Appeal Tribunal of the BCCSA in the matter of *Jacaranda 94.2 FM v C Gengan*<sup>157</sup> held that the clause only protected the dignity of individuals. It was stated that “a complaint cannot be lodged by a person who is of the opinion that a broadcast infringed the dignity of a third person”.<sup>158</sup> In *Bell v Jacaranda FM*, the Tribunal stated that the legal test to be applied in determining whether clause 38 was contravened, was both subjective and objective. The objective standard should be that of a reasonable viewer who is broadminded, balanced and not overly sensitive.<sup>159</sup> In *Loonat v Radio Islam*<sup>160</sup>, the Tribunal held that “dignity” included reputation.<sup>161</sup>

It is contended that this narrow interpretation of this clause does not contribute to resolving the issue under discussion.

#### 4.4.2.5 Clause 4(1) of the new Code

The Chairperson of the BCCSA in his Annual Report for 2010-2011 reiterated the principle that the mere broadcasting of that which is unlawful does not amount to a contravention of clause 4(1). He indicated that this would apply in the context of a fictional programme such as a drama, as well as in the context of information rightfully given to the public. He added that the latter includes interviews with people who may be potential criminals, and with rioters.<sup>162</sup> The general acceptance of this approach has been highlighted throughout the study.<sup>163</sup>

In *Le Roux v Heart 104.9FM*<sup>164</sup>, the Tribunal held that “sanction” means “permit, approve endorse, authorise, and the like”, and “promote” means “to encourage, support and

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<sup>157</sup> *Jacaranda 94.2 FM v Gengan* 09/2008 (BCTSA): par 12-13.

<sup>158</sup> BCCSA Chairperson’s Report 2007-2008: par 5.

<sup>159</sup> *Bell v Jacaranda FM* 04/2008 (BCTSA): par 9.

<sup>160</sup> *Loonat v Radio Islam* 03/2008 (BCTSA). See also *SABC3 v F* 24/2009(BCTSA) and *J v Heart 104.9 FM* 49/2011(BCTSA) with respect to a similar finding in terms of section 15(1) of the new *Code*.

<sup>161</sup> See also *SABC3 v F* 24/2009 (BCTSA).

<sup>162</sup> BCCSA Chairperson’s Report 2010-2011: par 5. See *Jersild v Denmark*: par 6.4.2.

<sup>163</sup> See *Jersild v Denmark*: par 6.4.2.

<sup>164</sup> *Le Roux v Heart 104.9 FM* 28/2011 (BCTSA).



endorse”.<sup>165</sup> The matter concerned a presenter’s personal remarks about, and insults directed at, the mother of his child. The Tribunal held that the broadcaster had transgressed clause 4(1) of the *Code* when the presenter sent out the message that it is acceptable to use abusive language against women. It was stated that the insults could also be construed as advocating violence or, at least, unlawful conduct in the form of *crimen iniuria* against women. It was further held that it would have been acceptable for the presenter to discuss the topic in general, but the personal remarks about, and insults directed at, the mother of his child were unacceptable in law. The Tribunal described his words and the tone in enunciating them as “scornful, derisive and denigrating”.

The very personal nature of this incident indeed involved the *dignitas* of the presenter’s wife. There certainly would be reasonable prospects of success should the presenter’s wife choose to lay a charge or file a claim against her husband. There might even be grounds to hold the licensee vicariously liable. It does not, however, necessarily follow that the licensee can be held to condone, sanction or promote potentially unlawful – especially criminal – activities on its airwaves. Moreover, unlawful conduct under clause 4(1) should not be described as “*iniuria* against women”. *Crimen iniuria* and the *actio iniuriarum* concern the *dignitas* of an individual.<sup>166</sup> The determination of whether expression has the effect of promoting the abuse or denigration of women in general should apply the standard established in terms of prohibitions of unfair discrimination and “hate speech”. The most relevant provisions in this respect would be sections 6, 10 and 12 of the *Equality Act*. *In casu*, relevant questions would be whether the remarks of the presenter were based on a prohibited ground and could reasonably be construed to demonstrate a clear intention to be hurtful, harmful, incite harm or propagate hatred. It is arguable that the answer to these questions would probably have been positive. The insults are boldly related to the target’s gender and the remarks can be described as “assaultive” rather than communicative.

In *Hacksley v Heart 104.9FM*<sup>167</sup>, the statement at issue was the following: “If tonight you’re about to consummate your marriage on your honeymoon and Jacques Kallis wants first dibs, you should stand aside and let him have your wife.” It was found that this statement amounted to the strengthening of an attitude of male entitlement, namely that women were there for the

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<sup>165</sup> *Le Roux v Heart 104.9 FM*: par 7.

<sup>166</sup> See Chapter VI: 3.2.1.

<sup>167</sup> *Hacksley v Heart 104.9 FM* 10/2011(BCTSA).

taking. The statement was found to be seriously degrading to women and therefore to constitute a contravention of clause 4(1) of the *Code of Conduct*. The Tribunal related the expression to criminal forms of behaviour, for instance rape and crimes of sexual abuse, “that demean women (and men)”. This relation requires a broad interpretation of “sanction”, “promote” and “glamorise”, which may result in an endorsement of the proscription of discriminatory expression outside the boundaries of unfair discrimination or the prevention thereof. The terms should rather be narrowly interpreted to concern expression which can be directly related to the commitment of a specified criminal offence or legal transgression. The irony is that the reasoning of the Tribunal reflected the exact character of a fairness analysis with respect to discrimination, which corroborates the need for a provision designed to deal with unfair discrimination.

## **4.5 Comparative parallels with Canadian broadcasting codes and their application**

### ***4.5.1 Introduction***

The comparative relevance of discussing Canada’s broadcasting codes and their application is related to the striking similarity between the broadcasting policies articulated in section 3 of the Canadian *Broadcasting Act* 1991<sup>168</sup> and those of the South African *Broadcasting Act*.<sup>169</sup> Section 3(d) of the Canadian *Broadcasting Act* reads as follows:

[T]he Canadian broadcasting system should

- (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
- (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
- (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural

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<sup>168</sup> See Chapter IV: 4.3.3.2.

<sup>169</sup> See 4.2 above.

and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change.

Moreover, as was indicated in Chapter II, Canadian and South African jurisprudence recognise the same values as underlying, and restricting, the right to freedom of expression.

The scope of regulation of expression in Canada and South Africa can certainly be distinguished in material aspects, one of which is the criminalisation of “hate speech” in Canada and the consequent limiting requirement of intention. However, the scope is comparable to the extent that one would expect at least similar guidelines to avoid the use of unacceptable expression. Expression under section 319 of the Canadian *Criminal Code* is viewed as unacceptable to the extent that its intentional use is criminalised. Section 319(1) can be related to “hate speech” in terms of section 16(2)(c) of the South African Constitution, while section 319(2), which is similar to section 10 of the *Equality Act*, prohibits expression that promotes hatred against an identifiable group. Section 319(3) can be related to the proviso in terms of section 2 of the *Equality Act*. Section 12 of the *Canadian Human Rights Act* can be related to section 12 of the *Equality Act*. The *Human Rights Act*, and corresponding legislation in the different provinces, furthermore defines and proscribes various discriminatory practices.<sup>170</sup> Against this background, it is noteworthy that Canadian broadcasting codes contain various provisions that guide against the use of unfairly discriminatory expression, while similar provisions that give explicit recognition to the right not to be unfairly discriminated against as contemplated by the Constitution and the *Equality Act* are absent from the codes of the BCCSA.

The relevant Canadian broadcasting associations were mentioned in Chapter IV.<sup>171</sup> The subsequent discussion highlights relevant provisions of Canadian broadcasting codes.

#### ***4.5.2 Relevant provisions of Canadian broadcasting codes and regulations***

As was indicated earlier, the Canadian Radio-television and Telecommunications Commission (CRTC) is an independent public authority that regulates and supervises

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<sup>170</sup> See Chapter IV: 4.3.1.2 and 4.3.2.1.

<sup>171</sup> See Chapter IV: 4.3.3.1.

broadcasting and telecommunications in Canada. The Canadian Broadcasts Standards Council (CBSC)<sup>172</sup> is a self-regulatory body that was established in 1990 by private broadcasters. It administers the codes of the Canadian Association of Broadcasters (CAB) and the Association of Electronic Journalists (RTNDA)<sup>173</sup> on ethics, equitable portrayal, television violence and journalistic independence, and responds to complaints from the public about possible violations.<sup>174</sup>

The relevant codes are the *CAB Voluntary Code Regarding Violence in Television Programming*, the *CAB Equitable Portrayal Code*, the *CAB Code of Ethics* and the *RTNDA Code of (Journalistic) Ethics*.<sup>175</sup> Codes like the *CAB Violence Code* and the *CAB Equitable Portrayal Code* are applicable to all public and private broadcasters, whether or not they are members of the CBSC, as conditions of their licences. Private broadcaster members of the CBSC must, in addition, and as a condition of their membership of the CBSC, adhere to the standards established in the codes administered by the Council. The CRTC<sup>176</sup> has, however, made it clear that private broadcaster standards to which the public broadcasters are not bound by conditions of licence, must nonetheless be respected by them. To achieve that result, the Commission has cited such “private” norms and incorporated them into public broadcaster responsibilities via the “high standard” policy objective set out in section 3(1)(g) of the *Canadian Broadcasting Act*.<sup>177</sup> The relevant regulations are the *Television Broadcasting Regulations of 1987*<sup>178</sup> and the *Radio Regulations of 1986*.<sup>179</sup>

The following provisions are particularly relevant to the study:

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<sup>172</sup> See Chapter IV: 4.3.3.1.

<sup>173</sup> See Chapter IV: 4.3.3.1.

<sup>174</sup> See Canadian Radio-television and Telecommunications Commission (CRTC): <<http://www.crtc.gc.ca/eng/com100/2011/r110121.htm>> (accessed on 7-11-2013).

<sup>175</sup> The relevant clauses are clauses 2, 3, 6, 8 and 9 of the *Canadian Association of Broadcasters' (CAB) Code of Ethics*: <<http://www.cbsc.ca/english/codes/cabethics.php>>; clauses 1.1, 7.1, 7.2, 7.3 and 8 of the *Voluntary Code Regarding Violence in Television Programming*: CAB: <<http://www.cabacr.ca/english/social/codes/violencecode.shtm>>; clauses 2-10 of the *Equitable Portrayal Code 2007*: <<http://www.cbsc.ca/english/codes/epc.php>>; clause 2 of the *Radio Television Digital News Association of Canada (RTDNA) Code of Ethics*: CBSC: <<http://www.cbsc.ca/english/codes/rtna.php>> (these web pages accessed on 2-04-2013).

<sup>176</sup> See Chapter IV: 4.3.3.1.

<sup>177</sup> See *SRC re Bye Bye 08/09-0620* (CBSC) 17 March 2009 par: “The Relevance of Private Broadcaster Standards to the Public Broadcaster”.

<sup>178</sup> *Television Broadcasting Regulations, 1987* (SOR/87-49): Government of Canada Justice Laws Website: <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-87-49/page-2.html#h-3>> (accessed on 7-11-2013).

<sup>179</sup> *Radio Regulations, 1986* (SOR/86-982): <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-86-982/>>.

## *The CAB Code of Ethics*

Clause 2, headed “Human Rights”, provides as follows:

Recognizing that every person has the right to full and equal recognition and to enjoy certain fundamental rights and freedoms, broadcasters shall ensure that their programming contains no abusive or unduly discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status or physical or mental disability.

Clause 3, with respect to “Sex-Role Stereotyping”, provides:

Recognizing that stereotyping images can and do have a negative effect, it shall be the responsibility of broadcasters to exhibit, to the best of their ability, a conscious sensitivity to the problems related to sex-role stereotyping, by refraining from exploitation and by the reflection of the intellectual and emotional equality of both sexes in programming. Broadcasters shall refer to the Sex-Role Portrayal Code for Television and Radio Programming<sup>180</sup> for more detailed provisions in this area.

Clause 6 reads as follows:

It is recognized that the full, fair and proper presentation of news, opinion, comment and editorial is the prime and fundamental responsibility of each broadcaster. This principle shall apply to all radio and television programming, whether it relates to news, public affairs, magazine, talk, call-in, interview or other broadcasting formats in which news, opinion, comment or editorial may be expressed by broadcaster employees, their invited guests or callers.

Clause 8, with respect to “Religious Programming”, provides as follows:

Broadcasters should endeavour to make available to the community adequate opportunity for presentation of religious messages and should also endeavour to assist in all ways open to them

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<sup>180</sup> The *Sex Role Portrayal Code for Television and Radio Programming* stated that it intended to assist in overcoming systemic discrimination portrayed in broadcast programming based on gender. It was the intent of the *Code* that broadcasters should advance the awareness of, and sensitivity to, the problems related to the negative or inequitable sex-role portrayal of persons. The *Code* provided practical guidelines in furtherance of this intent with regard to, inter alia, the reflection of diversity and non-sexist language.

the furtherance of religious activities in the community. Recognizing the purpose of the religious broadcast to be that of promoting the spiritual harmony and understanding of humanity and of administering broadly to the varied religious needs of the community, it shall be the responsibility of each broadcaster to ensure that its religious broadcasts, which reach persons of all creeds and races simultaneously, shall not be used to convey attacks upon another race or religion.

Clause 9 requires that particular care be taken by radio broadcasters to ensure that programming on their stations does not contain: (a) gratuitous violence in any form, or otherwise sanction, promote or glamorise violence; (b) unduly sexually explicit material; and/or (c) unduly coarse and offensive language.

#### *The Voluntary Code Regarding Violence in Television Programming*

Clause 1.1 determines that Canadian broadcasters shall not air programming which contains gratuitous violence in any form, or which sanctions, promotes or glamorises violence. “Gratuitous” means material which does not play an integral role in developing the plot, character or theme of the material as a whole.

Clause 7, with regard to violence against women, provides:

- 7.1 Broadcasters shall not telecast programming which sanctions, promotes or glamorizes any aspect of violence against women.
- 7.2 Broadcasters shall ensure that women are not depicted as victims of violence unless the violence is integral to the story being told. Broadcasters shall be particularly sensitive not to perpetuate the link between women in a sexual context and women as victims of violence.
- 7.3 Broadcasters shall refer to the *Canadian Association of Broadcasters’ Code on Sex Role Portrayal* for guidance regarding the portrayal of women in general.

Clause 8 concerns violence against specific groups and reads as follows: “Broadcasters shall not telecast programming which sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.”

## *The Equitable Portrayal Code 2007*

The *Code* replaced the *CAB Sex Role Portrayal Code* to ensure the equitable portrayal of all persons in television and radio programming.

Clause 2 recognises that every person has the right to the full enjoyment of certain fundamental rights and freedoms and that broadcasters must ensure that their programming contains no abusive or unduly discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability.

Clause 3 determines that, in an effort to ensure appropriate depictions of all individuals and groups, broadcasters must refrain from airing unduly negative portrayals of persons with respect to race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability. Negative portrayal can take many different forms, including (but not limited to) stereotyping, stigmatisation and victimisation, derision of myths, traditions or practices, degrading material, and exploitation.

Clause 4 describes stereotyping as follows:

Recognizing that stereotyping is a form of generalization that is frequently simplistic, belittling, hurtful or prejudicial, while being unreflective of the complexity of the group being stereotyped, broadcasters shall ensure that their programming contains no unduly negative stereotypical material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability.

Clause 5 recognises that members of certain or specified identifiable groups face particular portrayal issues and determines that broadcasters must ensure that their programming does not stigmatise or victimise individuals or groups on the basis of their race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability.

Clause 6 determines that broadcasters must avoid the airing of content that has the effect of unduly deriding the myths, traditions or practices of groups on the basis of their race, national

or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability.

In terms of clause 7, broadcasters must avoid the airing of degrading material, whether reflected in words, sounds, images or by other means, which are based on race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability.

Clause 8 prohibits the airing of programming that exploits women, men or children. It also prohibits the sexualisation of children in programming.

Clause 9 requires sensitivity with regard to language and terminology in the following terms:

Broadcasters shall be sensitive to, and avoid, the usage of derogatory or inappropriate language or terminology in references to individuals or groups based on race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability.

- a. Equality of the sexes must be recognized and reinforced through the proper use of language and terminology. Broadcasters shall employ language of a non-sexist nature in their programming, by avoiding, whenever possible, expressions which relate to only one gender.
- b. It is understood that language and terminology evolve over time. Some language and terminology may be inappropriate when used with respect to identifiable groups on the basis of their race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability. Broadcasters shall remain vigilant with respect to the evolving appropriateness or inappropriateness of particular words and phrases, keeping in mind prevailing community standards.

Clause 10 makes provision for contextual considerations in the following terms:

Broadcasts may fairly include material that would otherwise appear to breach one of the foregoing provisions in the following contextual circumstances:

- a. Legitimate artistic usage: Individuals who are themselves bigoted or intolerant may be part of a fictional or non-fictional program, provided that the program is not itself abusive or unduly discriminatory;
- b. Comedic, humorous or satirical usage: Although the comedic, humorous or satirical intention or nature of programming is not an absolute defence with respect to the proscriptions of this Code, it is understood that some comedic, humorous or satirical



content, although discriminatory or stereotypical, may be light and relatively inoffensive, rather than abusive or unduly discriminatory;

- c. Intellectual treatment: Programming apparently for academic, artistic, humanitarian, journalistic, scientific or research purposes, or otherwise in the public interest, may be broadcast, provided that it: is not abusive or unduly discriminatory; does not incite contempt for, or severely ridicule, an enumerated group; and is not likely to incite or perpetuate hatred against an enumerated group.

Clause 2 of the *RTNDA Code of Ethics* reads as follows: “Broadcast journalists will report factors such as race, national or ethnic origin, colour, religion, sexual orientation, marital status or physical or mental disability only when they are relevant.”

Section 5.(1) of the *Television Broadcasting Regulations* of 1987 reads as follows:

A licensee shall not broadcast

- (a) anything in contravention of the law;
- (b) any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;
- (c) any obscene or profane language or pictorial representation . . . .

Section 3(b) of the *Radio Regulations* similarly prohibits the broadcast of: (a) anything in contravention of the law; (b) any abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.

The selection of decisions of the CRTC and the CBSC that will subsequently be discussed will highlight the application of the relevant principles in different contexts. The focus is on the reasoning of the panels in the light of these principles, and not so much on the outcomes. Relations between the facts of, and issues considered in, these cases, and those relevant to the decisions of the BCCSA that were discussed above, are often apparent. Furthermore, the reasoning of the panels can often be clearly related to the principles to be applied in terms of section 10 of the *Equality Act*. What is clear is the emphasis on the responsibility of the broadcasting sector to guard against the promotion of hatred and inequality in society.

### 4.5.3 Decisions of the Canadian Radio-television and Telecommunications Commission (CRTC)

In Broadcasting Decision CRTC 2006-19<sup>181</sup>, the Commission ruled on a broadcast that, at the time, was aired on a service that fell under the *Specialty Services Regulations*, 1990. Section 3(b) of the *Regulations* is the equivalent of section 3(b) of the *Radio Broadcasting Regulations*, 1987, as well as section 5(1) of the *Television Broadcasting Regulations*, 1987.

The Commission stated the general approach of the CRTC, namely that it is required to regulate and supervise the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1) of the *Broadcasting Act*. It was noted that the *Specialty Services Regulations* were enacted with a view to implementing these objectives, and required that programming of the Canadian broadcasting system should respect and reflect the equality rights, sense of self-worth, human dignity and acceptance within society of those targeted.<sup>182</sup> The Commission set out that on-air comments contravened section 3(b) of the *Regulations* where all three of the following criteria are met:

- (i) the comments are abusive;
- (ii) the abusive comments, taken in context, tend or are likely to expose an individual or group or class of individuals to either hatred or contempt; and
- (iii) the abusive comments are on the basis of an individual's or a group's race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.<sup>183</sup>

In Broadcasting Decision CRTC 2006-293, the Commission had to decide whether the comments were abusive in terms of section 5(1)(b) of the *Television Broadcasting Regulations*. The case concerned conversations with respected members of the Muslim community on the television programme “*Les Francs-tireurs*”. The host in the first episode voiced the following comment about the fact that children were required to fast during Ramadan: “This is a stupid religion. This is a stupid religion.” In a later episode, the host

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<sup>181</sup> CRTC: <<http://www.crtc.gc.ca/eng/archive/2006/db2006-19.htm>>.

<sup>182</sup> Broadcasting Decision CRTC 2006-19: par 12-14; Broadcasting Decision CRTC 2006-293: par 17: <<http://www.crtc.gc.ca/eng/archive/2006/db2006-293.htm>>; Broadcasting Decision CRTC 2004-271: par 30-39: <<http://www.crtc.gc.ca/eng/archive/2004/db2004-271.htm>>.

<sup>183</sup> Broadcasting Decision CRTC 2006-19: par 15.

expressed indignation about the recriminations of Muslim students who filed a million-dollar lawsuit against their school after the school had refused to provide them with premises for prayer and other Muslim religious practices. He remarked as follows: “They piss us off with their prayers and washing of feet in the washrooms.”<sup>184</sup>

Although the complaint was overruled, the broader scope of the prohibition of abusive comment that exposes to hatred or contempt, by contrast to “advocacy of hatred that constitutes incitement to cause harm”, appears from the considerations that were taken into account. Moreover, in the discussion of decisions of the CBSC that will follow, an even broader interpretation will be highlighted.

The Commission described the programme as one of social criticism and public affairs. It focused on emerging social phenomena, taboos and controversial subjects, and people were invited to appear on the programme to present their views on topical issues. More often than not, the tone of the programme was very direct and contained satirical humour. The hosts or their guests regularly used expletives.<sup>185</sup>

The above-mentioned criteria as set out in Broadcasting Decision CRTC 2006-19 were then applied. The determination in terms of the third criterion, namely whether the comments focused on a specific group within the meaning of the *Regulations*, was the departure point. With respect to the first episode, the Commission noted that reference to fasting is sufficiently recognisable as being associated with the Muslim religion and its practitioners to conclude that an offensive comment about this practice could be considered an offensive comment about its practitioners. With respect to the second episode, the Commission was of the view that the comments discriminated against the Muslim religion and were hurtful. It was consequently concluded that the third criterion of the *Regulations* had been met in both broadcasts.<sup>186</sup>

In its application of the first criterion, the Commission considered the content of the comments objectively, using the reasonable television viewer as a norm. The Commission considered that, in a democratic society, citizens and broadcasters must be able to exercise

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<sup>184</sup> Broadcasting Decision CRTC 2006-293: par 13-15.

<sup>185</sup> Broadcasting Decision CRTC 2006-293: par 10.

<sup>186</sup> Broadcasting Decision CRTC 2006-293: par 20-24.

their right to criticise religious groups or practices, sometimes using unpopular, unpleasant or confrontational expressions, without having their opinions automatically judged to be abusive comment that tramples on fundamental rights. The conclusion was that the comments in question in both episodes of the programme were not “abusive” within the meaning of section 5(1)(b) of the *Regulations*.<sup>187</sup>

With regard to the second criterion, the Commission considered the goal, format, duration and tone of the programmes, the presence of balance and opposing views, and, with regard to the first episode, the fact that some comments were indirect with respect to religion, and were not aimed directly at the individuals practising that religion.<sup>188</sup>

The Commission concluded that the host’s comments, although some people could consider them inappropriate, did not, taken in their context, incite violence, hatred or contempt within the meaning of the *Regulations*.<sup>189</sup>

#### ***4.5.4 Decisions of the Canadian Broadcast Standards Council (CBSC)***

##### *Abusive comment*

The decision in *SRC re Bye Bye*<sup>190</sup> was rendered pursuant to a written request by the CRTC made to the CBSC, asking the Council to examine complaints received by the CRTC about a non-CBSC member. The request entailed that the CBSC examine the complaints “in light of the *Broadcasting Act*, the *Television Broadcasting Regulations*, 1987, and applicable conditions of licence”.

The Panel’s broad interpretation of section 5(1)(b) of the *Regulations* is noteworthy in relation to the point that is highlighted in this chapter, namely that the equality right is not sufficiently protected in terms of the broadcasting codes of the BCCSA.

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<sup>187</sup> Broadcasting Decision CRTC 2006-293: par 25-28.

<sup>188</sup> Broadcasting Decision CRTC 2006-293: par 29-42.

<sup>189</sup> Broadcasting Decision CRTC 2006-293: par 51.

<sup>190</sup> *SRC re Bye Bye* 08/09-0620/2008 (CBSC): par “Comments and Sketches about Blacks”.

It was acknowledged that the standard established in section 5(1)(b) appears on its face to be more rigorous than that of clause 2 of the *Equitable Portrayal Code*. While section 5(1)(b) requires that the comment or pictorial representation either “tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt”, the test in clause 2 is tied to the assessment of a comment as either “abusive or unduly discriminatory”, without any linked requirement that the individual or group be exposed to hatred, contempt or any equivalent societal reaction. Programme content may thus violate clause 2 of the *Equitable Portrayal Code* without rising to a level that would constitute a breach of section 5(1)(b) of the *Television Broadcasting Regulations*.<sup>191</sup>

The following statements gave rise to one of the complaints: “It will be good to have a Negro in the White House. It will be practical. Black on white, it will be easier to shoot him.” In another sketch that followed immediately thereafter and also provoked complaints, the interviewer “appeared to confuse the President Obama character with a Black Montreal singer ‘because the Blacks, you all look alike.’ He added that people should ‘hide their purses’ because a Black was coming on the program, following that with the line that his black guest could not rob you at home, because he’s on your television screen, ‘but he could take off with the TV anyway.’” The comments were, in the view of the Panel, respectively egregious and abusive in terms of clause 2 and degrading in terms of clause 7 of the *Equitable Portrayal Code*, and violative of clause 2 of the *Code of Ethics*.<sup>192</sup> It quoted and used the following guideline to distinguish between acceptable and unacceptable humour: “It poked fun but did not bludgeon. It tickled but was not nasty.” It has to be noted that this guideline will serve well in a determination in a similar case of the bona fides of expression in terms of the section 12 proviso of the *Equality Act*.

The Panel then applied section 5(1)(b) of the *Television Broadcasting Regulations* and held that the statements also contravened this section. It found that the abusive comments were likely to expose blacks to contempt and/or equivalent sentiments of scorn, belittling and disrespect. It was held that the comments were in violation of section 5(1)(b). The finding was based, inter alia, on the following excerpt:

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<sup>191</sup> *SRC re Bye Bye*: par “Comments and Sketches about Blacks”.

<sup>192</sup> *SRC re Bye Bye*: par “Comments and Sketches about Blacks”.

The purpose of section 3(b) of the [Radio] Regulations on abusive comments [the equivalent of Section 5(1)(b) of the Television Broadcasting Regulations] is to prevent the very real harm that may be caused by prejudicial comments that are contrary to the objectives of the Broadcasting Policy for Canada and that are likely to expose a group to hatred or contempt, potentially causing serious psychological and social problems for the members of the group against which they are directed. The derision, hostility and violence encouraged by such comments may severely affect the self-esteem, human dignity and social acceptance of the members of the group. This prejudice undermines the equal rights of the affected members' rights that the programming of the Canadian broadcasting system should respect and reflect in accordance with the Broadcasting Policy for Canada. As well as preventing prejudice against the persons referred to in such comments, the provision of the Regulations that prohibits abusive comments is intended to guarantee that all Canadians see themselves reflected in, and respected by, Canadian attitudes and values. The dissemination of comments that incite hatred and contempt also undermines the social and cultural fabric of Canada, which the Canadian broadcasting system must safeguard, enrich and strengthen.<sup>193</sup>

In *Sun News Network re The Source (Theft Ring)*<sup>194</sup>, the presenter commented on the recent arrest of a group of individuals who were allegedly involved in a theft ring. Apparently, all of the accused were of Roma heritage. The Panel members recognised that a broadcaster is entitled to condemn theft and law violators. However, “broadcasters shall ensure that their programming contains no abusive or unduly discriminatory material or comment which is based on matters of race, national or ethnic origin”. By asserting that Gypsies, based on their national or ethnic origin, were thieves and beggars, the presenter transgressed clauses 2, 3, 4, 5 and 7 of the CAB *Equitable Portrayal Code*.

#### *Racist or biased remarks in the context of comedy or art*

In *SRC v Bye Bye*, the Panel reiterated that the broadcaster was not shielded from the application of either the applicable code or section 5(1)(b) on account of the humorous context of the programme.<sup>195</sup>

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<sup>193</sup> *SRC re Bye Bye*: par “Abusive Comment under the *Television Broadcasting Regulations, 1987*”.

<sup>194</sup> *Sun News Network re The Source (Theft Ring)* 12/13-0069/2013 (CBSC).

<sup>195</sup> *SRC re Bye Bye* par “Abusive Comment under the *Television Broadcasting Regulations, 1987*”. See also *CKVL-AM re the André Arthur and Martin Paquette Show* 98/99-1184/2000 (CBSC).

The Panel referred to a previous CBSC decision, *CKTF-FM re Voix d'Accès*<sup>196</sup>, in which the Quebec Regional Council had held that the depiction of “Newfies” as “assholes” was clearly unacceptable.

The Panel stated that it had no hesitation in finding that, in the present case, the expressions “peckerheads”, “pussy-assed jack-offs”, “scumbags”, “pussies”, “frig the French” and “screw the French” were clearly as abusive as the term “assholes” used by the host in the *CKTF-FM* matter.<sup>197</sup>

The defence on the grounds that the statements concerned were not intended to be taken seriously was then considered. The host argued that he intended his comments to be understood as humorous, as comedy, and that he ought not to have been taken seriously. He was not, he argued, the “president” or a “head of state” and his comments ought not to have been taken in that vein.

The Panel, considering the decisions in *CFTR-AM re Dick Smyth Commentary*<sup>198</sup> where the commentator had argued that he had not intended to be racist or biased in his comments, and *CKTF-FM re Voix d'Accès*, concluded that the fact that no one would mistake the host for a head of state did not entitle him to say whatever came into his head and out of his mouth. Even had his comments been understood as comedic by some elements of his audience, they would be excessive by Canadian standards. Whether intended seriously or in jocular fashion, the use of the relevant terms in reference to any ethnic, racial, national or other discernible group was derogatory, abusive and discriminatory and in violation of clause 2 of the *CAB Code of Ethics*.

In *CKTF-FM re comments made on Les méchants matins du monde*<sup>199</sup>, the Panel applied the foregoing principle in the following way:

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<sup>196</sup> *CKTF-FM re Voix d'Accès* 93/94-0213 (CBSC): Decision 6 December 1995.

<sup>197</sup> See also *CKNW-AM re The Peter Warren Show (“Born-again” Christians)* 98/99-0277 (CBSC): Decision 14 October 1999 where the Panel found the expression “scum of the earth” to be abusive and concluded that the broadcaster had breached clause 2 of the *Code of Ethics* by broadcasting it.

<sup>198</sup> *CFTR-AM re Dick Smyth Commentary* 95/96-0062 (CBSC): Decision 26 March 1996.

<sup>199</sup> In *CKTF-FM re comments made on Les méchants matins du monde* 00/01-0705 (CBSC): Decision 5 April 2002.

The jokesters did not “poke” fun; they bludgeoned. They did not “tickle”; they were nasty. They did not joke *with* Hindus; they laughed *at* Hindus; they made fun *of* Hindus. They demeaned and denigrated the objects of their “humour”. This was “grit your teeth”, “cringe in discomfort” mockery; it had no cuteness or levity to offer.<sup>200</sup>

In *Comedy Network re Comedy Now (“Gord Disley”)*<sup>201</sup>, the Panel did not consider the word “fag” to be either inherently hateful, abusive or unduly discriminatory. It was reasoned that much modern comedy has a discriminatory edge, taking advantage of the propensity of individuals to find humour in difference. Only such discriminatory humour that goes over the edge will be in breach of clause 2 of the *CAB Code of Ethics*. The goal of the human rights clause, of the CBSC and of the National Specialty Services Panel, is not to ensure purity on the airwaves; it is to protect against harmful speech. The task of the CBSC is to balance cost and freedom, freedom and cost.

The Panel found that, although there might be circumstances in which the term “fag” might be presented in a sneering, derisive, nasty tone, the humour in the present matter was distinctly the opposite. Moreover, the term is not the equivalent of some of the racial epithets that are per se unacceptable, particularly since members of the gay community use the word themselves from time to time in a non-discriminatory way. The Panel accordingly found no breach of the human rights clause. The same approach was followed in *SRC re Bye Bye* with regard to the word “nègre”.<sup>202</sup>

In the recent matter of *CHOZ-FM re the song “Money for Nothing” by Dire Straits*<sup>203</sup>, the Atlantic Regional Panel considered a complaint about a well-known song that had continuously been played on air for more than 25 years. The lyrics of the song included the word “faggot” a total of three times. There are versions of the song available in which the word was replaced with another.

The complainant argued that the word carried an “unavoidable connotation of hate”. By airing it unapologetically on the radio, the station was indirectly propagating hate. The complainant

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<sup>200</sup> See also *CKOI-FM re a segment by Cathy Gauthier on Fun Radio* 04/05-1729/2005 (CBSC).

<sup>201</sup> *Comedy Network re Comedy Now (“Gord Disley”)* 05/06-0290 (CBSC): Decision 20 January 2006. See also *Quebec Regional Panel SRC re Bye Bye* 08/09-0620/2009 (CBSC): par “The Contextual Considerations”.

<sup>202</sup> *SRC re Bye Bye* par: “Comments and Sketches about Blacks”.

<sup>203</sup> *CHOZ-FM re the song “Money for Nothing” by Dire Straits* 09/10-0818/2011 (CBSC).



contended that the importance of ending discrimination should overshadow the value of presenting a timeless classic rock song in its original form. The broadcaster argued that to play the changed version would detract from the integrity and authenticity of the music.

The Panel examined the complaint under clause 2 of the *Code of Ethics* and clauses 2, 7, 9 and 10 of the *Equitable Portrayal Code*.

The Panel noted previous decisions on the role of edited versions of songs in broadcasting. The following *dictum* regarding “Boyz in the Hood” was quoted:

It is also appropriate to add that both the music recording industry and Canada’s private broadcasters are aware that there are often edited versions of songs, one for direct sale and the other for radio play. They often, therefore, have the choice of which version of a song to play or, in circumstances where they do not, their choice is reduced to whether the song is or is not suitable for airing in terms of the Codes with which they have agreed to comply.

The Panel then highlighted clause 9(b) of the *CAB Equitable Portrayal Code* which was included in that *Code* in 2008. In the light of this clause, it concluded that the word “faggot” is one that, “even if entirely or marginally acceptable in earlier days, is no longer so”. It fell in the category of unacceptable designations on the basis of race, national or ethnic origin, colour, religion, age, gender, sexual orientation, marital status or physical or mental disability. The Panel accordingly held that use of the word in the song “Money for Nothing” was unacceptable for broadcast and that, by broadcasting an unedited version of the song, CHOZ-FM breached clause 2 of the *CAB Code of Ethics*, and clauses 2, 7 and 9 of the *Equitable Portrayal Code*.

In the context of the present discussion, it is significant to observe the higher standard that was set with respect to broadcasting in contrast to, for example, the sale and distribution of songs in the market.

It should be noted that the CRTC has requested the CBSC to review this decision. It was mentioned that the decision “[had] elicited a strong public reaction and created uncertainty for private radio stations across the country”. It was contended that, inter alia, “the context of the

particular wording in the song's theme and intended message" and "the age and origin of the song and the performance date" should be taken into account.<sup>204</sup>

*Discriminatory remarks in the context of religion*

The decision in *CITS-TV (CTS) re John Hagee Today ("Diamonds for Successful Living")*<sup>205</sup> concerned complaints that comments of American Pastor Hagee during a religious programme that featured his sermons were in breach of clauses 2 and 8 of the *CAB Code of Ethics*. The Panel confirmed the principle that there are comments which, although discriminatory, may be acceptable in the context of religious programming. However, such views have to be presented in a non-abusive, legitimate manner. The Panel referred, inter alia, to *CKRD re Focus on the Family*<sup>206</sup> where the following was stated:

The relevance of the Commission's Religious Broadcasting Policy to the matter at hand is that the Policy provides specific indications of the limits of religious broadcasting. Religious programming does not, after all, have any inherent entitlement to say whatever it wants in the name of religion... . While *Focus in the Family* is free to describe the homosexual lifestyle as sinful, ... the program under consideration here has gone much further. It has treated support for the movement as "flimsy" and has disparaged that support... . Moreover, it has attributed to the gay movement a malevolent, insidious and conspiratorial purpose, a so-called "agenda", which, in the view of the Council, constitutes abusively discriminatory comment on the basis of sexual orientation, contrary to the provisions of Clause 2 of the *CAB Code of Ethics*.

The *John Hagee Today* Panel concluded that the broadcast of a series of cumulative comments that clearly targeted gays and lesbians inaccurately was contrary to the provisions of the human rights and religious broadcasting clauses of the *CAB Code of Ethics*. It was clearly Hagee's right to stand resolutely against homosexuality. He however did not stop there. He unfairly and inappropriately included abusive and unduly discriminatory comment on the basis of sexual orientation. He pinned on gays and lesbians a "gay agenda" and the "brain-washing" of children in the schools. He attributed to gays and lesbians "a malevolent, insidious and conspiratorial purpose, a so-called 'agenda'".

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<sup>204</sup> CRTC: <<http://www.crtc.gc.ca/eng/com100/2011/r110121.htm>> (accessed on 7-11-2013).

<sup>205</sup> *CITS-TV (CTS) re John Hagee Today ("Diamonds for Successful Living")*.

<sup>206</sup> *CKRD re Focus on the Family* 96/97-0155 (CBSC): Decision 16 December 1997.

In *OMNI.1 re an episode of the Jimmy Swaggart Telecast*<sup>207</sup>, the Panel acknowledged that same-sex marriage is a controversial issue that generates considerable passion among both its proponents and its detractors. The Panel noted that the debate in this regard is more than legitimate, it is democratically essential, “and raising the arguments that either favour or counter the notion of same-sex marriage is as salubrious a discussion under the umbrella of freedom of expression as one could imagine”. This, however, did not open the door to attacking the practitioners of same-sex marriage. The contrary-minded are entitled to take issue only with the ideas, the ideology, the arguments, the principles and the policies related to same-sex marriage. The Panel considered the following utterances of the speaker, a televangelist: “This utter, absolute, asinine, idiotic stupidity ... of men marrying men”; “These ridiculous, utterly absurd ... district attorneys and ... judges and ... state congress and ... well, we don’t know”; and “I’ve never seen a man in my life I wanted to marry.” It was concluded that there was no breach of the standards the CBSC.

The Panel then considered the following statement by the evangelist: “...And I’m gonna be blunt and plain; if one [man] ever looks at me like that [i.e. as if he wanted to marry me], I’m gonna kill him and tell God he died.” It in addition considered the follow-up, repeated emphatic references to “an abomination”, and the conclusion: “They all, they all oughta have to marry a pig and live with him forever.”

The Panel emphasised the fact that, while the word “abomination” may have a particular connotation or meaning to members of the Christian sect to which the evangelist belonged, once his preaching was televised it should have been appreciated that the meaning at issue was far more pervasive than that understood by the limited audience in the building in which the sermon was given.

It was noted that the evangelist’s language was, in a sense, exacerbated by the fact that he, as a religious figure, could be presumed to set an example for his community. It would, therefore, be easy for someone to infer that this might be the proper way for a Christian of this sect (or possibly of any sect) to respond to homosexuality. Repeating such terminology also contributed to the desensitisation of the public with respect to gays and lesbians, and even

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<sup>207</sup> *OMNI.1 re an episode of the Jimmy Swaggart Telecast* 04/05-0097 (CBSC): Decision 19 April 2005.

provided the audience with regrettable and negative terms with which to deal with this identifiable part of the community. The language cited in the previous paragraph was, in the view of the Panel, sufficiently abusive and unduly discriminatory to constitute a breach of both clauses 2 and 8 of the *CAB Code of Ethics*.

The Panel in *CFRA-AM re an episode of the Lowell Green Show (Islam)*<sup>208</sup> had to consider complaints regarding criticism of the Islam religion by a host at an open show. The Panel reiterated that it only needed to conclude that the challenged comments were abusive or unduly discriminatory to find a breach of clause 2 of the *CAB Code of Ethics*. The comments did not have to amount to hatred. The Panel found that the host who had argued that, based on what he called the “widespread acceptance of blatant oppression of women within the Muslim world”, there must be a problem within the Islam faith had mounted a sweeping, abusive, uninformed, unfair and unduly discriminatory criticism of Islam. He had conceded none of the diversity that exists in Islam or among its adherents. He consistently made it entirely clear that his issue, from the opening premise of the show, was: “Can you not conclude that there must be a problem within that faith?” Moreover, he brooked no contradictory observations by persons who were admittedly Muslim and who were well informed about the religion, nor was he prepared to listen to a different viewpoint. The Panel concluded that the episode was consequently in breach of clause 2 of the *CAB Code of Ethics*.

In *W Network re My Feminism*<sup>209</sup>, a documentary entitled “My Feminism” was broadcast, consisting primarily of individual interviews with a number of prominent feminists of diverse national, cultural and religious backgrounds who discussed a range of issues related to the feminist movement, including religion. The Irish feminist, Ailbhe Smith, remarked, inter alia, that the Holy Roman Catholic Church had been responsible, ably aided and abetted and reinforced by the Holy Irish Catholic State, to keep women in a state of submission, subordination and fear, and to restrict, constrict and constrain women in every way that it could possibly think of. That, according to her, meant that men should have the power to make sure that women should stay in their places as mothers and man-servers. She stated that she could not believe in or support a religion which “mind-fucked” people to that extent.

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<sup>208</sup> *CFRA-AM re an episode of the Lowell Green Show (Islam)* 07/08-0916/2008 (CBSC).

<sup>209</sup> *W Network re My Feminism* 01/02-1120/2003 (CBSC).

The Panel assessed the presentation of the entire documentary collectively, taking into account that “My Feminism” was a serious, strong and credible point-of-view, current-affairs essay documentary film which was not scripted, but depended on the choice of words of the interviewees. The words spoken represented the reaction of each individual to the questions put to her. The intensity and emotion of each response was reflected in the words used and the tone of their delivery. There were at least five religions other than Catholicism that were discussed, commented on or criticised. Moreover, criticism was not alone the equivalent of unduly discriminatory comment. Only unjustified, unsupportable and gratuitous criticism would fail the test of the private broadcasters’ codified standards. The Panel concluded that the presentation of the religious issue was reasonably balanced, fair and credible and that there was no breach of the human rights clause of the *CAB Code of Ethics*.

*Discriminatory remarks relating to ethnic and national origin*

In *CKTB-AM re the John Michael Show (Middle East Commentary)*<sup>210</sup>, the Panel considered remarks by the host during two open-line shows dealing with the conflict between Israel and the Palestinians. The Panel concluded that, by broadcasting broad statements advocating the killing of Palestinians and their leaders, CKTB had violated clause 6, paragraph 3, that is, the provision of the *CAB Code of Ethics* which prohibits the use of improper comment. By broadcasting the host’s statement that the Palestinian people, as an identifiable national group, hate all Jews and wish to eliminate the state of Israel, CKTB had aired unduly discriminatory comments about the Palestinian people contrary to the human rights provision of the *CAB Code of Ethics*. The Panel supported the right of the host to take either side in the current Israeli–Palestinian conflict. He was also justified in assessing the conflict as one in which negotiation was doomed to failure as a solution and that the only solution to the conflict would be a military one.

When, however, he recommended that the Israelis engage in indiscriminate killing, he went too far. The statement “Sharon, go to town with the biggest tanks, the biggest guns, the biggest of everything you got and blow the Palestinians, Yasser Arafat included, to kingdom come” targeted all Palestinians. The recommendation later in the opening monologue that

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<sup>210</sup> *CKTB-AM re the John Michael Show (Middle East Commentary)* 01/02-0651/2002 (CBSC).

Yasser Arafat be “taken out” together with “the next guy that takes his place” utterly disregarded the reality of the democratic choice exercised by Palestinian voters. Even if Arafat personally had lost the confidence of the international community, the presupposition that his successor would not be both the legitimately elected head of the Palestinian Authority and even acceptable in the international context (to the extent that that criterion is even relevant) was presumptuous. To call for the assassination of either Arafat (a step even the Israeli Government considered inappropriate and, perhaps, illegal) or his successor was excessive and improper. The host’s response to the caller Anthony to the effect that the Israelis should kick out all the Palestinians and then “kill everyone who is not their friend” was even more excessive. It promoted blanket violence against a people and smacked of a genocidal tone. To advocate violence against those who perpetrate terror would be one thing. To propose such a recourse against all persons of a nationality solely on the basis of their sharing that background had no place on Canadian airwaves. It constituted an improper and unfair comment or editorial viewpoint, in violation of clause 6, paragraph 3 of the *CAB Code of Ethics*.

The host’s blanket condemnation of all Palestinians as hating persons of the Jewish faith and wishing to drive Israel out of existence was also excessive. To tar all Palestinians with a brush of hatred constituted an unduly discriminatory comment based on their national or ethnic origin and was in breach of clause 2 of the *CAB Code of Ethics*.

The Panel acknowledged that open-line programmes are a vital part of Canadian broadcasting, an “essential home of public debate in a free democracy”, which accommodates the expression of conflicting passions, making for exciting radio. Different styles are available and acceptable. Public radio in Canada aims more at the provision of information, while private radio’s talk shows are intended to be livelier and more provocative. To accomplish this goal, the role of the host is “to breathe life into, to communicate ardour, energy, enthusiasm, excitement, passion, to lead, to inspire”, thus inviting countervailing passions and emotion, which may involve disagreement and unpleasantness.

It is here that more care must be exercised by the host. The holder of the microphone and the related electronic controls has a distinct advantage, which must not be exercised irresponsibly. At its best, talk radio must not be arbitrary or a one-way street. Skilled practitioners of the art must be deft, not brutal.

In *CILQ-FM re the Howard Stern Show*<sup>211</sup>, the panels concluded that the cumulative effect of certain suggestions by Stern was demeaning and degrading in the extreme and in breach of clause 4 of the *Sex Role Portrayal Code*. The panels referred to the decision in *CHOM-FM and CILQ-FM re The Howard Stern Show* where the Panel in that matter had remarked that Stern's<sup>212</sup> adolescent, puerile, crude attitudes toward many sex- and gender-related issues generally fell within the category of bad taste and were left by the CBSC to be judged by the marketplace. On the other hand, the unrelenting use of terms such as "pieces of ass", "dumb broads", "fat cow", "dikes", and "sluts", degrading remarks regarding individual callers, and comments reflecting on the intellectual and emotional equality of women generally, exceeded bad taste and violated the *Sex Role Portrayal Code* provisions. The panels noted that Stern frequently dealt with female guests on the basis of their physical attributes and sexual practices rather than, or occasionally in addition to, the skills or talents which were the reason for their common recognition. In the case of callers, he regularly avoided the subject with respect to which they had called in order to seek details of their bust size and weight, as well as their sexual practices, despite the fact that this information was utterly irrelevant to the subject of interest.

In *CIOX-FM re a song entitled "Boyz in the Hood"*<sup>213</sup>, the Panel found that lyrics such as "Gotta get my girl to rock that body" with such violent imagery as "I reached back like a pimp and I slapped the ho" clearly perpetuated the link between women in a sexual context and women as victims of violence and was in contravention of clauses 2 and 15 of the *CAB Code of Ethics* and clause 7.1 of the *CAB Violence Code*. The Panel stated that, whether the intention of the song was serious or satirical, the lyrics, in their sanctioning, promotion or glamorising of violence against women, constitute abusive commentary on the basis of gender and are insensitive to the dangers of stereotyping generally and to the exploitative linking of sexual and violent elements in dealing with women.

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<sup>211</sup> *CILQ-FM re the Howard Stern Show* 99/00-0717, -0739/2001(CBSC). See also *CFRB re Ed Needham (OWD Publication)* 92/93-0096/1993 (CBSC); *CILQ-FM re the Howard Stern Show* Decision 99/00-0717 and -0739/2001 (CBSC); *CKVX-FM re morning show comments* 01/02-0059/2002 (CBSC).

<sup>212</sup> *CHOM-FM and CILQ-FM re The Howard Stern Show* 97/98-0001/1997 (CBSC).

<sup>213</sup> *CIOX-FM re a song entitled "Boyz in the Hood"* 99/00-0619/2000 (CBSC): Decision.

*Discriminatory remarks based on sexual orientation*

In *CHQR-AM re Forbes and Friends*<sup>214</sup>, the Panel determined that, although clause 2 does not contain a specific reference to “sexual orientation”, the term “sex” could reasonably be understood as being broad enough to include “sexual orientation”.

In *CFYI-AM and CJCH-AM re the Dr. Laura Schlessinger Show*, the Panel concluded that the host’s consistent characterisation of the sexual behaviour of gays and lesbians as “abnormal”, “aberrant”, “deviant”, “disordered”, “dysfunctional”, “an error” or the like constituted abusively discriminatory comment on the basis of sexual orientation. While there may be uses of these terms which could, in some circumstances, be reasonable, the Panel found their sheer weight in the programmes concerned and the host’s unremittingly heavy-handed and unambiguously negative characterisation of those sexual practices to be abusively discriminatory and in breach of the *Code*. The Panel stated that “to use such brutal language as she does about such an essential characteristic flies in the face of Canadian provisions relating to human rights”.

In a later matter which concerned comments by the same host on the same subject, the opposite conclusion was reached.<sup>215</sup> While the same general view was expressed, the host explained that she viewed homosexuality as a biological error “because it doesn’t result in reproduction”. The Panel remarked that she was careful to restrict her comments to a context which was not sweeping. There was no characterisation of the group and no use of any of the offending adjectives: abnormal, aberrant, deviant and dysfunctional. The Panel held that opinion as expressed in this instance fell within the protected bounds established in the earlier decision noted above.

In *CITS-TV re It’s Your Call*, the Ontario Regional Panel found that some of the comments made on the various episodes of a Christian call-in programme, “It’s Your Call”, constituted breaches of clause 2 of the *CAB Code of Ethics* and the *CAB Equitable Portrayal Code*. The comments were held to be abusive and unduly discriminatory. They were made either by the hosts themselves or by callers, and the hosts then made no attempts to refute or temper the

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<sup>214</sup> *CHQR-AM re Forbes and Friends*: 92/93-0187 (CBSC): Decision 8 August 1994. See also see *CITS-TV re It’s Your Call* 10/11-2217 & 11/12-0442/2012 (CBSC).

<sup>215</sup> *CJCH-AM re the Laura Schlessinger Show* 99/00-0652/2001(CBSC).



remarks. The comments referred to a malevolent gay “agenda” and to “recruiting” and “brainwashing” children. It was implied that all homosexuals are likely to commit rape and other violent crimes. The Panel pointed out that clause 8 of the *CAB Code of Ethics* states that religious programmes must not be used to convey attacks on other races or religions. It was held that the negative comments about homosexuals outlined above also constituted an attack on a group on the basis of sexual orientation, contrary to clause 8.

## **5. CONCLUDING REMARKS**

It is apparent that, in particular, the application of the broadcasting codes of the BCCSA allows expression that is prohibited in terms of section 10 of the *Equality Act*. For the following reasons, this approach cannot be supported.

Section 192 of the Constitution explicitly obligates the broadcasting media to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.

Media exceptionalism does not condone expression that jeopardises the values at the core of society’s interest in freedom of expression generally. It acknowledges the particular role that the media plays in terms of its obligation and distinct positioning in being instrumental to the establishment and maintenance of a “representative democracy”. The effect is that bona fide media reports on “hate speech”, whether narrowly or broadly defined, or the bona fide media publication of information about expression of such nature, is rendered constitutional.

Firstly, the values that inform the protection of freedom of expression are not served when “hate speech” in the media discourages members of vulnerable groups from enlightening their distress. If the supporters of the rights of these groups are likewise overpowered, the effect will be even greater. The fact is that a marketplace of ideas that denies equal opportunity to influence and be influenced by the exchange and promotion of ideas excludes issues that are of crucial relevance to the formation and operation of the democratic society from its subject matter. Moreover, such exclusion infringes the value of dignity as autonomy with respect to those who are overpowered. Furthermore, the dignity concept in terms of the South African Constitution not only involves dignity as autonomy, but also inherent human dignity, which at

the same time involves the equality right. The media has tremendous power to reinforce the mind-set of those who believe that they are entitled to humiliate others on the basis of their group identity. This requires enhanced sensitivity for the societal commitment to heal the divisions of the past.

Secondly, to allow expression that enjoys constitutional protection in terms of the right to freedom of expression, without providing for its limitation by other constitutional rights, negates the internal tension between the values that inform the protection of freedom of expression. It furthermore disregards the constitutional order, which requires a balancing of interrelated values and rights. Discriminatory expression involves all the foundational values of the Constitution. It also involves the constitutional rights of freedom of expression, equality and dignity. The broadcasting codes, however, only recognise an obligation to disallow expression that categorically does not enjoy constitutional protection in terms of the right to freedom of expression. The constitutional obligation to prohibit expression that promotes or constitutes unfair discrimination in the societal context is, however, disregarded. This approach is not in accordance with the constitutional “web of mutually supporting rights” that was discussed in Chapter II.

Lastly, the media has to obey the laws of the land. Section 10 of the *Equality Act* does not exempt the media from its application. It accommodates bona fide reporting and the publication of information. The discussion in Chapter V led to a conclusion that section 10, as well as the other relevant sections of the Act, regulates expression in accordance with the constitutional obligation to prevent and prohibit unfair discrimination. The values informing the protection of expression are acknowledged. The prohibitions do not infringe the right to freedom of expression more than is necessary to achieve this aim. They do not rule out the expression of opinions on any subject. Different views on homosexuality can, for example, be conveyed without crossing the line where insult rather than debate about the issue is the primary aim. The exclusion from categorical prohibition of bona fide engagement in media reporting and the publication of information acknowledges the responsibility of the media to provide readers, listeners and viewers with knowledge and with information and opinions that enable them to participate actively in a political democracy. Moreover, the potential of the media to create opportunities for self-fulfilment is not jeopardised.

The *Equality Act* addresses the risk of unfair disadvantage constituted by discriminatory expression in the societal context. It seems inevitable that this risk will be increased if the medium of expression is the media, in particular the broadcasting media. In this light, the criticism of the absence of guidelines to prevent the promotion of inequality is even more substantial. The criticism does not deny the obligation and prominence of the media in the maintenance of the constitutional democracy. It appreciates that knowledge, access to information, participation in, and exposure to, art and social interaction, and the stimulation of ideas and debate should not be stifled. In fact, the outcome of Chapter V was that the relevant provisions of the Act can be interpreted to reflect a proper balance between these considerations. This same balance should, and can, be achieved in the context of media codes and their application. In particular, the broadcasting codes of the BCCSA lack essential provisions, adapted to context, explicitly directed at protection of the right to equality.

## CHAPTER VIII

### CONCLUSIONS

*We, the people of South Africa, ... therefore ... adopt this Constitution as the supreme law of the Republic so as to –*

*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights; ... .*

#### *Preamble to the Constitution*

The protection of freedom of expression is required for the advancement of knowledge, the maintenance of democracy, and the protection of human dignity in the sense of autonomy. Freedom of expression entails that human beings have the right to influence and be influenced by means of the exchange and promotion of ideas, opinions and knowledge, and to act or refrain from action in accordance with their evaluation of such ideas, opinions and information. Moreover, freedom of expression is a weapon to combat inequality, for inequality has the potential to jeopardise both democracy and human dignity in the sense of autonomy. It seems to follow that the expression of views will be tolerated, even if they hurt or harm, offend or violate human dignity.

However, an understanding of the concept of human dignity as including the inherent dignity of every individual manifests itself in a claim to self-esteem and a sense of self-worth. This requires that every person treat every other person with respect for the individual, and for the identity groups of which the individual is a member. Inherent human dignity, like autonomy, is interrelated with equality, in particular substantive equality. The violation of dignity related to group identity is an essential element of unfair discrimination in terms of section 9 of the Constitution. Moreover, discrimination on a ground listed in section 9(3) establishes a presumption of unfairness. Discriminatory expression that violates inherent human dignity on a listed ground will therefore only be constitutional if it can be justified in terms of the constitutional justification standard.

The inherent tension is apparent. It is evident that any categorical regulation of expression will have to be carefully designed not to be instrumental in the destruction rather than the preservation of the pillars of democracy, and not to jeopardise rather than promote freedom, dignity and equality. A categorical prohibition of expression in the broad societal context will only be appropriate when the existence of an intolerable risk of unfair disadvantage in all circumstances consistent with the terms of the prohibition can be established.

In determining whether the regulation in South African law of hurtful and harmful expression based on group identity is constitutional, values that inform the protection as well as the limitation of freedom of expression, the reasoning and views that informed international agreements to limit freedom of expression, and the regulation of expression in other constitutional democracies, namely the United States of America, Germany and Canada, are relevant considerations.

It is apparent from the analyses that the value of expression in a given category or context is a crucial consideration in the justification of its limitation. The determination of such value in the context of a particular constitution is related to the values that are recognised as foundational to that constitution. It is furthermore related to the sensitivities that are part of the composition of the particular society. The value of expression is, firstly, an indication of whether or not its categorical prohibition will jeopardise rather than promote democracy and equality. Secondly, in a case-by-case analysis subject to a constitutional proportionality standard, the value of the expression at issue determines the weight to be assigned to the right to freedom of expression proportional to the equality right that calls for its restriction.

Freedom of expression has to be limited to give effect to the constitutional obligation to protect democracy against the proven risk of allowing, by means of expression, the promotion of hatred in society. It also has to be limited in order to give effect to the obligation in terms of sections 9(3) and (4) of the Constitution to prevent and prohibit unfair discrimination. The challenge is to protect democracy by the most effective legitimate means available to the state, as well as to heal the divisions of the past by means that will not enhance hatred and separation. The challenge entails that content-neutrality remain a respected principle, while expression that jeopardises the foundational constitutional values, including the rights to human dignity and equality, be prohibited. It also entails that different

sanctions and remedies be considered, respectively directed at the protection of institutional democracy and the building of a healthy, reconciled nation.

The first objective of the study was to determine the reasons for, and the scope of, the categorical exclusions from constitutional protection of certain forms of hateful expression in terms of section 16(2)(c) of the South African Constitution. The following conclusions in this respect are apparent. Section 16(2)(c) acknowledges the historical reality that extreme views on race, ethnicity and gender, infused with religious doctrine, inspired undemocratic systems of government that denied women and black people the right to vote and infringed their dignity and equality by means of legislative measures. This reality is part of the undemocratic history of South Africa. It also underlies international agreements intended to prevent the repetition of human rights atrocities that shattered the democratic values even of countries that believed that they were secure in this regard. In particular, article 20 of the *International Covenant on Civil and Political Rights (ICCPR)* can be related to section 16(2)(c) of the Constitution. Only expression within the ambit of article 20 should attract criminal penalties on the ground that it incites hatred, but with the exception that the grounds of sexual orientation and nationality be included. The *Draft Prohibition of Hate Speech Bill* of 2004 unduly exceeds this ambit.

The second objective was to determine the constitutionality of provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act)* that regulate discriminatory expression. The Act prohibits discriminatory expression primarily in giving effect to the constitutional obligation in terms of sections 9(3) and (4) of the Constitution. It does so, firstly, by means of its general prohibition of unfair discrimination. It moreover contains specific conditional as well as categorical prohibitions of particular forms of discriminatory expression.

The categorical prohibition of “hate speech” in terms of section 10 of the Act is aimed at compliance with the constitutional obligation to prevent and prohibit unfair discrimination. If the prohibition is indeed necessary to achieve this aim, the implication will be that it is constitutional. It is noted that the prohibition by implication includes expression under section 16(2)(c) of the Constitution.

The proviso in terms of section 12 of the Act that excludes engagement in certain forms of expression from the application of sections 10 and 12 restricts the potential application of section 10 to: firstly, the expression of ideas that are not primarily informational or directed at debating any issues; secondly, non-bona fide engagement in expression that has been stipulated in terms of section 16(1) of the Constitution as enjoying prima facie constitutional protection; and, thirdly, expression contemplated by section 16(2) of the Constitution. This interpretation to a substantial extent depends on a reading of the proviso that views the “bona fide” qualification as applicable to engagement in all the forms of expression that are excluded from the application of section 10. The “bona fide” qualification has a subjective as well as an objective aspect. The subjective aspect entails a positive conviction and commitment by the communicator that the expressive act or activity concerned is employed for, and will achieve, its elemental purpose. The act or activity is furthermore, objectively assessed, excluded in terms of the proviso to the extent that the expression involves the essential character of the form of expression that is employed. To hurt or harm people based on their group identity or to promote hatred in society are not essential attributes of any of the excluded forms of expression. Accordingly, the use of, for example, art, scientific enquiry or the publication of information primarily to achieve these results will, objectively speaking, not constitute bona fide engagement in the respective forms of expression. Decisions of different courts and tribunals illustrate that, when viewpoints are expressed in terms that render the expression in breach of section 10, the same viewpoints can be conveyed in terms that do not constitute “hate speech” in terms of the section. These factors greatly minimise the risk that the restriction may jeopardise the free flow of ideas to the ultimate disadvantage of the promotion of equality in society.

The term “words” in section 10 should be substituted with a more textually appropriate term. The term “ideas” is suggested. The substitution will not only address the linguistic problem that “words” cannot be advocated, but will also bring the section in line with the constitutional concept of expression that includes expressive conduct. It will also exclude any suggestion, based on a broad interpretation of the term “communicate”, that private conversation falls under the section.

In the light of the above considerations, and taking into account the low value of the expression related to those values that inform the protection of freedom of expression, the risk that the prohibition may in any given context promote rather than prevent inequality is

overshadowed by the protection that is provided to vulnerable members of identity groups and society as a whole. The prohibition will, on the contrary, serve to prevent the marginalisation of identity groups and their members, as well as the reinforcement of stereotypes by means that do not stimulate reasonable debate. Moreover, the “chilling effect” of section 10 is minimised by the nature of the remedies that the Act provides. These remedies in fact create the possibility that, ultimately, healing and reconciliation can ensue from the expression of detestation and hatred.

It follows from the above that the prohibition of expression in terms of section 10 is constitutional. A justification analysis in terms of section 36 of the Constitution confirms this conclusion.

Section 12 of the Act applies in the same limited ambit as section 10. A fairness analysis is inherent to its terms. It firstly prevents intended unfair discrimination. On condition only that the perception that unfair discrimination is intended is reasonable, it also prevents the creation of an erroneous perception that unfair discrimination is intended. In this context, the prohibition applies even if a fairness analysis would indicate that the perception is unsubstantiated, as the discrimination that is reflected is justified, and no unfairness will in fact ensue. The effect should be that those who disseminate or publish information will take care not to unintentionally create the impression that unfair discrimination will occur. As far as the right to freedom of expression is concerned, this effect does not bar the dissemination of legitimate information in an accountable, unambiguous way. The prohibition accordingly does not unduly limit the right to freedom of expression.

The prohibition of unfair discrimination in terms of section 6 of the Act meets the challenge not to, by restricting free expression unintentionally, jeopardise rather than promote equality. This it does by requiring a case-by-case contextual application of the fairness analysis established in terms of section 14 of the Act. The Constitutional Court has highlighted that, when discrimination is constituted by expression, the interrelatedness of the rights to freedom of expression and equality manifests itself in the required fairness analysis. The vulnerability of the complainants to the particular expression and its potential effects is related to the nature of the characteristic that is condemned, the nature of the condemnation, and the ability of those targeted, or others who support their case, to respond effectively. Furthermore, the societal advantage to be generally gained by the protection of freedom of expression may



relativise the impact of the harm inflicted on the individual or on society as a whole. In this regard, the extent to which expression in a given context serves the values and interests discussed in Chapter II again manifests as a determinative consideration. Hence, if the expression at issue will eventually in the given context promote rather than jeopardise equality, for instance by evoking a response that exposes and condemns stereotypes that prevail, the hurt or harm caused by it should be considered as less violative of human dignity.

Section 7 of the Act is generally related to article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, which, inter alia, requires the criminalisation of:

all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

Section 7(a) gives effect to this obligation, but to a limited extent. The Act presents section 7(a) as an example, amongst others, of unfair discrimination. It is accordingly subject to the fairness analysis in terms of section 14 of the Act. The presentation as an explicit example suggests that, in a contextual fairness analysis involving engagement in expression under section 7(a), the international commitment in terms of article 4 of the *ICERD* as such, including its premise that “any doctrine of superiority based on racial differentiation is ‘scientifically false, morally condemnable, socially unjust and dangerous’”, will be a relevant and weighty consideration.

Section 15 of the Act provides that the fairness analysis in terms of section 14 does not apply to “hate speech” and “harassment”. An analysis of the prohibition of harassment in terms of section 11 of the Act leads to a conclusion that a contextual fairness analysis to determine harassment is implicit in the terms of the section.

Thirdly, an analysis of relevant provisions of the *Films and Publications Act 65/1996*, the *Riotous Assemblies Act 17/1956*, the criminal law offences of criminal defamation, *crimen iniuria* and incitement to commit a crime, and the *Draft Prohibition of Hate Speech Bill of 2004* was pursued. The following observations were made:

There is a need for the creation of a consolidating exclusive offence that at least captures, and requires proof of, the essential elements of expression contemplated in terms of section 16(2)(c) of the Constitution.

The *Films and Publications Act* contains discrepancies which render the relevant provisions unconstitutional. Inter alia, the prohibitions in terms of sections 16(2)(d) and 18(3)(a)(ii) of the Act exceed the grounds of “hate speech” listed in terms of section 16(2)(c) of the Constitution, while the related provisos in terms of sections 16(4)(a) and 18(3)(a) of the Act by implication provide for the exemption of expression that does constitute “hate speech” under section 16(2)(c).

South African criminal cases dealing with *crimen iniuria* constituted by expression related to group characteristics, without exception, and often in conjunction with assault charges, concern individualised situations where the alleged insult is intentional, face to face, and does not in any way constitute the expression of a view other than disrespect for the addressee. It will create certainty with respect to the proper recognition of the freedom of expression guarantee if the essential aspects informing this approach are theoretically articulated in terms of a required reasonableness standard.

Several provisions of the *Draft Prohibition of Hate Speech Bill* are susceptible to substantial criticism. The absence of the requirements of intention and incitement, related to a reasonable perception that, inter alia, hurt or harm is intended, is problematic. The apparent exclusion of the bona fide engagement in certain forms of expression, regardless of whether the engagement constitutes “hate speech” in terms of section 16(2)(c) of the Constitution, is untenable. The implication of enacting the Bill will be that the design of the provisions of the *Equality Act* directed at achieving the promotion of equality and the prevention of unfair discrimination by means calculatedly moving away from criminalisation, will be wasted to a substantial extent. At the same time, “hate speech” in terms of section 16(2)(c) will only be partially criminalised.

The final chapter of the study scrutinised relevant provisions of South African media codes. The codes, as well as decisions applying relevant provisions of the codes, illustrate the principles that are highlighted in the study. The obligation in terms of section 192 of the

Constitution, which requires that national legislation must establish an independent authority to regulate broadcasting in the public interest, informed a specific focus on the regulation of “hate speech” in broadcasting codes. This focus is particularly relevant in a developing country like South Africa where broadcasting has the potential to open up the marketplace of ideas to a huge percentage of citizens who have no other access to information or no other means to communicate their ideas. At the same time, it exposes these same citizens to the extensive hurt that can potentially be afflicted by media expression. Those who are humiliated often have little power to reduce, by means of response, the powerful and detrimental effect of media stereotyping. The following observations are relevant.

The broadcasting codes of the Broadcasting Complaints Commission of South Africa (BCCSA) and their application fail to comply with the prohibitions of the *Equality Act* that give effect to the constitutional obligation to prevent and prohibit unfair discrimination. The need for explicit guidelines that are in accordance with the prohibitions of the *Equality Act* with respect to discriminatory expression is exposed by the fact that, in some instances, BCCSA tribunals have employed provisions of the codes not intended for this purpose to proscribe expression of this nature. A comparative analysis of broadcasting codes on ethics, equitable portrayal, television violence and journalistic independence of the Canadian Radio-television and Telecommunications Commission (CRTC), which Commission regulates and supervises broadcasting and telecommunications in Canada, and of the Canadian Broadcast Standards Council (CBSC), which Council administers the codes of the Canadian Association of Broadcasters (CAB) and the Association of Electronic Journalists (RTNDA), supports this conclusion.

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## KEYWORDS

advocacy

autonomy

democracy

dignity

discriminatory speech

equality

freedom of expression

group identity

harm

“hate speech”

hatred

incitement

unfair discrimination

## SUMMARY

The theories of truth and the marketplace of ideas, of democracy, and of human dignity underlie the constitutional protection of freedom of expression and simultaneously set boundaries with regard to such protection. The value of expression in terms of these theories firstly determines the scope of protection afforded to particular forms and incidences of expression. There exists an inherent tension in the appeal of each of the values and interests that is involved. Freedom of expression is central to the development of human personality, but may also harm inherent human dignity. The response to discriminatory expression may eventually promote equality. Free expression may be instrumental to the increase in knowledge and to the maintenance of democracy, but may also discourage target groups from participating in the marketing of ideas and in the democratic process.

Secondly, the extent to which a discriminatory statement or expressive conduct serves the values and interests of knowledge, democracy and dignity is a relevant consideration in the context of proportionality analyses. It determines the weight to be assigned to the right to freedom of expression relative to other rights or interests that are involved.

The Constitution, in terms of section 16(2)(c), categorically excludes, from constitutional protection, “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. “Hate speech” on these grounds constitutes a proven threat to constitutional democracy. Expression of this nature should be criminalised. Circumstances may exist where “hate speech” on other grounds poses a similar threat and should likewise be criminalised. Current atrocities in South Africa related to homosexuality and nationality constitute such circumstances. This approach is in accordance with South Africa’s obligations in terms of international agreements.

Section 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* categorically prohibits a narrowly defined field of expression, including expression under section 16(2)(c) of the Constitution. The prohibition does not criminalise expression and does not apply to bona fide engagement in expression stipulated in terms of section 16(1) of the Constitution. Within the limited field that remains, it prohibits expression related to any

prohibited ground that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful, or to incite harm or promote or propagate hatred. The prohibition will be constitutional if it can be accepted that the expression will, in all given circumstances, constitute or promote unfair discrimination. Considerations in the South African context of the values that inform the protection as well as the restriction of expression, and of international obligations, lead to a positive conclusion in this respect. Of essential importance is the fact that the prohibition does not stifle debate about issues, even if statements relevant to the debate offend people with reference to their group identity.

Section 6 of the Act prohibits unfair discrimination, subject to a fairness analysis. It is often not possible to determine whether the effect of discriminatory expression in the broad societal context is indeed detrimental. In the media context, the unequal balance of power in given circumstances reinforces the risk that inequality will be promoted. In the determination of fairness, care should be taken not to restrict expression without sufficient context-related indications of disadvantage. At the same time, the obligation to prohibit unfair discrimination, and the categorical restriction in terms of section 10, may not be disregarded. In the light of section 192 of the Constitution, these considerations are particularly significant with respect to broadcasting. The present broadcasting codes lack the necessary related guidelines and should be amended accordingly.

## OPSOMMING

Die teorieë van waarheid en die markplek van idees, demokrasie, en menswaardigheid is onderliggend aan die grondwetlike beskerming van vryheid van uitdrukking, en begrens terselfdertyd die beskerming. Die waarde van uitdrukking ingevolge hierdie teorieë bepaal eerstens die omvang van die beskerming wat aan spesifieke vorms en gevalle van uitdrukking verleen word. Daar bestaan 'n inherente spanning in die aanspraak van elkeen van die waardes en belange wat ter sprake is. Vryheid van uitdrukking is sentraal in die ontwikkeling van die persoonlikheid, maar kan ook inherente menswaardigheid skend. Reaksie op diskriminerende uitdrukking kan uiteindelik gelykheid bevorder. Vry uitdrukking kan instrumenteel wees tot die vermeerdering van kennis en die instandhouding van die demokrasie, maar kan ook deelname van teikengroepe aan die bemarking van idees en die demokratiese proses ontmoedig.

Tweedens is die mate waarin 'n diskriminerende stelling of ekspressiewe handeling die waardes en belange van kennis, demokrasie en menswaardigheid dien, 'n relevante oorweging in die konteks van proporsionaliteitsanalise. Dit bepaal die gewig wat aan die reg op vryheid van uitdrukking toegeken word relatief tot ander relevante regte en belange.

Artikel 16(2)(c) van die Grondwet sluit “die verkondiging van haat wat op ras, etnisiteit, geslagtelikheid of godsdiens gebaseer is en wat aanhitsing om leed te veroorsaak” kategorieë van grondwetlike beskerming uit. “Haatspraak” op hierdie gronde hou 'n bewese bedreiging vir grondwetlike demokrasie in. Uitdrukking van hierdie aard behoort gekriminaliseer te word. Omstandighede mag bestaan waar “haatspraak” op ander gronde 'n soortgelyke bedreiging inhou en dienooreenkomstig gekriminaliseer behoort te word. Vergrype met betrekking tot homoseksualiteit en nasionaliteit wat tans in Suid-Afrika voorkom, stel sodanige omstandighede daar. Hierdie benadering is in ooreenstemming met Suid-Afrika se verpligtinge ingevolge internasionale ooreenkomste.

Artikel 10 van die *Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie* verbied kategorieë 'n eng gedefinieerde veld van uitdrukking, insluitend uitdrukking ingevolge artikel 16(2)(c) van die Grondwet. Die verbod kriminaliseer nie

uitdrukking nie en is nie op bona fide uitdrukking gestipuleer ingevolge artikel 16(1) van die Grondwet van toepassing nie. Binne die beperkte oorblywende veld verbied die artikel uitdrukking gebaseer op enige verbode grond wat redelikerwys verstaan kan word as weerspieëland van 'n duidelike bedoeling om leed aan te doen, die aandoening van leed aan te hits, of haat te propageer. Die verbod sal grondwetlik wees indien aanvaar kan word dat die uitdrukking in alle omstandighede onbillike diskriminasie daar sal stel of sal bevorder. Oorwegings in die Suid-Afrikaanse konteks van die waardes wat die beskerming sowel as die beperking van uitdrukking inspireer, en van internasionale verpligtinge, lei tot 'n positiewe gevolgtrekking in hierdie verband. Van wesenlike belang is die feit dat die verbod nie debat oor onderwerpe van belang stuit nie, selfs indien stellings wat relevant is vir die debat individue op die basis van hulle groepsidentiteit aanstoot gee.

Artikel 6 van die Wet verbied diskriminasie onderhewig aan 'n billikheidsanalise. Dit is dikwels nie moontlik om te bepaal of diskriminerende uitdrukking in die breë samelewingskonteks inderdaad 'n nadelige effek het nie. In die media-konteks versterk die ongelyke magsbalans in gegewe omstandighede die risiko dat ongelykheid bevorder sal word. By die bepaling van billikheid behoort sorg gedra te word dat uitdrukking nie beperk sal word indien daar nie voldoende aanduidings van benadeling bestaan nie. Terselfdertyd mag die verpligting om onbillike diskriminasie te verbied, asook die kategoriese beperking ingevolge artikel 10, nie geïgnoreer word nie. In die lig van artikel 192 van die Grondwet is hierdie oorwegings van besondere belang met betrekking tot die uitsaaiwese. Die uitsaaiodes wat tans van toepassing is, bevat nie die nodige riglyne in hierdie verband nie, en behoort dienooreenkomstig gewysig te word.