THE CONSTITUTIONAL PROTECTION OF FREEDOM OF SPEECH AND THE PROHIBITION OF HATE SPEECH IN SOUTH AFRICA: PROMISES AND PITFALLS.

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DECLARATION

I DECLARE THAT THE DISSERTATION OF MASTER OF LAWS AT THE UNIVERSITY OF NORTH-WEST HEREBY SUBMITTED, HAS NOT PREVIOUSLY BEEN SUBMITTED BY ME FOR A DEGREE AT THIS OR ANY OTHER UNIVERSITY, THAT IT IS MY OWN WORK IN DESIGN AND EXECUTION AND THAT ALL MATERIAL CONTAINED HEREIN HAS BEEN DULY ACKNOWLEDGED.



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Public Law and Legal Philosophy

DECLARATION BY SUPERVISOR

I Professor Melvin L.M. Mbao, hereby recommend that this dissertation by Mr. P.R. Msaule, entitled: "The Constitutional Protection of Freedom of Speech And The Prohibition of Hate Speech In South Africa: Promises and Pitfalls," be accepted for examination.

In terms of Rule G44.2 of the University, this recommendation does not necessarily imply that the dissertation be accepted.

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ABSTRACT

Freedom of expression is one of the most important rights protected under the Constitution. It is as a pre-condition of the enjoyment of all other rights (except, may be the right to life). The right of freedom of expression is the mouthpiece of all other rights, without which all other rights are as good as dead. Freedom of expression has been found to be of importance for several reasons:- the search for truth rationale; the political process rationale; individual self-fulfilment.

Despite its resonance, freedom of expression is not absolute in South Africa. It is limited by other equally important fundamental rights contained in the Constitutional document, such as the right to equality, dignity and privacy. The Constitution of the Republic of South Africa makes it clear that some forms of expression that have racial connotations are not worthy of Constitutional protection 'from the word go'. These types of expression have the potential to debase the foundations upon which our constitution is premised. They show total disregard to the values of human dignity, the achievement of equality and the advancement of human rights.

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CHAPTER ONE: INTRODUCTION

1.0. INTRODUCTION

Before the dawn of the new democracy in 1994 freedom of expression, like all other related fundamental freedoms, had been virtually non-existent in this country. It is trite that those who held views different from those of the authority were most likely to be persecuted. The regime of that time did not tolerate any view diverging from its own. This had the effect of suppressing the views of the majority in this country, which resulted in the intolerance of views different from those of the state and '...the systemic violation of other fundamental human rights in South Africa'[1]. With the advent of democracy and the paradigm shift from parliamentary sovereignty to constitutional supremacy in 1994, freedom of expression was accorded constitutional protection subject to reasonable and justifiable limitations in an open, free and democratic society[2].

1.1. STATEMENT OF THE PROBLEM

South Africa is a young democracy, consisting of a diverse society, and because of this diversity and the history of this country (characterised by racial inequalities and injustices), difference of opinion is inevitable. The Constitutions of 1993 (Act 200 of 1993) and 1996 (Act 108 of 1996) enshrines provisions that seek to protect the expression of diverging opinions and other related fundamental human rights. Despite its potential to fuel social intolerance, freedom of expression is afforded constitutional protection. This is so because, no matter how human beings strive for excellence 'some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in ...[expressing a different view].'[3] Though at times the war of words can become so heated and intolerable, the society is expected to accommodate views which are not readily acceptable, that is a pre-condition of a functional democracy in which every

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[1] Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 249 (CC) at 307 B-C
[2] Devenish G. A Commentary on the Bill of Rights. 1999 p 187
[3] New York Times Co v Sullivan 376 US 254 (1964)

citizen is expected to contribute meaningfully to sustaining and preserving a democratic polity.[4]

This study undertakes to examine and assess the extent to which the right to freedom of expression is guaranteed by the constitution and protected by the courts of law. Due to the divided history of this country, conflicts seem inevitable on what should amount to accepted expression and what should not.[5] The dissemination of unbiased, impartial and objective information is of critical importance to the full realisation of the right to freedom of expression. Such information, so held the Constitutional Court in the landmark case of Islamic Unity Convention v Independent Broadcasting Authority[6], should not be confined only to those expressions which appeals to the mainstream society. That is what democracy dictates.

The study proposes to analyse and expand on when and how freedom of expression may be limited as a matter of general policy in an open and democratic society. Expression has been generously defined to include any form of human activity. A narrow definition limits expression to activity which attempts to convey a meaning.[7] The study aims to elaborate on approaches of interpretation adopted by the courts in interpreting this right, and why.

It is the purpose of this study to evaluate approaches of the courts in mapping out the frontiers or the outward boundaries of the right to freedom of speech and expression as enshrined in the Constitution.[8] This study proceeds from the fundamental premise that the

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[4] This is especially true when such view is not shared by those to whom such a view is being imparted. Racial differences, cultural diversity, class structure, political affiliation makes the perception of abuse of free expression an inevitable concept in the society.

[5] This should, however not serve as a self-restraining factor in expressing ones views in fear of being branded an outcast in the society.

[6] Islamic Unity Convention v Independent Broadcasting Authority Op Cit n 1

[7] Devenish Op Cit n 2 p 192

[8] Section 16 of the Constitution provides that: (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;
(d) Academic freedom and freedom of scientific research
(2) The right in subsection (1) does not extend to-
(a) Propaganda for war

unhindered flow of information may have the effect of harming, other equally important fundamental rights or hurting or demeaning those to whom the information is directed. In Holomisa v Argus Newspapers[9] the court recognised that the right to freedom of expression should not be given a blanket protection. It has to be weighed against other rights which are also important for the functioning of democracy. In *casu* the court reasoned that the right to freedom of expression must be measured against the right to dignity of a person protected in section 10 of the Constitution.[10]

The study also proposes to examine whether or not hate speech should be allowed in this country. This is so because hate speech has been held as amounting to discrimination and a violation of the individual's right to equality and dignity. Gutto is of the opinion that hate speech should not only be measured against the rights to dignity, equality and right against discrimination. He is of the view that if hate speech is not regulated it may undermine the rights to freedom and security of the person, the prohibition against torture of any kind, whether emotional or mental... cruel, inhuman or degrading treatment[11].

In Mamabolo[12] the Constitutional Court held that although of great value, freedom of expression was not an absolute right. Be that as it may, its limitation must not be considerable. It is common cause that when a person is hindered in any of the activities he envisages to take he will not reach his optimum best in that activity. Thus it is true that the possibility of being prosecuted for hate speech as provided for by s 10 (2) of the Promotion of Equality and Prevention of Unfair Discrimination Act[13] might have the 'chilling effects' which is not ideal for the free flow of information and ideas, and may undermine such constitutional guarantee.

(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

[9] Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W)
[10] Holomisa v Argus Newspapers Ltd ibid n 9 at 598 E-F
[11] Gutto S. 'The Criminalisation of Hate Speech?'. http:// fxi.org.za/books/chap5.htm. p 6. See Section 12 of the Constitution
[12] S v Mamabolo 2001 (3) SA 409 (CC)
[13] Act no 4 of 2000

As a member of the international community South Africa has international duties and obligations. Several international instruments advocate for the proscription of hate speech by States Parties to those treaties.[14] The study is going to focus on whether or not it is feasible and desirable to proscribe hate speech without impacting negatively on the area of speech protected by section 16 (1) of the Constitution. Those who are against the proscription of hate speech argue that it is a price the society should be prepared to pay in order to assure a system of free flow of information and ideas.[15] 'As the society becomes more complex we must be increasingly vigilant for the freedom of our minds and ideas.'[16] Those who support proscription of hate speech say that it perpetuates the inequalities between members of the dominant and the victim groups.[17]

For the purposes of this study hate speech will include expression or speech that does not enjoy constitutional protection and is expressly excluded from such protection by section 16 (2) of the Constitution. Hate speech is defined as expressive conduct which insults racial or ethnic group, whether by suggesting inferiority or by effecting exclusion[18]. This definition includes both derogatory epithets and political speeches and literature to the public.[19] In this regard, it is worth noting that the line between speech (verbal) and expression (action) is thin and both should be protected by the constitution, thus the mere fact that the words or ideas of an individual seem to fall foul of S 16 (2) must be approached with circumspection. Vulgarity and coarseness may in certain circumstances be legitimate vehicle for the communication of ideas.[20] In the US case of Cohen v California[21] the US Supreme Court expressed itself as follows in this respect:

> ...We cannot overlook the fact... that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached

[14] For instance the International Covenant on Civil and Political Rights (1966) and the Covenant on the Elimination of All Forms of Racial Hatred.
[15] Abrams F. Hate Speech: The Present Implications of a Historical Dilemma. http://fxi.org.za/books/chap7.htm
[16] Menzies R 'The Four Freedoms': Freedom of Speech and Expression.home.vicnet.net.au/~victorp/part2a02.htm. p2
[17] See Abrams Op Cit n 15, Gutto Op Cit n 11, Islamic Unity Convention Op Cit n 1, Mamabolo Op Cit n 12
[18] Devenish Op Cit n 2 p 211
[19] Devenish ibid n 18 p 211
[20] Devenish ibid n 19 p 190
[21] Cohen v California 403 US 15 (1971)

explication, but otherwise inexpressible emotions as well. In fact words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the constitution, while solicitous of the cognitive content of the individual speech, has little or no regard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[22]

1.2. AIMS AND RATIONALE OF THE STUDY

Freedom of expression is constitutionally protected, although with some necessary qualifications which are consistent with the respect for the values of dignity, freedom and equality in an open and democratic society. The rationale for the study is to assess the attributes or characteristics of what constitute constitutionally acceptable speech and what does not. This must take into account that it is ideal that in a democratic state the citizenry should be free to debate issues openly and frankly, in the quest for the truth, progress and an orderly society. Thus, Brennan J found in New York Times v Sullivan[23] that criticism must not be unnecessarily and unreasonably stifled. William Ketter observed, 'to truly believe in our exceptional form of liberty - to permit freedom for even speech or thought we hate - takes a special kind of courage and a resolute will to stand against the public tide.'[24] .

It is true that without maximum freedom of expression science, arts and political wisdom cannot develop and the progress of any nation is thus virtually impossible. The President of this country has acknowledged that freedom of expression is of importance in solving the problems of this country. The President is aware that

> ... We must ... recognise the fact that as we sit in this house, we represent different parties and schools of ideological and political thoughts. Out of this come different responses to the challenges facing our country. It may very well be that, in the main, all of us agree on the identification of many of our national problems. But as the debate

[22] Cohen v California 403 US (1971) -Cited from Haiman S. Speech and Law in a Free Societry. 1981 p17
[23] New York times v Sullivan Op Cit n 3
[24] City Press Sunday 15 July 2001 p 9

demonstrated we have different solutions to these problems reflecting our different ideological and political positions.[25]

Freedom of expression is of cardinal importance for the functioning of a democratic society. Freedom of expression is the lifeblood of any constitutional democracy and must be jealously safeguarded. It should be noted that freedom of expression is the thread of all other related rights (except, may be the right to life), without which all other rights are as good as dead. Thus, this right should not be arbitrarily and unreasonably restrained. It is the aim of this study to determine the reasonable and necessary parameters for the exercise and enjoyment of this right. Freedom of expression raises difficult and complex issues that require the balancing of competing interests. Freedom of expression may be used as a measuring stick to determine the functioning of a mature democracy and of tolerance in a society as diverse as South Africa. Tolerance does not pre – suppose that a society should shy away from issues that are of interest to it. As Van Niekerk observed: 'silence is not an option when things are ill – done'[26].

Van der Westehuizen asks whether maximum freedom of expression afforded to the citizenry make a society a mature democracy, or does a society become a mature democracy by allowing freedom of expression?[27] We shall return to this question herein later. It is also envisaged that at the end of the study a clear line between constitutionally acceptable speech and hate speech would be easily discernible. That is to say, how the courts in South Africa have been striving to strike a delicate balance between free speech and hate speech and other competing rights.

1.3. LITERATURE REVIEW

Van der Westhuizen has argued that freedom of expression and speech are essential in any attempt to build a democratic social and political order and a legal system based on constitutionalism and protection and observance of fundamental human rights. On the

[25] Sowetan Wednesday26 February 2003 p22

[26] Lord Denning in R v Metro Police Commissioner: In Ex Parte Blackburn (no 2) [1968] 2 ALL ER 319 Quoted by Van Niekerk B.'The Cloistered Virtue': Freedom of Speech and the Administration of Justice in the Western World. 1987. P 24

other hand, it is trite that no freedom is absolute, and freedom of expression is no exception. Boundaries not to be exceeded are determined differently by different constitutional orders based on factors like history, tradition, culture, political and social environment of each society among others. It is against this backdrop that the rights are bound to be exercised and interpreted in this country.[28] Thus it should be noted that it is going to take a resolute will from all sectors of the society to accept and protect speech and expression that may seem, on its face value, to counter the ideals that the constitution is so desperately seeking to uphold. Similarly we should not compromise other constitutionally protected rights in the name of free speech.

It is also true that, due to the institutionalised past differences in this country, the line between what amounts to protected speech and what does not, is blurred and must be deduced from, among others, the history of this country, the content and the context of the impugned statement. In an appeal before the Chairperson of the South African Human Rights Commission, in the case between the Freedom Front v The South African Human Rights Commission[29], at issue was whether the chanting of the slogan 'kill the Boer, kill the farmer' was worthy of constitutional protection? The tribunal, in deciding the matter, took into account the history of that slogan and the context in which it was chanted. The tribunal held that 'S 16 (2) of the Constitution withholds the constitutional protection of hate speech which accentuates the chasms that were fostered before 1994 and which threaten to tear this society apart'.[30]

Freedom of expression seem to be recognised universally in Bills of Rights of many countries. The rationale behind the high rank afforded to freedom of expression is the so-called 'quest for truth' or 'market place of ideas paradigm'[31]. To suppress the expression of a view is regarded as injurious to the quest for truth, or to claim omniscience (which I respectfully believe is nonsensical considering the extent of differences even in homogenous societies). The US Supreme Court has held that truth can best be gathered

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[27] Van der Westhuizen J.Rights and Constitutionalism: The New South African Legal Order. 1996. P 267
[28] Van der Westhuizen Ibid n 27 p 264
[29] Freedom Front v South African Human Rights Commission (unreported. Case number not given. Accessed from www.sahrc.org.za/hate_speech.PDF)
[30] Freedom Front v South African Human Rights Commission ibid n 29at p 11
[31] De Waal J*et al*. The Bill of Rights Handbook. 2000 p282

out of a multitude of tongues than through any kind of authoritative selection.[32] Moreover, other fundamental human rights cannot be easily realised without the right to freedom of expression. Freedom of expression is closely related to the freedoms and political rights in the Bill of Rights.[33] Freedom of expression has been described by the Constitutional Court as the centre of all other freedom rights. O'Regan J declared:

> ...Freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion..., the right to dignity..., as well as the right to vote and to stand for public office ... and the right to assembly. These rights taken together protect the rights of individuals not only individually to form and express opinions of whatever nature, but to establish associations and groups of likeminded people to foster and propagate such opinions. The rights implicitly recognise the importance both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.[34]

It should be noted that truth could not be discovered when we rely on the assumption which asserts that any particular conception of the good is innately inferior or superior to any other. Conception of the good is intractably disputed and there is enormous disagreement about the worth and validity of different conceptions.[35] Meyerson argues that it is undeniable that our conception of the good matters deeply to each one of us, and that our interest in its pursuit is, for that reason, at the heart of many of our constitutional rights[36]. By the conception of the good, Meyerson refers to one of the many all-embracing views about what is ultimately valuable or what we regard as of utmost importance.[37]

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[32] US v Associated Press 52 f supp 362 (1945) at 372 cited from Van der Westhuizen Op Cit 27 at P 268
[33] De Waal Op Cit n 31p 282; Devenish Op Cit n 2 p 187
[34] South African National Defence Force Union v Minister of Defence 1999 (4) SA 469 at 477 para E-F
[35] Meyerson D. Rights Limited: Freedom of Expression, Freedom of Religion and the South African Constitution, 1997, P56
[36] Meyerson ibid n 35 p 57
[37] Meyerson ibid n 36 p 55

Freedom of expression guarantees that we may disagree about the weight of considerations, even those that are generally accepted to be relevant. It should be noted that our concepts of the good are often vague and that there can be different kinds of normative consideration of different force on both sides of a moral issue (that could be the case even on the same side of the moral issue); and that differences in total experience cause judgments to diverge in cases of complexity.[38] Moreover, freedom of expression encompasses the freedom to receive and impart information to enable an individual the opportunity of assimilating different ideas so as to make an informed choice.[39] Thus, those involved in the business of information dissemination must be assured that their views will not be curtailed and limited without valid justifications.

Devenish argues that freedom of expression is the vehicle through which social problems are more likely to be resolved amicably, without resort to force.[40] Despite its importance, freedom of expression is more than likely to cause havoc (vis-à-vis other constitutionally protected rights) because it is clear that the ideas exchanged in the market place are not always pleasing to hear.

1.4. DATA COLLECTION AND RESEARCH METHODOLOGY

This study relied mainly on library resources such as articles in journals, weekly and daily newspapers, textbooks and other publications and decided cases. An innovative and modern tool utilised in this study was the Internet. It is possibly the easiest means to access information from the rest of the world. The Internet was of much help to the researcher in locating fresh and current information.

The methodology employed in this study was qualitative as opposed to quantitative. [41] The qualitative method is described as 'the non-numerical examination and interpretation of observations for the purpose of discovering underlying meanings and patterns of relationships. On the other hand, the quantitative method is defined as 'the numerical

[38] Meyerson ibid n 37 p 55

[39] Naldi G. Constitutional Rights in Namibia: A Comparative Analysis With International Human Rights, 1995, P86

[40] Devenish Op Cit n 2 p 187

[41] www.hc.sc.gc.ca/p-mcc/18-3/d-e.html phb-dgspsp/publicat/cdic

representation and manipulation of observations for the purpose of describing and explaining the phenomena that those observations reflect[42].

1.5. SCOPE AND LIMITATIONS OF THE STUDY

The focus of this study is limited to the assessment and evaluation of the constitutional protection of freedom of speech and the prohibition of hate speech in South Africa. The study will also focus on the reasons the drafters of section 16 of the Constitution took into account in affording certain expressions protection while at the same time proscribing others. Although other fundamental rights are discussed, this is done only to the extent that they enhance (or diminish) the right to freedom of expression.
The study is divided into five broad chapters. The first chapter deals with introductory materials.

The second chapter focuses on what is freedom of expression and philosophical and moral justifications for the protection of the right. This includes views on why and how freedom of expression should be constitutionally protected (or limited).

The third chapter focuses on the categories of expression that are constitutionally protected. This means that expressions specifically enumerated in section 16 (1) of the Constitution will be examined and whether or not these categories are to enjoy a greater protection than other categories of expression.

The fourth chapter assesses and evaluates constitutional prohibition of hate speech and its effects on society. In other words this chapter attempts to expose the evils associated with hate speech in any society.
The last chapter will contain the findings and observations, as well as conclusions and recommendations of the study.

[42] www.hc.sc.gc.ca/p-mcc/18-3/d-e.html phb-dgspsp/publicat/cdic

CHAPTER TWO: MORAL AND PHILOSOPHICAL JUSTIFICATIONS FOR THE PROTECTION OF FREEDOM OF SPEECH AND EXPRESSION.

> Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truthfulness...; and no other terms can a being with human faculties have any rational assurance of being right [than this].[43]

2.0. INTRODUCTION

The urge to say something is human. So too, unfortunately, is the reluctance to listen to others.[44] Section 16 (1) of the Constitution protects the right to freedom of expression. Devenish defines 'expression' as activity which attempts to convey a meaning.[45] Expression is a much wider concept and it is thus not limited only to 'verbal expression' or 'speech', but also extends to encompass activities such as displaying posters, painting and sculpting, dancing and the publication of photographs[46]. According to Van der Westhuizen, speech relates to utterances with some intelligible content intended to inform, ask or persuade whereas expression relates to the emotions or the senses, through sound, colour and others. [47] In principle, every act by which a person attempts to express some emotion, belief or grievance[48] should qualify as expression.[49] The individual is free to chose the 'language' or means he/she deems appropriate to convey the message.[50]
In Retrofit v Posts and Telecommunications Corporation[51] the Zimbabwean Supreme Court afforded speech a more generous interpretation. The court said that 'speech is an

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[43] Menzies Op Cit n 16 p 2. If we were to argue, for instance, that democracy is good we would be obliged to afford those who disagree with us the opportunity to present their case in order to disprove our contention. Our failure to afford our adversaries a chance to voice their views would suggest that we doubt the truthfulness of our assertion.
[44] Van der Westhuizen Op Cit n 27 p 264
[45] Devenish Op cit n 2 p 192
[46] De Waal Op Cit n 31 p 283
[47] Van der Westhuizen Op Cit n 27 p 246
[48] In Toy Ltd v Quebec (1989) 1 SCR 927 the Canadian Supreme Court held that the parking of a car would constitute expressive activity if done as a protest against parking regulations.
[49] De Waal Op Cit n 31 p 283
[50] Hogg P. Constitutional Law of Canada. 1992. P 283
[51] Retrofit v Posts and Telecommunications Corporation.1996 (1) SA 487 (ZS)

expression of self, effected by face to face exchange, or over the telephone, by writing, by pictures, or by any other mode'[52].

It should also be noted that both the speaker and the recipient of speech are protected by the Constitution.[53] In the Zimbabwean case of Chavunduka v Minister of Home Affairs[54] the Supreme Court found that the violation of the right to freedom of expression not only place in jeopardy the right of those who wished to communicate and impart ideas and information but also those who might wish to receive them.[55] Devenish is of the view that if the concept 'expression' could be given its literal construction, all human activities will qualify for the protection of S 16 (1), since every human conduct encapsulates some expressive features. After all a free society is the one in which the populace is at liberty to act as it is to speak. Adopting such a wide interpretation, Devenish is convinced that prostitution could easily be construed as expression.[56]

De Waal *et al* are of the view that the wider interpretation afforded the term 'expression' may give rise to the anomalies of properly barricading what the Constitution intend to protect[57]. They submit that expressive conduct may be subjected to more extensive limitation than words. Generally speaking, expression that comes closer to action and drifts away from conveying ideas and opinions will enjoy lesser protection of the right. However, at times speech and action become almost indistinguishable, such as shouting, swearing and finger-pointing used to provoke an immediate physical response, the so-called 'fighting words'[58]. There is little value in such expressive conduct and restrictions on it are therefore easily justified[59], as they are no-where near attempting to convey a message.[60] In this study the terms 'expression' and 'speech' are used interchangeably.

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[52] Retrofit ibid n 51 p 157
[53] See the minority judgment of Mokgoro J in Case v Minister of Safety and Security 1996 (3) SA 165 (CC); Barendt E. Freedom of Speech. 1985. P 7
[54] Chavanduka v Minister of Home Affairs 2000 (4) SA 1 (ZS)
[55] Media Rights Monitor June 2000 p 19
[56] Devenish Op Cit n 2 p192
[57] De Waal Op Cit n 31 p 283
[58] De Waal ibid n 57 p 283. In Chaplinsky v New Hampshire 315 US 568 (1942) 572 Fighting words where defined as 'those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'
[59] De Waal ibid n 58 p 283

2.1. WHY IS FREEDOM OF SPEECH WORTHY OF CONSTITUTIONAL PROTECTION?

According to Devenish, freedom of expression is the cornerstone of democracy... 'the matrix, the indispensable condition of nearly every other form of freedom, without which other freedoms would not endure and de facto it must be ranked as a very important right.'[61] Freedom of expression is regarded as a good in itself or at least an essential element in a good society.[62] Thus, the protection of freedom of speech in a society that prides itself as being libertarian, democratic and civilised needs no justification whatsoever.[63] Sarduski is of the view that freedom of expression would be valuable if speech was inconsequential, that is, 'if the reason people had for speaking was speaking for its own sake.'[64] Freedom of expression would only be a primary value if it did not matter what was said and no one gave a 'damn' but liked to hear (just) talk.[65]

In the case of Holomisa v Argus Newspapers[66] the court was of the view that the protection of freedom of expression was justified because it is valuable not just of virtue derived from it, but because it is an essential and constitutive feature of a democratic politic.[67] Nevertheless, in no country (at least except America)[68] is freedom of expression unlimited. As the Constitutional Court rightly observed: 'with us [having regard to our past characterised by thought-control, censorship and enforced conformity with government's theories] the right to freedom of expression cannot be said to [be an absolute right]'[69] 'ranking above all others'[70]. However this does not mean that freedom of expression in this country is no less important than it is in the United States of

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[60] Devenish Op Cit n 2 p 192
[61] Devenish ibid n 60 p 188
[62] Canavan Freedom of Expression. 1984. p xiii
[63] Marcus and Spitz 'Expression' in Constitutional Law of South Africa (eds). 1999. p 20-6
[64] Sarduski Freedom of Speech and its Limits. 1999. p 7
[65] Sarduski ibid n 64 p 7
[66] Holomisa v Argus Newspapers Ltd Op Cit n 9
[67] Holomisa v Argus Newspapers Ltd ibid n 66 at p 608
[68] According to Matsuda freedom of expression is the most fundamental right protected under the American Constitution. Matsuda M. Words That Wound. 1993. p 31. Tribe describes the first Amendment as 'the constitutions most majestic guarantee.' Cited from Freedom Front v South African Human Rights Commission. Op Cit n 29 at page 8 footnote 5
[69] Mamabolo Op Cit n 12 p 31
[70] Mamabolo ibid n 69 p 30

America. In fact the concept of open market-place of ideas is more important to this country because of its embryonic democracy.[71]

The extent to which the courts are prepared to uphold the protection of freedom of expression depends on the courts' inclination to subordinate other rights and interests[72] to free expression.[73] The pride of place afforded freedom of expression is founded on the premise that expression is more deserving of immunity from government regulation than other forms of social practice. Freedom of expression is deemed to be 'central to the enterprise of democracy',[74]and thus should be jealously guarded by the courts.[75]Ngugi wa Thiongo, the respected Kenyan play-wright likens expression to a hand that mediates through tools between human beings and nature and 'form real life'. '[Speech] mediates between human beings [and form a harmonious life]'.[76]

Representative democracy as is known today is, in great part, the product of free expression and discussion of varying ideas depends upon the maintenance and protection of such expressions and ideas.[77] In order for freedom of expression to enjoy protection to the fullest, it should be realised that

> Free expression could only be a primary value if what you are valuing is the right to make noise [for the sake of it]; but if you are engaged in some purposive activity in the course of which speech happens to be produced, sooner or later you will come to a point when you decide that some forms of speech do not further but endanger that purpose.[78]

It is obvious that such conclusion (that protected speech must directed at some purposive activity) will follow only if particular pre-determined and definable speech was to be afforded freedom of expression. This conclusion, it will appear, hold water because suppressed speech (which does not fulfil the values for the protection of speech) may turn

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[71] Mamabolo ibid n 70 p 28
[72] Such as the rights to equality (S 9), dignity (S 10), privacy (S 14), political rights (19), fair trial (S 35) and economic activity (26).
[73] Marcus and Spitz.Op Cit n 63 p 20-6
[74] Marcus and Spitz ibid n 63 p 20-6
[75] Retrofit Op Cit n 51
[76] Ngugi Decolonising the Mind. 1991 p 14
[77] Marcus G 'Freedom of Expression Under the Constitution' (1994) SAJHR p141
[78] Saduski Op Cit n 64 p 7

out to be valuable. 'Muted silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy.'[79] Without free expression no fulfilling human activity could be undertaken. Also no resistance could be mounted and maintained against what the individual or the society perceives as being unjust or unacceptable to him/her or it as the case may be.[80]

Freedom of expression has been regarded as being at the forefront of ensuring that democratic and stable government is maintained, and simultaneously ensuring the realisation of other fundamental rights. In South African National Defence Force Union v Minister of Defence[81] the Constitutional Court recognised the potency of freedom of expression in shaping our embryonic democracy. The court declared that

> Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as the guarantor of democracy, its implicit recognition and the protection of moral agency of individuals in our society and its facilitation of the search for truth by individuals in our society and society generally. The constitution recognises that individuals in our society need to be able to hear freely and express opinions and views on a wide range of matters.[82]

In Mandela v Falati[83] the court recognised the primacy of the right to freedom of expression. The court held that 'in a free society all rights are important but they are not equally important. Political philosophers are agreed about the primacy of freedom of speech. It is freedom upon which all others depend, it is the freedom without which the others would no longer endure'.[84]

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[79] Kauesa v Minister of Home Affairs, Namibia and Others 1995 (11) BCLR 1540 (NmS) at p 1554
[80] Cooray M 'Freedom of Speech and Expression. www.ourcivilisation.com/cooray/rights/chap6.htm p2
[81] South African National Defence Force Union v Minister of Defence Op Cit n 34
[82] South African National Defence Force Union v Minister of Defence ibid n 81 at p 477 C-D. According to Tribe freedom of expression is important as a means to some further end like successful self-government or social stability or the establishment of a functioning democracy. Freedom of expression is thus 'instrumental' in achieving other important societal goals. It is also an important end in itself and allows the development of scientific, artistic and cultural endeavours and creativity. Cited from Freedom Front v South African Human Rights Commission Op Cit 29at footnote 5
[83] Mandela v Falati 1995 (1) SA 251 (W)
[84] Mandela v Falati ibid n 83 at p 259 F

The Zimbabwean Supreme Court[85] has found freedom of expression to be "the key or umbrella' provision in the declaration of rights under which all rights and freedoms must be subsumed...and it encapsulates the sum total of the individual's rights and freedoms in general terms"[86]. Several authors[87] are agreed that the values that underpin protection of freedom of expression in an open and democratic society are, *inter alia*, the search for truth through the free exchange of ideas, the pursuit of individual autonomy and self-fulfilment and the demands of the political process.

In re: Monhumeso[88] the court held that progress of everyman is dependent upon freedom of expression. The court reiterated the values which underlie the protection of freedom of expression in these words:

> As one of the most precious of all guaranteed freedoms, [freedom of expression] has four broad special purposes to serve: (i) it helps an individual to obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; (vi) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[89]

Accordingly, we should not value freedom of expression only for ourselves but for others too. We should be prepared to protect freedom of expression for our supporters as well as those people who disagree with us.[90]

As Voltaire said:

> I disapprove of what you say, but I will defend to death your right to say it.[91]

This simply means that if we do not believe in freedom of expression for those we abhor, then we do not believe in it at all.[92] In order to truly realise freedom of expression, we

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[85] In re: Munhemeso 1995 BCLR I25 (ZS)
[86] In re: Munhemeso ibid n 85
[87] Marcus and Spitz . ibid n 63 p 20-6; Johannessen L 'Freedom of Expression and Information in the New South African Constitution SAJHR (1994) p 218; De Waal. Op cit n 31 p 282
[88] In re: Munhemeso Op Cit n 85
[89] In re: Munhemeso ibid n 88 at p 130
[90] Menzies Op Cit n 16 p 1
[91] Cooray Op Cit n 80 p 2

must be prepared to preserve for others the right to think what they like about our beliefs and say what they like about our opinions even if we do not agree with them. That is a sign of civilisation. The more primitive the community, the less freedom of thought and expression is likely to be tolerated.[93] The South African Constitutional Court is of the view that tolerance (of diverging views) does not mean approval.[94] If freedom of expression was limited to speech and expression that is accepted in the mainstream, it would be a trivial right indeed. After all, almost every opinion is likely to be found threatening by someone or another.[95]

Expression protected by section 16 (1) of the Constitution does not relate to views that are favourably received or inoffensive. In Islamic Unity Convention v Independent Broadcasting Authority[96] the Constitutional Court was of the view that freedom of expression is:

> Applicable 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...Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."[97]

This assertion was confirmed by the same court in Phillips v Director of Public Prosecutions.[98] The court found that it is 'clear ...that under the new constitutional dispensation in this country, expressive creativity is prima facie protected no matter how repulsive, degrading, offensive or unacceptable to the society or majority of the society.'[99]In spite of which interest is fulfilled by freedom of expression, it must of necessity enjoy a considerable measure of protection in a liberal democracy.[100] Freedom of expression is a pre-condition of a stable constitutional order. Its existence and survival must not depend on it producing some positive effects.

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[92] Obligation of Pluralism www.searchhere.com/
[93] Cooray Op Cit n 80 p 2
[94] South African National Defence Force Union Op Cit n 34
[95] Meyerson Op Cit n 35 p 80-1
[96] Islamic Unity Convention v Independent Broadcasting Authority Op Cit n 1
[97] Islamic Unity Convention v Independent Broadcasting Authority ibid n 96 at p 307 F-G
[98] Phillips v Director of Public Prosecutions 2003 (3) SA 345 (CC)
[99] Phillips v Director of Public Prosecutions ibid n 98 at para 17
[100] Devenish Op Cit n 2 p 190

2.1.1. THE SEARCH FOR TRUTH THROUGH FREE EXCHANGE OF IDEAS

Without the free flow of information and ideas, the discovery of the truth will remain but an illusive dream to be pursued. The imperfections of human knowledge and the fallibility of judgment require a sceptical approach to accepted orthodoxy. The suppression of unfavourable arguments and opinions is an assertion of infallibility and often leads to suppression of the truth.[101]

It should be noted that the first rule of disinformation analysis is that truth is specific and lie is vague.[102] Vaclav Havel observed that 'the truth is not simply what you think it is; it is also the circumstances in which it is said and to whom, why and how it is said.'[103] Equally important is the fact that truth is not necessarily what one knows, but the ability to prove that matters.[104] The search for truth requires openness to competing or opposing opinions. Continuing criticism ensures that received opinion remains open to development, revision and change. Restricting dissident knowledge and opinion impoverishes the search for truth, and those holding true belief will no longer be challenged and kept on their toes to defend and review their propositions.[105]

'The history of liberty shows that the currency of every truth is to be found in the market place of ideas where, without restraint, individuals exchange the most sacred of their commodities. 'If the market is sometimes corrupt or abused or appears to serve the interest of the wicked and the unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature.'[106]

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[101] Marcus and Spitz. Op Cit n 63 p 20-7
[102] Obligation and Pluralism.www.searchhere.com/
[103] Vaclav Havel as quoted by Cohen T 'When the Truth is Just a Circumstance' Business Day. Friday 12 September 2003 p3
[104] Makhudu S 'Nothing is What It Seems' The Star Thursday 25 September 2003 p 7
[105] Barendt Op Cit n 53 at p 9. Thus the medical fraternity is at odds with idea of the search for truth, by taking their knives out and not giving the AIDS dissidents chance to propagate and have their views weight against the accepted orthodoxy that HIV causes AIDS, so that the citizenry could chose what they sees as a conceivable school of thought, rather than be chosen for.
[106] Mandela v Falati Op Cit n 83 at p 259 E

Van Schalkwyk J[107] justifies the search for truth as follows:

> In the case of any person whose judgment is really deserving of confidence, how has it become so?...Because he has felt, that the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his freedom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.[108]

The freedom of expression clause in the South African constitution does not exist to protect expression that is truthful or beneficial. It exists to protect expression.[109] It is submitted that the suppression of free speech, even where the speech's content appears to have little value, amounts to (government) thought-control. Government's thought control means that the government determines, defines and limits what individuals should think, say and hear. Although on the face of it, (government's) thought control does not appear to be costly to the society (because it may be argued that government will only censor unscrupulous and dangerous expressions), if a proper test is embarked upon the opposite turns to be true. Accordingly thought control will work to dissolve the great benefits which free speech affords.[110]

Van Niekerk summed up this proposition by holding that '...God knows, there is a risk in refusing to act till the facts are all in; but is there not a greater risk in abandoning the condition of all rational enquiry?...The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon a fair field and an honest race of all ideas'.[111] For these reasons, distinguishing between the constitutional protection on the basis of truth or falsity is illegitimate. Dissident opinions, false propositions and even those ideas that seem discredited may be highly valuable and thus require constitutional protection.[112]

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[107] Mandela v Falati ibid n 106
[108] Mandela v Falati ibid n 107 at 258 H-I
[109] Canavan Op Cit n 62 p xi
[110] Whillock and Slayden In hate Speech (eds).1995. P 246
[111] Van Niekerk B 'The Uncloistering of the Virtue: Freedom of Speech and the Administration of Justice- A comparative Overview. SALJ (1978) p 364

'In a real democracy there can be no single orthodoxy to the exclusion of orthodoxies. Hence the plurality of ideas, of various ideologies is essential.'[113] This means that in a democracy no assertions or propositions (because of their falsity or distatefulness) are to be discarded. Such propositions and ideas have the potential for human kinds' on going search for the truth and the desire to know.[114]

Without maximum freedom of expression science, arts, political wisdom and indeed human spirit cannot develop and progress is virtually not possible. Even blatantly false statements could be one step forward in the endeavour to discover the truth, because it may lead to (or at least stimulate the desire for) truthful and valuable discoveries.[115] For instance if scientists had decided to keep 'mum' about the fact that the earth is round (as that was regarded as heresy) we will still be trapped in the belief that the earth was flat.[116] Therefore, it is in the interest of democracy that people speak their mind openly without fear or restraints.[117]

Barendt criticises the quest for truth paradigm by pointing out that if it can never be properly claimed that one proposition is stronger than another, the notion of truth becomes more or less empty.[118] This may lead to what the Constitutional Court termed the 'zero-sum' game.[119] In *casu* the court reasoned in the context of the publication of a defamatory material that if the publisher is unable to prove the truth of the published material, the publisher may escape liability by showing that in all the circumstances the publication was reasonable.[120] This has the effect of giving the court a leeway in circumstances in which there are 'disproportionate' difficulties in proving the truth of the factual matter. Clearly where it is impossible to prove the truth or falsity of an assertion the court's inquiry will turn on its head.

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[112] Marcus & Spitz Op Cit n 63 p 20-7

[113] EMET v etv case no 2003/ 08 (BCCSA) at p 15

[114] Most scientific discoveries seem[ed] like an impossible dream and an invaluable exercise their early stages, until the final product is/was produced.

[115] Van der Westhuizen Op Cit n 27 p 267

[116] Van der Westhuizen ibid n 115 p 267

[117] EMET v etv Op Cit n 113 at p10

[118] Barendt Op Cit n 53 p 9

[119] Khumalo v Holomisa 2002 (5) SA 401 (CC) at para 42. Where it is not clear whether truth has been proven or not, the court will have to second guess which is not desirable for proper litigation.

[120] Khumalo v Holomisa ibid n 119 at para 43

To suppress the expression of an opposing view is regarded as a harm to the quest for truth. That amounts to the monopolisation of the truth and claim of infallibility or omniscience. Different and clashing views must be permitted to compete in the market place of ideas, from which the most valuable (at a particular time) will emerge victorious.[121] Justice Easterbrook of the 7th Circuit Court observed that the USA constitution does not make the dominance of truth a necessary condition of free speech.[122] Nor, according to Sardurski, is it the inevitable outcome of freedom of speech, though we may hope that more often than not it will be the case.[123] In US v Associated Press[124] it was stated that the First Amendment presupposed that right conclusions were more likely to be achieved from disagreements and deliberations than through any kind of authoritative selection. To ignore and to disregard the fact that where unpopular ideas are suppressed development cannot take place was dangerous.[125] This assertion applies with force in the South African context.

It is submitted in some quarters that the abridgement of false idea does not violate the right to freedom of expression. This is so because the protection of true statements may be consistent with the market place of ideas theory because false statements interfere with the truth-seeking function of the market place of ideas.[126] False statements are particularly valueless; they interfere with the primary objective of the theory of the search for truth. Nevertheless a scenario where false statements are completely debarred from social discourse is undesirable. Although falsehoods have a little value, some tolerance for them is necessary in order to provide a 'breathing space', because strict liability for false factual assertions would create a 'chilling effect' and result in the deterrence of true statements.[127]

[121] Van der Westhuizen Op Cit n 27 p 268
[122] American Booksellers Association v Hudnut 771 F.2d 323 (7th cir. 1985) from Sardurski Op Cit n 64 p 9
[123] Sardurski ibid n 122 p 9
[124] US v Associated Press Op Cit n 32
[125] Van der Westhuizen Op Cit n 27 p 268. It must be noted that some of the most successful people in the world espoused ideas that seemed inconceivable. Technology has impacted on our daily lives beyond imagination and had such ideas not been expressed they would have been realised.
[126] Sarduski Op Cit n 64 p 10
[127] Sarduski ibid n 130 p 11-12

It is argued that if a legal system only protects true statements, then it risks under-protecting such statements, because some true statements will not see the dawn of the sun due to the difficulty that may arise in having to prove the truth of such statements. Thus in order to avoid under-protecting true statements, protection of free speech must also be extended to falsities.[128] Sardurski points out that when the US Supreme Court[129] held that 'under the First Amendment there is no such a thing as a true idea' that may be extended to mean that 'there is no such a thing as a false idea.'[130] That is more true in South Africa considering the heterogeneous and diverse cultural backgrounds of society.

According to Sardurski, not all suppressions of statements are based on falsity of ideas expressed, nor is the protection of speech always in respect for truth.[131] This may be construed to mean that some expressions or lack thereof depend on beliefs, superstitions, *etcetera,* which could hardly be proven to be the truth. Gubbay CJ (as he then was) in Chavunduka[132] soberly concluded that:

> Before we put a person beyond the pale of the Constitution, before we deny a person protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criteria of falsity falls short of this certainty, given that false statements sometime have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the right to freedom of expression guaranteed by [section 16 (1)] hitherto adhered to by this court, cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech.[133]

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[128] Sarduski ibid n 131 p 11-12

[129] Gertz v Robert Welch 418 US 323 (1974)

[130] Sarduski Op Cit n 64 p 13. Normally, in authoritarian states only the views of the opponents, no matter how genuine and authentic, are stifled.

[131] Sardurski ibid n 134 p 13

[132] Chavunduka Op Cit n 54

[133] Chavunduka ibid n 132 at paras F-G. In Khumalo v Holomisa Op Cit n 119 The Constitutional Court reasoned in the context of the publication of defamatory material pertinent to the proof of truth that The danger of deliberate defamation by reference to unprovable facts is not merely a speculative or hypothetical concern. Lack of knowledge about third parties, the loss of critical records, an uncertain recollection about events that occurred long ago, perhaps during the period of special stress, the absence of eye-witnesses-a host of factors-may make it impossible for an honourable person to disprove malicious gossip about his past conduct, his relatives, his friends or his business associates. At para 38

The Constitutional Court found that the absence of evidence or the difficulty in procuring evidence to prove alleged factual assertions has the effect of preventing publication of matters which are very desirable to make public.[134] The court succinctly observed that:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions-and to do so on pain of libel judgments virtually unlimited in amount–leads to a comparable 'self-censorship'. Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred...Under such a rule [that is, proof of factual assertions] would be critics of official conduct may be deterred from voicing their criticism, even though it is in fact true, because of doubt whether it can be proved in court for fear of the expense of having to do so...[135]

Sardurski has some misgivings about the justification of freedom of speech on the search for truth rationale. He points out that if freedom of speech and expression were to be justified solely on the search for truth purpose the right will be excessively attenuated than it is necessary in contemporary liberal-democratic states.[136] He argues that the search for truth rationale would justify high degree of censorship. This, according to Sardurski, indicates a clash between the dominance of this rationale and widely shared intuitions about freedom of expression. This will have the effect of distinguishing among different types of speech in the first stage of the enquiry[137].

2.1.2. INDIVIDUAL SELF-FULFILMENT AND AUTONOMY

The desire to express and to communicate one's feelings and thoughts and to contribute to discussion and debates is an essential characteristic of human nature.[138] Speech is the most direct way of communicating to the rest of society who we really are. Thus, the denial of free expression assails the dignity and worth of an individual[139]. In Retrofit[140]

[134] Khumalo v Holomisa ibid n 137 at para 39
[135] Khumalo v Holomisa ibid n 138 at para 40.
[136] Sarduski Op Cit n 64 p 8. This is true because where an individual may not be able to prove the truth of his assertions logic dictates that he will be 'chilled' to voice it out.
[137] Sarduski ibid n 140 p10
[138] Retrofit v Posts and Telecommunications Op Cit n 51at 857 D-E; Van der Westhuizen Op Cit n 27 p 269.
[139] Marcus and Spitz Op Cit n 63 p 20-7. Retrofit Op Cit n 51at p 857 D-E
[140] Retrofit ibid n 143

the court found that 'people should not be constrained to communicate or not to communicate because the value of expression derives from the notion of self-respect that comes from a mature person's full and untrammelled exercise of capacities central to human rationality.'[141] Freedom of expression is a necessary condition of individual self-fulfilment,[142] and the attainment of his capacity.[143]

Self- definition and the determination of who we really are is impossible without open communication with our fellow human-beings. The Preamble to the Regulations to Gatherings Act[144] provides that 'every person has the right to assemble with other persons and to express his views on any matter freely... and to enjoy protection... while doing so.' There are many of us who perceive their greatest capacities as the ability to communicate their ideas to other people and conditions that are conducive to enhancing such talent must be nurtured.[145]

Consequently democratic societies have placed a high value in ensuring the conditions under which individuals may develop their capacities, participate in their own self-definition and exercise independent judgment as to the meaning and content of good life.[146] Freedom of expression is regarded as a vehicle to personal fulfilment and enlarges the prospect of personal growth and self-realisation.[147] The protection of the right to freedom of expression makes it possible for an individual to exhibit his creative capacity and it also nurtures self-respect and the respect by the community.[148] The government that muzzles free speech and expression runs a risk of destroying the creative instincts of its people.[149]

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[141] Retrofit ibid n 144 at p 857
[142] Spitz 'Eschewing Silence Coerced by Law: The Political Core and Protected Periphery of Freedom of Expression' (1994) SAJHR p 307
[143] Sardurski Op Cit n 64 p 17
[144] Act No 205 of 1993
[145] Sardurski Op Cit n 64 p 17. I believe that academics fall within this category, they could not be said to be fulfilled when what they have to think is limited and pre-determined.
[146] Marcus and Spitz Op cit n 63 p 20-7
[147] Hogg Op Cit n 50 p 963
[148] Marcus and Spitz Op Cit n 63 p 20-8
[149] Cooray Op Cit n 80

If freedom of expression is restrained, people are deprived of valuable information pertaining to the decisions they make (or could make) and consequently the means for reviewing their beliefs and desires. This will have the effect of having people stuck in the same old ideas for lack of alternative. Free expression is of importance in the development of maturity, rationality and reasonableness.[150] Autonomy pre-supposes that individuals must be free to develop their capacities and participate in their own self-definition.[151]

Meyerson believes that there is no human being who is innately subordinate, and as a result no human being must be compelled to trust on the judgments of others about what views they should express or hear.[152] To forbid the citizens to express or hear certain views fails to recognise the rationality and the faculties of human beings. 'Responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice and faith. Government insults its citizens, and denies their moral responsibility where it decrees that they cannot be trusted to hear opinions that might persuade them to offensive convictions.'[153] However, sight should not be lost that others would derive self-fulfilment from speaking for the sake of it. To those, 'speech as an instrument to personal satisfaction has no immediate aims than to be uttered and heard. Protection of freedom of expression should not be result-orientated'[154] because

> freedom to speak one's mind is now an inherent quality of the type of society contemplated by the constitution as a whole and is specifically promoted by the freedoms of conscience, assembly, association and political participation protected by ss15-19 of the Bill of Rights. It is the right–idealist would say the duty-of every member of civil society to be interested and concerned about public affairs.[155]

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[150] Peonidis 'Freedom of Expression, Autonomy and Defamation'. Law and Philosophy. (1999) Vol 17 p3
[151] Spitz Op Cit n146 p 305-6
[152] Meyerson Op Cit n 35 p 83
[153] Meyerson ibid n 152 p 84
[154] Sardurski Op Cit n 64 p 17
[155] Islamic Unity Convention v Independent Broadcasting Authority Op Cit n 1 307 D; S v Mamabolo Op Cit n 12 p 22-3

In the same vein Sardurski suggests that the extent of self-fulfilment determines the limits of free expression.[156] This simply means that the interests of others will inevitably limit the extent to which an individual is free to fulfil himself.

2.1.3. THE POLITICAL PROCESS RATIONALE

The concept of democracy locates sovereign power in a politically equal citizenry[157] which requires of them the capacity to make informed judgments about the manner in which they are to be governed. Accordingly, any defensible democratic political process sustains and is regulated by the protection of expression and speech.[158] According to Van Niekerk, it is an inalienable right of everyone to comment upon any matter of public importance. This right is one of the pillars of individual liberty which must be protected by our courts despite its content.[159]

Primstone describes political process rationale as 'a foundational motivation for the right to expression.'[160] In Phillips v Director of Public Prosecutions[161] the Constitutional Court found the right to freedom of expression to be the core of democracy, to human development and human life itself. Thus it must be zealously guarded because its infringement was in the past used as an instrument in an effort to achieve the degree of thought-control conducive to preserve apartheid and to impose a value system fashioned by minority on all South Africans.[162] Marcus and Spitz point out that expressions related to political activity must be afforded a wide and generous definition. This is so because political discourse extends far beyond the confines of legislative policy and electoral practice.[163] Thus in New York Times v Sullivan[164] the US Supreme Court held that 'the general proposition that freedom of expression upon public question is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard [of

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[156] Sardurski Op Cit n 64 p 18
[157] Spitz Op Cit n 146 p 306
[158] Marcus and Spitz Op Cit n 63 p 20-8
[159] Van Niekerk Op Cit n 111 p 382
[160] Primstone Hate Speech, the Constitution and the Conduct of Elections.1999 p4
[161] Phillips v Director of Public Prosecutions Op Cit n 98
[162] Phillips v Director of Public Prosecutions ibid n 161 at para 23
[163] Marcus & Spitz. Op Cit n 63 p 20-11
[164] New York Times v Sullivan Op Cit n 3

free speech], we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'[165] This assertion is apposite in a country where its citizens are expected to participate in the governing of their country, as envisaged by the South African Constitution[166].

Thus, freedom of expression is said to be a check upon the abuse of government power and a form of resistance to totalitarian control and thus an instrument for the maintenance of democratic order.[167] A democratic government is the one that is directed by the opinion of an open and free society.[168] A democratic government derives its legitimacy from its installation by the decision of a free society.[169] For democracy to function and prosper the electorate need access to different viewpoints and ideas in order to make informed choices[170]. According to Spitz, the guarantee of the society's freedom to express their problems has the effect of substituting force for rational discussion and increasing its ability to adjust to changing circumstances. Participation in public debate forges greater social cohesion.[171]

A democratic community must be construed as one which is interested and concerned with transparency, deliberation, debate and information which is required for such debate.[172] Accordingly, speech that concerns governmental processes must enjoy a considerable measure of protection vis-à-vis speech that has little or nothing to do with political processes. The protection to say something on political process and government policies must extend beyond the political arena and political debate.[173] Other activities such as liberty to artistic and scientific as well as academic freedoms are also of importance in the development of democracy because they contribute in the formation of informed decisions by the citizenry.[174] Meiklejohn believe that people needed dramas and

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[165] Marcus Op Cit n 77 p 142
[166] Devenish Op Cit n 2 p438
[167] Spitz Op Cit n 146 p 306
[168] Hogg Op Cit n 50 p 961
[169] Sardurski Op Git n 64 p 21
[170] Thus it is an acknowledged fact that the government is duty bound to ensure that the views of the opposition are not unjustifiably stifled.
[171] Spitz Op Cit n 146 p 307
[172] Marcus & Spitz Op Cit n 63 p 20-34
[173] Van der Westhuizen Op Cit n 27 p 271
[174] Marcus and Spitz. Op Cit n 63p 20-8

paintings and poems because 'they will be called upon to vote.'[175] A democratic polity requires extensive and participatory social debate which in turn requires free and open access to all available and relevant ideas and information. All forms of expression in one-way or the other, contribute to the furtherance of a democratic process.[176]

Most importantly other human rights could not be realised without the right to free expression, assembly and association.[177] Without free speech no political action is possible and no resistance to injustice and oppression is possible, and elections will be just a futility. Free speech is a pre-condition of a democratic society.[178] The suppression of free expression undermines the concept of democracy and elections.[179] The need of an informed electorate was succinctly described by Meiklejohn as follows:

> The First Amendment [protects] the freedom of those activities of thought and communication by which we "govern." [But] voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibility of making judgments, which that freedom to govern lays upon them...Self-government can exist only in so far as voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express. [Thus], there are many forms of thought and expression within the range of human communications from which the voter derives the [necessary] knowledge, intelligence, [and] sensitivity to human values. [These], too, must suffer no abridgement.[180]

When people are free to speak and to campaign, they feel that they are playing some role in the society, however modest. To be free to express oneself is a recognition of one's dignity and relevance as a human being. Although what the individual says may not have any political significance, like a single vote could never influence the results of the election, it is still worth constitutional protection because it may still lead to the

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[175] Sardurski Op Cit n 64 p 21
[176] Spitz Op Cit n 146 p 306
[177] Van der Westhuizen Op Cit n 27 p 270
[178] Cooray Op Cit n 80 p 2
[179] Sardurski Op Cit n 64 p 25
[180] Spitz Op Cit n 142 p 311

peaceable resolution of disputes.[181] It should be noted that the denial of free speech might very easily lead (with some justifications) to frustration, anger and political turmoil.[182] Failure to protect speech for the fear that it might be abused makes the government more abusive.[183] In Mandela v Falati[184] the court held:

> ...There may be few exceptions, but in general no politician should be allowed to silence his or her critics. It is the matter of most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny.[185]

Freedom of expression also enables the government to know and respond to the queries and needs of the people.[186] Freedom of expression also ensures that changes will be by lawful means, a condition necessary for the security of the Republic[187]. Thus In Kauesa v Minister of Home Affairs[188] the Namibian Supreme Court found that a regulation which made it an offence for a member of police force to comment 'unfavourably in public upon the administration of the force or any government department' unconstitutional. Moreover the court emphasised that the right to freedom of speech and expression 'cannot be frustrated by mere indiscretions of a speaker.' What should be considered is the fact that speech at issue furthers the purpose of the right. Thus to announce that there should be no criticism of the president or that we are to stand by the president right or

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[181] After the first democratic elections in 1994 many people who had been denied the franchise could hardly hide the excitement of exercising their right to vote for the first time in as many years.
[182] Van der Westhuizen Op Cit n 27 p 270
[183] Cooray Op Cit n 27 p 2
[184] Mandela v Falati Op Cit n 83
[185] Mandela v Falati Ibid n 184 at p 260 C-D
[186] In trying to give effect to this assertion the government has launched the imbizo programme. Imbizo is a forum for enhancing dialogue and interaction between government and the people. It provides an opportunity for government to communicate its Programme of Action and the progress being made. It promotes participation of the public in the programmes to improve their lives. Imbizos also highlights people's concerns, grievances and advice about the government's work. www.gov.za/issues/imbizo/
[187] Van der Westhuizen Op Cit n 27 p 271
[188] Kauesa v Minister of Home Affairs Op Cit n 79

wrong, is not only unpatriotic and servile, but it is morally treasonable[189] because, according to Spitz,

> Those who won our independence... valued liberty both as an end and as a means... They 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; that without free speech and assembly discussion will be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace of freedom is an inert people; that public discussion is a political duty...Believing in the power of reason as applied through public discussion, the eschewed silence coerced by law-the argument of force in its worst form.[190]

According to Suttner, freedom of speech must be allowed to the extent that it ensures fuller democratic participation and helps to inform the masses, to increase their capacity to decide their own future and to be active in their government. It is only through freedom of expression that a system of government in which all will participate effectively-and ensuring that government rules in their fullest interest-could be ensured.[191] The experience of participation in public debate forges cohesion and makes it easier for those whose ideas do not emerge victorious in the market place to accept and abide by the decisions reached through an open and non-cohesive process. Furthermore free expression permits articulation of dissent and thus fosters a method of working through social conflicts instead of working them out.[192]

The importance of freedom of speech in a democratic society could be best summed-up in the words of Thomas Emerson,

> ...Freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgement impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing

[189] Obligation and Pluralism.www.searchhere.com/
[190] Spitz Op Cit n 142 p 312
[191] Suttner ibid n 207 p 379

> circumstances or developing new ideas; and because suppression conceals the real problems confronting a society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in decision-making process. Moreover, the state at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.[193]

This means that freedom of expression contributes to the internal peace and stability of the country, as problems are likely to be raised and resolved in a constructive manner when freedom of expression is protected than when it is not. Only when the citizenry is free to express their grievances could the government be able to discern and ascertain the frustrations of the people.[194] A government which can confidently claim that its policies are right and appropriate for its citizenry is the one which will allow dissent and criticism.[195] Freedom of expression could be regarded as the mouthpiece of other rights. Although it is argued that freedom of the press and arts are useless to the homeless, the hungry and the illiterate, freedom of expression is a means to pointing out to these social ills and injustices in a society to the world and campaigning for their amelioration.[196]

The 'democratic self-government' theory is either unduly restrictive in that it provides for protection only to political speech *strictu sensu* or virtually meaningless because it broadens the meaning of the political process so as to include in it every expression which deserves protection, regardless of its place in the political process.[197] Sardurski points out that 'there is some incongruency between the rationale and the scope of protection: either the rationale is too narrow (thus leaving much of the worthy speech unprotected) or there is lack of fit between the rationale and the breadth of protection. The first horn of the dilemma captures the sense of unease that many of us have about

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[192] Spitz Op Cit n 142 p 307
[193] Van Niekerk Op Cit n 111 p 386
[194] Cooray Op Cit n 80 p 2
[195] Barendt Op Cit n 53 p 9
[196] Van der Westhuizen Op Cit n 27 p 270
[197] Sardurski Op Cit n 64 p 21-2

elevating politics to the apex of human activity; such an elevation is said to smack of elitism, and neglect for other realms of human endeavour. Balkin complains that

> [I]f we constitutionally value art as a servant or victim of politics, we risk skewing our estimation of it. It becomes art not for art's sake, but for policy's. The second horn of the dilemma (that is, lack of fit between the rationale and the breadth of the protection) can only be remedied by watering down the "the political" to a point at which virtually any worthy activity is connected (albeit indirectly) with the formation of one's mind, character and preferences, which will in turn find its remote articulation in the voting decision. In such a case there is a danger that we are arguing backwards: from the assessment of the domain of expression as worthy of protection to a characterisation of the domain as "political", rather than the other way round, as the theory postulates.[198]

In some quarters there are views that self-government is not necessarily linked to the principle of strong protection of freedom of speech. The adherents to this assertion point out that self-government may be the basis for restraining free speech. This could be the case where the people themselves, after full, free and open discussion, decide in accordance with democratic procedures that certain speech could not be tolerated. According to Sarduski, in such circumstances it is not the government which is depriving its citizens of their right to free speech but the citizens themselves.[199]

Sardurski adds that we often believe that restraints on speech are special and require particularly stringent rules. When in fact a mere invocation of democratic and collective self-restraint is a sufficient justification for inhibiting or limiting free speech. This leaves us with little, if any, complaints for the invasion of our right to free speech.[200] In the same vein Sardurski points out that the concept of collective self-restraint is not satisfactory for limiting freedom of speech. He points out that collective self-restraint does not cater for those who do not share in the preferences of the majority. It is common cause that under majority rule, those who do not share in the majority preferences have to abide by them.

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[198] Sardurski ibid n 197 p 22
[199] Sardurski ibid n 198 p 22
[200] Sardurski ibid n 199 p 194. I would like to believe that section 16 (2) of the constitution could be best understood in that context.

Sardurski believes that this surely amounts to a violation of freedom of speech of the individuals.[201]

2.2. THE SCOPE OF THE RIGHT TO FREEDOM OF EXPRESSION

2.2.1. THE LIBERAL OR THE NEAR ABSOLUTE PROTECTION APPROACH

Those who advocate for the liberal conception of freedom of speech, consider it in individualistic terms.[202] They conceive freedom as less power (on the government) to do and more as a power to restrain government from interfering with individuals.[203] The US Supreme Court[204] held that the ability of the government, which is in line with the constitution, to shut down discourse solely to protect others from hearing it must be dependent upon showing that the interest of the individual are inhibited in essentially intolerable manner. A broader view of this authority will empower the majority to silence dissidents simply as a matter of personal predilections which, it is respectfully submitted, would attenuate the dissidents' freedom of speech.

To the Americans freedom of expression is the 'majestic' right, probably ranking above all others. The Americans belief on the near absolute nature of freedom of expression could be best described in the dissenting judgment of Justice Black in Beauharnais v Illinois[205]. The learned Justice was of the view that 'no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of speech is a startling and frightening doctrine in a country dedicated to self-government by its people for having their say in matters of public concern.' He concluded by finding that the First Amendment has 'safely cloaked' freedom of

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[201] Sardurski ibid n 200 p 24. It should be pointed out that freedom of expression ought not to depend on the predilections of the majority. This means that it ought not be proscribed because it is viewed as an affront by the majority.

[202] Suttner Op Cit n 191 p 380. This approach is so wide and will cater for almost any kind of expression regardless of whether it was meant to convey a message or not. A expression is granted protection by virtue of being an expression, nothing less, nothing more.

[203] Suttner ibid n 202 p381

[204] Cohen v California Op Cit n 21

[205] Beauharnais v Illinois 343 US 250 (1952) Cited from Whillock and Slayden Op Cit n110 p 232

expression in matters of public concern beyond the reach of the legislature.[206] This was the case because, according to Justice Douglas also dissenting in Beauharnais v Illinois,

> The framers of the constitution knew the human nature as well as we do. They too have lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardised thought. They weighed the compulsion for restrained expression and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the ...[expression] ...may be[207].

In the USA, freedom of speech although not absolute, is protected against censorship or restraints, unless it is shown that it is likely to produce a clear and present danger of a serious substantive evil that rises above public inconvenience and annoyance.[208] Speech should not be shut down for the sake of decency. For instance in Bradenburg v Ohio[209] the US Supreme Court held that Bradenburg was promoting speech that was detestable to the common Americans, but the freedom of speech right was created to protect those people whose beliefs (and ultimately their expressions) were not always thought to be politically correct.

Brandenburg had been convicted by the court a quo for the burning of the USA flag and urging for the return of 'niggers' to Africa and Jews to Israel which, it was asserted on behalf of the state of Ohio, violated the Ohio criminal syndicalism law which prohibited advocacy for 'crime, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform...' The US courts are of the opinion that only the kind of expression that was likely to incite immediate violence was to be regarded as falling outside the First Amendment protection. This, the court termed the 'fighting words'. It was opined by the court that 'fighting words' were of less social value to enjoy the First Amendment protection.[210]Bradenburg's conduct was found to be falling short of amounting to fighting words.

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[206] Whillock and Slayden ibid n 205 p 232
[207] Whillock and Slayden ibid n 206 p 235
[208] Whillock and Slayden ibid n 207 p 236
[209] Bradenburg v Ohio 395 US 444 (1969)
[210] Chaplinsky v New Hampshire Op Cit n 58

The value attached to exposure of all tendencies is likened to the capitalist market, where commodities had to battle it out for survival.[211] It is asserted by Spitz, that the best test for truth is the power of the thought to get itself accepted in the competition of the market. Truth does not precede the attempts to uncover it. Its discovery is not a destination but a continuing process in which both error and critique require protection.[212]

In the case of Chavunduka v Minister of Home Affairs[213] the court found that even patently false statements communicate particular truths and are thus worthy of constitutional protection because they help the market place to reject false ideas by revealing them for what they are. Furthermore, according to Spitz, truths can be partial and plural, and thus the competition of opposing ideas and opinions may provide 'fuller truths.' The continuing questioning of accepted opinions prevents the truth from degenerating into a dogma and makes social life open to development, revision and change and thus development.[214]

The correct view will not be to assert a certain opinion as being correct, but rather to 'evoke demand' in the market place of ideas. To use the words of John Stuart Mill:

> ...Every opinion which embodies any fraction of the truth, not only finds advocates, but is advocated to be listened to.[215]

In similar terms Jefferson declared that:

> If a book be false in its facts, disprove them; if false in its reasoning, refute them. But for God's sake, let us freely hear both sides.[216]

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[211] Suttner Op Cit n 191 p 380-1
[212] Spitz Op Cit n 142 p 305
[213] Chavunduka v Minister of Home Affairs Op Cit n 54
[214] Spitz Op Cit n 142 p 305
[215] Suttner Op Cit n 191 p 381
[216] Suttner ibid n 215 p 381. In South Africa, and I believe world over those people who tend to question the assertion that HIV causes AIDS seem to be regarded with disdain. Their views and opinions are never let out of the cloak, so that people can, with the plethora of information make decision which are not restricted (on the basis of information) as is the case now.

These libertarians are of the view that 'if there is a principle of free expression, should not it be allowed as long as it does not involve violent means?' Freedom means the ability to say, and peaceably do what you chose to do as long as it does not impinge on the rights of others.'[217] Simply put freedom allows us to be different. In Cohen v California[218] the US Supreme Court reversed the court a quo's conviction of the accused for the inscription on his jacket, 'f... the draft.' The court found that the only conduct for which the accused was convicted for was a conduct intended to be received as expressing a particular view. The court concluded that such conduct was guaranteed by the First Amendment. Moreover, according to Meyerson, no matter how abhorrent the views expressed, they may lead to the flourishing of an individual.[219]

However freedom of expression in its crude form will hardly see the light of the day in our courts. It is an accepted fact that freedom of expression could never be granted a carte blanche protection.[220]

2.2.2. THE CONTENT-NEUTRAL APPROACH

This approach presupposes that the 'content of the statement cannot deprive it of the protection accorded by section 16(1), no matter how offensive it may be.[221] This simply means that whatever is said is the concern of section 16 (1) protection. A court adopting this approach will presume that any statement is entitled to constitutional protection. According to Marcus and Spitz, it would be illegitimate to distinguish, at the threshold of the right itself, between forms of expressive conduct that are acceptable and that are not on the basis of their content.[222] 'At the first stage of the analysis, speech and expression ought to be broadly defined so that activity is expressive if it attempts to convey meaning.'[223] Any activity which purports to convey a meaning *prima facie* falls within the scope of protection of section 16 (1).[224]

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[217] Suttner ibid n 216p 384
[218] Cohen v California Op Cit n 21
[219] Meyerson ''No Platform for Racist': What Should the View of Those on The Left Be?'(1994) SAJHR p 397
[220] Expressions that are debarred by the Constitution would be discussed in the next chapter.
[221] Hogg Op Cit n 50 p 965
[222] Marcus and Spitz. Op Cit n 63 p 20-17
[223] Marcus and Spitz. ibid n 222 p 20-17
[224] Marcus and Spitz. ibid n 223 p 20-17

The content neutral approach is afforded a more generous interpretation by the courts.[225] Any limitation on such expressive conduct must therefore satisfy the conditions set out in section 36.[226] According to this approach the definition of expression depends on the presence of a communicative purpose. Thus expressions which are purely physical and do not (or do not attempt to) convey a meaning (and from which no meaning can be inferred) fall outside the ambit of section 16 (1)[227]. This means that the test for content-neutral approach is objective.

According to Marcus and Spitz, even unlawful expressions such as contempt of court, fraudulent misrepresentation and perjury are entitled to section 16 (1) protection and is upon the authorities to establish that the limitation is reasonable and justifiable in an open and democratic society. The analysis therefore focuses on the limitation clause inquiry.[228] Marcus and Spitz sum up the advantages of content-neutral approach as follows:

> It reduces the scope of value-based exclusions of forms of expression at the threshold of the right. It extends expression very broadly over almost all forms of expressive conduct. It reduces a burden of establishing a prima facie infringement of section 16 (1) because it requires the applicants to demonstrate no more than that the expressive conduct in issue constituted an attempt to convey meaning, and that such conduct has been restricted. It stays close to the common sense meaning of "speech and expression" and avoids the paradoxical results of a process which would define certain forms of expressive conduct as "non-speech." On its face it would appear to protect a wider array of expressive conduct.[229]

Spitz concludes that the risk of a wholly content-neutral approach will be that the courts will dilute the standard which must be satisfied in order to justify limitations upon expression. The adoption of a wholly content-neutral approach will mean that the wider the ambit of freedom of expression the more the courts are likely to 'relax the standard which must be satisfied in order to justify limitations upon expression. If an over-generous ambit of the definition extends protection to expressive conduct which is

[225] Devenish Op Cit n 2 p 192; Marcus & Spitz ibid n 224 p 20-17
[226] Section 36 limits the rights contained in the Bill of Rights.
[227] Devenish Op Cit n 2 p 192
[228] Marcus & Spitz Op Cit n 63 p 20-18
[229] Marcus & Spitz ibid n 228 p 20-18

outside the purpose of the guarantee, the courts will endeavour to uphold legislation which limits such conduct, even at the risk of weakening the standards of justification[230]. Spitz argues that:

> If the guarantee of expression in section 16 (1) were held to protect perjury, fraud, deception and conspiracy-all forms of expression in an extended sense- it would be foolish to require a legislative body to satisfy a high standard of justification in to order regulate or prohibit such obviously harmful behaviour.[231]

Such an approach will clearly weaken the standard of justification, because the courts will embark on the process of sifting constitutionally accepted speech from the whole lot of expressive activities. According to Spitz, if the generosity of section 16 (1) construction was to be understood to extend the same protection to commercial expression as to fraudulent misrepresentation, that would lead to frustration and confusion as to what section 16 (1) was designed to protect. If expressions like fraudulent misrepresentation and other constitutionally barred speech[232] were to be allowed to pass the first stage enquiry (that is, were found to be conveying or intended to convey a meaning) that will have the effect of weakening other expressive communications such as commercial speech because of the low degree of justifications for allowing expression.[233]

The content-neutral approach risks burdening the courts with useless litigation because of lack of clear terrain of constitutionally accepted expressions. Spitz suggests that our courts ought not adopt a wholly content-neutral approach to freedom of expression.[234] In the same vein, Devenish is convinced that our democratic experience is still both embryonic and fragile to accommodate an approach premised on content neutrality, and that at least initially the courts should adopt a definitional approach.[235] Spitz concedes and

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[230] Spitz Op Cit n 142 p 308
[231] Spitz ibid n 230 p 308
[232] Section 16 (2) of the Constitution debars speech which propagates war; incite imminent violence; and advocates hatred based on race, religion, ethnicity and gender which constitutes incitement to cause harm
[233] Spitz Op Cit n 142 p 308
[234] Spitz ibid n 235 p 309
[235] Devenish Op Cit n 2 p 194

points out that a narrower ambit will ensure that the standards of justification retain their protective bite.[236]

2.2.3. DEFINITIONAL APPROACH

Unlike the content-neutral approach, the definitional approach invokes a higher threshold at the first stage of the analysis.[237] According to Devenish, the language of both the interpretation clause and the limitation clause accords with the definitional approach. The definitional approach is premised on interpreting the Bill of Rights in a manner conducive to the promotion of values which underlie an open and democratic society based on freedom, equality and dignity.[238] Accordingly, freedom of expression would acquire meaning through an interpretative process which excavates the values underpinning the guarantee.

Defining the content of section 16 (1) protected speech also dermacates the ambit of the right. If any form of expression is to be denied constitutional protection, then such a decision will have to be justified on the basis that the expressive activity in question plays no role in furthering any of the values which underpin the guarantee.[239]Consequently, expressions which do not promote and are not conducive to the establishment of an egalitarian society, based on equality, dignity and freedom, would fall outside section 16 (1) ambit.

Section 16 (2) relieves the state from the burden of establishing that expressions which are not conducive to the establishment of a society based on equality, dignity and freedom are not worthy of section 16 (1) protection. Put differently, restrictions upon such expressions would not require justifications in terms of the limitation clause.[240] Devenish contends that such approach is open to abuse as happened in our previous constitutional dispensation.[241] The definitional approach is prone to abuse in that, too

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[236] Spitz Op Cit n 142 p 309
[237] Marcus & Spitz Op Cit n 63 p 20-18
[238] Devenish Op Cit n 2 p 193
[239] Marcus & Spitz Op Cit n 63 p 20-18
[240] Marcus & Spitz. ibid n 239 p 20-19
[241] Devenish Op Cit n 2 p 193

many categories of expressive activity will be denied protection altogether. This approach, it could be argued, has a tendency of prohibiting people to speak their minds, for fear of lack of protection to what they think and consequentially speak out.[242]

The wider latitude for judicial-value judgment may grant license to the courts to exclude valuable expression from seeing the dawn of the day. Marcus and Spitz are convinced that the risks associated with this approach could never be completely eradicated but might be reduced provided the values underpinning freedom of expression are generously elaborated.[243]

The value of a definitional approach is that it precipitates a jurisprudential discourse into the values that underpin the political and social philosophy than the more ad hoc and unpredictable task of balancing expressive interests with other interests.[244] Marcus and Spitz vividly outline the appositeness of the definitional approach for determination of free expression by the courts' in the following terms:

> In setting a higher threshold at the first stage of the analysis it avoids burdening the courts with frivolous and baseless litigation and seeks to ensure that section 16 (1) is not interpreted in a manner which extends protection beyond the purpose of the right. If an over generous definition of the ambit extends protection to expressive activities which are outside the purpose of the guarantee, the courts will endeavour to uphold the legislation limiting such activities even at the risk of weakening the standard of justification set out in the limitation clause.[245].

Devenish is of the view that the definition of speech in the first enquiry is beneficial rather than at the stage of application of the limitation clause, which involves a more pragmatic balancing of competing interests.[246] It is humbly submitted that the definitional approach affords certainty as to what is protected by the freedom of speech clause.

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[242] Stuart J 'The Right to Free Speech' www.searhhere.com/
[243] Marcus and Spitz Op Cit n 63 p 20-19
[244] Marcus and Spitz ibid n 258 p 20-19
[245] Marcus and Spitz ibid n 259 p 20-19. Should commercial speech, for instance, enjoy equal measure of protection with fraudulent misrepresentation, the former's protection will be greatly diminished for it will be somewhat difficult to prove its worth in a democratic and open society.
[246] Devenish Op Cit n 2 p 193

2.3. SUMMARY

This chapter has examined the philosophical and moral justifications of allowing the free flow of ideas and information. It has been established that freedom of expression is a means and an end in itself. This means that if fully protected, it should not depend on some purposive effect. It has been established that the justifications of protecting freedom of expression are not sufficient ground for the protection of speech, this is so because these justifications have certain loopholes which, if we only rely on them (for the protection of speech) may cause a substantial portion of speech to be stifled. Thus freedom of speech must be allowed and protected for its own sake.

CHAPTER THREE: THE CATEGORIES OF EXPRESSIONS WHICH ENJOY CONSTITUTIONAL PROTECTION AND THEIR LIMITATIONS.

3.0. INTRODUCTION

Section 16 (1) of the Constitution protects freedom of expression generally but also expressly includes protection for the freedom of the press and media, the freedom to receive and impart information and ideas, artistic creativity and academic freedom and scientific research. The formulation of this section raises the question whether the expressly enumerated categories should be afforded a higher protection than any other category that does not fall within these categories.[247] According to De Waal *et al* an approach that would have the effect of differentiating expression on such basis should not be adopted because the categories enumerated in section 16 (1) were not intended to describe the core of protected expression. Thus, according to the learned authors the inclusion of specific forms of expression does not single them out for greater protection than others.[248]

3.1. FREEDOM OF THE PRESS AND OTHER MEDIA

According to Marcus and Spitz, freedom of the press is a necessary concomitant of expression. An important part of freedom of the press is the right to report on matters of public interest, however controversial or offensive, without inappropriate interference by the government.[249] The rationale behind the protection of the freedom of the press is that the press has an important role to play in shaping a society based on openness and democracy.[250] The media has to fulfil the role of an effective watchdog in society.[251] In Grosjean v American Press Co[252] the court found that 'a free press stands as one of the

[247] De Waal Op Cit n 31 p 283
[248] De Waal ibid n 247 Pp 283
[249] Marcus and Spitz Op Cit n 63 p 20-20
[250] De Waal Op Cit n 31 p 284
[251] Govender 'Freedom of Speech' H R & CLJSA (1996) p 21
[252] Grosjean v American Press Co 297 US 233

great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.'[253]

The question which may arise in this scenario is whether the express articulation of the protection of the media grants the latter superior protection than other beneficiaries. In the US, the First Amendment to the Constitution which provides that 'Congress shall make no law ...abridging the freedom of speech and of the press', has been construed as not according the press special rights than other speakers.[254] This is so because there has not been evidence suggesting that the framers intended to give a privileged position to the press. Secondly it would be unacceptable to single out and confer special status on a limited group of people, particularly when that group is difficult to define.[255]

The freedom of the media does not grant the media the licence to publish whatever they wish in total disregard of the rights of others.[256] In Schenk v US[257] the court found that the media should never disregard the fact that freedom of speech belong to all people just like all other rights in the First Amendment. The court concluded that an orderly society must impose some limits, actual or implied, on absolute and total liberty, if it is to be worthy to all. Absolute and total liberty is bound to lead to irresponsibility and abuse. Thus the US Supreme Court[258] found that that argument applied with much force to organised media. The court described the lack of special immunity of the media in the following terms

> the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.[259]

In similar terms, Navsa J found in Van Zyl v Jonathan Ball Publishers[260] that

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[253] Steigleman W. The Newspaperman and the Law. WM. C. Brown Company. 1985. P 43p
[254] De Waal Op Cit n- 31p 284
[255] De Waal ibid n 254 p 284
[256] Davis D 'Holomisa v Argus Newspaper Ltd 1996 (2) SA 588 (W)' SAJHR (1996) P 333
[257] Schenk v US 249 US 74 (1919)
[258] Associated Press v National Labor Relations Board 301 US 103
[259] Cited from Steigleman Op Cit n 253 p 42
[260] Van Zyl v Jonathan Ball 1999 (4) SA 571 (WLD)

> The right of the media to communicate information and comment, while obviously crucial in a modern democracy, should be no greater than that of an ordinary citizen.[261]

In SABC v Public Protector[262] at issue was whether the refusal by the respondent to allow the applicants to record the proceedings of the investigations into the 'arms deal' by the respondent violated the media's right to freedom of expression as enshrined in the Constitution. The court, having regard to the fact that it had only powers to set aside administrative actions only if it (the court) was convinced that the administrator erred in the exercise of his powers upheld the decision of the respondents. Although the court seem to have recognised that the media's freedom of expression was curtailed, the court found that it was bound by the decision of the administrator unless it was shown that the administrator had erred in his decision.

As Ronald Dworkin has noted 'but if free speech is justified on principle, then it would be outrageous to suppose that journalists should have special protection not available to others, because that would claim that they are, as individuals, more important or worthier of more concern than others.'[263]

Despite lack of privileged protection to the press, the press has a significant role to play in shaping an open and democratic society envisaged by the Constitution. The freedom of the media should not be maligned because of some remote and doubtful dangers, because that would amount to the destruction of the right,[264] and would therefore undermine the essential role of the media in shaping and maintaining a responsible and an accountable government. In Government of the Republic of South Africa v Sunday Times Newspaper[265] the importance of the media was succinctly summed up as follows:

> The role of the press in a democratic society cannot be understated. The press is in the frontline of the battle to maintain democracy. It is the function of the media to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators.

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[261] Van Zyl v Jonathan Ball ibid n 260 at p 595

[262] SABC v Public Protector 2002 (4) BCLR 340 (TPD)

[263] Quoted byDavis Op Cit n 256 p 333

[264] Steigleman Op Cit n 253 p 43

[265] Government of the Republic of South Africa v Sunday Times Newspaper 1995 (2) SA 221 (T)

> The press must reveal dishonesty, mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed...[The purpose of] the press [is] to serve the governed, not the governors...The press [is] protected so that it could bare the secrets of government and inform the people.'[266]

The press has to probe and publish without fearing the chilling effect in order to satisfy the curiosity of the citizenry. In the case of National Media v Bogoshi[267] the Supreme Court of Appeal found that in a system of democracy, dedicated to openness and accountability, the role of the press must be recognised. The success of democracy is dependent on robust criticism of the exercise of power. This requires alert and critical citizens. A strong and independent media is needed to effectively voice that criticism, and to inform the citizenry of factual and critical perspective of the issues. It is for this reason that the Constitution recognises the especial importance and the role of the media in nurturing and strengthening democracy. This recognition is obvious in section 16 (1), which expressly states that freedom of expression 'shall include freedom of press and other media.'

The decision in Bogoshi acknowledges the democratic imperative that the common good is best served by the free flow of information and the task of the media in this process is immeasurable.[268]

According to Marcus and Spitz if the language in section 16 (1) (a) is not to be redundant, the organised media might be entitled to greater section 16 (1) protection than other members of society. Should that be the case Marcus and Spitz envisages the position thus:

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[266] Government of the Republic of South Africa v Sunday Times Newspaper ibid n 265 at 228 I- 229 A. Recently there has been a furore over the leak of the questions which the Scorpions were to send to Deputy President Jacob Zuma about his involvement, if any, in the arms deal scandal. Out of this some accused the media was of trying the Deputy President. They are ignorant of the function of the media. The media must report good and wherever they may find it.

[267] National Media v Bogoshi 1998 (4) SA 1196 (SCA)

[268] Marcus and Spitz Op Cit n 63 p 20-20A

3.2. FREEDOM TO RECEIVE AND IMPART INFORMATION

Section 16 (1) of the Constitution makes it expressly clear that freedom of expression is not only limited to the speakers, but listeners are also included in the rubric protection of section 16 (1).[273] This means that the listener is free to chose information s/he deems beneficial to her/himself. The individual is also at liberty to choose the means through which to receive or impart ideas and information regardless of frontiers.[274]

Interference with this right would amount to a constitutional breach. For instance, in her minority judgment in Case v Minister of Safety and Security[275] Mokgoro J, argued that the provision of the Indecent and Obscene Photographic Matter Act 37 of 1937 violated the right to freedom of expression. She found that the right to freedom of expression embraced the right to receive, hold and consume expressions submitted by others. In her view therefore, the right to freedom of expression protected both speakers and recipients.[276] It must be pointed out that section 16 (1)(b) prohibits interference with the freedom to receive and impart information. I respectfully submit that the stance taken by Mokgoro J is apposite considering that it is common cause that in order for an individual to express himself to the fullest, he needs every available information that can help him as to how best to express himself. Again, it should be recognised that section 16 (1) (b) of the Constitution protects the right to receive information, whether it is through visuals or audio it does not matter.

3.3. FREEDOM OF ARTISTIC CREATIVITY

Marcus and Spitz point out that it is 'notoriously difficult' to produce a satisfactory definition of art or, by extension, of artistic creativity. Thus, they propose a wide definition of artistic creativity in order to safe-guard against censorship, because neither the government nor public pressure should be able to mandate standards of content or taste as that would amount to thought control. The advantage of a broad definition of

[273] See the judgment of Mokgoro J in Case v Minister of Safety and Security n 53
[274] Kekana A. 'The State of Free Access to Information Trends in South Africa and internationally'. (www.ifla.org.sg/faife/papers/others/kekana.htm)
[275] Case v Minister of Safety and Security Op Cit n 53

artistic creativity is that it reduces the risk of placing the decision of what is art and what is not for constitutional protection in the hands of the judges.[277] By defining or even classifying creations we would then begin to narrow the types and forms of acceptable creations and inhibit creativity in those areas in general. With more and more creations becoming unacceptable, creativity itself would become less acceptable.

De Waal *et al* are of the view that no distinction should be made, for the purposes of section 16 (1) (c) protection, between the process of making art and the product, 'art'. The concept of freedom of speech pre-supposes that we should be prepared to endure the expressions we do not agree with. Freedom of artistic creativity (even those that are not greatly regarded) should be protected because if the majority of the population do not like the art form, it will naturally disappear by itself[278].

The difficulty with the wider definition is that the courts will be compelled to determine the appropriate level of constitutional protection on a case-by-case basis. According to Marcus and Spitz, this being the position, it becomes increasingly difficult to argue that artistic creativity as a category of speech relates to free and fair political activity, which at least, in as far as courts are concerned enjoys maximum protection.[279] However Fugard has argued that everything that will have the effect of removing the power of the people to think for themselves from the politicians should be protected and because art has that effect, he observed as follows:

> ...Anything that will get people to think and feel for themselves, that will stop them delegating these functions to the politicians, it is important to our survival. Theatre has a role to play in this. There is nothing John Balthazar Vorster and his cabinet would like more than to keep us isolated from the ideas and values current in the free world. These ideas and values find an expression in the plays of contemporary writers. I think we South Africans should see these plays.[280]

Marcus and Spitz, however, argue that artistic creativity is important not only for its contribution to the political process but also because of the role it plays in furthering

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[276] Case v Minister of Safety and Security ibid para 25
[277] Marcus and Spitz Op Cit n 63 p 20-23
[278] www.artformsunlimited.org/definingArt.html
[279] Marcus and Spitz Op Cit n 63 p 20-23

individual self-fulfilment, autonomy and dignity.[281] Thus, the search for political meaning should not be the pretext of regulation, but rather extension of the protection. This could be done by the adoption, by the courts, of a wide and generous understanding of free and fair political activity when determining whether particular work of art relates to political activity.[282]

Arts have been described by a Constitutional Court judge as the 'incident of freedom of expression'[283] and are important both in their own right and because they can enhance our experience and understanding of social institutions and human condition.[284]

De Waal *et al* point out that the need for protection of artistic creativity is self-explanatory. He argues that artists are sometimes responsible for radical criticism of the established norms in society. This simply means that the artists will, in many instances, anger or offend the sensitive (majority) consumers of the works of art.[285] Usually, in heterogeneous and diverse societies, works of art have never ceased to bring about controversies. It seems apparent that the majority of creative pursuits are in those areas deemed taboo by society[286]. In the recent past, a row erupted about the staging of a play which, it was alleged, would bring shame upon the AmaXhosa.[287] At first, the AmaXhosa king was adamant that the play should not be allowed to go on, but after some reassurances that the play was not meant to degrade the AmaXhosa people, they gave in their demand that the play not be staged.[288]

It should be noted that art is a very powerful instrument of communication and does not deserve unjustified inhibitions. According to Marcus and Spitz, it is possible to infer from the express articulation of freedom of artistic creativity that modes of expression that could not readily be described as speech could be specifically protected as artistic

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[280] Fugard 'Verbatim' Sunday Times Millennium Souvenir. 02 January 2000. P 54
[281] Marcus and Spitz Op Cit n 63 p 20-23
[282] Marcus and Spitz ibid 281 p 20-23
[283] Per Ngcobo J in Phillips Op Cit n 98 at para 54
[284] www.artformsunlimited.org/definingArt.html
[285] De Waal Op Cit n 31 p 288
[286] www.artformsunlimited.org/definingArt.html
[287] Mawande J ;Xhosa Monarchy Up in Arms Over Play. City Press. Sunday 08 June 2003 p 8
[288] Mawande J 'Play That Shamed the Xhosas to be Staged' City Press. Sunday 22 June 2003 p 19

creativity.[289] Matter that would seem otherwise not to warrant constitutional protection because of its content may find solace in the protection of artistic creativity and scientific research, if the manner of presentation of such matter justifies that conclusion. Viewed from this angle, the specific mention of artistic creativity offers a safeguard against too narrow an interpretation of the meaning of speech and expression.[290] It is a means to others to show case their creativity.

3.4. ACADEMIC FREEDOM AND FREEDOM OF SCIENTIFIC RESEARCH

In the past, research was stifled by the government of the day. Academics were prosecuted for under-taking research that was not favourably received by those in power.[291] Under the old regime, some academics were debarred from undertaking research while others had to obtain ministerial consent.[292] Thus in order to re-assure and counter the fear that the academics and researchers had, the framers of the Constitution deemed it fit to expressly guarantee freedom of scientific research. At the core of this right, is the freedom of the individual to do research, to publish and to disseminate learning through teaching, without government interference.[293]

In the Japanese case of Tokyo Public Prosecutions v Senda,[294] which I respectfully submit is the approach likely to be adopted by our courts, the court found that academic freedom included the freedom to pursue academic research and to announce the results of such study and that this freedom was guaranteed to all people, including university students. The researchers are guaranteed to teach the results of their works.[295] The interference into scholarly activity and means to make known such activity is prohibited. Venter describes science as a search for the truth which is not fully discovered yet and which is not expected to be fully discovered. Thus the provision does not protect a particular scientific notion or theory, but all activity that may be construed in content and form to be a sincere

[289] Marcus and Spitz Op Cit n 63 p 20-23
[290] Marcus and Spitz ibid n 289 p 20-23
[291] S v Van Niekerk 1970 (3) SA 665 (T); S v Van Niekerk 1972 (3) SA 711 (AD)
[292] Open Universities of South Africa and Academic Freedom 1957-1974. 1974. P 9
[293] De Waal Op Cit n 31 p 228
[294] Tokyo Public Prosecutions v Senda BverfGE 35, 79 cited from Venter F. constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States. 2000. P164
[295] Venter ibid n 295 p 164

attempt to discover the truth. Venter defines research as the intellectual activity aimed at a methodological, systematic and controllable disclosure of new knowledge. Accordingly the definition incorporates both research and teaching.[296]

Academic freedom vests in individuals and not the university.[297] This is so because a university, as an entity, cannot do research. De Waal *et al* submit that the university's decision-making bodies could violate academic freedom, just as the organs of state.[298] Nevertheless, the concept of academic freedom would be hollow indeed without institutions such as the universities.

Section 16 (1) (d) does not grant an enforceable right to the university to force the government to provide the means necessary for the realisation of academic research. This simply means that the government is proscribed from conduct which will render academic research unbearable.[299] It should be pointed out that universities are autonomous entities which must be free from the government's control. Any attempt by the government to influence university decisions could lead to breaches of academic freedom. The preservation of academic freedom is of pressing and substantial importance, for academic freedom is a necessary element to the continuance of a lively democracy.[300] It should be noted that it is only through research that the 'truths' could be explored, and revealed.

3.5. PARLIAMENTARY PRIVILEGE

The constitution guarantees freedom of expression for Cabinet Ministers, Members of the National Assembly[301] and members of the National Council of Provinces (the NCOP).[302] Subject to the rules and orders of the National Assembly and the NCOP or orders of the subcommittees Members of the National Assembly and the NCOP enjoy 'absolute' right

[296] Venter ibid n 296 p 164-5
[297] De Waal Op Cit n 31 p 288
[298] De Waal ibid n 297 p 288
[299] De Waal ibid n 298 p 288
[300] Venter Op Cit n 294 p167
[301] Section 58 (a) of the Constitution
[302] Section 71 (a) of the Constitution

of freedom of speech on the floor of the house. They are not liable to civil and criminal proceedings, arrest or damages for anything they have said in, produced before or submitted to the Assembly, the NCOP or any of their committees[303]. They are similarly not liable for anything revealed as a result of their activities. These privileges extends to Provincial Legislatures.[304]

In the landmark case of De Lille v Speaker of the National Assembly[305] the Cape High Court held that freedom of expression conferred by section 58 of the Constitution was not subject to general limitation under section 36 of the constitution but could be limited only in terms of the rules and orders of the Assembly. According to Marcus and Spitz, freedom of speech in parliament is essential to the political process. The proper functioning of representative democracy depends on Members of Parliament enjoying the privilege to speak openly, robustly and without fear in the Assembly.[306] Any issue that is placed beyond the protection of freedom of speech in Parliament is an issue which cannot be addressed by the political process.

Moreover, if Members of Parliament do not know what they can and cannot say in the House without exposing themselves to liability, they will tend toward self-restraint. That will have dire consequences for the proceedings and debates in Parliament. On that regard in the case of Speaker of the National Assembly v De Lille[307] the Supreme Court of Appeal found that the National Assembly had no legal authority of suspending a member for making a speech which did not obstruct or disrupt the proceedings in the Assembly when such a suspension was not provided for any national legislation nor by the Rules and Orders of Parliament but was nevertheless considered objectionable by others.

[303] Section 58 (b) (i) & (ii) for the Assembly and Section 71 (b) (i) & (ii) respectively
[304] Section 117 of the constitution
[305] De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C)
[306] Chaskalson and Klaaren Op Cit n 63 p3-28C

3.6. LIMITATIONS ON FREEDOM OF SPEECH

Unlike in the United States of America, freedom of expression does not enjoy superior status in South Africa and does not automatically trump other constitutionally protected rights.[308] In Van Zyl v Jonathan Ball Publishers[309] the court held that 'freedom of expression does not trump all other individual rights-it is, like these other rights, subject to reasonable and justifiable limits...'[310] According to Heyman, there is prima facie justification for restricting speech which is directed at infringing the right of another or in fact infringes that right. When freedom of speech infringes the rights of others, it is legitimately subject to restraints unless it has overriding value that should make it protected despite the injury that it causes.[311]

This means that freedom of expression is limited by the rights of others. Conflicting rights have to be balanced against each other to ensure that no right assails the material content of others. In addition to being limited by other fundamental rights contained in the Bill of Rights (for instance the right to dignity), freedom of expression is also limited by section 36 of the Constitution.[312]

Section 36 (2) of the Constitution states that no right in the Bill of Rights may be limited except as provided in subsection (1). Subsection (1) provides that fundamental 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. In the case of Makwanyane the Constitutional Court, per Chalskalson P (as he then was) found that the phrase 'open and democratic society based on human dignity, equality and freedom' had no simplistic explanation. The learned Judge stated:

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[307] Speaker of the National Assembly v De Lille 1999 (4) SA 863 (SCA)

[308] De Waal Op Cit n 31 p132; Van Wyk C 'The Constitutional Treatment of Hate Speech (iv. C1)' XVI Conference of the International Academy of Comparative Law. Brisbane 14th-20th July 2002 P5

[309] Van Zyl v Jonathan Ball Op Cit n 260

[310] Van Zyl v Jonathan Ball ibid n 309 at p 591

[311] Heyman. Hate Speech and the Constitution..1996 p xxiii. See also Section 36 of the Constitution.

[312] Van Wyk ibid n 312 p 5. De Waal terms such limitation 'justifiable infringement.' De Waal Op Cit n 31 p 133

> The limitation of Constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing of competing values, and ultimately an assessment based on proportionality... the fact that different rights have different implications for democracy, and in the case of our Constitution where "an open and democratic society based on freedom and equality" means that there is no absolute standard which can be laid down for determining reasonableness and necessity . Principles can be established but the application of those principles with particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality which calls for the balancing of different interests.[313]

A right in the Bill of Rights may only be limited by 'law of general application' which is precisely formulated and non-arbitrary in its application.[314] This is a minimum requirement for the (justifiable) infringement of a right.[315] In the case of August v Independent Electoral Commission[316] the Constitutional Court found that in the absence of 'law of general application' no justification of an infringement of a right could be successfully mounted.[317] Such law of general application, must as a pre-condition of an infringement of a right, meet the requirements of reasonableness and justifiability.[318]

In De Reuck v Director of Public Prosecutions[319] the Constitutional Court found that a limitation on the possession of child pornography (proscribed by section 27 (1) of Films and Publications Act 65 of 1996, which the applicant claimed was overbroad and thus violated his right to freedom of expression), did not suffer from overbreadth or vagueness but clearly captured expressive conduct objectively hostile to Parliament's intent and thus attacked only the harm at which the prohibition was targeted. The Court found that the protection of children's right to have their dignity protected weighed with the Court in reaching the conclusion. Any law which limits section 16 (1) expression or extends beyond expression envisaged by section 16 (2) would encroach the terrain of protected speech, and could do so only if it satisfies section 36 requirements.[320]

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[313] S v Makwanyane 1995 (2) SACR 1 (CC) at para 104
[314] De Waal ibid n 313 p 135
[315] De Waal ibid n 314 p 135
[316] August v Independent Electoral Commission 1999 (3) SA 1 (CC)
[317] August v Independent Electoral Commission ibid n 316 at para 23
[318] August v Independent Electoral Commission ibid 317
[319] De Reuck v Director of Public Prosecutions CCT 5/03
[320] Van Wyk Op cit n 308 p 13

In the case of National Coalition of Gay and Lesbian Equality v Minister of Justice[321] the Constitutional Court found that the common law offence of sodomy which prohibited gays from giving expression to their sexual orientation placed severe limitation on gay men's right to equality. The court found that the offence of sodomy had the effect of exposing consenting adult males to prosecution, while, if the same act was performed by consenting adult females or by male and female no criminal prosecution was likely to follow. Thus the law applied arbitrarily and discriminately.

A law is reasonable and justifiable if it restricts a fundamental right for reasons that are readily acceptable to an open and democratic society based on human dignity, equality and freedom. Such a law should not inhibit a fundamental right any further than it is necessary to achieve its objective or purpose.[322] To satisfy the limitation test the infringement in question must serve a constitutionally acceptable purpose or advance some important societal need. Similarly in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs[323] the Constitutional Court was of the view that where a legislation did not bear a rational connection between the infringement of the right and the objective or the purpose it sought to achieve, then such limitation could be saved by section 36.[324]

In Phillips[325] the Constitutional Court found that when an infringement of a fundamental right is alleged, the courts will apply a two pronged analysis. The court will first establish whether there has been any conflict or repugnancy between the measure contested and the Bill of Rights. The applicant shoulders the burden of establishing that there was indeed an infringement on his/her ability to exercise the fundamental right. The enquiry is whether the activity complained of falls within the ambit of the right. Here the focus will be on which interests does the right aim to protect, and what is the purpose of the limitation, among others. In short, the spotlight falls on the content, ambit and boundaries of the right in question.

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[321] National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)
[322] De Waal Op Cit n 31 p 142
[323] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) 1 (CC)
[324] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs ibid n 323 at para 56

At the second stage of the enquiry the limitation of the right is tested. It is investigated whether the prima facie infringement on or limitation of the right is reasonable and justifiable in terms of section 36 (1) of the Constitution. In other words, a determination would have to be made as to whether the infringement or the limitation is permissible under section 36 (1).[326] The factors listed in section 36 (1) all have to be taken into consideration in determining whether the right has been reasonably and justifiably limited. Section 36 provides a mechanism which allows the government to undertake certain actions, though prima facie unconstitutional, to serve a pressing public interest. This implies that the importance of a guaranteed right is measured against the strength of the justification for the infringement, namely social good. In order for the limitation to pass the constitutional muster, it must be shown (usually by the government) that the limitation is reasonable and justifiable.

Under the Interim Constitution expression related to political activity enjoyed maximum constitutional protection[327] and this led to a bifurcated guarantee. This meant that under the Interim Constitution, certain rights were valued more than others and thus a higher threshold for their limitation was called for. With regard to freedom of speech Cheadle and Davis are of the view that it was necessity of limiting this right had to be proved as this right was essential for transition to a democratic order.[328] In the final Constitution however, the express protection of freedom of speech related to political activity is not expressly articulated, thus creating a uniform standard of justification. Unlike the Interim Constitution, the Final Constitution and does not distinguish between different levels of constitutional protection afforded to Freedom of expression.[329]

Marcus and Spitz are of the view that even in the absence of an express distinction between a political core and protected periphery it is unlikely to mean that all expression,

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[325] Phillips Op Cit n 98 para 23 et seq

[326] Section 36 provides that 'the rights in the Bill of Rights may only 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...'

[327] Section 15 (1) (b) of the Interim Constitution

[328] Davis D *et al* Fundamental Rights in the Constitution: Commentary and Cases, 1996 p316

[329] Section 33 (1) (b) (bb) of the Interim Constitution provides that 'the rights in the Bill of Rights may be limited by law of general application, provided that such limitation – shall not negate the essential content

regardless of its content, is treated the same for purposes of section 36 analysis. Marcus and Spitz submit the courts will appropriately develop a judicial distinction between political core of freedom of expression because it implicates directly the most important values which the guarantee is designed to protect, and expression which is somewhat removed from this core.[330]

According to these authors the core values of freedom of expression will include the search for political, artistic and scientific truth; the protection of individual autonomy and self-development and promotion of participation in the democratic process. The distinction between the core and periphery will have a major influence in the manner in which courts will apply the factors listed in the limitation clause. This simply means that a rigorous and searching scrutiny will be applied to restrictions on expression which relate to core values. A lower standard of justification will probably be applied to restrictions on expression which is somewhat remote from these core values.[331]

3.7. SUMMARY

This chapter examined the categories of expressions enumerated in section 16 (1) of the constitution and the limitation of freedom of expression. It has been argued that the expressly mentioned categories of expressions in section 16 (1) do not necessarily enjoy a greater protection than other expression which are not expressly enumerated. It has been argued that these categories do not define the core of section 16 (1) protection. It has been argued that expressions which have the potential to violate the rights of others or in fact violates such rights must not enjoy constitutional protection as well.

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of the right in question,and provided further that any limitation to- any right which relates to free and political activity ,- shall in addition to being reasonable, also be necessary.

[330] Marcus and Spitz Op cit n 63 p 20-57

[331] Marcus and Spitz ibid n 330 p 20-57

CHAPTER FOUR: AN EVALUATION AND ASSESSMENT OF HATE SPEECH PROVISION AND CONSIDERATIONS FOR OR AGAINST ITS PROHIBITON.

> Until the philosophy which hold one race superior and another inferior is finally and permanently discredited and abandoned everywhere is war...That until that day the dream of lasting peace... will remain but a fleeting illusion to be pursued but never attained[332]

4.0. INTRODUCTION

Freedom of speech, though of great value, is not absolute, and some domains of speech are more valuable than others. To insist that all speech, no matter its nature, should enjoy equal protection is patently absurd.[333] This is so because speech is the pre-eminent mechanism by which social meaning is derived. It forges collective identity. Social harms, the perpetuation of stereotypes and the justifications for social distinctions are never separated from absolute freedom of speech. Speech, if left unabated, has the tendency to buttress and to perpetuate social, political and economic inequality.

According to Pimstone, freedom of expression should be perceived as a 'de-individualised' notion, because social meaning (which is one of the many justification for freedom of speech) is forged in a dialogical process and as such expression is an intersective right not limited to the speaker, it implicates both the speaker and the listener.[334] Such speech may be unbearable to the listener to the extent that it causes harm. This kind of speech may inflict psychological harm, which is morally on par with physical harm, provided the target cannot avoid being exposed to it (more especially when the target belongs to a vulnerable minority group or group that was previously denigrated). Thus, because the infliction of physical pain is proscribed, so too, must be speech which cause psychological harm.[335] Mill asserted that speech loses its immunity

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[332] Bob Marley,www.thirdfield.com/html/lyrics/war.html
[333] Sarduski Op Cit n 64 p 36
[334] Pimstone Op Cit n 160 p 3
[335] Heyman Op Cit n 311 p 454

when it instigates some harmful action.[336] Speech that is likely to instigate some mischievous act (or psychological offence), accordingly loses constitutional protection when the circumstance in which it is expressed constitutes harm.[337] Section 16 (2) of the Constitution makes it vividly clear that expression that causes harm is constitutionally proscribed.

4.1. THE BACKGROUND TO SECTION 16 (2) OF THE CONSTITUTION

Apartheid South Africa's statute books were full of prohibitions, in various forms, of incitement to racial hostility. These hate speech regulations were only a pretext to silence the opponents of apartheid rule. 'Such dire history of the brutal manipulation of law', according to Pimstone, 'should at least [have made] us wary of advancing the cause of modifying expression restriction on grounds of hatred or hostility, by incorporating a hate speech exclusion in the constitution.'[338] In the process leading to the making of the Interim Constitution, it is perhaps, according to Johannessson, not surprising that the draft ANC Bill of Rights contained a very extensive provision for control of hate speech.[339] The ANC has long favoured the regulation of hate speech. The Freedom Charter of 1955[340] had a provision which declared that 'the preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime.'[341] However neither the various drafts coming out of the multi-party negotiating process nor the final version of the Interim Constitution directly addressed the issue of hate speech. Neieser is of the view that the omission of the hate speech proposal from the constitution finally agreed upon, probably reflected 'the disagreements' within the ANC about the appropriateness of banning hate speech.' [342]

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[336] Heyman ibid n 335 p 270
[337] Heyman ibid n 336 p 270
[338] Pimstone Op Cit n 160 p 7
[339] Johannesson J 'A Critical View of the Constitutional Hate Speech Provision' SAJHR 137
[340] The freedom charter was or still is the African National Congress important instrument. It contains the party's ideals and objectives about South Africa. It was adopted at the Congress of the People in Kliptown in 1955 and it has since been, until may be a democratic South Africa was born, an inspirational, influential and instructive document of the African National Congress.
[341] Johannesson Op Cit n 339 p 137
[342] Johannesson ibid n 3419 p 137

The Technical Committee on Fundamental Rights During the Transition made no reference to the desirability or otherwise of an explicit hate speech clause in their report.[343] According to Johannesson, the Committee found racial equality to be adequately addressed by the relative primacy of equality over expressional rights in the statements of the Interim Constitution's general purpose and the clauses authorising limitations on the fundamental rights and setting forth the rules of interpretation.[344]

The position changed in the Final Constitution. The first draft of the Final Constitution on the section of hate speech along the lines of the final version of Section 16 (2) was included in the freedom of expression provision. Johannesson points out that the change does not seem to have been motivated by any major controversy during the operation of the Interim Constitution. He says that the motivation for section 16 (2) has its roots in the desire by the ANC to make a political statement to its constituency that hate speech would not be tolerated.[345] In their preliminary submission to the Theme Committee responsible for the drafting of the freedom of expression provision, the ANC motivated the addition of hate speech in the following words:

> The right to freedom of expression is closely related to free political activity. It is one of the foremost fundamental civil and political human rights that is universally accepted. It is advisable that the right should be reformulated to provide constitutional protection from racist, sexist or hate speech calculated to cause hostility and acrimony, and racial, ethnic or even religious antagonism and division.[346]

The ANC contended that hate speech provision would send 'a powerful message' that that type of behaviour would not be accepted in a democratic society where equality and human dignity were fundamental. They were supported by the Freedom Front and the African Christian Democratic Party. They were opposed in this regard by the Democratic Party which considered a specific limitation in the Bill of Rights undesirable.[347] They were of the view that such limitation was 'unhealthy' because it could be used by future

[343] Johannesson ibid n 342 p 137
[344] Johannesson ibid n 343 p 137
[345] Johannesson ibid n 344 p 137
[346] Johannessson ibid n 345 p 137. The Freedom Charter provides that 'all national groups shall be protected by law against insults to their race and national pride'.
[347] Johannesson ibid n 346 p 137

governments for their ulterior motives. Dene Smuts of the Democratic Party, stated that 'it is healthier for this type of speech to be heard and the consequences dealt with. But in an open democracy everyone has the right to express their views.'[348] They were supported by the National Party.[349]

Pimstone is of the view that the hate speech provision must be understood to give effect to the totality of the equality clause.[350] This could deduced from the fact that, as was pointed out before, hate speech impacts negatively largely (if not only) on those who were previously denigrated.

4.2. THE INTERNAL LIMITATIONS OF 16 OF THE CONSTITUTION

In addition to the limitation of the right to freedom of expression by section 36, this right is also internally limited[351] by section 16 (2).[352] Section 16 (2) defines the boundaries beyond which the right in section 16 (1) do not extend. This simply means that section16 (2) has the effect of removing a definable category of speech from section 16 (1) protection. This means that the right to freedom of expression is internally limited.[353] Expression and speech guaranteed by section 16 (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; and (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. These forms of expression are excluded from constitutional protection by section 16 (2) because they have the potential to impact adversely on the security of the country and dignity of others and cause them harm.[354]

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[348] Johannesson ibid n 347 p 138

[349] Johannesson ibid n 348 p 138

[350] Pimstone Op Cit n 160 p 6. It should be noted that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits hate speech.

[351] Pimstone points out that section 16(2) is not an internal limitation, but an internal modifier or demarcation. He terms it 'excision'. Pimstone ibid n 350 p 10. On the other hand Johannesson argues that section 16 (2) is not a modifier or aid to determine the content of the right but is a limitation. He gives an example of the words 'peaceful and unarmed' in section 17 (right assembly) as modifiers. Johannesson Op Cit n 339 p 136

[352] Section 16 (2) provides that the right to freedom of expression does not extent to (a) propaganda for war; (b) incitement to cause imminent violence; (c) advocacy of hatred that is base on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

[353] Van Wyk Op Cit n 308 p 5

[354] Van Wyk ibid n 353 p 6

In the case of S v Mamabolo[355] the court found that the categories of expression enumerated in section 16 (2) were not to be regarded as constitutionally protected speech. The provision determines which expressions are not to be regarded as constitutionally accepted. The provision, by barring some defined forms of expression, acknowledges that not all forms of expression are worthy of constitutional protection because, *inter alia*, it has the potential to impinge adversely on the dignity of others and cause them harm. The Constitution is founded on the values of dignity, equal worth and freedom of every person, and these objectives should be given effect to. Accordingly, expressions expressly enumerated in section 16 (2) are excluded from the realm of protected speech.

Pimstone points out that the Constitution, by prohibiting expression in section 16 (2), forbids the adoption of a sacrificial approach to the rights to dignity and equality, order within the republic and the security of the state . The insertion of section 16 (2) in the Constitution has rendered the debate of whether or not to proscribe hate speech unnecessary.[356] According to Burns, there is no need to debate issues such as whether hate speech should be heard and the consequences dealt with, or whether censorship should be applied, with the accompanying danger that the repressed ideas may be driven underground and sympathy for their thoughts increased and resentment towards the beneficiaries of the prohibition fuelled.[357]

By excluding advocacy of hatred and propaganda for war from constitutional protection, South Africa has implemented various international instruments which demand that hate speech and propaganda for war should be prohibited, for instance the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966) among others. South Africa has signed and ratified these international instruments, which, it will appear, have a deep influence on the South African Constitution and its interpretation. Section 39 of the Constitution enjoins a court, tribunal or forum interpreting the Bill of Rights to consider international law.[358]

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[355] S v Mamabolo Op Cit n 12
[356] Pimstone Op Cit n 160 p 4
[357] Van Wyk Op Cit n 308 p 6
[358] Van Wyk ibid n 357 p 6

Section 16 (2) does not mandate the parliament to introduce hate speech legislation, but leaves it within the discretion of parliament to pass legislation regulating such speech. Such legislation, it is submitted, would be beyond general limitation analysis in terms of section 36, since it would not amount to a limitation of the right contained in section 16 (1). This means that a statute prohibiting hate speech as defined in the Constitution cannot be subjected to a freedom of expression challenge, because there is no constitutional right of this nature.[359] Put differently, section 16 (2) would operate as a shield, immunising hate speech legislation from constitutional challenge. Pimstone maintains that the critique is overstated because the courts will still be called upon to ensure that the impugned expression corresponds with what section 16 (2) seeks to prohibit, however, he concedes that that exercise could not be amounted to performing a full-scale limitation exercise.[360]

It is clear from the outset that the proscription of 'incitement of violence', 'propaganda for war' and hate speech in section 16 (2) could never be said to be a violation of any constitutional right. However, Johannesson submits that section 16 (2) is a serious denigration of the right to freedom of expression and may be abused by the government to restrict opposition speech.[361] Hate speech is moved beyond the constitutional scrutiny to the area of parliamentary sovereignty.[362] This means that parliament is given the latitude to pass hate legislation, which would not be subject to section 36 analysis. According to Johannesson, the effects of the internal limitation not only affects the subsequent limitation analysis, but may even render it nugatory. He points out that that section has the effect of removing the entire area of speech beyond the ambit of the right to freedom of speech, and thus such exclusion would never be subjected to the limitation enquiry.[363] He submits that he would have preferred a carefully crafted legislation subject to constitutional review,[364] instead of the internal limitation that currently pertains.[365]

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[359] Van Wyk ibid n 358 p 7
[360] Pimstone Op Cit n 160 p 10
[361] For instance on several occasions the President has accused and branded certain sects in our society of racism. The opposition parties on the hand maintains that the President is shifting the poles. They claim that whenever the government is criticised of corruption and ineptitude the President plays a race card. This is a clear indication that the government may stifle opposition based on the prohibition of hate speech.
[362] Johannesson Op Cit n 339 p 138
[363] Johannesson ibid n 362 p 139-140
[364] Johannesson ibid n 363 p 136

Johannesson abhors the provision because if a person was to be prosecuted under a statute which targets speech within section 16 (2) ambit, such person would not be able to raise as a defence that what he was being charged under is an unreasonable and unjustifiable restriction on his constitutional guarantee of freedom of expression. The only available avenue would be for the accused person to prove that his speech was not propaganda for war or does not incite to cause harm as contemplated by section 16 (2). If the accused could prove that his expression does not fall under section 16 (2) and therefore is protected speech under section 16 (1) then the two-pronged limitation analysis would be embarked upon. In such a case, the speech would only be outlawed provided that the limitation of such speech is justified and reasonable in an open and democratic society. [366]

Johannessson is critical of the inclusion of the internal limitation in the freedom of speech provision. He is of the view that if section 16 (2) was meant to introduce and enforce hate legislation, it is superfluous. Section 16 (2) goes far beyond that which is necessary. He says that that could have been attained by a provision which could have subjected hate speech to limitation clause enquiry.[367] Pimstone points out that the internal limitation could be apposite in the US jurisprudence, because of the lack of the limitation clause in her constitution.[368]

Burns, on the other hand, welcomes the internal limitation as a clear statement that hate speech will never be tolerated in South Africa. She points out that hate speech is often regarded as synonymous with expressions of racial hatred and racism and has a destabilising and divisive effect on society. It assails the dignity of the individual and encourages discrimination between groups which may ultimately culminate in violence and a breakdown in public order given the discriminatory past of this country. She is of the view that hate speech, not so much amounts to hostility between individuals, but rather involves groups.[369]

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[365] Van Wyk Op Cit n 308 p 7
[366] Johannesson Op Cit n 339 p 140
[367] Johannesson ibid n 366 p 141
[368] Pimstone Op Cit n 160 p 10
[369] Van Wyk Op Cit n 368 p 7. It is trite that we may change our features as often and as differently as we can, but one thing that commands permanency is our race.

4.3. THE ANALYSIS OF SECTION 16 (2) OF THE CONSTITUTION

4.3.1. 'PROPAGANDA FOR WAR'

De Waal *et al* are of the view that by propaganda for war, the provision refers to acts of external aggression, and not internal resistance to the government of the day. The latter may be covered by the term 'incitement of imminent violence'. De Waal *et al* are convinced that the formulation of this exception has been largely influenced by International law. They point out that the exception has been taken from the International Covenant on Civil and Political Rights of 1966.[370] Article 20 (1) of that Covenant provides that 'any propaganda for war shall be prohibited by law.'[371] De Waal *et al* submit that that requires an active proscription of war propaganda, possibly making it an offence. They are of the view that section 16 (2) (a) is insufficient to give effect to the requirement of Article 20(1) of the International Covenant on Civil and Political Rights.[372]

4.3.2. 'INCITEMENT OF IMMINENT VIOLENCE'

De Waal *et al* point out that the 'incitement of imminent violence' provision has its origins in the US First Amendment jurisprudence. In Bradenburg v Ohio[373] the court held that state laws may not criminalise the advocacy of the use of force or civil disobedience, except where such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action.

The court found that 'the mere abstract teaching of the moral propriety or even moral necessity to resort to violence is not the same as preparing a group for violent action and steering it to such action. Our provision, however, does not require the incitement to be likely to lead to violence. Nevertheless, De Waal *et al* point out that it will be practically impossible to determine whether a particular expression constitutes incitement of

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[370] De Waal Op Cit n 31 p 289
[371] Lerner N. Is There A Right to Hate Speech.
www.wcl.american.edu/PUB/humright/brief/v3i2/lerner32.htm p 1
[372] De Waal Op Cit n 31 p 289
[373] Bradenburg v Ohio 395 US 444 (1969)

imminent violence without having regard to the possible effects it may have on its audience. The context within which the statement was made is of grave importance.[374]

4.3.3. THE PROHIBITION OF HATE SPEECH

Section 16 (2) (c) of the Constitution is directed at the exclusion of the advocacy of hatred based on race, ethnicity, religion and gender.[375] The Constitutional Court has defined this provision as hate speech and thus falling outside the protected ambit of freedom of speech.[376] Marcus and Spitz broadly define hate speech as 'expressive conduct which insults a racial or ethnic group, whether by suggesting inferiority or by effecting exclusion.'[377] A narrower definition would view hate speech as expression which constitutes an incitement, particularly to racial hatred.[378] According to Floyd Abrams, hate speech is speech that cause considerable pain and offers little in the way of social benefit.[379] The Canadian Supreme Court defined hate propaganda to include expression which encourages' derision, hostility and abuse [based on race, gender, religion and ethnicity].'[380] Gutto, on the other hand, maintains that hate speech is torturous in its nature. This, he claims, could be deduced from the fact that international instruments dealing with torture define it broadly enough to include situations of propagation of speech that is inhuman.[381].

The prohibited categories (in the hate speech provision) are specified as particularly noxious grounds of differentiation. These grounds were embedded in the apartheid history of this country. They were institutionalised and used as a means of exclusion of others from playing any significant role in the society and to regard them as sub-human.[382]

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[374] De Waal Op Cit n 31 p 290
[375] Pimstone Op Cit n 160 p 15
[376] Islamic Unity Convention v Independent Broadcasting Authority Op Cit n 1 p 309
[377] Marcus & Spitz Op Cit n 63 p 20-47
[378] Marcus & Spitz ibid n 377 p 20-48
[379] Abrams Op Cit n 15
[380] R v Keegstra [1990] 3 SCR 697
[381] Gutto Op Cit n 11 p 6 Article 1 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture 'as any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person...'
[382] For instance, Hendrick Verwoerd the then Minister of the Department of Native Affairs once declared that 'If a Native in South Africa... is being taught to expect to live his adult life under a policy of equal

Thus, expression based on those factors may tend to enhance the vulnerability of groups who were subjected to subordination in the past, to de-autonomise, exploit, marginalise and justify harm inflicted to them.[383] In Islamic Unity Convention case[384] the court found 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 a non-racial and non-sexist society based on human dignity and the achievement of equality.'[385]

Unlike the equality clause, De Waal *et al* point out these categories are 'numerus clausus'. They are a closed list. This means that grounds analogous to the prohibited categories will not be considered when dealing with hate speech. This is so because exceptions[386] like those provided for in section 16 (2) are to be restrictively interpreted.[387]

Pimstone is of the view that because the drafters of the Constitution deliberately chose to exclude additional grounds in the hate speech provision, the court's interpretation should be thus confined to these expressly mentioned grounds. The learned author maintains that these categories were selected because of their relevance, both to our history of discrimination and more fundamentally to the role expression played in pursuing such discrimination. These four factors have been 'singled out' for their particular expressive resonance.[388] However, these categories are different. They have differing links to discriminatory form and extent; they reflect variable statuses of disempowerment and marginalisation[389] as well as differential and responsive claims to social identity.[390] However, according to the South African Human Rights Commission these categories are interrelated and had to be read conjuctively.[391]

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rights he is making a big mistake... there [was] no place for the native in the European community above certain forms of labour.' Harrison J. The White Tribe of Africa. 1981. P 190-1

[383] Pimstone Op Cit n 160 p 14

[384] Islamic Unity Convention v Independent Broadcasting Commission Op Cit n 1

[385] Islamic Unity Convention case ibid n 384 at 309

[386] Section 16 (2) is an exception to the general freedom of expression provision, that is section 16 (1)

[387] Van Wyk Op Cit n 308 p 9

[388] Pimstone Op Cit n 160 p 15

[389] For instance black women had to bear the burden of being discriminated against both on the basis of race and gender.

[390] Pimstone Op Cit n 160 p 15

4.3.4. THE PROHIBITED CATEGORIES

4.3.4.1. PROHIBITION OF HATE SPEECH BASED ON RACE

Race is defined by the Oxford dictionary as 'any of the great divisions of human kind with certain inherited physical characteristics in common; or a number of people related by common descent'[392]. Ineke Boerfijn argues that the term 'race' is itself discriminatory. She contends that 'there is only one human race and every distinction on the basis of race is scientifically inaccurate and morally unjust.[393] The definition of race found in the Oxford dictionary will be adopted in this study. Prohibition of hate speech based on race has been specifically excluded from the constitutional protection because it was the primary category of discrimination in the past[394]. All apartheid legislations had a racial basis. It was a determining factor to access resources and opportunities. This boils down to mean that in the past, the majority of the people in the country were denied opportunities merely because of their skin colour. Racism in all its expressive forms served to buttress the policy of apartheid, providing justification for racial oppression. The ernomous socio-economic disparities which were a feature of apartheid have continued well into democracy. This feature (of inequality) was clearly perpetuated along racial lines.

In the case of Moseneke v The Master of the High Court[395] the Constitutional Court found such a situation abominable. In this case the applicants challenged the provision of the Native Administration Act 38 of 1927 which provided that the estate of deceased black people were to be administered by Magistrates' Court as opposed to estates of white people which were to be administered by the Master of the High Court. The Constitutional Court found laws or behavioural patterns which had racial bias to be

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[391] Freedom Front v South African Human Rights Commission Op Cit n 29

[392] Oxford Newpaperback Dictionary. Third Edition. 1988

[393] Coliver (eds) Striking a Balance: Hate Speech, Freedom of Expression and Non Discrimination. 1992 p 201

[394] See Freedom Front v South African Human Rights Commission Op Cit n 29; South Human Rights Commission v SABC 2003 (BCLR) 92 (BCCSA)

[395] Moseneke v The Master of the High Court 2001 (2) SA 18 (CC)

> Antithetical to the society envisaged by the constitution. It is an affront to all of us that people are still treated as 'Blacks' rather than as ordinary persons...and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.[396]

Pimstone asserts that hate speech will continue to discriminate and disadvantage the previously disadvantaged and it is particularly objectionable to constitutional norms.[397] In Islamic Unity Convention[398] case the court found that any form of expression which had the effect of undermining the basis of the Constitution (equality and the protection of dignity) could not be tolerated. Van Wyk is convinced that if race is given a meaning in accordance with the definition of racial discrimination in Article 1 (1) of the Convention on the Elimination of All Forms of Racism (1965), that is colour, descent or natural or ethnic origin, it will include elements of a social and cultural nature. If this definition is to be accepted as the correct one, Van Wyk argues that language groups and groups of specific national origin would be included under the category of race.[399]

4.3.4.2. PROHIBITION OF HATE SPEECH BASED ON ETHNICITY

Van Wyk describes ethnicity as relating to races or large groups of people classed according to common traits and customs. The learned author is of the view that this definition is wide enough to include language and national groups.[400] According to Pimstone, ethnicity was 'intricately linked' to race under apartheid's strategy to divide and rule. He is of the view that the apartheid state's concept of separate development (along racial and ethnic lines) was meant to expel blacks from 'South Africa' by denying them the right to citizenship and land.[401]

Pimstone points out that ethnic identity has 'taken a substantial force' in this country and thus the need to prevent the ignition of differences based on ethnic lines.[402] Ethnicity was

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[396] Moseneke v Master of the High Court ibid n 395 at para 21
[397] Pimstone Op Cit n 160 p 15
[398] Islamic Unity Convention case Op Cit n 1
[399] Van Wyk Op Cit n 308 p 9
[400] Van Wyk ibid n 399 p 9
[401] Pimstone Op Cit n 160 p 15
[402] Pimstone ibid 401 p 15

manipulated by the apartheid regime to implant contempt and hatred among the ethnic groups. The different (black) ethnic groups were indoctrinated to see each other (members of different ethnic groups) as lesser human beings.[403] Thus, the drafters of the constitution saw it befitting to proscribe hate speech based on ethnicity.[404]

4.3.4.3. PROHIBITION OF HATE SPEECH BASED ON GENDER

Gender traditionally refers to categorisation based on sexual appearance, that is to male and female. [405] Van Wyk questions (in the light that the equality clause expressly mentions sex and sexual orientation) whether this categorisation will include sex and sexual orientation.[406] According to De Waal *et al,* forms of hate speech contained in section 16 (2) will not extend to analogous grounds, such as sex, sexual orientation and homophobic speech.[407]

Burns on the other hand, is of the view that the concept of gender will include sexual preference or sexual orientation. Although she concedes that the wording of the equality clause indicates that the drafters of the Constitution were at liberty to adopt a similar approach in section 16 (2) by expressly including categories such as sex and sexual orientation, she nevertheless supports her argument by pointing out that the judicial approach to the interpretation of the Constitution generally and the Bill of Rights in particular calls for a generous and purposive approach 'primarily concerned with the recognition and application of constitutional values and not with finding the literal meaning of statutes' which 'requires the courts to play a pro-active role in changing society in accordance with the aims and spirit of the Constitution.'[408] Thus, according to Burns, hate speech directed at lesbians and gays will also be prohibited.[409]

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[403] For instance, during apartheid era, in a Zulu newscast the news reader while relating the accident that had occurred said: 'in a train accident that occurred in Johannesburg, two people and a Shangaan were injured.' Khumalo B. 'Radio'. Sunday Times Milllenium Souvernir. O2 Janaury 2000. P 58

[404] It could also be submitted that because of our past certain places were deliberately concentrated with members of particular ethnic group and the members of minority ethnic group in such places could be subjected to unabated ethnic slurs.

[405] What's the Difference Between Gender and Sex?www. searchhere.com/

[406] Van Wyk Op Cit n 308 p 9

[407] Van Wyk ibid n 406 p 9

[408] Van Wyk ibid n 407 p 10

[409] Van Wyk ibid n 408 p 10

Van Wyk, on the other hand, is convinced that, taking into account the judgment in Islamic Unity Convention[410], preference must be given to the more restrictive interpretation propagated by De Waal *et al*, namely that analogous grounds of hate speech will not be covered by section 16 (2).[411]

Pimstone is of the view that for pornography to perpetuate gender discrimination, it must depict women in the manner that denigrates them. He points out that there has been 'vociferous' debate over whether pornography is a type of hate speech. In determining whether pornography falls within the ambit of hate speech clause, we are required not only to identify pornography as amounting to hate speech, but we must enquire whether such hate speech constitutes incitement to cause harm. Pimstone points out that the generalised notion of harm adopted in R v Butler[412] to justify pornography might not tally with section 16 (2) more rigorous requirement of incitement to cause harm.[413] According to Pimstone, the requirement of incitement to cause harm 'suggests if not intention, then at least a clear attempt to provoke the committal of harmful acts and it makes more apparent the element of causation.'[414]

4.3.4.4. PROHIBITION OF HATE SPEECH BASED ON RELIGION

The inclusion of hate speech based on religion in the categories of speech prohibited by section 16 (2) (c) reflects a recognition of the insidious manipulation of christianity under apartheid. 'All facets of life were subject to the dictates of calvinist morality; a set of

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[410] In that case at issue was the constitutionality of section 2 (a) of the Code of Conduct for Broadcasting Services (Schedule to the Independent Broadcasting Authority Act 153 of 1993). The section provided thus: 'Broadcasting licensees shall...not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population or likely to prejudice the safety of the state or the public order or the relations between sections of the populations.' However the argument in court was centred around the portion 'likely to prejudice relations between sections of the population', and in giving judgement the court found that it will not be appropriate to deal with the constitutionality of the entire section instead it focused solely on the argued portion of the section and found it to be unconstitutional.

[411] Van Wyk Op Cit n 308 p 10

[412] R v Butler [1992] 8 CCR (2ND)1. In casu the Canadian Supreme Court applied the 'community standard of tolerance' test. The court found that the test not concerned with what the Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to.

[413] Pimstone Op Cit n 160 p 16

[414] Pimstone ibid n 413 p 16

norms which formed a vigorous component of the ideology of apartheid.'[415] All other religions were rendered inferior. The only sensible conclusion that could be deduced from this was that the adherents to other religions were outsiders and not members of the political community. The exclusion of other religions from the mainstream, or according to Pimstone 'religious marginalisation' was either incidental or coincidental to racial discrimination, social exclusion and political [dis]empowerment.[416] Religion was not *per se* a matter of faith and belief, but it had racial connotations.[417]

Pimstone is of the view that the inclusion of hate speech based on religion in the proscribed categories is of great importance because conflictual relationships between faiths have the potential, via speech, to be exacerbated. The language of religious intolerance is particularly pernicious. It preys on the vulnerable status of the minority religious communities. In his dissenting judgment, Sachs J, in the case of Prince v The President of the Law Society of the Cape of Good Hope[418] said:

> Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct.[419]

Pimstone is of the view that, because of the exclusion of nationality in section 16 (2) (c), some religious slurs may be camouflaged on nationality. He gives an example of anti-semitic rhetoric posing as anti-zionist expression. The courts should be on their toes to guard against such situation. According to the approach adopted by Burns anti-semitic slurs (or any other factor analogous to those excluded by section 16 (2) (c)) would be prohibited. However, according to the restrictive approach adopted by De Waal *et al* any expression based on grounds analogous to those mentioned in the hate speech clause will not be excluded from the constitutional protection.

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[415] Pimstone ibid n 414 p 16
[416] Pimstone ibid n 415 p 16
[417] This could be deduced from the fact that white and black congregants of the same church (at least by name) could not attend under the same roof.
[418] Prince v The President of the Law Society of the Cape of Good Hope 2002 (2) SA 749 (CC)

4.3.4.5. ADVOCACY OF HATRED

According to Van Wyk, the term 'advocacy' implies more than merely a statement, but includes an element of exhortation, pleading for, supporting or coercion. The phrase 'advocacy of hatred' signifies an intense communication of 'antipathy, a kind of visceral contempt that is emotionally heightened and is not merely ordinary hostility. Such hostility should have some persecutorial, coercive or threatening quality. Van Wyk defines hatred to mean 'an intense, passionate or active dislike, ill-will, malevolence, or feeling of anti-pathy or enmity connected with a disposition to injure.'[420] The advocacy of hatred certainly goes beyond ill-feeling or dislike, plain insult, repudiation or even contempt. In Freedom Front v South African Human Rights Commission[421] the tribunal found that

> Hatred is not a word of causal connotation. To promote hatred is to instil enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies.[422]

Section 16 (2) proscribes only one kind of advocacy- that of hatred. Other forms of antipathy falls outside the contours of the limitation. Van Wyk is of the view that that the concept 'advocacy of hatred' is a bit imprecise. Such inexactitude will render it difficult for the judiciary to construct a clear test in the interpretation of the hate speech provision. The contours of the unacceptable speech are very difficult to identify. This would most probably, lead to judicial-subjectivity and therefore possible definitional overbreadth.[423]

Pimstone, on the other hand, advises that the courts should not be influenced by the tenor of the expression, but should look at the effect. He points out that hatred need not be conveyed through exaggerated or emotive expression. Hate expression may be conveyed in a detached and unemotional 'harboured communicative form'. He concludes that the

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[419] Prince v The President of the Law Society of the Cape of Good Hope ibid n 419 at para 145
[420] Van Wyk Op Cit n 308 p 8
[421] Freedom Front v South African Broadcasting Corporation Op Cit n 29
[422] Freedom Front v South African Broadcasting Corporation ibid n 421 at p 8
[423] Pimstone Op Cit n 160 p 16

absence of sentimental or passionate quality should not pose severe problems in ascertaining whether the expression is indeed hateful.[424]

Hate speech may be based on pseudo-scientific facts grounded on the differences in human beings. For instance, writings on racial supremacy represents some prima facie detachment. Nevertheless a thorough assessment of expressive context and intention will reveal hate clues.[425] An association with movement related to racial supremacy will not *per se* amount to hate speech. For instance, the collection of Nazi or fascist regalia or memorabilia does not amount to hate expression.[426]

4.3.4.6. INCITEMENT

Pimstone is of the view that the omission of the element of intention in the hate speech provision will create problems for the courts. Moreover, if section 16 (2) (c) is read so as to exclude intention, it allows parliament to legislate a strict liability hate crime into being.[427] In many instances, this has been the response of several countries[428] to the demands of Article 4[429] of the Convention on the Elimination of All Forms of Racial Discrimination. However, Pimstone is of the opinion that intention could be read into section 16 (2) (c) by virtue of the phrase 'to cause harm'. If these words were absent and the formulation of the provision read like this: 'incitement to harm' then the claim for an inferred element of intention would have been diminished. Pimstone convincingly argues

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[424] Pimstone ibid n 423 p 17

[425] Pimstone ibid n 424 p 17. (n 3 above). In his essays entitled (1) 'Manners' and (2) 'Laws' Thomas Jefferson first paints a picture whereby slavery had to be seen as evil. He purports to be bemoaning the degrading, inhuman and cruel treatment that befalls the Negroes. In his second essay he clearly articulates why Negroes are innately inferior to their White counterparts. For instance he claims that Negroes were better suited to manual work because of their tolerance to heat. A factor that could have been clearly exploited to enslave the Negroes.

[426] Pimstone ibid n 425 p 18. That fact is made clear by the fact that some extremists have been seen carrying the old apartheid flag at some national events like the national games although rebuked by many, their expressive activity falls short of what is envisaged by section 16 (2).

[427] This will run against section 35 (3) (h) of the constitution which guarantees to every accused person the right to be presumed innocent.

[428] For instance the Racial Discrimination Act in Australia; the Strafgetzbuch (the German Criminal Code) of Germany; the Penal Law of Israel; the Criminal Code of Canada.

[429] Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination mandates state-parties to the Convention to pass legislations prohibiting hate speech.

his case by pointing out that incitement directed at causing harm 'automatically' brings with it some element of 'intentionality.'[430]

Pimstone asks how it can be said that one incites to cause something if there is no notion of intent or willingness. Pimstone points out that the words 'to cause' can also support the case for objective likelihood.[431] Incitement means to call for, to urge, or persuade, to rouse, stimulate, put in motion to move to action' to spur or to move on'.[432] Incitement connotes an element of persuasion by which some measure of reluctance or hesitation on the party incited is overcome, or which seeks to influence the mind of another to commit a crime.[433]

Pimstone argues that incitement should be interpreted to mean directed to cause the types of harm mentioned above, and not so much to encourage the audience to cause harm to the targets of the hate speech.[434] It is the speech itself, and not what an audience may do in response to it that causes the harm.[435] In South African Human Rights Commission v South African Broadcasting Corporation[436] the tribunal held that the fact that Indians did not suffer any attack did not attenuate the impact of hate speech on that group. The tribunal found that the song 'Amandiya' tended to polarise around racial divisions and the words of the song had a strong hate element. The tribunal was of the view that the song had the potential to cause Zulus to take up arms against Indians because of their perceived wickedness (worse than the boers during apartheid).

The test to determine whether speech amounts to hate speech is objective. It is not dependent on the subjective intent of the speaker. This approach was also adopted by the

[430] However this argument ignores the fact that harm might be caused even in the instances were the speaker did not intend to cause harm. According to Pimstone's interpretation of the phrasing 'negligent hate speech' is not necessarily excluded from the realm of the constitution. According to this interpretation the speaker must not only persuade, but steel the audience to take actions. If it was not the intention of the speaker to steel the audience to take action his speech will enjoy constitutional protection, even if the audience are thus steeled. Pimstone Op Cit n 160 p 17
[431] Pimstone ibid n 430 p 17
[432] Van Wyk Op Cit n 308 p 11
[433] Van Wyk ibid n 432 p 11
[434] Pimstone Op Cit n 160 p18
[435] Pimstone ibid n 434 p 18
[436] South African Human Rights Commission v South African Broadcasting Corporation Op Cit n 394

South African Human Rights Commission[437] appeal tribunal. In *casu* the tribunal found that 'the tone, content and context of the expression will determine whether it amounts to advocacy of hatred. 'Calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred that constitute incitement, unless the context clearly indicates otherwise.'[438] Pimstone argues that the 'harm principle' offers a narrower test than the mere stirring up but wider than incitement to violence.[439]

Pimstone argues that every idea is an incitement, but for expression to be excluded from section 16 (1) cover, the incitement must be actively separated from the idea. It must constitute conveyance of idea so as to influence and persuade the causing of the undesired consequence.[440] However such consequence need not necessarily follow. Incitement to cause harm has both the direct and indirect aspects. The phrase will cover the expression of a speaker directly to the audience. Indirect incitement may be through communicative means such as the press or any other form of media-which is publicly directed. Section 16 (2) is not extended to private expressions. It requires public voicing of enmity. However, there are no hard and fast rules in this regard. For instance, private settings like work place or private educational institutions could provide a platform for incitement that constitutes harm. All factors must be taken into consideration in determining whether the set up comports with the notion 'to cause harm.' The nature of the speaker, the listener and the locale are the most important considerations.

In Rv Keegstra[441] the court found Keegstra guilty of wilfully promoting hatred to his students. Mr Keegstra, a teacher, had taught his class that the Jews were odious and attempted to destroy Christianity. He faulted them for world calamities like depressions, anarchy, chaos and wars. Students obtained very high marks for regurgitating what he taught them.

[437] In Freedom Front v South African Human Rights Commission Op Cit n 29
[438] Freedom Front v South African Human Rights Commission ibid n 434 at p 8
[439] Pimstone Op Cit n 160 p 17
[440] Pimstone ibid n 439 p 17

4.3.4.7. 'TO CAUSE HARM'

According to Pimstone, the phrase to cause harm is 'the fulcrum around which the constitutional conception of hate speech turns'.[442] Harm implies a form of injury, although of course not necessarily physical or personal. Such injury must exceed the engendering of feelings of discomfort, anger or even outrage. A line should be drawn between speech that disturbs, challenges or provokes from that which wounds.[443] Owen describes hate expression as 'speech that kills.'[444]

The concept of harm will not only be limited to physical harm but includes financial as well as psychological and emotional harm. It is submitted that words have grave psychological and social consequence such as humiliation, degradation, loss of self worth and dignity-which are undesirable consequences in a society that prides itself on the values of equal human worth and tolerance. Words are the greatest power of man. With words, you can wound and you can also heal. The negative effects of hate speech are not only limited to an individual. They extend to the group to which the individual belongs, to society in general and thus to democracy itself. It should be noted that insults based on race are more threatening and consequently more psychologically damaging than other forms of insults.[445]

Pimstone points out that because section 16 (2) (b) proscribes incitement to imminent violence, if section 16 (2) (c) was to be limited to physical harm it would be redundant.[446] He maintains that to argue that section 16 (2) (c) alludes to violent expression only would be to ignore hate speech as an instrument of discrimination and subordination. Hate speech creates and perpetuates an environment which breeds intolerance and violence. It has immense potential to generate conflicts. The intrinsic harm that hate speech

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[441] Keegstra Op Cit n 380
[442] Pimstone Op Cit n 160 p 18
[443] Pimstone ibid n 442 p 18
[444] Owen U. Speech that Kills. www.oneworld.org/index_oc/issue198/hate-speech.html p 1
[445] Van Wyk Op Cit n 306 p 11-2
[446] Pimstone Op Cit n 160 p 18

represents is also immediately apparent for it is no more than 'the verbal embodiment [of apartheid's philosophy], in the new South Africa.'[447]

The proscription of hate speech by section 16 (2) (c) of the Constitution bears testimony to the fact that such speech is abusive, intimidating and harassing. Hate speech should be differentiated from dirty and impolite expressions. Hate speech reminds the victim of his inferiority, that he is 'painstakingly repressed' and it 'imprints' upon him a 'badge of servitude and subservience for all the world to see.'[448]It may lead to violence, hatred, degradation and discrimination and it therefore violates the right to freedom of security[449], dignity[450] and equality[451] of a person.[452] Hate speech is described as a form of expressive violence in and of itself. It affects the hearts and minds of the victim in a way unlikely ever to be undone. It causes emotional scarring and feeling of anxiety and fear pervade every aspect of the victims life.[453]

Against this background it should be noted that freedom of expression does not grant a right to vilify and dehumanise others.[454] Hate speech, it can be argued, denies target groups their individual and collective right to dignity. It does not recognise the human worth of target groups.[455] Hate speech, it is contended, creates and sustains and even support a social environment which reinforces perceptions of difference, dulls moral and social sensibilities and leads to circumstances in which violence is tolerated.[456] In Islamic

[447] Pimstone ibid 446 p 19
[448] Lawrence Op Cit n 68 p74
[449]Section 12 of the constitution
[450] Section 10 of the constitution
[451] Section 9 of the constitution
[452] Owen Op Cit n 444 p 1
[453] Lawrence Op Cit n 68 p 74
[454] Kallen E. electronic Journal of Sociology. Hate on the Net/ A question of power. www.socilogy.org/content/vol0003.002/kallen.html p2
[455] Kallen ibid n 454 p 3
[456] Pimstone Op Cit n 160 p 24. In his song Oh Lord, Brook Benton interrogates the Lord why the colour of his skin is said to be an 'open sin'. He questions the Lord why it seems sacred that he should be mistreated solely on the basis of his skin colour. He pleads with the Lord to do something about the insecurity brought upon him by his colour. He asks the lord to restore some harmony. He claims that he does not 'ask for some special kindness, I ask not for crowns' justice is the only thing he asks for. He pleads with the Lord to restore what is right.

Unity Convention case[457] the Constitutional Court found that such speech has the potential of debasing the very foundations upon which our constitution is premised.

In Freedom Front v South African Human Rights Commission[458] the tribunal found this speech to have the effects of retarding the strides made by the Constitution in promoting tolerance and reconciliation. The tribunal found that issues that divide society, promote tension, polarising the society further and thus increasing possibilities of confrontations and conflicts must not be allowed in our society. Any speech that has the effect of accentuating the chasms that were fostered before our democracy and therefore threatening to tear our society apart should not enjoy constitutional protection.

This sentiment was echoed in Human Rights Commission of South Africa v South African Broadcasting Corporation[459] by the Broadcasting Complaints Commission of South Africa's tribunal which found that the protection of the rights of the minorities and the vulnerable was an integral part of our new democracy. The recognition of diversity and the protection of the minorities and vulnerable was an important aspect in the pursuit of nation building and reconciliation. The dignity of minorities and the vulnerability of members of any minority group suggest that they must, at all times, be protected against explicit and implied threats and/or derogatory language. Inherent in dignity also lies the right to security of the person and the right to privacy, which include the right to be free from all forms of violence or threats of violence from either public or private sources. The impact of hate speech on target groups constitutes discrimination.[460]

Hate speech retards 'our grow[th] into the people and the communities, citizens that our constitution wishes us to become.'[461] Hate speech is viewed as nothing less than a means of silencing and coercion. Hate speech is assaultive in its nature thus it is frequently accompanied by actual violence. 'Hate speech also plays a more overt role in engendering social tensions and fuelling violence. Even if violence does not accompany hate speech, it (hate speech) has a progressive, interdependent relationship to violence. It

[457] Islamic Unity Convention Op Cit n 1
[458] Freedom Front v South African Human Rights Commission Op Cit n 29
[459] South African Human Rights Commission v South African Broadcasting Corporation Op Cit n 394
[460] Kallen Op Cit n 454 p 4

depends on violence for its own effect, thus it compromises the right of freedom and security of the person.[462]

Hate speech deters public life[463]and make the victim to develop low self-esteem and ultimately self-hate.[464] This perpetuates and deepens social divisions. Target groups experience exclusion, a 'devaluing' factor of their views and the threat to their very survival.[465] Hate speech implants in the victim a feeling of unworthiness, the feeling 'of not being part of us, the in crowd, or, more pertinently, our community or our country'.[466] This is contrary to the Preamble to the Constitution which makes it vividly clear that'...South Africa belongs to all who live in it, united in our diversity'

Such results (of seclusion and exclusion of the victim of hate speech from the mainstream society) bears negatively on a nation that prides itself on tolerance and the fostering of human dignity through the respect for racial, religious and ethnic groups in our society.

Psychologists recognise the harmful effects that hate speech has on the mind of the receiver. According to Kanfan, in his 1966 report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada,

> Most psychologist accept a theory of general persuadability as a personal characteristic. He argues, in light of this theory, that account must be taken of the fact that human beings are emotional as well as rational in their predispositions, and that, particularly in times of stress and strain, they can be swept away by the emotional appeal of false, defamatory propaganda against identifiable target groups.
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> Hitler's Germany...provides a stark case in point...The uncontrolled harassment of minority target groups and uncontrolled repetition of falsehoods and pseudo-facts can leave behind a residue of prejudice and hate among (non target) recipients - seed bed from which more widespread incitement to hate and harm can flourish...Hate-mongering

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[461] Pityana B 'Politicians Are Not Above the Law.' City Press. 26 October 2003 p 19
[462] Pimstone Op Cit n 160 p 24
[463] Marcus & Spitz Op Cit n 63 p 20-48
[464] Pimstone Op Cit n 160 p 23
[465] Pimstone ibid 464 p 24
[466] Neisser E. Hate Speech in the New South Africa (1994) SAJHR p 339

can inflict profound psychological and spiritual damage on members of target groups through defamatory messages which violate the right to dignity of a group as a whole.'[467]

Mosibudi Mangena concedes to the theory of psychological harm on members of target groups. He observes that 'if you repeat lie long enough it becomes truth. So many of us have internalised these negative perceptions of ourselves. This was evident during the many years of white racist rule and it is still a feature of our lives under democracy.'[468] In the same token, argues Pimstone, harm caused by hate speech is so severe that its prohibition is inevitable, no matter the weight of justification for such speech. He points out that the victim suffers emotional distress, develops mental disorders and physical symptoms such as headaches, ulcers and hypertension, even leading to suicide.[469] This clearly bears testimony to the harmful effects of hate speech in our society and thus justifies its prohibition.

According to Neisser a person would feel more offended when insulted about his skin colour or religion than about his beauty or height. This is so because insult based on race or religion are more threatening and thus more psychologically harmful than those based on beauty or height.[470] Ugly people have never been persecuted as a target group because of that characteristic in any existing society, and therefore (the characteristic of ugliness) does not carry the same explicit threat and does not cause the same fear of physical injury, than do racial insults.[471] Neisser clarifies his point by making a comparison between harm caused by other insults such as nasty comments about one's beauty, athletic ability, height and weight and hate speech based on race, religion, ethnicity and gender.[472] He says there are four differences between racial slurs and, for example athletic prowess.

First, one's race, religion, ethic origin and gender are more an objective fact than a value judgment. Thus a parent cannot make it all better by saying one is really not Black or Jewish, as she could say one is really athletic or could be athletic when he starts to gym.

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[467] Kallen Op Cit n 454 p 4
[468] Mangena M. We Have Not Lived Up Biko's Legacy' City Press Sunay 7 September 2003 p 19
[469] Pimstone Op Cit n 160 p 23
[470] It should be noted that many conflicts around the world spark from racial or religious differences.
[471] Neisser Op Cit n 466 p 339

Thus, if a person is abused on the basis of his athletic ability there is always a room for improving that aspect of his life, but with one's race that is impossible.

Secondly, race, religion, ethnic origin and gender are more central part of one's identity. When asked for one's background or who you are? One is far less likely to say one is tall, small and handsome (even if it is objectively true) than to say that one is Jewish or of South African descent. The reason for that, is that we tend to associate with others of the same racial or ethnic group, and are treated as members of such groups by others in society. This, in effect implies that the victims of hate speech are innately inferior by virtue of being members of that group.

Thirdly, hate speech is painful because one is rejected not because of inadequacies in one's efforts or skills. Efforts and skills can always be worked upon, but not one's race.

Fourthly, 'race is immutable.' Race and ethnicity of a person are fixed from birth and no one person can change them. They are an inherent and innate characteristics with which a person can do very little (if anything at all) to change. It is trite that one can improve one's skills, but can do nothing to 'improve' his race. Thus hate speech touches more closely to the unchangeable and objective core of one's social identity, it makes one feel less valued and more degraded and thus it hurts more.[473]

Niesser believes that hate speech may leave the victim feeling powerless[474]and servile. Hate speech entrenches the inferior rank of the victim in society.[475] Thus hate speech has to be prohibited even if no harm follows from its utterance.[476]

Gutto points out that hate speech is a strategy for the protection and promotion of inequality and domination. He terms it 'a power game.'[477] Niesser support Gutto's theory. He says that hate slurs reflect disparities in and of the use power of and are designed to

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[472] Neisser ibid n 471 p 339
[473] Niesser ibid n 472 p 340
[474] Niesser ibid n 473 p 340
[475] Gutto Op Cit n 11 p 5
[476] Neisser Op Cit n 466 p 338
[477] Gutto Op Cit n 11 p 5

continue the political subordination of the target group. Thus the fear of physical injury and/or the pain of devaluation and rejection are often fuelled by the fact that one is powerless to overcome. This so because such fear and rejection stems from innate characteristic of target group.[478]

Neisser points out that hate speech gratuitously inflict psychic harm, which is unjustifiable.[479] In order to justify the violation of the fundamental rights of target group, hate-mongers rely on and promote invalidation myths and ideologies. These myths and ideologies attempt in essence to invalidate, to dehumanise target groups and legitimise the violation of their fundamental rights. Kallen defines invalidation myths as falsified statements which allege that identified human populations are innately inferior or in the words of Kallen 'invalid'. He says that these theories are designed to give credibility to invalidation myths by providing distorted evidence for them. For instance Jews are depicted as 'evil-incarnates, unscrupulous, power hungry, manipulators of the media, government and international finance, whose only loyalty is to the other Jews. Blacks are classified as racially, culturally and morally inferior sub-human beings –criminally inclined, wife beaters and murderers.'[480] According to Kallen

> These arguments are' premised on scientifically unsupportable assumptions about differences in human attributes among various populations; prejudicial assumptions which serve to inferiorise, to invalidate particular populations and thus to provide a platform for discriminatory action against them. Typically pseudo-scientific and/or pseudo-religious 'evidence' of minority inferiority or dangerousness is manipulated in order to justify violation of rights...Hate propaganda represents probably the most malignant expression of invalidation ideology, for it not only inferiorise target populations, but it also singles them out as dangerous and threatening to society.[481]

According to Pimstone, section 16 (2) (c) is not designed to proscribe expression that is unpalatable, provokes or upsets, but speech whose primary objective is not communication at all, but the 'infliction of harm.'

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[478] Niesser Op Cit n 466 p 340
[479] Neisser Op Cit n 478 p 341
[480] Kallen Op Cit n 454 p 4

The Constitution fully acknowledges that freedom is not only limited to the removal of external restraints.[482] Cockrell points out that obstacles to the enjoyment of freedom by yourself or even by others may be internalised.[483] In order to disinternalise these obstacles, acts which tend to perpetuate the internalisation of such obstacles must be discarded. The belief in apartheid represents an internal barrier to true freedom. 'The freedom to espouse racism is the freedom to entrench our own [and others] non-freedom, for the internally fettered person is not entirely free [and can interfere with others freedom].'[484]

Niesser makes us aware that, in addition to interfering with other people's rights, there are costs of treatment and other remedies stemming from hate speech. Like physical assaults require medical attention, speech which incites fear may require psychological treatment, more so when the threats are repetitive and pervasive. Such treatment is costly and thus diverting scarce health resources from other pressing needs.[485] Even if no costs are incurred due to hate speech, it is still expensive to the society because of the limitations imposed on the victim by the emotional scars. Those who have been made to believe that they are inferior or subordinate will find it difficult, if not impossible, to participate in public affairs. People who have been made scared by racial insults are less likely to participate in society, in the workplace, the community's cultural or social life or political scene.[486]

Niesser points out that the fear of sexual assault on the willingness of young women in urban American universities to participate in night time activities is a classic example of how fear restrict the participation of the largest group in some institutions. A pressing societal concern about hate speech is its likeliness to culminate into violence. This will

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[481] Kallen ibid n 480 p 4

[482] Sections 26, 27 and 28 obliges the government to take positive steps for the realisation of the right protected therein.

[483] Cockell 'No Platform for Racist: Some Dogmatism Regarding the Limits of Tolerance? (1990) SAJHR 340. A person who truly and sincerely believes in segregation could never be said to enjoy the fruits of our constitution and thus the rights protected thereunder.

[484] Cockrell ibid n 483 p 341

[485] Niesser Op Cit n 466 p 343. In this regard Niesser fails to appreciate that the regulation of hate speech will have the effect of diverting the attention and the resources of agencies that will be responsible for the regulation from other pressing needs.

[486] Neisser ibid n 485 p 342

perpetuate and enrich the concept that might is right, in that disputes will be (or will have to be) resolved by violent means. It should be appreciated that hate speech in its nature is violent. This might clearly lead to divisions along racial and religious lines and thus dividing the country into portions.[487]

Some people believe that threats posed by verbal expression are limited. Truly the dangers of verbal retaliation are far less substantial than those posed by physical response. It is common cause that many, if not all, societies encourage verbal expression of anger rather than physical retaliation. This attitude is reflected in the American ditty that 'sticks will break my bones but words will never hurt me.' This argument ignores the fact that hate speech is used to provoke a 'devalued' person, and suggests that he could therefore be treated with contempt.[488] This will indeed lead to the stigmatisation of the victim which will automatically lead to his seclusion because of the conviction that he is a lesser person. Niesser articulates the effects of stigmatisation as follows:

> The consequences of the feelings of stigma and exclusion caused by racial invectives are significant for communal life. Like the fear of violence, the pain of stigma and exclusion discourages the victim from participating in at least those aspects of life from which the insults suggest exclusion. Although stigmatisation is normally less of a deterrent than violence, experience suggests it is very real factor. Thus, for example, advocates of regulating hate speech in America have often focussed on the impact of such invective on the involvement and success of minority students in university life, both academic and social. If historical background of the insult suggest total exclusion from society-certainly a reasonable inference in a society that has had physical apartheid for [more than] 45 years-hate speech may [very] well deter participation in all aspects of communal life-economic, social and political, to the degree the new democratic South Africa sees widespread participation in social life as a social good, hate speech, like other forms of discrimination may undermine the [constitutional dispensation]. In addition, the effectiveness of a democratic system depends upon a belief that the system belongs to all the people and the sense of communal cohesion.[489]

[487] Cockrell Op Cit n 483 p 342. This simply mean that people of the same race will want not want to be associated with people from other races. The same is true of religion and ethnicity.
[488] Niesser Op Cit n 466 p 343
[489] Niesser ibid n 488 p 343

Niesser is convinced that unity among culturally, religiously and racially diverse groups is vital for the cohesion and thus success of democratic process. By deterring participation in communal life, exclusionary hate speech, like other forms of racial discrimination may undermine community building necessary for democracy to be sustained.[490]

The difficulty with utilitarian perspective as espoused by Niesser is that, it does not answer the question as to whether or not hate speech propagated by members of the previously disadvantaged group or the target group and directed at persons who are members of the dominant group should be given the same treatment as hate speech perpetuated by the members of the latter group.[491] It is common cause that members of protected group have suffered from vilification and degradation and thus it has been argued that members of the dominant group who find themselves targets of hate speech do not suffer harm, intimidation, fear and discrimination that members of the target group experience as targets of hate speech. Critics of this approach argue that it is itself a violation of the right to equality.[492]

This criticism is sustainable because, in effect every racial grouping may have its set of laws protecting them at the expense of others. This will clearly violate the rule of law which is the foundational value of the Constitution. This approach, it respectfully submitted, will also fail to pass constitutional muster on the basis that it is not law of general application. In Freedom Front v South African Human Rights Commission[493] the tribunal found hate speech can be perpetuated against members of (previously) dominant group.

[490] Niesser ibid n 489 p 343
[491] Coliver Op Cit n 393 p 270
[492] Coliver ibid n 393 p 270. Affirmative action does not promote hatred among different racial groups. Thus this argument is not worthy of entertainment.

4.4. SHOULD HATE SPEECH BE CRIMINALISED?

4.4.1. ARGUMENTS FOR CRIMINALISATION OF HATE SPEECH

It has been argued in the preceding paragraphs that hate speech causes not just offence, but real harm. This part of the study will focus on whether or not it is desirable and feasible to proscribe and punish hate speech without having adverse effects on the exercise of the freedom of speech. Those who support the regulation of hate speech are of the view that an alternative philosophical orientation and methodology in legal analysis, which take into cognisance the harmful effects of hate speech on personalities involved should be adopted.[494]

Gutto points out that such approach will put emphasis on the actualities than on mere 'abstract reasoning.'[495] As already pointed out that the victim and the perpetrator are normally not on the same footing, Gutto maintains that the alternative approach forces the analyst to have a balanced appreciation of the circumstances of both the offender and the victim in any legal dispute.[496]

The alternative approach takes into account the historical inequalities between the perpetrators and the victim of hate speech. 'The victims perspective requires respect for the idea of rights, for it is those on the bottom who are most hurt by the absence of rights, and it is those on the bottom who have sustained the struggle for rights.'

Hate speech has the tendency to leave the victim vulnerable and exposed to dispiriting and dehumanising experience. Gutto is of the view that the victim of hate speech usually finds himself being unable to 'meaningfully' react. He says that the victim of hate speech will look for anything that may counter such speech but in vain.[497] The victims of hate

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[493] Freedom Front v South African Human Rights Commission Op Cit n 29
[494] See Matsuda Op Cit n 68; Gutto Op Cit n 11
[495] Gutto ibid n 494 p 2
[496] Gutto ibid n 495 p 2
[497] Gutto recollects that whilst still a PhD candidate in the US had experienced a barrage of shouts 'Nigger, Nigger' hurled at him, after having avoided a bottle thrown at him by the perpetrators. He recounts that after that 'Nigger, Nigger' he 'looked frantically for any sold object, a stone to smash them with. My

speech often than not, find themselves in helpless situation without any means of mounting an equally effective response. The only meaningful avenue open to the victim is resort to violence[498]which-although tallied to hate speech by some-is proscribed by law.[499]

The propagation of hate speech amounts to a war of words.[500] A renowned poet and singer Mzwakhe Mbuli, in his song Nobel Peace, prudently observed that 'peace cannot be [realised] when conditions that give rise to hatred and bitterness are regarded as God given.'[501] According to Mbuli, God created us equally and in his image and we should see ourselves in each other. Hate speech suggests that one group is inferior to the other and thus it hits the guts and the inner self of the victim. It equates victims with animals requiring extermination.[502] In addition, the internationally acclaimed reggae artist, the late Bob Marley[503], was of the view that 'until there are no longer first class and second class citizens of any nation, until the colour of a man's skin is no longer of significance than the colour of his eyes...[there] will be war.' He continues by pointing out that for as long as people are treated on the basis of their class and colour there will be war. It is such instances which compelled Gutto to observe that failure to regulate hate speech could be interpreted as encouragement and perpetuation of it. He says however sympathetic we might be to freedom of speech 'no civilised society ought to categorise the behaviour such as I experienced as requiring encouragement under the umbrella of democracy or human rights.'[504]

Hate speech denies both the victim and the perpetrator the opportunity of enjoying basic rights and freedoms of equality and dignity.[505] Hate speech denies both the perpetrator and the victim some of their constitutional rights. According to Matsuda, associational

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failure to get something to throw at them annoyed me...I was mad with myself for not being able to amount an effective counter attack. Gutto ibid 496 p 2.

[498] Gutto says after that hate speech incident he was emotionally charged and ready for for a fight if anyone dared abused him on the basis of his race. Gutto ibid n 497 p 3

[499] Matsuda ibid n 68 p 35

[500] Matsuda ibid n 499 p 22

[501] Mbuli M quoted from the inlay of the album Unbroken Spirit.

[502] Matsuda Op Cit n 68 p 22

[503] www.thirdfield.com/html/lyrics/war.html

[504] Gutto Op Cit n 11 p 3

[505] Gutto ibid n 504 p 3

rights of members of the dominant groups are curtailed in an atmosphere rife with racial hatred.[506]

Hate messages, threats and violence are a price frequently borne by whites for marrying, adopting and socialising with people of colour.[507] Similarly, people of colour find themselves forced to dissociate from white people for the fear of racial slurs and hatred. The victim of hate message feel threatened in his personal security. To be hated, despised and to be left alone is the ultimate fear of all human beings. This is worsened when the victim is powerless and cannot defend him/herself. Matsuda is of the view that aloneness and fear are made worse by the message of tolerance.[508]

Everytime the victim is subjected to hate speech, the reaction is fear and rejection, yet he is aware that he has to fulfil the constitutional mandate of acceptance and tolerance of others or such values will remain but a hollow dream. This has the effect on the mind of the victim that government tolerates and accepts hate speech. This impacts negatively on the identity of the victim. Members of the target group feel that they must either identify with the community that promotes racist speech or admit that the community does not include them.[509] This runs contrary to the Preamble to the Constitution which provides that we must work together 'to heal the divisions of the past and establish a united society based on democratic values, social justice and fundamental rights'.

Matsuda maintains that members of dominant group who rightfully, and often angrily object to hate propaganda 'share a guilty secret.' Their belief that they are not themselves

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[506] Matsuda Op Cit n 68 p 49

[507] For instance a member of Georgia Bureau of Investigations once suggested to whites targeted for hate speech because of their associations with blacks that they should avoid being seen in cars with blacks and cease inviting them to their homes. Matsuda ibid n 506 p 49

[508] Matsuda ibid n 507 p 25

[509] Matsuda ibid n 508 p 25. For instance more especially in the Cape, many amaXhosa changed their surnames to English or Afrikaans. During those times Coloureds were treated much better than Blacks by the apartheid government, thus the latter had to resort to the tactic of being perceived as a coloured than Black. In this regard W.E.B Du Bois observed that '[t]he Negro is a sort of seventh son, born with a veil, and gifted with second sight in this American world-a world which yields him no true self-consciousness but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double consciousness, this sense of always looking at oneself through the eyes of others, of measuring one's by the tape that looks on in amused contempt and pity. One ever feels his two-ness-an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.' Heyman Op Cit n 322 p 307, footnote 21

targets of hate speech bears testimony to that. Even though they may reject hate speech, they ambivalently feel relieved that they are not the victims. Thus they unconsciously embrace hate propaganda in the context that they are being spared from inhuman and derogatory treatment. Matsuda illustrates her point by citing a scenario of human tragedy a natural disaster or plane crash. She says that

> We feel the blessing of the fortunate (sic) that distances us from the victims, the presence of hate propaganda distances right-thinking dominant group members from the victim, making it harder to achieve a sense of common humanity. Similarly racist propaganda forces victim group members to view dominant group members with suspicion.[510]

Another commentator maintains that differences among races will prevail because we are not 'disembodied individuals with no prior history that shaped our interactions and experiences of each other.'[511] However, this does not justify our past differences being used as a justification to further perpetuate the victimisation and degradation of victim group. It is through this history that we continue to embrace racial inferiority or superiority 'as an idea that may hold some truth'. The continued and repeated presentation of this myth, although improbable and abhorrent, is there before us. We reject the idea. We stifle it, we reject it as wrong, but it is there (may be hidden) and when it is triggered it interferes with our perception and interaction with the person next to us.[512] When we are seated next to a member of dominant group, we feel subservient and almost deny who we are. When we sit next to a member of target group like ourselves, we see them as being more subservient than us (given the historical background of ethnic polarisation in this country).[513]

Matsuda recounts that she had been reading about a 'dot busters' campaign against immigrants from India. She says it happened that she passed-by an Indian woman on campus. Instead of thinking 'what a beautiful Sari', the first thought that came to her mind was 'dot busters'. Only after setting aside the hate message aside could she move

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[510] Matsuda Op Cit n 68 p 25
[511] Mangcu X 'Damned If You Do, and Damned I You Don't, In Circle of Critics' Business Day Thursday Thursday October 2 2003 p 10
[512] Matsuda Op Cit n 68 25-6
[513] Matsuda ibid n 512 p 26

on to her own thoughts. She says the propaganda she read had taken her one step back from casually treating a 'fellow brown-skinned' human being as that, rather than as someone 'distanced from my self.'[514] For the victim, similarly, the angry rejection of the message of inferiority is coupled with absorption of the message. When a dominant group member responds favourably, there is a moment of relief–the victim of hate speech do not always believe in their insides that they deserve decent treatment. Matsuda says that this obsequious moment is degrading and dispiriting when the self-aware victim acknowledges it.[515]

It is from incidences like these that Matsuda sees racist speech presenting a historically untenable idea, so dangerous and tied to perpetuation of degradation of the very class of human beings who are least equipped to respond.[516] Hate speech must be outlawed because its approbation unduly burdens the victim. The victim will have to lick the wounds caused by hate speech with less or without any remorse from the members of the dominant group. The learned author points out that where the interests of the (same) judges and legislators are at stake they are prepared to devise some form of legal protection.[517]

She gives an example that American law, at one stage provided a tort remedy for white plaintiffs who were 'insulted' by imputation of association with persons of a race against which there is prejudice. She claims that 'when the legal mind understands that reputational interests [are at stake] it realises the concrete reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self-worth and their free enjoyment of life are limited. Their political capital-their ability to speak and be heard-is diminished.'[518]

To recognise and protect abrogation against such interest and yet fail to afford the same protection to victim of hate speech is to adopt double standards. Such selective consideration of one victim's story and not another's results in unequal application of the

[514] Matsuda ibid n 513 p 26
[515] Matsuda ibid n 514 p 26
[516] Matsuda ibid n 515 p 35
[517] Matsuda ibid n 516 p 47

law, which transgress the concept of equality. According to Matsuda, unlike the victims of defamation, the victims of hate speech are not representative of the population at large, but they form an easily identifiable sect in/of the society.[519] This sect of the society already experience diminished access to private remedies such as effective counter-speech and this diminished access is worsened by the failure of the authorities to recognise the difficulties of the victim. Hate propaganda debases and discredits members of the target group, further reducing their speech to mediocrity. Matsuda likens the tolerance of hate speech with burdening those least able to pay tax being the only ones who are made to pay. This turns the constitutional ideal of bridging the gaps of the past into a joke.[520]

The first step towards bridging this historical divide is through the recognition and respect of human dignity, the achievement of equality and the advancement of human rights and freedoms for all.[521] The value expounded above will be but a hollow dream if our society is based on discrimination. Approbation of speech that has connotations of racial supremacy clearly retards the noble ideals of the constitution. When target groups are forced to alter their behaviour, change their choice of neighbourhood or leave their jobs for fear of being exposed to speech that runs counter the aspirations of the constitution it can never be said that there is equality.[522]

According to Matsuda, tolerance and protection of hate speech by the government is a form of state action. Open display and propagation of hate speech conveys hate speech's legitimacy. The government gives effect to this kind of speech by leaving it unabated. To make matters worse, failure to regulate hate speech elevates the liberty interest of racists over the liberty interest of their targets.[523]

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[518] Matsuda ibid n 517 p 47
[519] Matsuda ibid n 518 p 47. That might be understood to mean that because members of the dominant group may as well be victims of defamation, defamatory statements have to be regulated. This clearly proves how vulnerable and powerless members of victim group are. Where they are the lone victims law has nothing to do with them.
[520] Matsuda ibid n 519 p 49
[521] Section 1 (a) of the Constitution.
[522] Matsuda Op Cit n 68 p 48
[523] Matsuda ibid n 522 p 49

It has been argued in some quarters that racist speech is private and thus the loss of liberty does not arise. Matsuda counters this assertion by pointing out that state silence is a public action from which the perpetrators of hate speech derive impetus. The government's failure to curb hate speech, albeit indirectly, gives the perpetrators a ticket to preach and perpetuate their hate propaganda. Failure by the law to afford the victim a remedy amounts to a second injury. The second injury is the pain of knowing that the government provides no remedy and offers no recognition of the dehumanising experience that victims of hate propaganda are subjected to. The government's denial of personhood through its denial of legal recourse may be even more painful than the initial act of hatred. One can dismiss hate groups as organisations of marginal people, but the state is the official embodiment of the society we live in.[524]

Failure to regulate hate speech amounts to acceptance of the value of that speech. Matsuda points out that legal realist recognise that law formulation is largely a matter of value. She maintains that 'in a society that expresses its moral judgements through law, and in which the rule of law and the use of law are characteristic responses to many social phenomena, this absence of laws against racist speech is telling.'[525] In simple terms if we do not outlaw hate speech, we accept it as normal. We should reject any proposition that racism is part of our law by making up our minds and outlawing hate groups and their activities. We have opted for freedom over degradation and dehumanisation. Accordingly, we should regulate hate speech, 'not because that it is not really speech, not because it does not fall within a hoped for neutral exception, but because it is wrong', it causes not imaginary but real harm.

Cockrell maintains that freedom to propagate racism raises special considerations precisely because 'we can be so confident that racism is wrong. We have no such confidence with most other matters of individual life style, and indeed this is the reason why we protect individual autonomy in these areas.' [526] He expresses himself as follows in this regard:

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[524] Matsuda ibid n 525 p 49
[525] Matsuda ibid n 526 p 49
[526] Cockrell Op Cit n 483 p 341

> The respect for autonomy and authenticity need not extend to freedom to espouse racism if we are convinced of the truth of our claim that apartheid is an evil. If we claim this is truth, then we are bound to claim the falsity of any theory that denies it. And this thesis holds, not in spite of but because of, our belief that the state should treat its citizens with dignity and respect.[527]

Niesser points out that hate speech undermines the greatest happiness for the greatest number.[528] When viewed as a threat of assault, hate speech poses the risks as physical assaults.

The proponents against the regulation of hate speech argue that it will open floodgates to prohibition of speech which is merely unpalatable. They argue that because of the thin line between acceptable speech and speech that causes harm, the regulation will be open to abuse. Matsuda counters that argument by pointing out that 'there is in every constitutional doctrine we devise the danger of misuse, but we should not be afraid to take the first step because of the possibility of falling. Nothing in law ties our hands, and the benefits to be derived from the regulation of hate speech far outweigh the dangers inherent therein'.[529] Cockrell argues that there is no way in which the proscription of hate speech should not be authorised because of some far-fetched risk of the abuse of the regulation.[530] Law is the only vehicle available for redrawing the boundaries of what is acceptable in any society and defining new standards of behaviour.[531] Hate speech flourishes where it has become acceptable, and by not prohibiting hate speech we are dressing it with some form of respectability and acceptability.

Lawrence is of the view that the protection of hate speech risks making freedom of expression a tool for domination rather than a vehicle for liberation. He argues that tolerance of hate speech (more so) by members of target group would implicate them in the 'vicious words [they] would never utter.' Until racism and white supremacist have been totally eradicated it is only then that we can afford a carte blanche protection of

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[527] Cockrell ibid n 526 p 341
[528] Niesser Op Cit n 466 p 342
[529] Matsuda Op Cit n 68 p 50
[530] Cockrell Op Cit n 483 p 342
[531] Coliver Op Cit n 393 p 14

speech.[532] Hate speech does not just offend, it causes real harm. Lawrence emphatically argues that 'psychic injury is no less an injury than being struck in the face, and is often more severe.' [533] Lawrence illustrates this point by recounting an incident in which his nephew was threatened with death by a way of drawing on soccer kickboard thus

> On Sunday evening, May 1, four students in the senior class [at the Wilmington Friends School] met by pre-arrangement to paint the soccer kickboard, a flat rectangular structure, approximately one hour under bright moonlight and then went home.
> What confronted students and staff the following morning, depicted on the kickboard, were racist and anti-Semitic slogans, and most disturbing of all, threats of violent assault against one clearly identified member of the senior class. The slogans written on the kickboard included save the land, join the Klan,' and 'down with Jews', among the drawings were at least twelve hooded Ku Klux Klan, Nazi swastikas, and a burning cross. The most frightening and disturbing depictions, however, were those that threatened violence against one of our senior Black students. He was drawn, in a cartoon figure, identified by his name, and his initials, and by the name of his mother. Directly to the right of his head was a bullet, and farther to the right was a gun with a barrel directed toward the head. Under the drawing of the student, three Ku Klux Klansmen were depicted, one of whom was saying that the student 'dies'. Next to the gun was a drawing of a burning cross under which was written 'kill the Tarbaby.'[534]

After that incident Lawrence explains that his nephews 'were quite, their faces betrayed' and the incident had inflicted a blow and newly discovered vulnerability. What Lawrence observed from his nephews was that 'the pain and scars were no less enduring because the injury had not been physical.' What made matters worse for the victim was that, because there was no physical attack, members of the dominant group tolerated the incident and were of the view that it warranted no punishment for the perpetrators.[535]

If a certain group of people is allowed to denigrate and dehumanise others with impunity, that leads to an inevitable conclusion which ties the law to racism. That would mean that law is both the product and the promoter of racism. The primary objective of the law should be to attack and uproot the effects of racism. Hate speech will unavoidably lead to

[532] Lawrence Op Cit n 68 p 172
[533] Lawrence ibid n 532 p 74
[534] Lawrence ibid n 533 p 73

discrimination against the victims.[536] According to Matsuda the places to where law does not extend its protection are the places where the vulnerable, the helpless and the defenceless are.[537]

The protection of hate speech will only cater for the interest of those who profit from an unequal and oppressive society.[538] In terms of section 9 (1) of the Constitution, we are all entitled to equal protection and benefit of the law. If hate speech protection is going to benefit only one sect of the society to the exclusion of others, then such regulation or lack thereof must be unconstitutional. Section 7 (1) of the Constitution enshrines the rights of all people in our country. Thus, if rights and freedoms are of value only to self interested individuals, then the reason to respect them is weakened.[539] Accordingly, relationship with other people is a condition of our freedom and democratic a society cannot tolerate that which is evil and which is the cause of oppression. Democracy cannot protect what contradicts and counteracts the possibilities of freedom.[540]

According to Pityana, the Constitution requires us to acknowledge one another, sing each others praise and give an estimate of one another's stature and offer the best that we have to the greater good of our nation. He adds:

> The constitution is not there simply as a vehicle to derive what privileges and benefits one desires for oneself. It is there to uphold the total fabric of society.[541]

A government which allows the propagation of hate propaganda violates the rights of its citizens. Gutto maintains that the Constitution is there to protect the rights of all citizens and thus the sections of the Constitution must not be read in isolation. He says 'individual sections of the constitution...cannot be properly understood in themselves or by narrow

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[535] Lawrence ibid n 534 p 73
[536] Matsuda ibid n 535 p 19
[537] Matsuda ibid n 536 p 18 A renowned Poet Don Mattera impassionately observed that 'there is no pain quite like being unloved, unwanted ..., in one's own land.' He urges all South Africans 'to reach out to those who are said to be lesser of God's creation...to touch them [and make them feel part of our own]'. Sowaga D 'Bra Don Speaks of his Own Suffering.' City Press. November 9 2003 p 8
[538] Meyerson Op Cit n 219 p 395
[539] Meyerson ibid n 538 p 395
[540] Meyerson ibid n 539 p 397
[541] Pityana Op Cit n 461 p 19

approach and interpretation that fail to take account of the relevant other sections in the constitutional document.' Gutto encourages a holistic approach to the reading and interpretation of the Constitution. To allow hate speech amounts to violation of other protected rights and creates a culture of impunity. The proponents against the prohibition of hate speech argue that limiting freedom of speech (even hate speech) violates a constitutionally guaranteed right and shows the intolerance of society[542]. Cockrell argues that in suppressing hate speech no right (worthy of constitutional protection) is violated.[543] He goes on to say that there is no reason why progressive thinkers may consistently claim that it is a commitment to full freedom that justifies the argument against outlawing hate speech.[544]

The regulation of hate speech that should be proscribed in the constitutional order based on human rights ought to be limited only to speech that is illegal under human rights inspired international law and strictly necessary to control harmful speech. The regulation must be necessary to regulate hate speech and at the same time be able to allow critical and robust debate. The regulation must be narrowly crafted to catch the clearest cases of racially and personally harassing speech.[545]

The primary object of the regulation should be to protect and promote human rights as a whole, not some chosen rights and freedoms. The regulation should not be seen as forming a hierarchy of the rights guaranteed in the constitution. At the heart of this regulation should be the protection against the stifling and restraining the development of speech, thought and conscience. A nation that deliberately attenuates speech to the point of dumbness is poorer. There should be latitude for contradictions and disagreements and they must be expressed openly and without fear.[546]

Gutto notes that regulation against hate speech has been criticised, for its apparent failure to curb such speech. Thus it is a waste of effort to try and use the law to discourage those

[542] Gutto Op Cit n 11 p 6
[543] Cockrell Op Cit n 483 p 340
[544] Cockrell ibid n 543 p 341
[545] Gutto Op Cit n 11 p 7
[546] Gutto ibid n 545 p 7

who are racists and wish to express their racism openly, it has been argued.[547] He counters this argument by pointing out that the object of the regulation against propagation of hate speech in general is to express society's collective disapproval of racism and to discourage the propagation of such ideas. 'It discourages and limits, but does not eliminate the belief or its practice entirely. After all, we have laws against deliberate homicide and theft, but these practices continue to exist. I am convinced that the existence of laws against these practices contributes to limiting the incidence of homicide and theft.'[548]

Gutto is of the view that those who argue that the regulation of hate speech is likely to lead to the further use of censorship laws for other evil purposes 'appeals to speculative fact rather than to logical consistency.' Hate speech is not only injurious to the individual victim, but to the entire society. Society must be understood in the broader sense not only to the group to which the individual belongs but the entire nation of South Africa.

4.4.2. ARGUMENTS FOR THE PROTECTION OF HATE SPEECH

Those who favour the protection of hate speech have raised a number of arguments in support. First, hate speech should be tolerated for it reinforces our commitment to tolerance as a value.[549] Democratic representative government presumes that people are free to think, say and hear whatever they might, even the most distasteful. It is argued that they can advocate the end of democracy. This is so because to allow the government to control expression might produce unpalatable repercussions. 'Power is jealous and power corrupts.'[550] The regulation of hate speech might result in stifling legitimate opposition. No one has the right to pre-determine for others what to say for that amounts to regulating what the person should think. That violates the person's right to freedom of thought and opinion enshrined in section 15 of the Constitution.[551]

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[547] Gutto ibid n 546 p 7
[548] Gutto ibid n 547 p 7
[549] Matsuda Op Cit n 68 p 18
[550] Matsuda ibid n 549 p 32
[551] Matsuda ibid n 550 p 32

In Mamabolo[552] the Constitutional Court held, per Kriegler J, that '...we should be particularly astute to outlaw any form of thought-control, however respectably dressed. We have no basis of distinguishing good from bad ideas.' We have made the commitment to a free society, it will become unfree if we stifle and limit what a person thinks or should think and as a result say. If we accept that our society is racist, that is the more reason to afford freedom of expression greater protection. The best way to combat racist oppression is the right to protest.[553]

Secondly, we should be vigilant to avoid the suppression of ideas under the guise of controlling harmful speech. Thus the best route to follow is to protect the rights of those we do not agree with or even the ideas we despise. 'If we can hold fast to freedom when it is most difficult to do so, we will avoid [following an easier path thereby avoiding] making easy and disastrous mistakes.'[554]

The difficulty with regulating freedom of expression is that it is 'content based'. It put the state in censorship business, with no means of assuring that the censors hand will go lightly over 'good' as opposed to 'bad' speech. If we outlaw the AWB as an organisation repugnant to democratic values, then we can outlaw the Communist Party for the very same reasons. Admitting one exception will lead to another, and yet another until those in power are free to stifle opposition[555] in the name of protecting democratic ideals. The government may silence the opposition in the pretext of standing for and protecting democracy. It is argued that the outlaw of hate propaganda would compel those who propagate that idea to chose more violent and secret means of obtaining their goals.[556] It is humbly submitted that that might be the case. This could be deduced from the fact that liberation organisations such as the African National Congress, the Pan Africanist Congress resorted to 'armed struggle' after they were banned in the country. This simply suggest that if the individual or organisation is prepared to advocate and make known its stance or view it can go an extra mile to ensure that including illegal means.

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[552] Mamabolo Op Cit n 12
[553] Matsuda Op Cit n 68 p 32
[554] Matsuda ibid n 553 p 32-3
[555] Matsuda ibid n 554 p 33
[556] It should be remembered the ANC and other liberation movements resorted to 'armed struggle' after they were banned in the country.

The only way we could effectively deal with hate speech is by allowing it. When people are exposed to hate speech they will reject and organise against it.[557] When a bad idea is driven underground it is given 'an aura of martyrdom', and allow its advocate to accuse those who suppress it of intolerance. The claim that advocating racism is not an act of force nor a direct threat against any person is misguided. Propagating an idea, however irrational or disturbing is a peaceful act, but silencing a person solely on the grounds of ideas he holds is, on the contrary, not a peaceful act at all. It is the use of force. Force cannot determine the truth or falsehood of an idea. Only reason can do that. Reason can only be exercised by individuals who are free to think and to say. Regulations cannot make people reason or stop reasoning nor can it stop them from holding particular ideas (even at a threat of sanctions).[558]

Neisser is of the view that when force controls the debate, the question is not whether the idea is true or not, but whether the idea is permitted or not. History has shown that the suppression of ideas however well-meaning, may lead to persecutions of those who do not share in those ideas. For instance, the expression of ideas incompatible with christianity were outlawed. The rationale for prohibiting such ideas was that christianity was not only true, but also teaching otherwise would put people's souls in peril. Such regulation put a standard of force over a standard of reason. The result was the torturing and persecution of the heretics.[559]

The regulation of hate speech amounts to a decision by the government of not only choosing what may be said, but also choosing who may speak.[560] Such a scenario should not be tolerated in a democratic society. Such behaviour transgresses the right to equal protection and benefit of the law and the right to dignity. 'The only thing that separates a free society from others is the free flow of ideas. Even hateful ideas. Even ideas that may hurt us.'[561]

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[557] Matsuda Op Cit n 68 p 33
[558] In Defense of Hate Speech www.pauix.com/~gmcgath/hatespeech.html
[559] In Defense of Hate Speech www.pauix.com/~gmcgath/hatespeech.html
[560] Neier A. defending My Enemy: American Nazis, the Skokie Case and the Risks of Freedom. 1979 p126
[561] Neier ibid n 560 p 59

In the case of Village of Skokie v Nationalist Socialist Party[562] Decker J found that, although 'acutely aware of the very grave dangers posed by public dissemination of doctrines of racial and religious hatred' such ideas should be permitted. Decker J pointed out that

> ...When tensions and feelings are at the highest peak, it is a temptation to reach for the exception to the rule announced by Mr Holmes, 'if there is any principle of the constitution that more imperatively calls for attachment than any other, it is the principle of free thought-not free thought for those who agree with us but freedom of thought we hate'...When choice must be made [whether or not to allow thought we hate], it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of the government to decide what its citizens must say and hear.[563]

What judge Decker points out is that sometimes, if not always, expression is an emotional experience, and we should not control how people think and feel even if we had power to do so.

Bollinger believes that freedom of expression is the only guarantee political minorities have to make their views known in the political process.[564] Freedom of expression must be seen as a kind of condemnation of power.[565] Although there are risks inherent in freedom, as the US Supreme Court succinctly observed that 'some degree of abuse is inseparable from the proper use of everything.'[566] Hate propaganda must not be proscribed. Although Neier is aware of the risks inherent in freedom, he is however adamant that suppression of freedom 'is a sure prescription for disaster'.[567] He is convinced that 'defending my enemy is the only way to protect a free society against the enemies of freedom.'[568] He however concedes that 'freedom is no certain protection.' The risks are ever present if the advocates of hate speech are allowed to propagate their ideas.

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[562] Village of Skokie v Nationalist Socialist Party 51 Ill App.3d 279, 366 N.E 2d 347 (1977) cited from Neier ibid n 561 p 57.
[563] Neier ibid n 562 p57
[564] Bollinger L. The Protection of Minorities and Human Rights (eds) . 1992 p 172
[565] Bollinger ibid n 564 p 173
[566] New York Times CO v Sullivan Op Cit n 3
[567] Neier Op Cit n 560 p 3
[568] Neier ibid n 567 p 2

It is possible that they will win so many adherents that they will attain the power to abolish freedom. However Neier realises that the alternative to freedom is power. If the minorities who are victims of hate speech had power, they would probably wipe out all advocates of hate speech. Usually, if not always, the victims of hate speech are few in numbers or have little power, if at all.[569]

Victims of hate speech are never free in a society in which encounters are settled by power. Thus, restraints must be placed on power. The most important is the restraint that the vulnerable group will never be quashed by power unnoticed by the rest of the world. Such restraints must prohibit those in power from interfering 'with my right to speak, my right to publish, or my right to gather with others who feel threatened'[570]. Those in power must not be allowed to prevent others from assembling and joining forces together so that they can speak louder and be heard. Thus, power must be restrained by freedom, even though the temporary beneficiaries are the very enemies of freedom. 'Freedom is the concern of the oppressed, and her natural protectors have always came from among the oppressed. It is a matter of self-interest. The oppressed are the victim of power. If they are to end their oppression, they must either win freedom or take power themselves.' Unfortunately, not in all, if there are any, circumstances do the victims have the capacity to take power.[571]

Bollinger is of the view that to allow hate speech is to the benefit of the victims. He terms it 'a matter of self-protective political strategy.'[572] He says allowing hate speech is an apt 'response to a perceived reality of ever threatening intolerance and prejudice by the politically powerful against the politically weak...One detects in their defence of the free speech rights of 'bad' minorities a sense of added security that is inevitable tinged with a heightened sense of insecurity.'[573] Prohibiting hate speech tantamount to claiming rights that you are not prepared to extend to others.[574] According to Tleane, we as a nation must

[569] Neier ibid n 568 p 4
[570] Neier ibid n 569 p 5
[571] Neier ibid n 570 p 5-6
[572] Bollinger Op Cit n 564 p 174
[573] Bollinder ibid n 572 p 174
[574] Neier Op Cit n 560 p 10

be prepared to 'honestly challenge [ourselves] and each other, about entrenched stereotypes that we hold about each other.'[575]

Thirdly, speech is a means of organising and inspiring action, thus others are convinced that it must not be curtailed. In the US all speech must be tolerated until there is 'clear and present' danger of some serious and substantive evil. This doctrine, like any other doctrine that might be developed to curtail speech might be open to abuse. Judges with different perspectives would reach different conclusions in actual cases and still say that they are applying the same standard. [576] According to Bollinger the curtailment or the protection of expression largely depends on who is the victim. In this regard Bollinger observed thus

> The application of the test and therefore the scope of the protection afforded by the First Amendment, has varied depending upon the appeal or the troublesomeness of the political minorities who happened to be at forefront of political activity at the time.[577]

He argues his case by pointing out that 'around the first world war, anarchist, socialists and pacifists were all sent to jail for their speech and the First Amendment did not stand in the way.'[578] Bollinger argues that after the second world war, freedom of speech was curtailed because the governments were threatened by the ideology of communism.[579] Thus, the prohibition of hate speech from the market place is not desirable because, according to Bollinger, at certain times the various 'good' minorities have seen their own fate as inextricably tied up in the protection of 'bad' minorities (including minorities whose very objective is the destruction of the good minority). According to Bollinger, when the bad minorities are stripped off of their right to free speech, there is nothing that may prevent the authorities to strip the good minority of their right. Bollinger poignantly observed that 'as their speech rights go, so go our speech rights.'[580]

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[575] Tleane file://A:\anti-terrorism%20will%20stamp%20on%20human%20rights.htm p 3
[576] Bollinger Op Cit n 564 p 173
[577] Bollinger ibid n 576 p 173-4
[578] Bollinger ibid n 577 p 174
[579] Bollinger ibid n 578 p 174
[580] Bollinger ibid n 579 p 174

Fourthly, limiting freedom of expression causes uneasiness, this is more true when such limitation invites sanctions.[581] This may be aggravated by the fact that in a diverse society like ours committed to equality and the respect of dignity an identification has to be made as to who is a victim of hate speech. From the foregoing it has been pointed out that in most instances, if not all, the dominant group is less likely to be affected by hate propaganda. Hate speech must be seen in the context of power relation. For instance the less powerful groups are unable to inflict harm on members of the powerful group.[582]

4.5. REGULATING HATE SPEECH

Van Wyk submits that Parliament did pass legislation prohibiting hate speech.[583] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was passed not only to give effect to section 9 of the Constitution, but also to prohibit hate speech.[584] The objects of the Act are articulated as, among others, 'the prohibition of advocacy of hatred based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated by section 16 (2) (c) of the Constitution...'[585] Van Wyk submits that the Act clarifies and implements the Constitutional hate speech provision.

Unlike section 16 (2) (c) of the Constitution which only placed hate speech beyond Constitutional protection, section 10 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act prohibits hate speech. Although the Act does not criminalise hate speech, it still affords some remedies like an order that specific steps be taken to stop the hate speech or that an unconditional apology be made to counter the effects of hate

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[581] Coliver Op Cit n 393 p 185

[582] Console Tleane says that power can be either political/administrative and economic. He says that those in power are almost always tempted to protect their side of the story even at the expense of truth. In illustrating his point he recounts that at a certain seminar a certain MEC (a member of the African National Congress) was asked whether the Pan Africanist Congress slogan 'one settler, one bullet' should be banned. The answer was in the affirmative. The follow up to that was whether the equally stingful African National Congress slogan 'kill the Boer kill the Farmers' must also be banned. The answer was a resounding no. On economic power Tleane says that because of the deepening gap between the haves and the have nots in this country the latter would, in the ultimate end, become frustrated and angry. Due to their anger and frustration the have nots will start teasing the haves and say things like '[The people] must stand up and fight the blood sucking, big bellied capitalists. This will lead to a situation in which mainly, if not only, the poor will be targets of hate speech regulation. Tleane Op Cit 575 p 2

[583] Van Wyk Op Cit n 308 p 13

[584] Van Wyk ibid n 583 p 13

[585] Section 2 (b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

speech. It should be noted however, that criminal prosecution is a possibility. Section 10 (2) read with section 21 (2) (n) of the Act provides that where necessary the Equality Court[586] may refer publication, advocacy, propagation or communication of hate speech to the Director of Public Prosecution for the institution of criminal proceedings or relevant legislation.

Section 10 (1) of the Act prohibits speech that is intended to be hurtful, harmful or to incite harm or promote or propagate hatred. Van Wyk submits that the term 'harm' probably bears the same meaning as 'harm' contemplated by section 16 (2) (c) of the Constitution. According to Pimstone, the phrase incitement to harm excludes the element of intention. He submits that the omission of the element of intention in section 10 (1) (b) of the Act will create problems for the courts. Apparently the Act has created a strict liability prohibition. It is respectfully submitted that the phrase 'promote or propagate hatred' (on one or more of the listed grounds) has set the threshold lower than that envisaged by the Constitution. Another point worth noting is that the grounds of prohibition have been vastly extended (compared to those enumerated in section 16 (2) (c) of the Constitution) and are similar to those in section 9 (3) of the Constitution.[587] Thus the interpretation of hate speech provision found in the Promotion of Equality and Prevention of Unfair Discrimination Act (enacted on the demand of s 9 (4) of the Constitution) will be streamlined to the equality provision interpretation.[588]

Van Wyk submits that since the provisions of the Act go beyond the categories of hate speech envisaged in section 16 (2) (c) of the Constitution, the Act will be subject to the two-stage limitation analysis. The party relying on the limitation will have to prove that the limitation is reasonable and justifiable in terms of section 16 (1) of the Constitution. Johannesson is convinced that given the weight attached to values of equality, human dignity, non-racism and non-sexism, it should not be difficult to justify a limitation of

[586] Equality courts are courts established by the Promotion of Equality and Prevention of Unfair Discrimination Act.

[587] Van Wyk Op Cit n 308 p16. This would have the effect that hate speech would no longer be limited to those grounds enumerated in section 16 (2) of the Constitution. It is respectfully submitted that the test for hate speech (based on the Act) would be similar to the equality test.

hate speech.[589] On the other hand Van Wyk submits that taking into account the restrictive approach adopted by the Constitutional Court to exceptions, the limitation would hardly pass the constitutional master.

4.6. CONCLUSIONS

This chapter focused on hate speech and whether it should be prohibited or not. It has been argued that hate speech is not only speech of little value, but it causes harm. It has been contended that hate speech has the potential to affect the victim seriously in a comparably serious manner. This means that hate speech diminishes the human worth of an individual. It has been argued that hate speech must be regulated. The reasons advanced for the regulation of hate speech are that it will send out a clear message that society cannot tolerate activities which adversely impact on the human dignity of others. It is society's collective condemnation of an activity which compromises the Constitution. The next chapter carries our findings and conclusions.

[589] Johannesson Op Cit n 339 p 140

CHAPTER FIVE: FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1. FINDINGS AND CONCLUSIONS

This chapter contains the general findings and observations of the study. These findings and observations are based on discussions in chapters two, three and four.

It has been established from chapter two of the study that freedom of expression is one of the foremost important rights enshrined in the Constitution which has the potential of sustaining a democratic polity. In chapter three, the most important moral and philosophical considerations why freedom of expression has to be protected were considered. Chapter three focused on expressions which are not worth of constitutional protection, because such expressions compromise other equally important fundamental human rights, like the right to equality and the protection of dignity.

It is clear from the discussion in chapter two that truth cannot flourish without freedom of expression. The search for truth, it has been pointed out, requires openness to competing and opposing ideas. In order for truth to be discovered, no person should claim that what he says is correct to the exclusion of all others and therefore impose it on others. This means that human beings should recognise that they are not omniscients. Restricting dissident knowledge and opinion impoverishes the search for truth. Freedom can only be realised when individuals are free from government thought-control. No one should assert that his knowledge and idea, and only his, are truthful. Thus in US v Associated Press[590] the court found that truth is more likely to be achieved through a multitude of tongues, than any kind of authoritative selection. The protection of the freedom of expression on the basis of the search for truth, it has been established, has the potential to stifle freedom of expression. It has been established from the discussion in chapter two that although falsehoods have little value and do not advance the search for truth, some tolerance for them is necessary in order to provide a breathing space. If only true expression was to be protected and falsehoods prohibited, the risks of under protecting

[590] US v Associated Press Op Cit n 32

the former would prove inevitable. This would be the case where the speaker may find it impossible or difficult to prove the truth of his statement.

Every person realises his worth and discovers the respect accorded to him by others when he is listened to. Expressing oneself is the only way one can communicate with the rest of the society. It is the only way he can define himself to those around him. Freedom of expression is the only way one can convey his capabilities and capacities to the whole world. It is the only means through which one's rationality could be discovered and acknowledged. It has been shown from the discussion in chapter two that freedom of expression is of grave importance in the realisation and enjoyment of other fundamental human rights enshrined in the Constitution. In Islamic Unity Convention[591] and Mamabolo[592] the Constitutional Court acknowledged that freedom of expression was in tandem with the freedoms of conscience, assembly and association and political participation.

It has been shown from the discussion in chapter two that freedom of expression is an indispensable element of a democratic politic. In order to ensure an accountable government, the citizenry must be free to probe and criticise the government whenever they observe irregularities or mal-administration. Without freedom of expression, there can never be checks on the exercise of state power. Freedom of expression keeps those in power at bay and by extension democracy alive. Freedom of expression forges cohesion in society and contributes to the peaceable settlement of disputes. A citizenry which is not free to express its frustrations and anger, may be left with no alternative but to make their anger and frustration known by resorting to violence. It is only through ballot (which is a means of expression) that government could be peaceably removed from office. A government which appeals to its citizens will ensure and guarantee freedom of expression. However, this does not mean that all forms of expression will enjoy a blanket protection. Citizens, through their government may decide to proscribe expressions which they find to be a menace or corrupting the moral fibre of the society. That is consistent

[591] Islamic Unity Convention Op Cit n 1
[592] Mamabolo Op Cit n 12

with democracy. It has been established in this study that freedom of expression can never enjoy absolute (freedom) protection.

There are various approaches open to courts of law in determining whether expression falls within the boundaries demarcated by section 16 (1) of the Constitution. The first is termed the liberal approach. The adherents to this approach conceive freedom of expression in individualistic terms. This approach is extreme and does not comport with our Constitution. According to this approach freedom of expression is absolute and has no bounds. The other approach is known as the content–neutral. In terms of this approach, expression cannot be denied constitutional protection because of its content. According to this approach every expression enjoys constitutional protection at the first stage of the limitation enquiry. However, according to this approach, speech may be denied constitutional protection if it is found, in the limitation analysis, to be of little value. The other approach is known as the definitional approach. It has been shown in the discussion in chapter two that this approach defines acceptable speech at the threshold. According to this approach, only speech which promotes the tenets of the constitution will enjoy the protection afforded by section 16 (1). This approach has been found to be beneficial in that its definition at the threshold would avoid burdening the courts with frivolous litigations. The only disadvantage of this approach is that it is open to abuse by the authorities. Devenish submits that this approach is apposite for South Africa's young democracy.[593]

It has been evident from the discussion in chapter two of this study that the constitutional protection of free speech specifically and expressly extends to five categories, namely, the press and other media; freedom to receive and impart knowledge; freedom of artistic creativity; academic freedom and freedom of scientific research; and parliamentary privilege. It has been shown from the discussion in chapter one that none of these categories, except parliamentary privilege, enjoy judicial protection. The freedom afforded these categories is equal. The study has found that, with regard to the press that it does not enjoy any special protection vis-à-vis other stakeholders. Although it is

[593] Devenish Op Cit n 2 p 194

conceded that the press has a special role to play in shaping our democracy, the protection extends only to conditions that will not hinder it from carrying out its business (of informing the public).

It has been established in this study that freedom to receive and impart information covers both the speaker and the receiver of information. Artistic creativity not only protects the product of art, but also the process of producing such results, art. Artistic creativity must be afforded wider definition. This is so because by defining artistic creativity narrowly many forms of art may be excluded from the realm of section 16 (1) protection. Academic freedom and freedom of scientific research means that academic institutions and the researchers must be left autonomous from government's control. This means that these institutions and researchers must be free to research even works that have the potential of not being palatable to the powers that be. It has been shown from the discussion in chapter two that not only the government is being restrained from hindering the works of academic institutions and the researchers, but also that academic institutions must not hinder the works of the researchers. Freedom of expression guaranteed to members of the National Assembly and the National Council of Provinces is absolute. These members are immune from any form of liability for what they say before or during the sittings of the respective houses.

The right protected by section 16 (1) of the Constitution is subject to the general limitation under section 36 of the Constitution. Accordingly, speech that has the potential of violating other constitutionally protected rights may be limited. Any restriction on section 16 (1) freedom must be necessary and justifiable in an open and democratic society. In restricting this freedom the court must make sure that there are no other alternatives which could achieve the intended consequences without restricting the speech concerned. In other words, the restriction of speech must be the last resort.

Chapter three of this study is mainly, if not solely, focused on hate speech. It has been established from the discussion in that chapter that the Constitution forbids hate speech. It was shown, although, amid some opposition that the inclusion of hate speech provision in the Constitution was inevitable as the ruling party was adamant that hate speech

provision should be included in the Constitution. It has been proved that the drafters of the Constitution avoided adopting a sacrificial approach to the rights of equality and dignity.

Hate speech is venomous and lethal and thus must not be accepted. It has been shown that hate speech has the potential to deny the worth of an individual and the society as whole. It hits the guts and the core of human worth. It plunges the nation into chaos. Hate speech, it has been shown, has the effect of causing social and psychological harm. It causes social harm in that those adversely affected by hate speech tend to exclude themselves from the mainstream of social life. It is also psychologically harmful because it causes irreparable scars of inferiority in the victim. It is that inferiority complex that would fail the victim to enjoy their constitutionally entrenched rights. Hate speech polarises society and runs counter to the aspirations of the Constitution.

It has been shown from the discussion in chapter three that there are some people who are opposed to the prohibition of hate speech. They argue that regulating hate speech amounts to intolerance of diverging view. They argue that government may be accused of intolerance. Regulation of hate speech may amount to the much undesired attenuation of the core value protected by section 16 (1) of the Constitution. It has been shown from the discussion in chapter two that the government has the mandate to restrict expression which causes harm. It is the duty of the government to protect the helpless and the vulnerable. It has also been shown that, although hate speech regulation is desirable to control and to curb racist slurs, it may still be used for other purposes it was not intended to. The government may stifle legitimate opposition on the pretext of fighting racist speech. It has been established that those who are against the regulation of hate speech, regard freedom of any speech as the only weapon available to the oppressed. If the right of speech of the dominant or racist groups is diminished so too will be the right of the victim group.

It has been established from the discussion in chapter two that this assertion fails to recognise that hate speech ignites violence and hatred. It is a time bomb waiting to explode. It is respectfully submitted that, although the Constitution does not expressly

advocate for the hate speech legislation, it is within the discretion of Parliament to pass such legislation.

5.2. RECOMMENDATIONS

The right to freedom of expression is hailed as one of the most important rights protected in the Constitution. It is only when people are free to speak that that they are able to make known their misgivings without resort to violence. The South African Constitution not only protects the right to freedom of expression , but also limits this right to some definable categories. Section 16 (2) of the Constitution excludes expressions which are in total contrast to the constitutional values. These categories are regarded as being of no value to the establishment of a democratic, non-racial and non-sexist society based on the respect of human rights.

The state is constitutionally mandated to ensure and to make it a reality that everyone enjoys the benefits of the rights entrenched in the Constitution. In a culture of human rights no person has the right to arbitrarily deny others the enjoyment of their rights. Hate speech is regarded as a denial of others rights to equality and dignity. It runs counter to the ideals and aspirations of the Constitution. It is clear that the South African courts and other tribunals are engaged in mapping a way in which all people tolerate and see each other as equals. They are, through their decisions, attempting to deliver our society from the past characterised by racial hatred to a future in which all people are equal and valued for their worth.

Despite the difficulties inherent in differentiating between offensive speech and speech that is acceptable, such differentiation has to be made because it is important if we want to achieve unity in our country. Respect and tolerance of other people is a condition which has to be fulfilled in order to become a truly 'rainbow nation.' Thus, it is respectfully submitted that if we are to build a united nation, expressions which engender and perpetuate hatred must be discarded until such time that true equality and unity have been achieved.

Protection of freedom of speech must be measured against other constitutionally entrenched rights. Freedom of expression is not an absolute right that should be allowed to trump over other rights. It submitted that the courts must take into cognisance the history of this country and social relations between different races when interpreting the right to freedom of expression.

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