

CHAPTER 11: FREEDOM OF EXPRESSION

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1. INTRODUCTION

In the case of *Mamabolo*, the Constitutional Court said the following about freedom of expression:

Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.¹

The right to freedom of expression is contained in section 16 of the Constitution. Against the backdrop of censorship that was prevalent under the apartheid government,¹ it is no surprise that the drafters of the Constitution included the right.² Under South Africa's current constitutional dispensation, the right to freedom of expression serves to protect everyone from censorship and thought control. It also serves to empower everyone to express themselves in both political and non-political contexts.

Yet the right is a controversial one. The biggest issue associated with the right is how to balance it against various other rights that are implicated by certain forms of expression. We can all broadly agree that while people should be allowed to express themselves freely, they cannot always say whatever they like. So, for example, should people be allowed to say racist things? Or incite violence? Should they be allowed to defame others? Should they be allowed to discuss matters that are pending before a

¹ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 37.

² For a full account of the drafting history of section 16, see Dario Milo, Glenn Penfold and Anthony Stein 'Freedom expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2003) (service 6) ch 42.

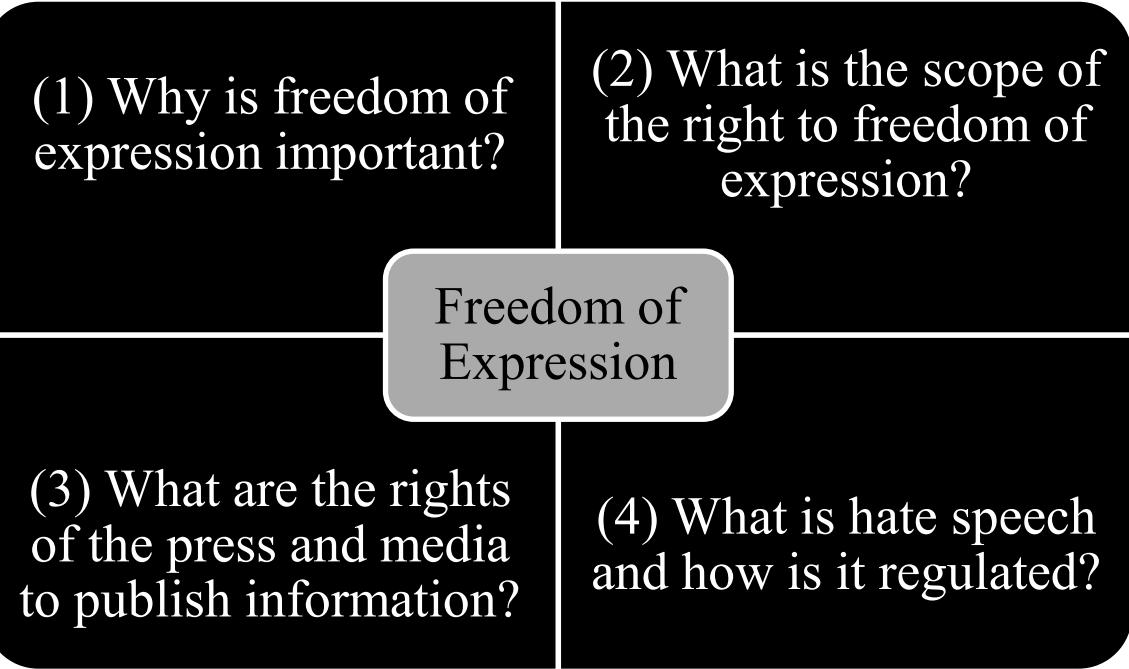
court? Should they be allowed to say things that scare and hurt others? Should they be able to publish fake news? These questions probe the justifiable limits we might want to place on the right to freedom of expression. Many of these justifications are sourced in other constitutional rights or values that someone purporting to rely on their right in section 16 may encroach on. Returning to the racism example, one person's rights to dignity and equality could easily be implicated by bigoted statements. The key challenge is to strike a balance between the right in section 16 and various other rights. The Constitutional Court has explained this tension as follows:

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

There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests.³

This chapter considers the content of the right to freedom of expression. First, it canvasses various arguments for why freedom of expression is important. Second, it discusses the architecture of section 16: its generality, its specific inclusions and its particular exclusions. Third, the chapter deals with the press and media's specific right to freedom of expression and common limitations of that right. Fourth, the chapter considers the prohibition of hate speech. The chapter then provides questions and answers relating to the content.

³ *Islamic Unity* supra n i paras 27-8.



2. THE IMPORTANCE OF FREEDOM OF EXPRESSION

It is important to understand why freedom of expression is valued and philosophically significant. The political and ideological reasons underpinning freedom of expression should play a significant role in an analysis of the section 36(1) limitation to the right in section 16. If we cannot understand why we have the right, we may struggle to decide properly when it should be limited.

Ideological reasons for freedom of expression are often invoked by the Constitutional Court when introducing the right and assessing its limitation. For example, in *DA v ANC*, Cameron, Froneman and Khampepe JJ said the following about why the right in section 16 is so important:

[1] The Constitution recognises that people in our society must be able to hear, form and express opinions freely.

[2] For freedom of expression is the cornerstone of democracy.

[3] It is valuable both for its intrinsic importance and because it is instrumentally useful.

[4] It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed.

[5] It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong.

[6] Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.

[7] What is more, being able to speak freely recognises and protects “the moral agency of individuals in our society”. We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human.

The elements prefaced by the square brackets in the quote detail the moral claims in favour of freedom of expression. Each of these claims does not purport to constitute law, but invokes value judgments concerning freedom of expression. The court has consistently interpreted the right against its underpinning moral value. It has gone so far as to find that freedom of expression is ‘the lifeblood of an open and democratic society cherished by our Constitution’.⁴ So to understand these underlying arguments and the value placed on freedom of speech is crucial to understand the content of the right.

There are various reasons for why a society should promote free speech and expression based on three common arguments made in defence of free speech.⁵ These arguments have been analysed by the Constitutional Court on numerous occasions.⁶

First, freedom of expression is often justified with reference to the pursuit of truth. The argument is that human beings can only discover truth through open discussion and by considering a full range of possibilities; only freedom of expression can guarantee such discussion and consideration; therefore freedom of expression is indispensable to the pursuit of truth. The full range of possibilities that needs to be considered to acquire knowledge includes possibilities that widely-accepted propositions are wrong and that roundly-rejected propositions are true. Because a government or an institution could have a vested interest in certain propositions never being considered critically (for example, ‘we should vote for the ANC because it liberated South Africa from apartheid’), government or establishments should not be able to regulate which ideas can be examined. Instead, ideas should be left only to the forces of human inquiry. Good ideas will gain traction, just as good products attract demand, while bad ideas will be rejected, just as bad or expensive products repel

⁴ *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 92.

⁵ For a fuller account of these arguments, see Milo et al op cit n 2 and Dennis Davis ‘Freedom of expression’ in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (2015) (service 26).

⁶ See *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (SANDU) para 7; *Phillips and Another v Director of Public Prosecutions and Others* [2003] ZACC 1; 2003 (3) SA 345; 2003 (4) BCLR 357 at para 23; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 59.

demand. In this sense, a ‘marketplace’ for ideas that allows for truth-seeking is created by guaranteeing freedom of expression.

This argument has been endorsed by the Constitutional Court⁷ and is particularly foundational to the American constitutional right to freedom of speech. But, it is not without its problems. Some forms of expression are protected even though they have no bearing on a pursuit of truth. For example, while the statement ‘Harry Potter went to Hogwarts’ might be true, the publication of *Harry Potter* books is not protected because it enhances knowledge or truth.⁸ Another problem is that there is no empirical evidence demonstrating that people are more likely to believe true propositions if they are left to their own devices. People can be gullible and irrational, and freedom of expression can result in the proliferation of widely believed false ideas. Moreover, in most contexts (and especially South Africa) there is no neutral ‘marketplace’. On the contrary, power relations between recipients and disseminators of information mean that some ideas will spread not because of their truth but because a powerful entity is responsible for their dissemination.⁹

Second, democracy is often invoked to justify freedom of expression. Democracy entails public accountability, transparency, public participation, and ultimately rule by the people. But the people cannot rule if they are not allowed to express their needs and complaints, especially to those in power (who are supposed to represent them). People similarly cannot hold officials accountable if they are prevented from speaking out against maladministration, corruption and nepotism. Without freedom of expression then, there can be no democratic society. This argument obviously presupposes that democratic values are morally desirable, which may not be true. The argument also suffers from the same problem as the ‘truth’

⁷ *Mamabolo* supra note 1.

⁸ So there may be truth in fiction, but that is not why we like fiction. The same is true of art in general and forms of expression like pornography.

⁹ Compare *Case and Another v Minister of Safety and Security and Others*, *Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 at para 26: ‘It is useful to relate that reasoning to the foundational purposes for the existence of the right to freedom of expression. The most commonly cited rationale is that the search for truth is best facilitated in a free “marketplace of ideas”. That obviously presupposes that both the supply and the demand side of the market will be unfettered.’

argument, especially with regard to non-political speech. How does permitting the publication of pornography, for example, have a bearing on democracy and democratic values?

A third popular argument for freedom of expression invokes self-fulfilment and growth of the individual. The argument is that human beings cannot grow or experience fulfilment without being able to express themselves and experience diverse expressions from others. Even if the ideas are wrong, amoral or non-political, people still experience satisfaction and growth by expressing them or by being exposed to them, and so people should be free to express themselves.

One concern with the argument for self-fulfilment is that it does not account for protecting forms of speech that significantly hurt others (to the extent that they do not experience meaningful growth or fulfilment). Racist speech, for example, may at times be protected under certain laws even though it does not contribute to any form of legitimate fulfilment. The Constitutional Court has also repeatedly emphasised that the right to freedom of expression plays an important role in enabling the exercise of other rights, holding:

[F]reedom 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 (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). 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 like-minded 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.¹⁰

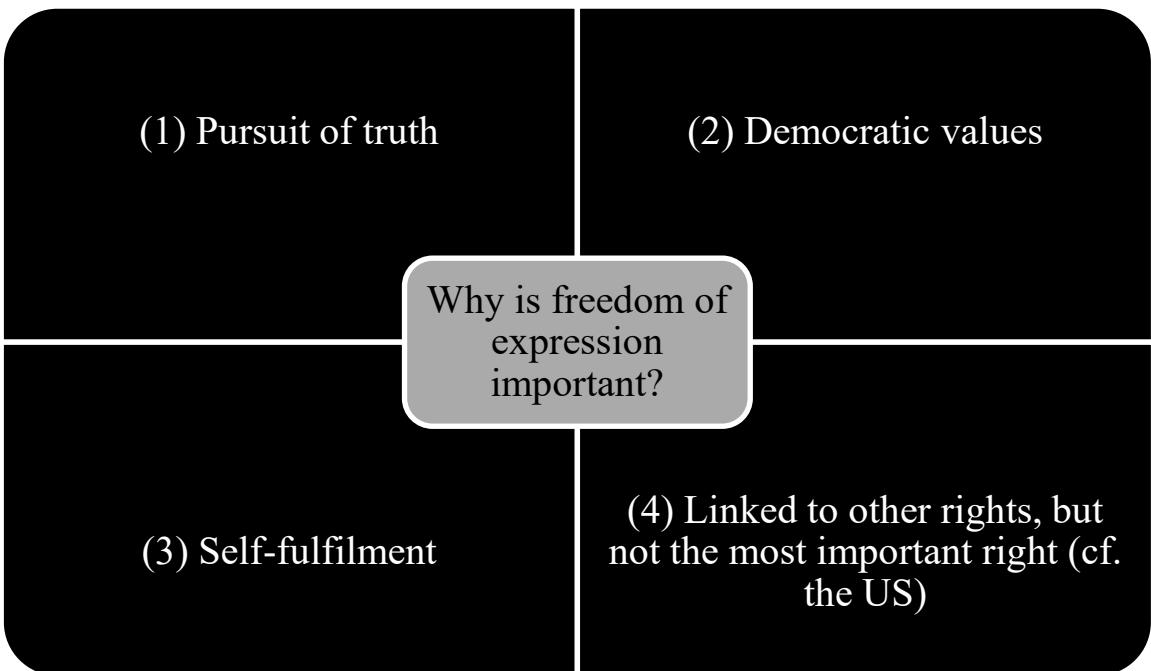
Perhaps what all these arguments and counter-arguments demonstrate is that while there is good reason to believe that freedom of expression is important, it is by no means the most important right in a society. As will become clearer below, the

¹⁰ SANDU supra n 6 para 8. See also *Islamic Unity* supra note i para 24 and most recently (in the context of the right to freedom of assembly) *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC) para 70.

South African Constitution adopts this position. The right in section 16 is not superior to other rights, and the right explicitly does not extend to certain forms of expression. This position is often contrasted to the position in the United States, which prioritises freedom of speech. As the Constitutional Court has explained:

The balance which our common law strikes between protection of an individual's reputation and the right to freedom of expression differs fundamentally from the balance struck in the United States. The difference is even more marked under the two respective constitutional regimes. The United States constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country.¹¹

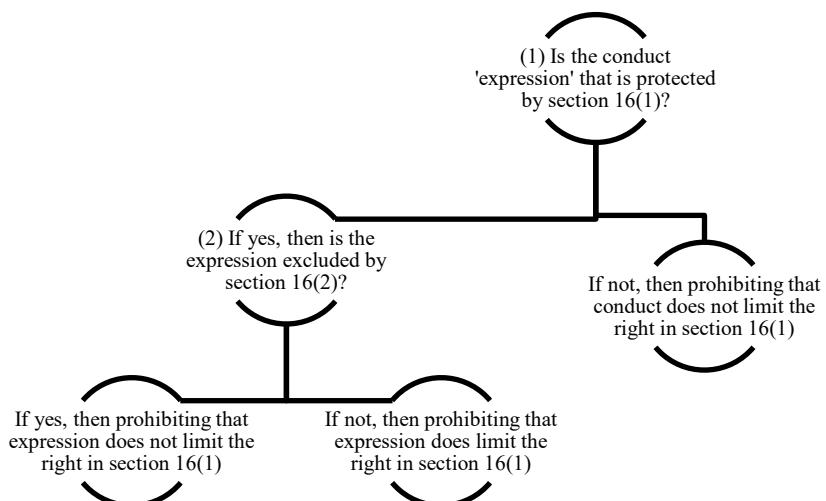
¹¹ *Mamabolo* supra note 1 para 40.



3. THE ARCHITECTURE OF SECTION 16

There are two steps to ascertain whether conduct falls within the ambit of the right in section 16. The first is to ask whether the conduct constitutes 'expression' as envisaged in section 16(1). The second step is to ask whether the expression is placed beyond the ambit of the right in section 16(1) by section 16(2). If the conduct constitutes expression *and* it is not excluded by section 16(2) then it is expression protected by the right in section 16(1) (author's emphasis). If such expression was prohibited by an Act of Parliament or a rule of the common law, then the right in section 16(1) would be limited by a law of general application. In such a case, the law would need to pass a section 36 limitations analysis.

However, if the expression is excluded by section 16(2), then the expression is not covered by the right in section 16(1). A law that prohibits that expression would then not limit the right in section 16(1). The law would not need to go through a limitations analysis.¹² Below, we consider each of these steps in further detail.



¹² See *Islamic Unity* supra note i para 29, which reads: 'Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.' See further *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) para 47.

(a) The Meaning Of ‘Expression’

The right in section 16 purposefully refers to ‘expression’ and not only ‘speech’. On a plain reading, the right is much broader than just freedom of speech. The Constitutional Court has consistently adopted a broad interpretation of ‘expression’ that extends to conduct that may not necessarily be ‘speech’. Most famously, the Court held that the production and possession of child pornography constitutes expression protected by section 16(1).¹³ Its reasoning was that any form of expression that does not fall under section 16(2) is protected by section 16(1); child pornography is a form of expression that does not fall under section 16(2); therefore it is protected by section 16(1).¹⁴ The court thus rejected an argument that the Constitution, like that of the United States, categorically does not protect the production and possession of child pornography.¹⁵ This did not mean, of course, that the limitation was unjustified.

The court has held that naked, erotic dancing constitutes a form of expression.¹⁶ Arguably other forms of non-speech expression, such as pulling a middle finger, wearing political clothing and kneeling during a national anthem would all constitute expression as envisaged in section 16(1). The Constitutional Court has explained that the right extends to expression that may shock, offend or disturb its audiences.¹⁷ So, just because people disagree with the expression, or even if the expressed idea is false, does not mean it falls outside the ambit of the right in section 16(1). Although, the expression of incredibly hurtful or false ideas may be justifiably proscribed – its fate would depend on the legislation and a section 36 analysis.¹⁸

¹³ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 50.

¹⁴ *Ibid* para 48.

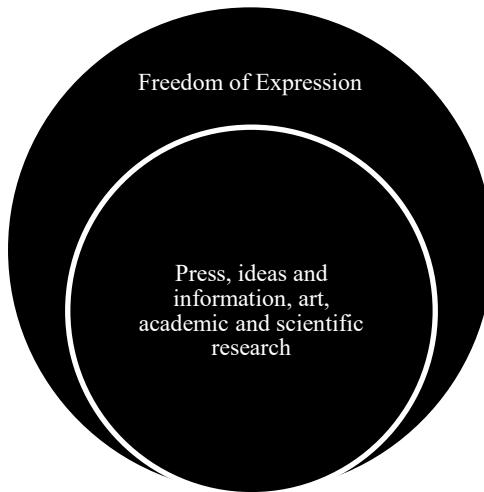
¹⁵ *Ibid*

¹⁶ *Phillips and Another v Director of Public Prosecutions and Others* [2003] ZACC 1; 2003 (3) SA 345; 2003 (4) BCLR 357 para 15.

¹⁷ *Islamic Unity* supra note i at paras 28-9.

¹⁸ Consider for example the provision in the Electoral Act 74 of 1998, which was in question in *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC), that prohibits the dissemination of false information around elections.

The Constitution delineates specific freedoms that are included in the right to freedom of expression in section 16(1)(a) - (d). These freedoms are to be thought of as specific instances or guarantees of the more general right to freedom of expression. There is a broad, general right to freedom of expression, and then there are specific freedoms that are contained within that right. If a more specific freedom listed in section 16(1) is undermined, then the right to freedom of expression is undermined; but if the general right to freedom of expression in section 16(1) is undermined, this does not mean that one of the specific freedoms in section 16(1)(a) - (d) are undermined. The general right to freedom of expression extends beyond the specific freedoms listed in section 16(1)(a) - (d). Litigants do not need to show that their expression qualifies under one of the freedoms in section 16(1)(a) - (d). They only need to show that their conduct constitutes expression. Hence, for example, child pornography constitutes expression protected by section 16(1), even though it does not neatly fall into one of the specific freedoms in section 16(1)(a) - (d). This relationship is illustrated in the diagram below.



The first specific freedom, the one in section 16(1)(a), is the freedom of the press and other media. This freedom is discussed in further detail in the next section. The second is freedom to receive or impart information or ideas. This freedom is of profound importance as it clarifies that the right to freedom of expression includes not only the freedom to express oneself to others, but also to receive the expressions of

others.¹⁹ In *Case*, Mokgoro J, for the minority, emphasised the importance of the right to receive information:

‘But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others’ rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.’

The third specific freedom is freedom of artistic creativity. The Constitution expressly provides for the freedom of artistic ‘creativity’ and not only expression. Arguably then, it is not merely the outcome or end product of the artistic process that is protected, but the process of creation itself.²⁰

The fourth specific freedom is academic freedom and freedom of scientific research. This freedom is to guard against interference with the independence of educational and research institutions.²¹ The freedom has not yet been properly defined or explored by the Constitutional Court. It has the potential to infringe other rights (researching eugenics, for example). It also, at a time where the role of universities is being protested against and contested, has the potential of being infringed. Again, as explained above, the key consideration will always be whether, assuming the right is limited, the limitation strikes an appropriate balance with other competing interests.

¹⁹ *Islamic Unity* supra note i at para 48.

²⁰ Milo et al op cit note 2 at 52.

²¹ Ibid at 60.

(b) The Excluded Expressions

As explained above, section 16(2) lists three forms of expression that fall outside of the ambit of the right to freedom of expression. If expression falls within any of these three exceptions, then that expression is not protected by the right in section 16(1). If legislation prohibited that expression, it would not be a limitation of the right to freedom of expression.

The first exclusion in section 16(2)(a) is propaganda for war. There have been no authoritative pronouncements on this exclusion by the Constitutional Court. The exclusion is vague in that the respective meanings of ‘war’ and ‘propaganda’ are not clear. These meanings could be controversial. People should be able to express support for international conflicts or even South African military intervention. At the same time, the exclusion, at least arguably, envisages that propagating support for unlawful international conflict should not be protected. When and how this exclusion should be applied remains to be seen.

The second exclusion is incitement of imminent violence. Very few people would argue that this form of expression should be protected. The finer contours of the exclusion are yet to be defined. ‘Incitement’ might need to be interpreted narrowly. Merely advocating for violence in public – like saying that people should grab land or that the President should be shot – may not be the same as inciting violence. In criminal law, incitement has been interpreted as ‘whether the accused reached and sought to influence the mind of the other person towards the commission of a crime’.²² This might be a start to understanding incitement. The incited harm must not only be a probable consequence, it must be ‘imminent’. Some commentators have explained that ‘imminence’ means that there must be ‘a real threat to public safety’, as there would be when there is an ‘incendiary context’ in which the audience is ‘tinder’ and words advocating racial or ethnic hatred are intended as a ‘spark’.²³

²² *S v Nkosiyanza and Another* 1966 (4) SA 655 (A).

²³ David Benatar and Anton Fagan ‘On the genocidal fantasies of Masixole Mlandu’ *Politics Web* (13 November 2018) available at <https://www.politicsweb.co.za/opinion/on-the-genocidal-fantasies-of-masixole-mlandu>.

The third exclusion relates to hate speech. It will be discussed in further detail below.

4. FREEDOM OF THE PRESS AND MEDIA

The role of the press and media in modern society is incredibly significant. As the Constitutional Court has declared:

[I]n considering the comprehensive quality of the right [to freedom of expression], one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media.²⁴

People depend on the media for information ranging from political news to celebrity gossip. This information, especially political information, can then affect how people exercise many other rights. The press also ensures that government – as well as powers in private sphere – are accountable. The media are in many ways responsible for democratic development. The Constitutional Court has also held:

In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.²⁵

²⁴ *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 54.

²⁵ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at para 24.

The Constitution thus protects the media's right to disseminate information scrupulously and reliably.²⁶

(a) The Media and The Courts

At the same time, the Constitution allows for various limitations on the media's ability to disseminate and access information. The law on defamation is one example, though a full discussion of this law is beyond the scope of this chapter. Another example is access to court proceedings. The law recognises various instances in which the media's access to a court should be limited. One instance is criminal trials, where sensitive information is discussed and the fairness of the accused's trial could be undermined.

In the case of *SABC*, the Constitutional Court explained that a court has the discretion to refuse the media access to broadcast live court proceedings, because a court under section 173 of the Constitution has the power to regulate its own processes in the interests of justice.²⁷ The exercise of this discretion will not be interfered with lightly on appeal.²⁸ It will only be interfered with if the discretion was exercised with some 'demonstrable blunder' or reached an 'unjustifiable conclusion'.²⁹ On the facts of that [SABC] matter, the Supreme Court of Appeal prevented live visual and audio broadcasting of a criminal appeal,³⁰ and the Constitutional Court decided that the Supreme Court of Appeal had properly exercised its discretion. The Supreme Court of Appeal understood that its primary obligation was to ensure that the criminal appeal proceedings before it were fair, as guaranteed by section 35(3) of the Constitution. The Supreme Court of Appeal still allowed the public and reporters to attend the hearing of the appeal and to take photographs of the hearing. In that way it

²⁶ Ibid.

²⁷ *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others (SABC)* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 38.

²⁸ Ibid at para 40.

²⁹ Ibid at para 41.

³⁰ It was an appeal by Shabir Shaik against his various convictions in the High Court.

recognised the importance of the right to freedom of expression. But it did not extend the open nature of the court – live coverage – because the Supreme Court of Appeal was not satisfied that the fairness of the proceedings before it would not be threatened.³¹ The Constitutional Court found no reason to interfere with this discretion, primarily because it had properly balanced the fairness of the trial with the imperative of openness. The Constitutional Court has subsequently, in *Independent Newspapers*, affirmed its finding in the SABC case:

The right of the media or public to attend, receive and impart workings of a courtroom may be attenuated by a court where it exercises its inherent power to regulate its own process under section 173 of the Constitution. If in so doing “it impinges upon rights entrenched in chapter 2 of the Constitution, [it must ensure that] the extent of the impairment of rights is proportional to the purpose the court seeks to achieve”. It may be added that the right to an open court hearing and the right to report on it does not automatically mean that court proceedings must necessarily be open in all circumstances. There may be instances where the interests of justice in a court hearing dictate that oral evidence of a minor or of certain classes of rape survivors or confidential material related to police crime investigation methods or to national security be heard in camera. In each case, the court will have to weigh the competing rights or interests carefully with the view to ensuring that the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits.³²

Another instance of limited media access to courts is when children are involved in litigation. The media’s ability to disseminate information must be balanced against the best interests of the children. However, as the Constitutional Court held in

³¹ Ibid at paras 45-6.

³² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetsha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at para 45.

Johncom, this does not mean that the moment children are involved the media cannot access the proceedings at all.³³ In *Johncom*, a media company challenged the constitutionality of section 12 of the Divorce Act 70 of 1979. The section prohibited the publication of all information that comes to light during divorce proceedings, except the names of the parties, the fact that they were getting divorced and the judgment of the court. The Constitutional Court held that the section limited the media's right to freedom of expression by preventing the dissemination of information.³⁴ It then held that the limitation was unjustified because:

- a) It prevented the dissemination of information that might not impact on the interests of children and be in the public interest; and
- b) There is a less restrictive mean to protecting children – prohibiting the publication of their names. The Constitutional Court accordingly declared the section unconstitutional, but went on to order that subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited.

Media 24 is in some ways an interesting follow-up to *Johncom*.³⁵ It asks what happens when the child reaches the age of majority. Can their identity then be published by the media? The matter does not concern divorce proceedings, but the publication of the identity of victims of crimes who are children. The Supreme Court of Appeal held that section 154(3) of the Criminal Procedure Act, which prevented the publication of the identities of minor accused and witnesses in criminal trials, must extend to minor victims.³⁶ There was no rational reason for why the Act prevented publication of accused and witness identity but not the identity of a victim. However, the Supreme

³³ *Johncom Media Investments Limited v M and Others* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC)

³⁴ Ibid at para 23.

³⁵ *Centre for Child Law and Others v Media 24 Limited and Others* [2018] ZASCA 140; 2018 (2) SACR 696 (SCA); [2018] 4 All SA 615 (SCA).

³⁶ Ibid at para 29.

Court of Appeal held that preventing the publication of the details of minor victims when they are adults is an unjustifiable limitation of the media's right to freedom of expression. It undermines the principle of open justice and the public's right to receive information concerning criminal trials. The matter was pending on appeal before the Constitutional Court at the time of writing.

In the matter of *Chipu*, the Constitutional Court was faced with a challenge to a provision in the Refugees Act that prevented the media from reporting on proceedings before the Refugee Appeals Board.³⁷ The provision, section 21(5), provided that '[t]he confidentiality of asylum applications and the information contained therein must be ensured at all times'. It was common cause that this limited the right to freedom of expression – the media could not report on anything concerning refugee applications, including the proceedings before administrative bodies like the Refugee Appeals Board.³⁸ In the justification analysis, the key argument for the court was the existence of less restrictive means. The court accepted the importance of ensuring confidentiality in refugee proceedings given the vulnerability of refugees.³⁹ But, the court held, this purpose could be achieved while still allowing the media access to refugee proceedings in specific circumstances. These circumstances could be:

- When the refugee applicant had consented to the media's access;
- Where the refugee application had been rejected;⁴⁰
- Where the material sought to be reported did not reveal the identity of the refugee applicant; or
- Where the information sought to be published was already in the public domain.⁴¹

³⁷ *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* (CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC).

³⁸ Ibid at para 41

³⁹ Ibid at para 55.

⁴⁰ Ibid at para 61.

⁴¹ Ibid at para 64.

The court accordingly declared the section unconstitutional and remedied the section by granting, in the interim, the Refugee Appeal Board the discretion to allow media access in the public interest.

The media, and members of the public, are sometimes prevented from expressing views on matters pending before a court. The idea is that it is usually unacceptable to discuss matter before a court delivers judgment for fear of influencing a judge with commentary on a matter or otherwise undermining the administration of justice. The rule can restrict freedom of expression, especially that of the media. Fortunately, in *Midi TV* the Supreme Court of Appeal went a fair way to soften the rule in the interests of freedom of expression.⁴² The court explained that the default position is to assume that a judge would not be influenced by public discussion of a matter before him (in that case, it was a broadcast of a documentary concerning the facts of the matter). Rather, certain strict requirements would need to be satisfied for expression to be limited in the interests of the administration of justice, namely:

1. There has to be a link between the material and the disruption of the administration of justice.
2. The harm potentially caused must be substantial.
3. There must be a real risk that the prejudice will occur.
4. The court must be satisfied that the harm outweighs the good in allowing for the expression of the information. This entails a proportionality assessment that considered alternative means.

(b) Prior Restraints

Prior restraint refers to instances where material is prevented from being published or where material requires permission before it is published. As mentioned at the start of this chapter, apartheid was rife with government censorship and prior restraint. How have the rules concerning prior restraint been interpreted and applied in constitutional South Africa?

⁴² *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA).

In *Print Media*, the Constitutional Court considered the constitutionality of the Films and Publication Act 65 of 1996.⁴³ The Act required a publisher of material that ‘contained sexual conduct’ to submit the publication for classification to a Film and Publication Board *before* publication (author’s emphasis). Failure to do so was a criminal offence. The court held that the Act was unconstitutional; requiring a publisher to receive permission from the administration before publishing material containing sexual conduct on pain of criminal sanction was a limitation of the right to freedom of expression. Material containing sexual conduct did not fall within the forms of expression in section 16(2), and so it must fall to be protected under section 16(1).⁴⁴ Prohibiting the expression of that material if not approved thus limited protected expression. The court also made an interesting finding that the right in section 16(1) did not require regulation by the state to give effect to that right. Any regulation of that right, ranging from outright ban to classification, therefore amounted to a limitation of that right.⁴⁵

When it came to the justification analysis, the court recognised that ‘an effective ban or restriction on a publication by a court order even before it has “seen the light of day” is something to be approached with circumspection and should be permitted in narrow circumstances only’.⁴⁶ The court emphasised the importance of preventing the dissemination of sexual material without appropriate measures to protect children and to inform consumers of the content of the material.⁴⁷ However, the extent of the limitation was severe. The board, which decided on classification, was an administrative body that was incentivised to classify material before publication instead of punishing a publisher after publication (at lower cost to the state).⁴⁸ The board had no time limits to make its decision, implying that publishers would have to

⁴³ *Print Media* op cit note 24.

⁴⁴ Ibid at para 49.

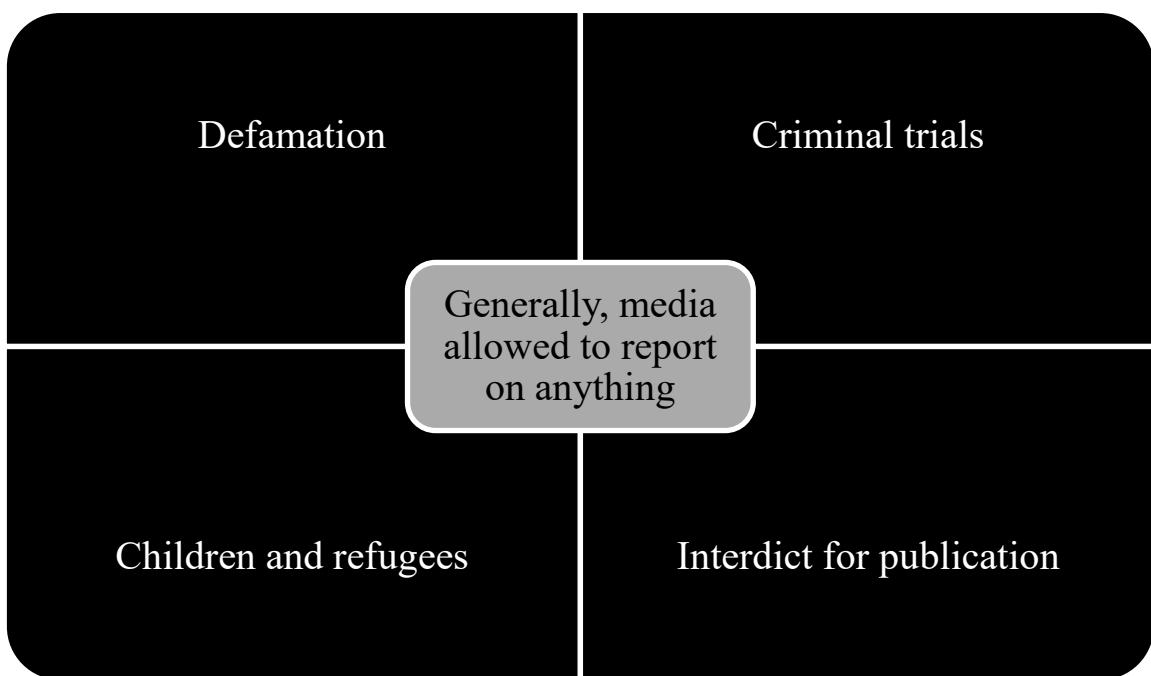
⁴⁵ Ibid at para 51.

⁴⁶ Ibid at para 44 and then again at para 52.

⁴⁷ Ibid at para 56.

⁴⁸ Ibid at para 59.

wait indefinite periods for their material to be published.⁴⁹ There were also less restrictive means to protecting children, such as prohibiting the publication of child pornography or disseminating pornography to children (other parts of the Act already did this).⁵⁰ There is also the method of a court interdict, which vests the power of prior restraint with the judiciary – a tougher test compared to vesting the power with an administrative body.⁵¹ It is only if this tougher test for an interdict, which will balance the right to freedom of expression against the competing interest concerned, is met will the material be restrained before publication. The section was accordingly declared unconstitutional.



5. HATE SPEECH

Section 16(2) of the Constitution provides that advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm, is not protected by the right to freedom of expression contained in section 16(1). This form of excluded expression is commonly known as ‘hate speech’. In a society recovering

⁴⁹ Ibid at para 60.

⁵⁰ Ibid at para 63.

⁵¹ Ibid at para 66.

from racial and ethnic oppression that was often propagated through words and expression, it is no surprise that the Constitution seeks to exclude certain forms of race-based hate speech from protection. Simultaneously, the exclusion is controversial because its bounds are not entirely clear, resulting in constant tension with the overarching imperative to protect freedom of expression. While most should agree that prohibiting the use of the ‘k-word’ is constitutionally permissible, what about other, less clear-cut examples? Does promoting Zionism, which some argue is based on the ethnic oppression of Palestinians, fall outside of the right in section 16(1)? Or if a political party put up posters saying ‘Secure Our Borders’, is it not advocating hatred of persons whose ethnicity is not South African?

What makes matters more complicated is that Parliament has attempted to regulate hate speech through the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 (PEPUDA). PEPUDA potentially provides for a far broader and more ambiguous definition of hate speech than section 16(2). What this means from a constitutional perspective is discussed in detail below.

Before then, it is important to recognise why a society, especially South Africa, would want to prohibit hate speech. The purpose behind hate speech will be integral to any section 36 analysis assessing the constitutionality of a prohibition of hate speech in the light of the overall protection of freedom of expression. Prohibiting hate speech could ensure and protect public order and social peace. It could prevent psychological harm to victims of hate speech that would prevent them from participating meaningfully in society. Hate speech can also undermine the dignity of a targeted person. Because hate speech undermines and marginalises target groups, prohibiting hate speech can ensure equal opportunities for minorities. Overall, hate speech can divide and promote discord in sections of society, so its prohibition can go a long way to ensure cohesion and unity.⁵²

⁵² Pierre De Vos and Warren Freedman (2014) *South African Constitutional Law in Context* 544-5.

(a) What is Hate Speech?

There are two sources of the definition for hate speech, namely in section 16(2) and in PEPUDA. Each is discussed in turn. After that, the discussion will turn to when reliance can be placed on each definition, and whether PEDUDA is constitutional.

(i) Section 16(2)

The definition of hate speech in section 16(2) can be set out as follows:

Hate speech is–

- (a) Advocacy of hatred;
- (b) based on race, ethnicity, gender or religion;
- (c) that constitutes incitement to cause harm.

All three of these requirements must be met, and if they are the expression is not protected by the right in section 16(1). As explained above, if speech is prohibited that does not meet all three of these requirements,⁵³ then it is protected speech, and its prohibition must be justified under section 36.

There has been no authoritative pronouncement on the meaning of these three requirements by the Constitutional Court. In *Masuku* the Supreme Court of Appeal was faced with a contentious set of facts.⁵⁴ Mr Masuku, who worked for COSATU, had published the following on a blog:

Hi guys,

Bongani says hi to you all as we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler!

⁵³ And it does not fall within the other exceptions in section 16(2).

⁵⁴ *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* (1062/2017) [2018] ZASCA 180; 2019 (2) SA 194 (SCA); [2019] 1 All SA 608 (SCA). The matter, at the time of writing, was set down to be heard by the Constitutional Court on appeal.

We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity. Every Palestinian who suffers is a direct attack on all of us.

Mr Masuku had also said the following at a public event concerning the Israel/Palestine conflict:

... COSATU has got members here on this campus, we can make sure that for that side it will be hell . . . ,

... the following things are going to apply: any South African family, I want to repeat it so that it is clear for everyone, any South African family who sends its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect . . . , and

... COSATU is with you, we will do everything to make sure that whether it is at Wits, whether it is at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if we will do something that may necessarily be regarded as harm . . .

The Supreme Court of Appeal held that the matter should not be decided on the basis of PEPUDA.⁵⁵ This part of the decision is discussed below. However, the court decided the matter on the basis of section 16(2) – a rare occasion when a court of appeal has considered the meaning of section 16(2). Although the judgment was terse in its interpretation, it does make certain findings concerning section 16(2), for example that it has generally been accepted that the bases of hate speech – race,

⁵⁵ Ibid at para 14.

ethnicity, gender or religion – are a closed list.⁵⁶ In *Masuku*, the Court of Appeal appeared to accept that when it held that:

[N]one of the other offending terms “racists”, “fascists” and “friends of Hitler”, either on their own or within the statement, connote religion or ethnicity. The terms may be irrational, offensive or even insulting. Threatening or unsavoury words in the statement such as “bitter medicine”, and “perpetual suffering” are only metaphorical.⁵⁷

The court also affirmed the proposition that expression is not hate speech just because it is offensive, holding:

The fact that particular expression may be hurtful of people’s feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection. Public debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Nothing that Mr Masuku wrote or said transgressed those boundaries, however hurtful or distasteful they may have seemed to members of the Jewish and wider community. Many may deplore them, but that does not deprive them of constitutional protection.'

The Supreme Court of Appeal further held that whether expression amounts to hate speech ultimately turns on the context in which it was said.⁵⁸ It remains to be seen whether the Constitutional Court will confirm the Supreme Court of Appeal’s approach and findings on appeal.

⁵⁶ De Vos and Freedman op cit n 52 at 545.

⁵⁷ *Masuku* supra n 54 at para 26.

⁵⁸ Ibid at para 26-7.

Commentators have suggested various interpretations of section 16(2).⁵⁹ Regarding the first requirement, advocacy is taken to mean that the speaker must promote hatred or attempt to instil hatred in others. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. As for the second requirement, hate speech does not extend to speech which simply advocates hatred of a particular person – a group must be the target of the hate speech on the bases listed in section 16(2)(c). As for the third requirement, it is unclear whether ‘harm’ is limited to physical violence and what exactly constitutes incitement. The phrase ‘incitement to cause harm’ could suggest that one should not look to the harm caused by the speech itself. In other words, the question is not ‘did the speech harm the target person or group?’ Rather, the focus should be on the impact of the speech on third parties, ie does the speech encourage, stimulate or call for others to cause harm? This is the ordinary meaning of ‘incitement’.

(ii) *PEPUDA*

Section 10(1) of PEPUDA defines and prohibits hate speech. The section reads:

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

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

This prohibition can be broken down to say that that no person may

- (a) communicate words;
 - (b) based on one or more of the prohibited grounds;
 - (c) against any person;
-

⁵⁹ The following is taken from Milo et al op cit n 2 at 80.

- (a) that could reasonably be construed to demonstrate a clear intention to—
 - (i) be hurtful;
 - (ii) be harmful or incite harm;
 - (iii) promote or propagate hatred.

The first requirement is relatively straightforward. It accords with the broad approach to ‘expression’ taken by Constitutional Court in interpreting section 16(1). However, the section specifically envisages ‘words’ being communicated. This might narrow the scope of hate speech considerably. Other forms of symbolic expression that are not ‘words’, which might nonetheless advocate hatred on prohibited bases, may not be captured by the definition of hate speech in section 10 of PEPUDA. For example, pulling the middle finger, imitating a gun with one’s hand or imitating a throat being cut by moving one’s hand across one’s throat could all incite harm and advocate hatred, even though these forms of expression are not words.

As for the second requirement, the prohibited grounds as defined in section 1 of PEPUDA, include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. To say that ‘Ministers and Members of Parliament are stupid’ is not to say something based on a prohibited ground, because holding public office is not a prohibited ground listed in section 1 of PEPUDA (and it is arguably not an analogous ground). Presumably, to use words based on a prohibited ground is to say something *because of* someone’s race or religion etc. So to call someone ‘greedy’ *because* they are Jewish is to say something because of someone’s religion. A link has to be demonstrated between the words expressed and a prohibited ground – but for the person being x, the speaker would not have said that. To say ‘that person should not be hired’ because they are not qualified, even though she might be a woman, might not be hate speech because it is not said *because of* a prohibited ground (author’s emphasis).

The third requirement is peculiar. Words are normally not said to be communicated or published ‘against’ a person. Presumably what the requirement

means is that the expression has to somehow target any person. General statements like ‘the country is falling apart’ or ‘we will come for land’ might not then be hate speech because they are not communicated *against* any person (author’s emphasis). They could be said in the air. However, as with all instances of hate speech, this will depend on the context.

The fourth requirement prescribes that the words could reasonably be construed to demonstrate a clear intention to be or do one of the things listed in section 10(1)(a) to (c). This is an incredibly vague and difficult requirement to apply. The meaning must attach to the context of the words. All relevant factors must be considered, such as who the speaker is, who the audience is, the broader social context against which the words are said, the power dynamics surrounding the speech, the effect the speech had on the audience, the constitutional rights to dignity equality and freedom of expression, and any harm that resulted from the speech or incitement. The test is ultimately objective because PEPUDA imposes a standard of reasonableness. Showing subjective fear or hurt by a person or group of persons is not sufficient to demonstrate hate speech, though it may be a relevant factor.

There have been controversial interpretations and applications of this reasonableness test. For example, in *Malema*, the Equality Court was faced with an application declaring the singing of ‘*Shoot the Boer*’ as hate speech.⁶⁰ On the reasonableness test, the court held that the focal point was the message the words deliver when analysed from an objective standpoint. Furthermore, words can mean what they imply, and gestures help give meaning to words too. Applying the reasonableness test to the facts, the court accepted that the meaning of the song was ambiguous. The song’s meaning changes according to context and it could either mean literally to kill farmers or Afrikaans people or take down the oppressive apartheid regime. The solution the court gave was that if words have more than one meaning to different sections of society, then the test is to see how a reasonable person who is part of targeted group would interpret or see the meaning of the words. *Malema*

⁶⁰ *Afri-Forum and Another v Malema and Others* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC). The relevant words of the song are ‘Awudubula (i) bhulu” and “Dubula amabhunu bay a raypha’. These words were translated as meaning ‘shoot the Boer/farmer’, ‘shoot the Boers/farmers they are rapists/robbers’.

argued that the audience at the time the song was sung comprised only of soldiers who were not impacted by the song. The court rejected this argument, holding that because the media was invited to be an audience at the occasion, the actual audience was the public in general, including Afrikaans people. The court then asked whether a reasonable person who is Afrikaans would consider the words to be hate speech. Given the translation of the words, the court said yes because the chant was dehumanising. The court was also concerned about the aggressive tone of the chant, the numerical minority status of Afrikaans people, and the ‘snowball effect’ words connoting violence can have.

The judgment has also been criticised from all corners. Some commentators forcefully argue that because there was no imminence of violence flowing from the song, given the power many white Afrikaners have, the speech should not have been classified as hate speech.⁶¹ Others lament the simplistic and divisive premise that South Africa is divided into ‘sections’ and that the reasonable person from each section must be used to decipher ambiguous meaning.⁶²

In another controversial judgment (the *Khumalo* judgment), the Equality Court was asked to consider whether the following words, posted online, constituted hate speech:

‘I want to cleans this country of all white people. we must act as Hitler did to the Jews. I don’t believe any more that the is a large number of not so racist white people. I’m starting to be sceptical even of those within out Movement of the ANC. I will from today unfriend all white people I have as friends from today u must be put under the same blanket as any other racist white because secretly u all are a bunch of racist fuck heads. as we have already seen. [sic]

⁶¹ Joel Modiri ‘Race, Realism and Critique: The Politics of Race and *Afriforum v Malema* in the (In)Equality Court’ (2013) 130 SALJ 274.

⁶² Pierre de Vos ‘Malema Judgment: A re-think on hate speech needed’ (2011, 12 September) *Constitutionally Speaking* available at <https://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/>.

'Noo seriously though u oppressed us when u were a minority and then manje u call us monkeys and we suppose to let it slide. white people in south Africa deserve to be hacked and killed like Jews. U have the same venom moss. look at Palestine. noo u must be bushed alive and skinned and your off springs used as garden fertiliser. [sic]⁶³

The most interesting part of the *Khumalo* judgment is that it held that all three subsections of section 10(1) must be read conjunctively rather than disjunctively. That is, the words concerned must be reasonably interpreted to be hurtful, be harmful or incite harm, *and* promote or propagate hatred [author's emphasis].⁶⁴

The court explained that this must be done to ensure that section 10(1) is constitutional. As explained below, section 10 is potentially broader than section 16(2). It thus could be read to limit, perhaps unjustifiably, the right in section 16(1). The court, however, decided that to prevent the right in section 16(1) from being limited the subsections in section 10(1) must be read conjunctively. This radically narrows the scope of hate speech under section 10(1). Whether this approach will be adopted by other courts remains to be seen.

The court also explained that 'harm' must be construed in the context of the statute's aims. The harm envisaged that derives from inter-racial hostility cannot be limited to violence alone. The court explained that societal demands contemplate the prohibition of non-physical harm too. Moreover, the rehabilitative objectives of PEPUDA, the court continued, suggest a broader ambit than physical violence.⁶⁵ Therefore, one can commit hate speech even when the harm incited or caused is not physical in nature.

In conclusion, it should also be noted that section 10 of PEPUDA is subject to a proviso contained in section 12. If the expression is a genuine form of artistic creativity

⁶³ *South African Human Rights Commission v Khumalo* [2018] ZAGPJHC 528; 2019 (1) SA 289 (GJ); [2019] 1 All SA 254 (GJ).

⁶⁴ *Ibid* at para 82.

⁶⁵ *Ibid* at para 94.

or academic and scientific inquiry, then it is not prohibited by section 10. Section 12 thus operates as a defence to hate speech under section 10, albeit a narrow one.

(b) PEPUDA versus Section 16

There are two issues concerning the relation between PEPUDA and section 16. First, when should PEPUDA be used instead of section 16? Second, is PEPUDA's definition of hate speech broader than section 16(2)(c), and thus potentially unconstitutional?

As to the first issue, the principle of subsidiarity has already been discussed fully elsewhere in this book.⁶⁶ PEPUDA must be used to found a cause of action for hate speech. The only time section 16 can be relied on is to test the constitutionality of PEPUDA or other legislation. This also makes sense given the role of section 16(2)(c) as a definitional role instead of a prohibitive role. To this extent, with respect, the Supreme Court of Appeal erred in *Masuku*. Section 16(2)(c) does not *prohibit* hate speech [author's emphasis]. It only says that hate speech of a certain kind is not protected under section 16(1). So even if something is declared as hate speech under section 16(2)(c), it does not mean that it is prohibited. It only means that legislation could prohibit it, and if it did, this would not be a limitation of the right in section 16(1).

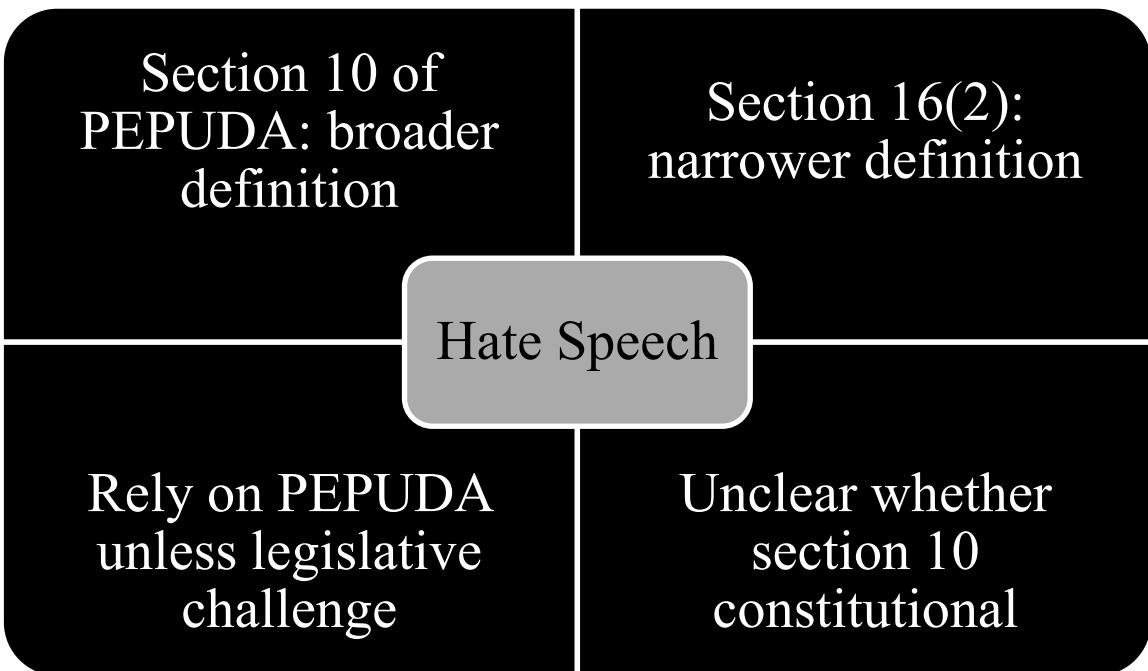
Second, is section 10 constitutional? The first step in determining this is assessing whether the section prohibits protected forms of speech. It quite clearly does, given the requirements for hate speech under section 10. These are tabulated below:

⁶⁶ LINK TO RELEVANT CHAPTER.

Is PEPUDA broader than section 16(2)(c)?	
PEPUDA	Section 16(2)(c)
Hate speech can be based on various prohibited grounds and analogous grounds	Hate speech can be based on limited bases of race, ethnicity, religion and gender.
Hate speech can only be 'words'.	Hate speech could be all 'expressions'.
Hate speech can be when words are taken to be hurtful, be harmful or incite harm, or promote or propagate hatred (but cf. <i>Khumalo</i>).	Advocacy of hatred must incite harm.

The most obvious overreach in PEPUDA is that words can constitute hate speech if they are reasonably interpreted to be hurtful. For expression to be hurtful is not the same as expression inciting harm. As explained above, the latter is a strict test, while the former is unclear. What is 'hurtful'? Many things people say can reasonably be interpreted to be hurtful. Not all of these things constitute inciting harm. Calling someone a bitch because she is a woman is hurtful, even though it might not incite harm. PEPUDA might nonetheless classify this as hate speech, even when it may be protected speech under section 16(1). The primary issue of breadth with section 10(1) is that it does not envisage that the hate speech must incite or persuade others. It prohibits speech that itself gives rise to the harms envisaged in the section. In this way, PEPUDA limits protected expression. It thus needs to be justified under section 36.

A full section 36 analysis of section 10 is beyond the scope of this chapter. It is a matter of time before the Constitutional Court determines the matter. Crucial to the enquiry will be the importance of prohibiting hate speech and the dignity of target groups. At the same time, the vagueness of section 10 will create serious inroads into people's right to freedom of expression. The court will ultimately have to decide whether section 10 is well-tailored enough to achieve its important purpose: does it adequately balance the rights to dignity and equality, on the one hand, against the right to freedom of expression on the other hand?



6. CASE SUMMARIES

(a) Islamic Unity Convention

Facts

Islamic Unity Convention ran a community radio station known as Radio 786. On 8 May 1998 the station interviewed Dr Zaki. He expressed views which, among other things, questioned the legitimacy of the state of Israel and Zionism as a political ideology, asserted that Jewish people were not gassed in concentration camps during World War 2 but died of infectious diseases, particularly typhus and that only a million Jews had died.

Following the broadcast, the fourth respondent, the South African Jewish Board of Deputies, lodged a formal complaint with the second respondent, the Head: Monitoring and Complaints Unit of the Independent Broadcasting Authority. The board claimed that the material that had been broadcast contravened clause 2(a) of the Code of Conduct for Broadcasting Services (the Code). The clause provides: 'Broadcasting licensees shall . . . not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or

the public order or relations between sections of the population'. The Code is contained in Schedule 1 to the Independent Broadcasting Authority Act. The board only invoked the last part of the clause, arguing that the offending broadcast was 'likely to prejudice relations between sections of the population'.

Issue

is the relevant part of clause 2(a) of the Code a limitation of the right to freedom of expression? If so, is it justifiable?

Law	Application
<p><i>Limitation</i></p> <p>The right in section 16(1) is limited whenever expression not listed in section 16(2) is prohibited. (paras 28-32)</p>	<p><i>Limitation</i></p> <p>The prohibition against the broadcasting of material that is 'likely to prejudice relations between sections of the population' limits the right in section 16(1) because:</p> <ul style="list-style-type: none"> (i) The phrase 'section of the population' in clause 2(a) is less specific than 'race, ethnicity, gender or religion' as spelt out in section 16(2)(a); (ii) The clause does not, for instance, require that the material prohibited should amount to advocacy of hatred, least of all hatred based on race, ethnicity, gender or religion, nor that it should have any potential to

	<p>cause harm. (para 33). In other words, not every expression or speech that is likely to prejudice relations between sections of the population would be ‘propaganda for war’, or ‘incitement of imminent violence’ or ‘advocacy of hatred’ that is not only based on race, ethnicity, gender or religion, but that also “constitutes incitement to cause harm”. (para 34)</p>
<p><i>Justification analysis</i></p> <p>Section 36(1) of the Constitution sets out the criteria for the limitation of rights. The limitation must be by means of a law of general application and determining what is fair and reasonable is an exercise in proportionality, involving the</p>	<p><i>Justification analysis</i></p> <p>The purpose of the limitation is legitimate. The prohibition aims to achieve and promote equality, national unity, and human dignity. (para 43)</p> <p>The prohibition against the broadcasting of any material which is ‘likely to prejudice relations</p>

<p>weighing up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom. (para 36)</p>	<p>between sections of the population' is cast in absolute terms; no material that fits the description may be broadcast. The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects. The wide ambit of this prohibition may also impinge on other rights, such as the exercise and enjoyment of the right to freedom of religion, belief and opinion guaranteed in section 15 of the Constitution. (para 42)</p> <p>The fact that the prohibition only affects broadcasters does not mitigate the extent of the limitation, because it still affects the public's right to receive information. (para</p>
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45)

The Act imposes a potential penalty of suspending the broadcaster's license if they fail to comply with the Code. (para 46)

Since constitutionality is an objective exercise, a broadcaster's ability to opt out of the Code is irrelevant (para 47).

So, the Code is unconstitutional.

7. QUESTIONS

(a) MCQs

1. The right in section 16(1) is limited when:
 - a. The expression prohibited is listed in section 16(1) and 16(2);
 - b. The expression prohibited is listed in section 16(2);
 - c. The expression prohibited is not listed in section 16(2);
 - d. The expression prohibited is not listed in neither section 16(1) nor section 16(2).

2. If expression is listed in section 16(2), then:
 - a. It is hate speech;
 - b. It is prohibited by the Constitution;
 - c. It is not protected by the right in section 16(1);
 - d. It is prohibited by PEPUDA.

(b) True/False

1. Section 16(1) protects the right to freedom of speech.

2. Like the American Constitution, the South African Constitution regards freedom of speech as a right more important than others.

3. Expression, to be protected, cannot include morally objectionable material, such as child pornography.

4. The right to freedom of expression is not linked or related to any other right.

5. If expression is not expressly listed in section 16(1), then it cannot be protected by the right in section 16(1).

6. If expression is listed in section 16(2), then it is prohibited by the Constitution.

(c) Short Questions (5 marks each)

1. Briefly discuss how section 10 of PEPUDA is broader than section 16(2)(c) of the Constitution.
 - a. All prohibited grounds and not only race, ethnicity, religion and gender can form the basis of hate speech. Hate speech can include speech that is hurtful, whereas section 16(2)(c) requires the expression to incite harm.
2. You are a judge who has been assigned the murder trial of a famous South African athlete. The media has requested to broadcast the entire trial, including the examination of witnesses. What kind of discretion do you have in considering their request? What factors must you consider in making up your mind?

(d) Long Questions (15 marks each)

1. Imagine that the University of Cape Town passed a resolution that requires its academics to boycott all interactions with academics and academic institutions in Israel. The impetus for the resolution was that the majority of academics at the institution feel that boycotting Israel will bring an end to the oppression of Palestinian people. These academics also believe the boycott has intrinsic moral value – it signals to the global community that what Israel is doing is wrong, and that UCT stands by that. The resolution was properly passed in terms of the relevant legislation and university policy. A group of academics wish to bring a challenge to the resolution. These academics have established relationships with Israeli universities and the boycott will mean that they cannot publish work that is done in collaboration with these Israeli universities. Assume the resolution is a law of general application. Advise them on the prospects of success to this challenge, focusing exclusively on the right to freedom of expression.
2. Imagine that a student wore a T-shirt saying “Fuck White People” to a constitutional law lecture. A group of law students are offended by the T-shirt and approach you for an opinion on whether the student’s conduct constitutes

hate speech. Advise on the prospects of success in bringing an application to have the conduct declared as hate speech.

A film, called *The Wound*, was distributed in South African cinemas in early 2018. It sparked controversy around how it depicts Xhosa culture, especially around male circumcision and initiation. Assume that the Film and Publication Act provides that any interested party may approach the Film and Publication Board to prevent the distribution of film if it contains material ‘unjustifiably infringing on the cultural rights of a person as guaranteed by the Constitution’. Assume further that the Act says that a film will be presumed to be violating the cultural rights of a person if that person alleges as such. You are a judge of the High Court and are assigned an application in which the producers of the film are challenging these two provisions of the Act. They argue that it unjustifiably infringes their right to freedom of expression, while a group of Xhosa traditional leaders, who oppose the application, argue that the provisions are necessary to protect their constitutionally enshrined cultural rights. Write a judgment resolving the dispute.

3. You are a judge and have been assigned a matter that is a terribly controversial. The matter is a criminal trial of a corrupt politician. The media have applied to broadcast the hearing, the examination of witnesses, and the handing down of judgment. In addition, a large group of members of the public have applied to live-stream the court proceedings from their phones. Do you grant everyone access to everything? Would it make a difference if, instead of a criminal trial, the matter was a review of an unlawful, corrupt decision?

8. ANSWERS

(a) MCQs

1. c. The expression prohibited is not listed in section 16(2);
2. c. It is not protected by the right in section 16(1);

(b) True/False

1. Section 16(1) protects the right to freedom of speech.

False. It protects the right to freedom of expression, which is far broader than just speech.

2. Like the American Constitution, the South African Constitution regards freedom of speech as a right more important than others.

False. The South African Constitution does not create a hierarchy of rights. Freedom of expression (and not speech) is regarded on the same plane as all other rights. Should the right conflict with another, then the two will be balanced out in a section 36 analysis. See *Islamic Unity* and *De Reuck*.

3. Expression, to be protected, cannot include morally objectionable material, such as child pornography.

False, if the expression is not excluded by section 16(2), then it is protected. This includes child pornography (*De Reuck*).

4. The right to freedom of expression is not linked or related to any other right.

False. The Constitutional Court has recognised that the right is linked to other rights (*SANDU*).

5. If expression is not expressly listed in section 16(1), then it cannot be protected by the right in section 16(1).

False. Only expression listed in section 16(2) is excluded from protection. All other expression, even if not listed specifically in section 16(1), is protected.

6. If expression is listed in section 16(2), then it is prohibited by the Constitution.

False. If expression is listed in section 16(2), then it is not protected by the Constitution. It can be prohibited without limiting the right in section 16(1).

(c) Short Questions

1. Briefly discuss how section 10 of PEPUDA is broader than section 16(2)(c) of the Constitution.
 - a. All prohibited grounds and not only race, ethnicity, religion and gender can form the basis of hate speech. Hate speech can include speech that is hurtful, whereas section 16(2)(c) requires the expression to incite harm.
2. You are a judge that has been assigned the murder trial of a famous South African athlete. The media has requested to broadcast the entire trial, including the examination of witnesses. What kind of discretion do you have in considering their request? What factors must you consider in making up your mind?
 - a. In SABC, the Constitutional Court explained that a court has the discretion to refuse the media access to broadcast live court proceedings, because a court under section 173 of the Constitution has the power to regulate its own processes in the interests of justice. This discretion will not be interfered with lightly on appeal, and only if the discretion was exercised with some 'demonstrable blunder' or reached an 'unjustifiable conclusion'.

- b. A court's primary obligation is to ensure that the criminal appeal proceedings before it are fair, as guaranteed by section 35(3) of the Constitution. But a court must also recognise the importance of the right to freedom of expression. These two, at times competing values, must be balanced when making the decision.
- c. Factors include: the public interest in the matter, the sensitivity of the facts, interference with witnesses, the involvement of children and offering to broadcast only certain parts of the trial.

(d) Long Questions

1. Imagine that the University of Cape Town passed a resolution that requires its academics to boycott all interactions with academics and academic institutions in Israel. The impetus for the resolution was that the majority of academics at the institution feel that boycotting Israel will bring an end to the oppression of Palestinian people. These academics also believe the boycott has intrinsic moral value – it signals to the global community that what Israel is doing is wrong, and that UCT stands by that. The resolution was properly passed in terms of the relevant legislation and university policy. A group of academics wish to bring a challenge to the resolution. These academics have established relationships with Israeli universities and the boycott will mean that they cannot publish work that is done in collaboration with these Israeli universities. Assume the resolution is a law of general application. Advise them on the prospects of success to this challenge, focusing exclusively on the right to freedom of expression.
 - a. Introduction:
 - i. The issue in this matter is whether the resolution unjustifiably limits the right to freedom of expression, especially academic freedom.

ii. Because we are dealing with a law of general application, this question is resolved by testing the resolution against the provisions of the Constitution.

b. Is the right limited?

- i. There are two steps to determining whether the right in section 16(1) is limited. First, is the conduct in question ‘expression’? Courts have taken a broad approach to this question (*De Reuck; Phillips*). Quite clearly here, academic research and its publication constitute expression. The Constitution expressly states that freedom of expression includes academic freedom.
- ii. Second, is the expression excluded by section 16(2)? Nothing here to suggest so, unless the research being done somehow advocates hatred, incites violence or is war propaganda.
- iii. If expression is not excluded by section 16(2), then its prohibition is a limitation of the right to freedom of expression in section 16(1) (*Islamic Unity*).

c. Is the limitation justifiable?

- i. This is ultimately a value judgment. A good answer will include a consideration of the following and make arguments along these lines.
 - ii. Purpose of limitation: giving effect to will of majority of faculty, expressing academic consensus, right to academic freedom could include right to decide who not to associate oneself with. Could argue no legitimate purpose because a university is never supposed to take a stance on controversial topics, but allow debate on them.
 - iii. Relation to purpose: could be rational. Boycott allows for expression of consensus.
 - iv. Nature of right: academic freedom critical in democratic society. Compare to state interference in apartheid and non-democratic states.

- v. Extent of limitation: ultimately depends on what resolution says. Potentially could mean, for some academics, that their research is severely affected.
 - vi. Less restrictive means: consider allowing individual academics to boycott instead of university as a whole. Alternatively impose exceptions in resolution, like only certain academics or certain research is boycotted.
2. Imagine that a student wore a T-shirt saying “Fuck White People” to a constitutional law lecture. A group of law students are offended by the T-shirt and approach you for an opinion on whether the student’s conduct constitutes hate speech. Advise on the prospects of success in bringing an application to have the conduct declared as hate speech.
- a. Introduction:
 - i. Issue here is whether conduct is hate speech.
 - ii. Because dealing with conduct, cause of action is PEPUDA. Mention principle of subsidiarity.
 - b. Hate speech under PEPUDA
 - i. Lay out the requirements for hate speech and discuss them briefly. Be sure to mention *Malema* and *Khumalo* interpretations. Most importantly explain how hate speech is ultimately contextual.
 - ii. Apply requirements to facts.
 - iii. Most focus must go to fourth requirement: will reasonable person interpret this as hurtful, harmful or inciting harm? Ultimately a value judgment. A good answer will consider racial and power dynamics in South Africa, the vulgarity of the shirt, whether wearing the shirt at a lecture (instead of perhaps a more tense environment) make a difference, who else is in the class, and whether a reasonable white person would consider this to be hate speech.

- iv. The answer must also critically reflect on the problems in *Malema* and the breadth of section 10. A good answer will conclude by commenting on how wearing the T-shirt might not be hate speech under section 16(2)(c). Because of this, section 10 is actually limiting the right to freedom of expression. This means the section could be unconstitutional.
3. A film, called *The Wound*, was distributed in South African cinemas in early 2018. It sparked controversy around how it depicts Xhosa culture, especially around male circumcision and initiation. Assume that the Film and Publication Act provides that any interested party may approach the Film and Publication Board to prevent the distribution of film if it contains material ‘unjustifiably infringing on the cultural rights of a person as guaranteed by the Constitution’. Assume further that the Act says that a film will be presumed to be violating the cultural rights of a person if that person alleges as such. You are a judge of the High Court and are assigned an application in which the producers of the film are challenging these two provisions of the Act. They argue that it unjustifiably infringes their right to freedom of expression, while a group of Xhosa Traditional Leaders, who oppose the application, argue that the provisions are necessary to protect their constitutionally enshrined cultural rights. Write a judgment resolving the dispute.
- a. Introduction
- i. The issue in this matter is whether the provisions unjustifiably limit the right to freedom of expression, especially artistic creativity.
 - ii. Because we are dealing with a law of general application, this question is resolved by testing the resolution against the provisions of the Constitution.

- b. Is the right limited?
 - i. By the first provision, undoubtedly. *Print Media* says that any regulation of expression is a limitation of that right. and also prevents artistic creativity, which is especially guaranteed.
 - ii. By the second provision, yes, for the same reasons.
- c. Is the limitation justifiable?
 - i. This is ultimately a value judgment. A good answer will include a consideration of the following and make arguments along these lines.
 - ii. Purpose of limitation: protect cultural rights of South Africans.
 - iii. Relation to purpose: could be rational. If films that offend cultural rights are allowed to be distributed, cultural rights of people could be impacted.
 - iv. Nature of right: artistic creativity critical in democratic society. Compare to state interference in apartheid and non-democratic states.
 - v. Extent of limitation: first provision alone does not seem too bad. Requires showing that cultural right is limited. An advanced answer will consider the content of cultural rights, and discuss the internal qualifier in sections 30 and 31 of the Constitution. Could be argued that because film has to be especially offensive to limit cultural right, the extent of the limitation is not so bad. However, second provision is severe. Creates reverse onus. Means the artist must prove that film should be published if someone simply avers it. Significant inroad into expression.
 - vi. Less restrictive means: consider having first provision alone. Alternatively have classification that warns people about film being offensive, in which case they do not have to watch it.

4. You are a judge and have been assigned a matter that is a terribly controversial. The matter is a criminal trial of a corrupt politician. The media have applied to broadcast the hearing, the examination of witnesses, and the handing down of judgment. In addition, a large group of members of the public have applied to live-stream the court proceedings from their phones. Do you grant everyone access to everything? Would it make a difference if, instead of a criminal trial, the matter was a review of an unlawful, corrupt decision?

a. Introduction

- i. The issue in this matter is whether you, as a judge, should exercise discretion and grant access to everyone to everything during proceeding.

b. Exercising the discretion

- i. Must be just and equitable (SABC). Balance freedom of expression and open justice against fair trial.
- ii. This is ultimately a value judgment. A good answer will include a consideration of the following and make arguments along these lines.
 - i. Should not allow access to witness examination because witnesses can be affected (SABC).
 - ii. Should allow broadcasting of other proceedings, like oral argument. Although this depends on sensitivity of information and whether the accused opposes. But because matter concerns a public official and public funds, massive public interest in matter might mean that some of the material might already be in the public domain.

- iii. No reason to distinguish between normal media and people streaming on their phones.
 - iv. If it was a review, would only have hearing of oral argument, and so no reason not to allow broadcasting of whole thing.
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