Hate speech under the South African Constitution:

How should South African Courts interpret

'incitement to cause harm'

by

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Submitted in partial fulfillment of the requirements for the degree Masters in Law (LLM) by coursework and minor dissertation in Constitutional and Administrative Law to the Faculty of Law at the University of Cape Town.

Under the Supervision of

Associate Professor Richard Calland.

Word Count

Including Footnotes:26 067

Excluding Footnotes: 22 250

17 October 2024

DECLARATION

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ACKNOWLEDGEMENTS

I began this project in 2020 under extremely difficult circumstances. The Covid 19 Pandemic had begun which caused uncertainty and confusion.

Firstly, I would like to thank the Constitutional Law tutoring teams of 2020 and 2021 for our stimulating conversations as well as being supportive throughout the process.

Secondly, without the incredible support of my parents and siblings I would not have been to have completed this thesis.

Lastly, to my Supervisor, Associate Professor Richard Calland, for his patience and feedback. His support was instrumental in this process.

ABSTRACT

This thesis investigates the meaning of the phrase 'incitement to cause harm' under section 16(2)*(c)* of the Constitution. In order to determine the meaning of incitement to cause harm, I utilise section 39(1) of the Constitution which provides that when interpreting the Bill of Rights, "a Court (a)must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, (b)must consider international and (c) may consider foreign law". First, I examine the role of international law in the interpretation of incitement to cause harm as required by section 39(1)(b) of the Constitution. This exercise involves an examination of international conventions relevant to restrictions on freedom of expression, hate speech, case law and academic commentary. Particular focus will be accorded to whether interpretations of Article20(2) of the International Covenant on Civil and Political Rights can provide a guide or framework to interpreting incitement to cause harm as it closely resembles section 16(2)*(c)* of the Constitution. Second, as per section 39(1)(c) of the Constitution, I evaluate three foreign jurisdictions, namely Canada, Germany and the United States to assess how useful their interpretations of "incitement" and "harm" are for interpreting incitement to cause harm. Thirdly, I attempt to determine the meaning of 'incitement to cause harm' in its constitutional setting by adopting a generous, purposive, and contextual interpretation of the right in terms of section 39(1)(a) of the Constitution in conjunction with a comparative analysis of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act which gives effect to the right. Lastly, I return to South African domestic law to see whether incitement to cause harm can be determined by resorting to its meaning in South African criminal law to regulate the extreme anti-democratic expression enumerated under section 16(2)(c). This chapter will also involve an evaluation of the Prevention and Combating of Hate Crimes and Hate Speech Act and other legislation regulating hate speech. Ultimately, the purpose of this thesis is to determine the meaning of 'incitement to cause harm' by relying on the tenets of constitutional interpretation as well as international and foreign law.

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LIST OF ABBREVIATIONS

African National Congress (ANC).

African Charter on Human and Peoples Rights (AUHPR).

African Court on Human and Peoples' Rights (ACTHPR)

Broadcasting Complaints Commission of South Africa (BCCSA)

Broadcasting Complaints Tribunal (BCT)

South African Constitutional Court (CC)

Convention for a Democratic South Africa (CODESA)

European Court of Human Rights (ECTHR)

The Convention on the Elimination of all forms of Racism (CERD).

Human Rights Committee (HRC)

High Court (HC)

International Covenant on Civil and Political Rights (ICCPR)

MPNP (Multi Party Negotiating Process).

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

South African Human Rights Commission (SAHRC)

Supreme Court of Appeal (SCA)

The United States of America (US)

Universal Declaration of Human Rights (UDHR)

CHAPTER 1: INTRODUCTION

1.1. Introduction

On 29 November 2019, the Supreme Court of Appeal (SCA) handed down judgment declaring section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) unconstitutional.[1] The main reason for this decision was that section 10 was vague and therefore constituted an unjustifiable infringement on the right to freedom of expression under section 16 of the Constitution.[2] Thus, the provision which provided the determination of hate speech was declared invalid pending a confirmation order from the South African Constitutional Court (CC).[3] In determining the remedy under section 172 of the Constitution, A.J. Navsa contended that the definition of hate speech must include 'incitement to cause harm' and consequently read in the phrase in section 10 for the duration of the suspension.[4] The CC held that section 10 of PEPUDA was inconsistent with section 1(c) and section 16 of the Constitution.[5] However, the provision was declared unconstitutional and invalid to the extent that it included the word hurtful.[6] The revised version of section 10 of PEPUDA operation was suspended for 24 months in order to give Parliament time to remedy the constitutional defect.[7]

While the Court considered arguments regarding the constitutionality and meaning of section 10 of PEPUDA, it omitted an analysis of the meaning of the right to freedom of expression which gives effect to the provision. Specifically, section 16(2)*(c)* of the Constitution[8] which provides that "the right in subsection (1) does not extend to – advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm."[9] This exclusion is referred to by J. Langa in *Islamic Unity* as 'hate speech'.[10] However, what does the phrase 'incitement to cause harm' mean? As there is no precedent or academic consensus to rely on, it remains an area of uncertainty. Therefore, a seminal aspect of determining whether

[1] *Qwelane v SAHRC & others* (686/2018 [2019] ZASCA 167 (29 November 2019) para 96 (d).
[2] Ibid.
[3] *Qwelane v South African Human Rights Commission and Another* (2021) ZACC 22.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] The Constitution of the Republic of South Africa, 1996.
[9] *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002) para 33.
[10] Section 16 of the Constitution of the Republic of South Africa, 1996.

conduct amounts to hate speech or not is unclear. It is this question – what does 'incitement to cause harm' mean? – which will be the central focus of this thesis.

1.2. Methodology

My research methodology comprises of the use of the interpretative scheme provided in section 39(1) of the Constitution. Section 39(1)(a) provides that this provision provides that "a Court, forum or tribunal when interpreting a right must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.". With respect to subsection (a) the method of constitutional interpretation endorsed by the CC will involve a wide-ranging generous, textual, historical, structural, purposive, and contextual analysis of the right in section 16(2)*(c)*.[11]In addition, section 10(1) of the PEPUDA will be used in a comparative analysis with section 16(2)(c) of the Constitution as section 10(1) of the PEPUDA was enacted to give effect to section 16(2)(c) of the Constitution. Subsection (b) requires the mandatory consideration of international law in the interpretation of the Bill of Rights and subsection (c) requires the optional consideration of foreign law in the interpretation of the Bill of Rights. Both international and foreign law will be utilised in the interpretation of incitement to cause harm. This will include a literature review examining case law, conventions, legislation and academic commentary.

1.3. Relevance

The purpose of the thesis is three-fold. First, section 1(c) of the Constitution lists both the supremacy of the Constitution and the rule of law as foundational values.[12] Among other requirements, the rule of law provides that laws must be clear and accessible.[13] As noted in *Qwelane*, international law provides that domestic laws prohibiting hate speech ought to be clear and unambiguous.[14] Therefore, the right that gives effect to these laws ought to have its meaning clarified. Secondly, hate speech undermines the foundational values of freedom, dignity, equality, and the constitutionally mandated objective of national unity in the preamble

[11]See *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006) and *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), and Currie Iain and De Waal Johan "Chapter 6: Constitutional Interpretation", The Bill of Rights Handbook, JUTA (2013).
[12]See *Pharmaceutical Manufacturers Association of SA and Others*; In re: Ex parte Application of President of the RSA and Others 2000 (3) BCLR 241 (CC) para 40 and *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 47.
[13]Fuller Lon "The Morality of Law" Yale University Press New Haven and London (1964) 63-65.
[14]Supra note 3 para 79.

of the Constitution.[15] Thus, the prohibition and regulation of hate speech is crucial to achieving the mandate of the Constitution. Accordingly, the right must be given a meaning to better achieve these goals. Significantly, there is a gap in the academic literature on this topic. While several authors consider the meaning of the phrase, no consensus can be drawn from the body of work. Furthermore, there has been little engagement with this question in case law.

1.4. Outline of Project

In Chapter 2 I briefly analyse hate speech laws[16] from an historical and social perspective. The definition of hate speech, examples of expression that constitute hate speech, the rationale behind the prohibition of hate speech, and the regulation of hate speech will be discussed in this section. This introduction to hate speech is important as it outlines some of the values crucial to the interpretation of constitutional rights that are relevant to hate speech.[17] It also provides some of the challenges involved in regulating hate speech, with a particular focus on the regulation of hate speech in South Africa.

The determination of the meaning of "incitement to cause harm" will take place in three different settings. In Chapter 3, I attempt to determine the meaning of the phrase[18] in its international context as per section 39(1)(b) which requires the consideration of international law in interpreting the Bill of Rights. This exercise will involve an analysis of international conventions relevant to restrictions on freedom of expression, hate speech, case law and academic commentary. Particular emphasis will be accorded to the interpretation of Article20(2) of the ICCPR as it closely resembles section 16(2) of the Constitution. The purpose of this determination is to examine the applicability of international law in interpreting incitement of cause harm.

In Chapter 4, I conduct my foreign analysis. Section 39(1)(c) of the Constitution provides for the optional consideration of foreign law when interpreting the Bill of Rights. In complying with section 39(1)(c), I evaluate three foreign jurisdictions which are, namely, the United States of America (US), Canada, and Germany. During the drafting of Section 16 of the Constitution,

[15]Supra note 9 para 45.
[16]Hate speech laws refer to laws that prohibit and regulate hate speech.
[17]Rosenfield Michel "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" in Michael Herz and Peter Molnar (eds) *The Context and Content of Hate Speech: Rethinking Regulation and Responses* Cambridge University Press (2012) 247.
[18]Incitement to cause harm' and 'the phrase' are used interchangeably.

the Explanatory Memorandum "expressly recognises the influence of foreign jurisdictions' constitutional protection of expression in the drafting of the clause, and in particular the constitutions of Canada, the United States, Germany, India and Namibia."[19] All three jurisdictions will be evaluated with respect to their freedom of expression clauses and their regulation of hate speech. Key reference in each jurisdictions analysis will be made to the interpretation of "incitement" and "harm" The purpose of this determination is to assess whether foreign law can assist in the determination of incitement to cause harm.

Chapter 5 attempts to determine the meaning of incitement to cause harm in its constitutional setting. I attempt to determine its meaning in its constitutional context, by using the interpretative techniques employed when interpreting constitutional rights as provided for in section 39(1)(a) of the Constitution and case law. This includes a generous, purposive, and contextual interpretation of the right. In addition, the history of the right will be analysed as well as its relationship to other rights. The reason for the use of this method is that it has been endorsed by the CC, case law, and academic sources.[20] In conjunction with the use of section 39(1)(a) of the Constitution, I will contrast section 16(2)(c) with section 10(1) of PEPUDA to add to the interpretative exercise. This is significant as section 10(1) of PEPUDA was enacted to give effect to section 16(2)(c). Lastly in Chapter 6, I revert to a review of the South African crimes of incitement and crimen iniuria to assess whether these crimes can regulate incitement in the context of hate speech. Significantly, this chapter will also involve an evaluation of the Prevention and Prohibition of the Hate Speech Act (Hate Crimes Act) as it relates to the criminalisation of hate speech required by section 16(2)(c) and the Films and Broadcast Act which also criminalises hate speech.

[19]Milo, Penfold and Stein 42.2 "The Drafting History of FC 16 s" in 'Freedom of Expression' in Woolman and Bishop (eds) *The Constitutional Law of South Africa* (2013).
[20]See op cit note 11.

CHAPTER 2: HATE SPEECH- A BRIEF EXPOSITION

2.1. Introduction

The transmission of hate speech vilifies and stigmatizes people based on group membership to threaten exclusion and perpetrate violence (actual or the threat thereof).[21] Because of its threat, hate speech prohibitions exist in virtually all democratic societies. For example, section 16(2)*(c)*, referred to by Langa in *Islamic Unity* as 'hate speech',[22] is excluded from constitutional protection in South Africa.[23] In Canada, the Supreme Court has upheld laws prohibits hate speech[24] while in Germany, legislation prohibits incitement to hatred and attacks on human dignity based on grounds such as race, religion, or nationality.[25] Although hate speech prohibitions are widespread, the regulation of these laws provides constitutional democracies with an array of challenges. Some of these challenges include, but are not limited to, line drawing, interpretative difficulties, and whether criminal or civil sanctions are appropriate with respect to hate speech laws. In addition, hate speech regulation in constitutional democracies must cater toward an "increasingly diverse, multiracial, multicultural and multilingual society" committed to pluralism.[26]

The guarantee of freedom of expression is fundamental to hate speech regulation in constitutional democracies.[27] Hate speech laws expose the tension in any democracy "between the right of the speaker to freedom of expression and the obligation of the speaker not to use words constituting hate speech."[28] Thus, the regulation of laws that prohibit hate speech implicate various constitutional rights including freedom of expression clauses,[29] as well as the rights to dignity and equality. In adjudicating freedom of expression clauses, Courts engage in a balancing exercise. This requires a Court to weigh up or balance competing rights and

[21]Bhikhu Parekh 'Is there a Case for Banning Hate Speech?' in Michael Herz and Peter Molnar (eds) *The Context and Content of Hate Speech: Rethinking Regulation and Responses* (2012) at 41.
[22]Supra note 9 at para 33.
[23]Ibid para 32.
[24]See *R v Keegstra* [1990] 3 S.C.R. 697.
[25]Friedrich Kubler 'How much freedom for racist speech: Transnational Aspects of a Conflict of Human Rights' (1998) 27 *Hofstra. Rev.* 335 at 344. See Chapter 4 for a more detailed analysis of hate speech in Germany.
[26]Op cit note 17 at pg. 247.
[27]Ibid.
[28]*Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC) (12 September 2011) para 31.
[29]Goldsworthy Jeffery 'Constitutional interpretation' in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 703.

interests when determining whether freedom of expression clauses prevail over other values or interests. A Court will also need to interpret the right to see whether the impugned expression falls within the scope or ambit of the right. As rights are phrased in broad terms, Courts will resort to a variety of interpretative techniques. For example, a Court might consider a textual analysis of the right, its relationship to other rights, the structure of the Constitution, as well as the history of the right.[30]While significant attention has been directed towards the rationale for prohibiting hate speech, whether criminal or civil liability is appropriate for hate speech prohibitions and how a Court should conduct its balancing inquiry, scant attention has been drawn to the interpretation of hate speech laws. It is this aspect, the interpretation of the hate speech clause in the Constitution, which will be the seminal focus of this thesis.

2.2. What is Hate Speech and why is it prohibited

There is no universal definition of hate speech.[31] According to Parekh, "hate speech expresses, advocates, encourages, promotes or incites hatred of a group of individuals distinguished by a particular feature or set of features, such as race, ethnicity, gender, religion, nationality, sexual orientation."[32] Hatred indicates ill will or malevolence towards the target group and cannot connotate dislike or disapproval.[33]Additionally, context plays a significant role in how a society determines what expression constitutes hate speech. For example, Germany's history of antisemitism will play a role in its hate speech regulation. As a result, Holocaust denial is a criminal offence in Germany and many other societies.[34] Therefore, context plays a seminal role in the adjudication, regulation, and determination of hate speech. According to Brown, proponents of laws that prohibit hate speech argue that they "safeguard autonomy, reduce insecurity, emancipate people from subordination, underpin human dignity, protect, and give public assurances of civic dignity, ensure recognition of cultural identity, and facilitate respectful intercultural dialogue."[35] Critics, on the other hand, suggest that they undermine individual autonomy,[36] democratic citizenship,[37] and democratic legitimacy.[38] Regardless of the differing perspectives on the topic, hate speech is condemned globally.

[30]Barendt Eric 'Freedom of Expression' in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 893.
[31]Supra note 3 para 79.
[32]Op cit note 13 at pg. 40.
[33]Supra note 15.
[34]Op cit note 12 pg. 248.
[35]Brown, Alexander *Hate Speech Law: A Philosophical Examination* (2015) 1.
[36]Baker C. Edwin *Human Liberty and Freedom of Speech* (1989).
[37]Heinze Eric *Hate Speech and Democratic Citizenship* (2016).
[38]Dworkin Ronald 'Foreword' in Hare I, Weinstein J (eds) *Extreme Speech and Democracy* (2009) v-ix.

The Court in *Malema* summarised the following main reasons for the prohibition of hate speech:

> "1. To prevent disruption to public order and social peace stemming from retaliation by victims.
>
> 2. To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society.
>
> 3. To prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of … society and invisibly exclude their acceptance as equals.
>
> 4. To prevent social conflagration and political disintegration."[39]

In addition, hate speech has been described by the South Africa Courts as one of the most "devastating modes of subverting dignity and self-worth of human beings",[40] "destructive of democracy",[41] and "seek[ing] to undo the very fabric of our society as envisioned by the Constitution."[42] In sum, hate speech can be defined as expression that incites or advocates hatred toward an identifiable group based on a particular feature such as race or religion. The kinds of expression which constitute hate speech vary depending on the society's history and culture. Hate speech is much more than offensive speech and causes harm, exclusion, and violence (actual or threat thereof).[43]

2.3. Regulation

Hate speech has been regulated for over a century. Many international conventions were influenced by the relationship between the dissemination of Nazi propaganda and the resultant Holocaust.[44] In response, a variety of international conventions were drafted, ratified, and enforced to entrench a set of universal human rights. Subsequently, freedom of expression has been entrenched in most international conventions. Consequently, most international conventions guarantee freedom of expression, but also recognize its limits.[45] Hate speech is

[39]Supra note 26 para 21.
[40]Supra note 3 para 1
[41]Ibid para 78.
[42]Ibid para 1.
[43]Ibid.
[44]Op cit note 13 at pg. 241.
[45]See Pillay Navanethem *Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance* 14 New Eng. J. Int'l & Comp. L. (2008) 203.

seen as a justifiable restriction of freedom of expression. For example, Article19(2) of the ICCPR provides that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[46] On the other hand, Article20(2) of the ICCPR provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[47] Therefore, Article 20 of the ICCPR functions as a restriction to Article 19 in that the exercise of the right to freedom of expression is subject to the restrictions set out in Article 20. Other international covenants which contain hate speech prohibitions include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples Rights (ACHPR). Importantly, some of these international conventions provide an obligation on state parties to adopt and implement measures to prohibit or criminalise hate speech.[48]

The domestic regulation of hate speech varies according to context. However, it is important to recognize that the way a society approaches freedom of expression will heavily impact its regulation of hate speech.[49] There is a contrast in approach between the US and other democracies. In the US, freedom of speech has been described as "the indispensable condition of nearly every of other form of freedom."[50] Even if speech is considered to be vulgar and degrading it will be constitutionally protected.[51] However, this does not mean that there are no restrictions on free speech in the US. For example, if speech presents a clear and present danger it will be prohibited.[52] Additionally, under the imminent lawless action test, speech will be constitutionally protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[53]

While the above two restrictions are not exhaustive, it is clear that the US approach has a higher threshold for the restriction of speech than other societies. Other societies tend to favour a

[46]Article19 of the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171.
[47]Article20 of the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR].
[48]See Article4 of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660.
[49]Op cit note 12.
[50]*Palko v Connecticut* (1937) 302 US 319 at 326327.
[51]See *RAV v City of St. Paul* 505 US 377 (1992).
[52]See *Schenk v United States* 249 US 47 (1919).
[53]See *Brandenburg v Ohio*, 395 US 444, 448-49 (1969).

balancing approach whereby freedom of expression is balanced against other rights and values. Canada for example regulates limitations to freedom of expression through sections 1 and 2 of the Canadian charter. Section 1 of the Canadian charter balances competing rights and interests whenever it needs to determine whether section 1 of the Canadian charter has been justified. Section 2 of the Canadian charter provides the freedom rights which guarantee freedom of expression. Significantly, there is an emphasis on the protection of multicultural diversity and equality in Canada which drives much of its approach to freedom of expression and consequently hate speech.[54] Germany's regulation of hate speech mirrors that of South Africa due to the German Constitution emphasis on human dignity. In Germany, freedom of expression can be restricted by values such as dignity.[55] Importantly, both Canada and Germany prescribe criminal sanctions for incitement to hatred or hate speech, in their respective codes. A more thorough discussion will take place on the regulation of hate speech in Germany and Canada in Chapter 4.

Other countries which provide criminal sanctions for hate speech or incitement to hatred include the Netherlands, France, Ethiopia, and the United Kingdom.[56] In South Africa, hate speech is almost exclusively regulated through legislation. The PEPUDA is the legislation enacted in terms of section 9 (4) of the constitution which aims to promote equality and prevent unfair discrimination.[57]Section 10(1) provides the test for the determination of hate speech while section 12 provides the defences to a hate speech claim. Ordinarily, the sanction for a contravention of PEPUDA for hate speech would be an apology and/or fine.[58] However, it is also important to note that Section 10(2) of PEPUDA provides that a case involving hate speech may be referred to the Director of Public Prosecution for the potential institution of criminal proceedings in terms of the common law or relevant legislation. This subsection raises the question of whether hate speech can be criminalised. There is further support to this argument with respect to the interpretation section 16(2) of the Constitution. The CC in *Islamic Unity* held that the forms of expression enumerated under section 16(2) are "underserving of constitutional protection" as they are incompatible with the objective of building a non-racial

[54]Op cit note 13 at pg 261.
[55]Ibid.
[56]Ibid.
[57]Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[58]Section 21 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

and non-sexist society based on the values of equality and dignity.[59]The Court further held that the state has an interest in regulating these forms of expression.[60]

Marais notes that by expressly excluding a section 36 limitations analysis from the purview of this section, the drafters of the Constitution have indicated that the expression under section 16(2) are incompatible with the constitution and its foundational values to the extent that warrants additional legislative measures to combat the harms posed by this section.[61] In justifying her argument, Marais compares section 16(2) of the Constitution with Article 18 of the German Constitution and the criminal prohibitions prohibiting hate speech in Canada to illustrate how the history of these various societies influences their conception of hate speech.[62]

Ultimately, Marais contends that the international context regarding an increasing awareness to the ills of hate propaganda was influenced the drafter's decision to include a categorical exclusion in the Constitution.[63] The implication is that the forms of expression enumerated under section 16(2) are extreme and therefore warrant's additional regulation other than what is covered under PEPUDA. An argument in this regard can be made with respect to the criminalisation of hate speech in South Africa. Section 7 of the Constitution obliges the state to protect, promote, respect and fulfil the Bill of Rights. In doing so, the state may be required to enact legislative or other measures in achieving in the fulfilment of a duty or obligation. Acknowledging that section 16(2) categorially excludes expression deemed unworthy of protection read with the additional obligations imposed by international law with respect to adopting and enforcing measures to prohibit hate propaganda, it can be argued that the Constitution permits the criminalisation of hate speech. This issue will be dealt with in more detail in Chapter 6.

2.4. Conclusion

In sum, hate speech can be defined as expression that incites or advocates hatred toward an identifiable group based on a particular feature such as race or religion. Acknowledging the harm caused by hate speech, many societies have sought to regulate it through legislative and other measures. South Africa, is not alone in this regard and has prohibited hate speech in legislation. Furthermore, it is submitted that the categorical nature of section 16(2*)* read with

[59]Supra note 9 at para 33.
[60]Ibid
[61]ME Marais "Does the Constitution call for the criminalisation of Hate Speech" (2015) 30 SAPL at pg. 458-468.
[62]Ibid.
[63]Ibid.

the international obligations imposed on South Africa by the ICERD and the ICCPR permits the criminalisation of hate speech.

CHAPTER 3: HATE SPEECH IN INTERNATIONAL LAW

3.1. Introduction

International law provides an obligation on states to prohibit hate speech.[64] Section 39(1)(b) requires that a Court must take international law into account when interpreting the Bill of Rights. Therefore, this chapter will be concerned with the role of international law in the interpretation of incitement to cause harm. First, I consider the status of international law in the Constitution as well its value in interpreting rights. Secondly, I consider the importance of the guarantee of freedom of expression in international law as is it is inextricably tied to the regulation of hate speech. Thirdly, I interpret the varying hate speech prohibitions contained in the international conventions under investigation such as ICERD and the ICCPR. Particular attention will be directed to Article20(2) of the ICCPR as it closely resembles section 16(2)(c) of the Constitution. Ultimately, I determine whether the international law regulating hate speech can be of value in the interpretation of incitement to cause harm.

3.2. The Status of International Law in the South African Constitution.

Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a Court, tribunal, or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.[65] As required by subsection (b), a Court must consider international law when interpreting a right in the Bill of Rights. As the CC provided in *Makwanyane*:

> "Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations

[64]Roni Cohen 'Regulating Hate Speech: Nothing Customary About It' (2013) 15 *Chi. J. Int'l L.* 22 at 229.
[65]Section 39(1)*(c)* of the Constitution of the Republic of South Africa, 1996.

> Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three."[66]

Two observations can be drawn from this quote. First, that when considering international law, both treaties and customary international law must be taken into account. Both binding and non-binding international law must be considered in this regard. Secondly, while there is an obligation to consider international law in the interpretation of the Bill of Rights, it is not binding. Thus, the CC in *Coetzee v President of RSA* held that section 39 requires that due regard be paid to the principles that can be extracted from the international experience.[67] This echoes the dicta in *Grootboom* where the Court held that:

> "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."[68]

In addition to section 39(1), section 233 of the Constitution provides that when interpreting legislation, Courts must prefer an interpretation consistent with international law over one that is not.[69] It is clear from these two sections that international law plays an extremely valuable role in the interpretation of rights in the Constitution. Furthermore, both binding and non-binding sources of international law will be considered in this analysis.

3.3. Freedom of Expression in international law

Hate speech is universally condemned and globally regulated. Most societies therefore find international law, a valuable source for developing their own hate speech laws. South Africa has ratified several international conventions which protect and promote the right to freedom of expression. While the focus of the analysis will be on Article20(2) of the ICCPR, various other international conventions will be discussed as is required by the application of section

[66] *S v Makwanyane* para 35.
[67] *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* (CCT19/94, CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631 at para 57.
[68] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) at para 26.
[69] Section 233 of the Constitution of the republic of South Africa, 1996.

39(1)(b) of the Constitution. Therefore, a brief discussion of the importance and content of freedom of expression in international law is necessary before proceeding to an analysis of the provisions which prohibit hate speech. Freedom of expression in international law has esteemed status. The first appearance of a freedom of expression provision in international law was in the 1948 Universal Declaration of Human Rights (UDHR). In this regard, Article19 of the UDHR states that

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

Other international law instruments which provide for the guarantee of freedom of expression include the ICCPR, the European Court of Human Rights (ECTHR), and the ACHR. In addition to the above international instruments, the Court in Handyside emphasized the importance of freedom of expression, as it "constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man." Despite the high importance attributed to freedom of expression international law, it can be curtailed. In this regard, international law identifies several factors that justify the restriction of freedom of expression. As stipulated in *Qwelane* these include "the prevailing social and political context; the status of the speaker in relation to the audience, the existence of the clear intent to incite, the content and form of the speech, the extent and reach of speech."[70]

3.4. Hate Speech in International Law

There is no universal definition of hate speech in international law. However, expressions that constitute hate speech or can be categorized as hate speech can be prohibited under certain international covenants such as the ICCPR. Other international conventions, such as ICERD, place an obligation on states to prohibit hate speech.[71]

3.5. The International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD was adopted in 1965, with the aim of eliminating all forms of racial discrimination. Marais contends that the inspiration for the adoption of the ICERD was due to a fear that

[70]Supra note 3 at para 89.
[71]See Op cit note 61.

societies would become authoritarian.[72] South Africa is a signatory in this regard. While, the convention does not explicitly prohibit hate speech, it prohibits certain forms of conduct under Article 4 of the ICERD. It provides that;

> "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination. "[73]

Of relevance is subsection (a) which refers to "incitement to such acts against any race, or group of persons of another colour or ethnic origin," Article4 places a positive obligation on state parties to penalize or criminalize the varying forms of conduct set out in the article.[74] These forms of conduct include all dissemination of ideas based on racial hatred, incitement to racial hatred and acts of violence, or incitement against other a group based on a category such as race, gender, or religion.[75]

Furthermore, Article 5 (viii) provides that freedom of expression and opinion must be guaranteed, unless it amounts to incitement of racial violence. Additionally, a number of state parties have entered reservations meaning that the State Party can adapt the requirements of this Article to its norms. Marais contends that the interpretation, application and

[72]Ibid at pg. 461.
[73]Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.
[74]Article 19 'Prohibiting incitement to discrimination, hostility or violence: Policy Brief' December 2012 pg. 12.
[75]Ibid.

implementation of Article 4 has raised controversy.[76] With respect to interpretative difficulties, scholars have noted that the opening paragraph is broadly phrased for example. Furthermore, there is uncertainty as to whether Article 4 requires mandatory implementation. South Africa in this regard is in the process of enacting the Prevention and Combatting of Hate Crimes Act ("Hate Crimes Act") in fulfilling their obligations under Article 4.[77]A more in-depth analysis of the Hate Crimes Act will take place in Chapter 6 in so far as it relates to the obligation to criminalise hate speech in terms of section 16(2)(c) of the Constitution.

3.6. European Convention of Human Rights

The ECHR was adopted in 1953 with the aim of protecting and promoting fundamental human rights. Article 10 (1) guarantees the right to freedom of expression. Article 10 of the European Convention on Human Rights states that "everyone has the right to freedom of expression", including the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[78] Subsection (2) provisions may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[79] Essentially, subsection 2 provides a qualification to subsection 1. According to the ECTHR, there are some kinds of expression which could be deemed as harmful which therefore ought to be circumscribed in terms of the ECHR. The ECTHR has stated the following:

> "[A]s a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued".[80]

[76]Op cit note 61 at pg. 462.
[77]https://www.thepresidency.gov.za/president-ramaphosa-assents-law-prevention-and-combating-hate-crimes-and-hate-speech (accessed on 10/09/2024)
[78]Article10 of the European Convention of Human Rights.
[79]Article11 of the European Convention of Human Rights.
[80]*Erbakan v Turkey* No. 59405/00 6 June 2006 para 56.

Although incite or justify hatred based on tolerance differs to incitement to cause harm, the quote above demonstrates the international commitment to prohibiting hate speech.

3.7. American Convention of Human Rights

The American Convention on Human Rights (ACHR) was adopted in 1968 and came into force in 1978. Much like the conventions discussed above, it was enacted to protect and promote human rights. Article 13 of the ACHR provides for the right of freedom of expression. Additionally, subsection (5) places a positive obligation on States to make an "offense punishable by law" "any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin."[81] While the ACHR provides for the punishment of any advocacy of national, racial, or religious hatred, the Inter-American Court has not interpreted the above provision. Much like the international conventions discussed above, Article 13 is reflective of the position of international law with respect to its commitment to the prohibition of hate speech.

3.8. African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights (African Charter) was enacted with the objective of promoting and protecting human and peoples' rights and freedoms, taking into account the importance traditionally attached to these rights and freedoms in Africa.[82] Article 9 of the African Charter provides for the right to freedom of expression and information. Although, the African Charter does not specifically deal with incitement it must be noted that the African Court on Human and Peoples' Rights (ACTHPR) in the case *Konate v Burkina Faso*, provided the following with respect to the criminalisation of hate speech;

"Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions."[83]

[81]Article13 of the American Convention on Human Rights.
[82]The African Charter of Human and People's Rights.
[83]*Konaté v Burkina Faso* 004/2013 ACtHPR (5 December 2014) at para 165.

Similarly to Article4(a) of the ICERD, the ACTHPR has recognised that incitement to hatred can be criminalised. This is of particular relevance as South Africa is also a signatory to the African Charter.

3.9 International Covenant on Civil and Political Rights

Having assessed whether the provisions which prohibit hate speech could potentially be useful to the interpretation of 'incitement to cause harm', the next convention that will be dealt with is the ICCPR. As the drafting of section 16(2) of the Constitution is heavily influenced by articles 19 and 20 of the ICCPR, the meaning of these specific provisions might aid in the interpretation of incitement to cause harm and consequently might be important for the interpretation and application of hate speech laws in South Africa.

The UN adopted the ICCPR in 1966. The travaux préparatoires of the ICCPR indicate that Articles 19 and 20 were drafted as a consequence of the relationship between the dissemination of hate propaganda and the Holocaust as well as how the threat of the ensuing Cold War might destabilise democratic values.[84] The ICCPR mandate state parties to enforce the measures contained in the convention subject to their domestic law.[85] The Human Rights Committee ("UNHRC") monitors state parties with respect to whether they have complied with the provisions of the ICCPR.

3.9.1. Article19

Article19 of the ICCPR provides that:

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

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

[84]Paul M. Taylor *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (2020) 579.
[85]Preamble of the International Convention of Civil and Political Rights.

Article19(1) provides the content for the right to hold opinions. Specifically, it entitles one to the right to form and hold opinions without fear of restriction. In terms of General Comment 10, the right in subsection 1 has no exceptions or restrictions.[86] Freedom of opinion will not be focused on here as it is distinct from freedom of expression and therefore not relevant to the objectives of this thesis. However, it is important to note that General Comment 34 acknowledges the importance of the right to hold opinions along with the right to freedom of expression as contained in Article19(2) are indispensable to a free democratic society.[87] Article19(2) provides the content for the right to freedom of expression in varying forms. Article19(2) is broad in its application and comprises a statement of the right and a list of contexts in which the exercise of the right may be limited.[88] In terms of which, it includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice." Scholars conclude that the Article refers to every communicable type of subjective idea and opinion.[89] This view has been confirmed in cases such as *Ballantyne, Davidson and McIntyre v Canad*a.[90] Furthermore, both political and commercial speech is protected by the article.[91] Case law on the Article also confirms that it protects both attacks on journalistic expression as well as attempts by states to undermine journalistic expression.[92]

Article 19(3) provides the limitation to the above rights enunciated in subsection 1 and 2. This provision provides a list of contexts in which the exercise of the right is limited. The words "special duties and responsibilities" provide that a State Party must take positive measures to enhance the role of freedom of expression in society.[93] Cases that have dealt with restrictions, indicate that restrictions must be necessary and proportional to the goal sought to be achieved by that restriction.[94] A state party cannot place the right to freedom of expression in jeopardy

[86]General Comment No. 10: Freedom of expression (Art. 19): 29/06/1983 para 1.
[87]General Comment No. 34 par 2
[88]Michael O'Flaherty 'Freedom of expression: Article19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment' 34 *Human Rights Law Review* 12 (2012) 636.
[89]Ibid
[90]See *Ballantyne, Davidson, McIntyre v Canada, Communications* Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).
[91]See *Primo Jose Essono Mika Miha v Equatorial Guinea* (414/1990), CCPR/C/51/D/414/1990 (1994); 2 IHRR 67 (1995), at para 6.8 and *Ballantyne, Davidson, McIntyre v Canada* at para11.3.
[92]*Philip Afuson Njaru v Cameroon* (1353/2005), CCPR/C/89/D/1353/2005 (2007); 14 IHRR 641 (2007) and *Rakhim Mavlonov and Shansiy Sa'di v Uzbekistan* (1334/2004), CCPR/C/95/D/1134/2004 (2009); 16 IHRR 650 (2009).
[93]General Comment. No 34 at para 21.
[94]Ibid.

if it seeks to limit its exercise.[95] General comment 34 interprets the term "rights" to include human rights recognised in international human rights law.[96]

3.9.2. Article 20

Article 20 of the ICCPR provides that:

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

The travaux préparatoires provide that the inclusion of Article 20 was inspired in part by the dissemination of hate propaganda proliferated by the Nazis which consequently led to the atrocities committed during the Second World War.[97] The Rabat Plan of Action suggests that interpretation of this Articlemust be narrow and that it must have a high threshold.[98] This suggestion accords with the approach of the UN Special Rapporteur on Freedom of Religion and Belief who argue that the interpretation must be strict.[99] The Human Rights Committee (HRC) has stated that Article20 does not mandate criminal sanctions.[100] Significantly, it has also been argued by scholars that a violation of Article 20 can result in a criminal sanction.[101]

Article20(2) refers to hate speech. The provision is non-self-executing because implementation laws are required at a national level. If a state party attempts to implement the provisions of Article20(2), the implementing law cannot exceed the limits placed on freedom of expression set out in Article19(2). This was confirmed in General Comment 34 as provided below:[102]

> "[A]re compatible with and complement each other. The acts that are addressed in Article20 are of such an extreme nature that they would all be subject to restriction pursuant to Article19, paragraph 3. As such, a limitation that is justified on the basis of Article20 must also comply with

[95]General Comment No. 34 para 21.
[96]Ibid para 28.
[97]Op cit note 167 at pg. 582.
[98]Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add 45 October 2012.
[99] UN General Assembly "Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and (15 March 2006) available at https://digitallibrary.un.org/record/583355?v=pdf&ln=en#files (accessed 2024-10-04) para 47.
[100]Op cit note 160 at pg. 10.
[101]Bukovska, Callamard and Parrmer 'Towards an interpretation of Article20 of the ICCPR: Thresholds for the prohibition of incitement to hatred. Work in progress' 2010 http://www.ohchr at pg. 17.
[102]General Comment No. 34 para 50.

Article19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible."[103]

Significantly, any limitation to freedom of expression must be an exception.[104] Thus, Article20 must have a high threshold. In order to meet this threshold, restrictions on expression must be defined clearly and narrowly.[105] Furthermore, restrictions cannot be overbroad and must comply with Article19 as stated above. With respect to the relationship between Article 19 and 20, General Comment 34 notes the following;

"What distinguishes the acts addressed in Article20 from other acts that may be subject to restriction under Article19, paragraph 3, is that for the acts addressed in Article20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that Article20 may be considered as lex specialis with regard to Article19."[106]

Thus, as noted by Marais, Article 20 obliges state parties to adopt the necessary legislative measures with respect to the forms of expression enumerated in subsections (1) and (2). [107]

3.10. Scholarly Interpretations of Article20(2)

There are varying international law instruments that might provide some form of guidance in interpreting Article20(2). The Camden Principles on Freedom of Expression and Equality were created by Article19, a non-governmental organisation, for the purpose of providing a progressive interpretation of international law and standards with respect to the rights to freedom of expression and equality. Principle 12 of the Camden Principles provides guidance on how to interpret Article20(2). Principle 12 defines "hatred" and "hostility" as "intense and irrational emotions of opprobrium, enmity and detestation towards the target group."[108]These definitions recognise the high threshold attached to hate propaganda in that hatred must refer to some sort of detestation and not mere dislike or disapproval.

[103]Ibid.
[104]Rabat Plan para 18.
[105]Ibid.
[106]General Comment No.34 para 51.
[107]Op cit note 61 at pg. 467 and see Human Rights Committee, Malcolm Ross v. Canada, Communication no. 736/1997 (18 October 2000)
[108]Camden Principles on Freedom of Expression and Equality, ARTICLE19, Principle 12.1.

Advocacy is defined as "requiring an intention to promote hatred publicly towards the target group."[109] Article 19 also proposes that national laws which implement Article 20(2) should define the varying terms such as discrimination and violence and that it should be defined explicitly.[110]

Significantly, incitement can be defined as communication which "creates an imminent risk of discrimination, hostility or violence" against persons falling within groups.[111] Marais argued that this understanding of an imminent risk can be equated with a likelihood that a risk of ensuing harm is created.[112]Furthermore, Marais argues that the approach mentioned above correlates to the conception of incitement in section 130 (1) of the German criminal code which provides that the incitement of hatred be 'in a manner capable of disturbing the public peace.[113] She further argues that section 319(1) of the Canadian Criminal Code and section 16(2)(c) of the Constitution contains similar conceptions of incitement.[114]It is important note that, section 16(2) of the Constitution resembles Article 20(2) and therefore this conception of incitement is instructive. Although, a notable difference is that Article 20(2) refers to discrimination, hostility or violence and section 16(2)(c) refers to cause harm.

Although, the provisions are self-executing, it is clear that the interpretation accorded to Article 20 of the ICCPR reflects a conception of incitement that refers to a likelihood that a risk of ensuing harm or the triggering of imminent acts. This understanding of incitement will be explored in more detail in Chapters 4 and 5.

3.11. Case Law interpretation of Article20(2)

The majority of case law evaluating Article20(2) comes from the HRC. In *Faurisson v France,* Robert Faurisson was an academic who denied the existence of the gas chambers at Nazi deathcamps through various writings. Faurisson was eventually convicted under statute. Subsequently he complained that his right to freedom of expression had been violated before the HRC. The HRC decided the case on its merits. In assessing the merits of the claim, the HRC decided the case on Article 19 as opposed to Article20. The HRC ruled that Faurisson's right to freedom of expression could be limited in "respect of the rights or reputations of

[109]Ibid.
[110]Op cite note 101 at pg.7.
[111]Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1.
[112]Op cit note 61 at pg.469.
[113]Ibid.
[114]Ibid.

others."[115] Despite the ruling, there was a number of individual opinions which preferred the application of Article20(2) as provided for in the quote below.

"[e]very individual has the right to be free not only from discrimination on grounds of race, religion and national origins, but also from incitement to such discrimination."[116]

In *Zundel v Canada*, the applicant was a German citizen residing in Canada. He was arrested and jailed on charges of Holocaust denial by the Canadian government. He wanted to challenge the hate speech legislation in Canada under which he was charged and convicted.[117] Zundel claimed that his ability to challenge hate speech legislation was a violation of Article 19 of the ICCPR. Canada's defence was that Article19 had not been breached as a result of the said refusal.[118]

Canada invoked both Article19(3) and Article20(2) against Zundel's arguments.[119] Despite Canada's readiness to discuss the merits of the case, the HRC ruled that the case was inadmissible. However, in *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, the merits of an Article20(2) complaint were triggered. However, the HRC rendered it inadmissible. [120] This was due to the fact that the HRC ruled that the applicants had not proved that they suffered incitement as defined under the ICCPR. Rather, their complaint concerned a religious insult.

In summary, the case law on incitement in international law with specific reference to Article 20 (2) has no definitive approach. Most of these cases deal, for example, with issues of admissibility and therefore the Article itself has not been interpreted sufficiently for the purposes of this thesis.

3.12. Conclusion

In conclusion, the Constitution provides that when interpreting a right, the consideration of both binding and non-binding international law is mandatory. The international conventions which regulate hate speech permit both its prohibition and its criminalisation. In particular, Article 4(a) of the ICERD obligates state parties to criminalise hate speech. Turning to

[115]See Robert Faurisson v. France, Communication no. 550/1993(19 July 1995).
[116]Ibid.
[117]Human Rights Committee, Ernst Zündel v. Canada (I), Communication no. 953/2000 (admissibility decision of 27 July 2003).
[118]Ibid.
[119]Ibid.
[120] Human Rights Committee, Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark , Communication no. 1487/2006 (admissibility decision of 1 April 2008).

interpretations of Article 20(2), it is clear that the case law from the HRC is unhelpful as no definitive interpretation of the Article provided. Other forms of interpretation, such as the Camden Principles, provide a guide to interpretation as opposed to a definitive interpretation, thus leaving it up to nation states to develop their own laws. It is noteworthy in this regard, that section 16(2) of the Constitution and Article 20(2) resembles one another. Therefore, it is submitted that the conception of incitement developed by the Camden Principles is relevant to incitement in section 16(2)(c).

CHAPTER 4: HATE SPEECH IN FOREIGN LAW

4.1. Introduction

Section 39(1)(c) of the Constitution permits the consideration of foreign law when interpreting the Bill of Rights. This chapter is concerned with the role of foreign law in determining the meaning of incitement to cause harm. First, I explain the status of foreign law as per the requirement of section 39(1)(c). Next, I discuss the reason for the selection of the foreign jurisdictions which are, namely, the United States of America (US), Germany and Canada. All three jurisdictions are evaluated by first examining their constitutional guarantees of freedom of expression. Secondly, I examine their respective approaches to hate speech with reference to legislative measures, academic commentary and case law. Particular attention will be paid to interpretations of the terms "incitement" and "harm". Ultimately, the purpose of this chapter is to assess whether the consideration of foreign law as per section 39(1)(c) is of assistance in the interpretation of incitement to cause harm.

4.2. The Status of Foreign Law in the South African Constitution

Section 39(1)(c) of the Constitution provides that "[w]hen interpreting the Bill of Rights, a Court, tribunal, or forum may consider foreign law." In *Makwanyane,* the CC provided that:

> **"**In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution . . . We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."[121]

The extract above emphasises that comparative law must be considered with regard to the South African legal system, its history, and circumstances. Importantly, while there is an obligation to consider foreign law, a Court is not bound by a foreign ruling.

As noted above, the US, Canada and Germany were selected as comparative jurisdictions. There are a number of reasons for the selection of these jurisdictions. First the Explanatory Memorandum recognised the influence of the US, Canada and Germany in the drafting of section 16 of the Constitution.[122] Secondly, South African Courts have frequently cited Canadian jurisprudence with respect to issues relating to freedom of expression and hate speech.[123] Additionally, there are many structural similarities between the Canadian, German

[121]Supra note 11 at para 39.
[122]Op cit note 19 at pg. 2.
[123]See Supra note 3.

and South African Constitutions with respect to the balancing exercise required when determining whether a limitation on a right is justifiable. Significantly, all three jurisdictions have similar histories pertaining to patterns of prejudicial and discriminatory attitudes toward people on the basis of grounds or categories such as race and gender.

4.3. The United States of America

The American Constitution was drafted in 1787 and became enforceable in 1789. As noted in Chapter 2, the American approach to the regulation of freedom of expression differs considerably from other western democracies. The reason for this is the US legal system's preference for certain fundamental values. In this regard, Molnar and Herz describe the values associated with the US's position on fundamental rights including "the preference for equality over liberty, commitment to individualism, and a natural rights tradition derived by Locke, which champions negative freedom or freedom from the state."[124] Thus, the US conception of freedom of expression is primarily focussed on individual autonomy and limited state intervention.

4.3.1. Approach to Freedom of Expression

The First Amendment of the American Constitution provides the following:

"Congress shall make no law abridging freedom of speech."[125]

The first amendment has been referred to as "the matrix, the indispensable condition, of every other form of freedom."[126]It therefore has pre-eminent status. The significance of the First Amendment is informed by the Lockean principle of individualism as well the 'marketplace of ideas' analogy.[127] The principle of individualism dictates that the government should not interfere with individual liberty while the marketplace of ideas principle refers to the idea that society itself will regulate speech without the need for any interference or regulation. The implication here is that there is a general presumption in favour of free speech.[128] However, the presumption is not absolute as certain categories of expression may be regulated, provided that they comply with the First Amendment.[129]In this regard certain forms of expression are

[124]Op cit note 17 at pg. 247.
[125]First Amendment of the Constitution of the United States of America.
[126]See supra note 51.
[127]*Schenck v United States,* 249 U.S. 47 (1919).
[128]See *Whitney v. California* 74 U.S. 357, 372-79 (1927).
[129]Claudia Haupt "Regulating Hate Speech-Damned if you do and Damned if you don't: Lessons learned from comparing the German and US approaches" Boston University International Law Journal Vol 23 (2005) at pg. 317.

regarded as exceptions to the presumption in favour of First Amendment. For example, speech that is profane, obscene, or promotes fighting words or incitement is prohibited.[130]

4.3.2 Approach to Hate Speech

As noted above, tests such as the "fighting words doctrine" and "imminent lawless test" raise the question of whether one of the exceptions to the First Amendment possibly includes hate speech.[131] In terms of the fighting words doctrine, the US Courts have prohibited "words which inflict injury or tend to incite an immediate breach of peace."[132]Although there is no reference to a stipulated ground, words which tend to incite an immediate breach of peace correlates with the understanding of incitement in Article20(2) of the ICCPR which relates to imminence.

Since *Chaplinksy* there have been numerous decisions of the US supreme Court dealing with fighting words. In *Collins v Smith,* the Seventh Circuit declared an ordinance which prohibited gatherings that "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation," unconstitutional.[133] The Court invalidated the ordinance on the basis that it was too broad and held that there was nothing in the First Amendment preventing Nazi's from having a march in a Jewish neighbourhood.[134]The Court in acknowledging the limits of restrictions to the First Amendment acknowledged that a Nazi march would be psychologically and emotionally damaging to Jewish people.[135] Significantly, the Court noted that a state may not criminalise the "peaceful expression of unpopular views".[136] What is significant about this case, is that Court although acknowledging the potential emotional damage that the march could cause, recognised that it is not a sufficient reason to ban it. This approach is reflective of the US conception of free speech which holds it as paramount.

In *R.A.V v City of St Paul*, the Supreme Court had to consider whether a statute prohibiting the burning of crosses was unconstitutional. The statute was declared unconstitutional because it only prohibited discrimination on the basis of one of the several enumerated grounds.[137] The Supreme Court stated that St Paul must prohibit all fighting words or none.[138] Significantly,

[130]See *Chaplinsky v Hampshire* 315 U.S. 343,568,572 (1942).
[131]Op cit note 128 at pg. 318.
[132]Ibid.
[133]*Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978)
[134]Ibid.
[135]Ibid
[136]Ibid.
[137]*R.A.V. v City of St. Paul,* 505 U.S. 377 (1992).
[138]Ibid.

Justice Scalia writing for the majority opined that in certain instances a state may restrict speech "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[139] This dicta recognises that a state can restrict speech that has no social value.

In *Virginia v Black*, a law which prohibited cross burning was declared unconstitutional as the Court found that burning a cross does not always constitute intimidation.[140]Justice O'Conner noted that a government can regulate cross-burning provided that it complies with the First Amendment.[141] Furthermore, Justice O'Connor states that this is the case when "the speaker means to communicate a serious expression of an intent to commit and act of unlawful violence to a particular individual or group of individuals."[142] Thus, the threshold for prohibiting certain kinds of speech must involve a "serious expression of an intent to commit and act of unlawful violence" which is a high threshold and requires proof of intent or actual violence.

The imminent lawless test or the incitement to imminent violence test is another exception to the first amendment. In *Brandenberg v Ohio*, the Supreme Court had to determine whether an Ohio ordinance which prohibited certain forms of public speech violated Brandenburg's first amendment right.[143] In order to determine whether the speech could be prohibited, the Court developed a test which involves two legs. The first leg asks whether the speech is "directed at inciting or producing imminent lawless action."[144] If the first leg is met, the second leg then asks whether the speech was "likely to incite or produce such action."[145] In applying the test, the Court held that the law prohibiting the Ku Klux Klan from attempting to drive African Americans and Jews out of the country through public speech was unconstitutional because it was overly broad.[146] Significantly, the statute was declared unconstitutional because it failed to distinguish between advocacy and incitement.[147]

4.3.3. Application

As discussed in Chapter 2, the US approach to freedom of expression holds it as paramount. Despite recognising limits on the restrictions of freedom of expression, a state can regulate

[139]Ibid.
[140]Virginia v Black (2003) 538 U.S. 343
[141]Ibid.
[142]Ibid.
[143]*Brandenburg v Ohio*, 395 U.S. 444 (1969).
[144]Ibid.
[145]Ibid.
[146]Ibid.
[147]Ibid.

expression provided that it complies with the First Amendment. Although hate speech is not explicitly excluded from protection, scholars such as Haupt, indicate that hate speech could potentially fall under the fighting words doctrine. The cases discussed above indicate that the Supreme Court largely upholds the presumption in favour of the First Amendment. With reference to the *Colins* case, the Court accepted the potential psychological damage that Jewish people could suffer from the Nazi march.[148] The reference to psychological damage can be equated with harm. Despite its recognition, the Court refused to ban the march. *RAV* and *Virgina* both confirm a state's power to regulate categories of expression but attribute too high a threshold for prohibiting such expression in comparison to other jurisdictions.

As noted above, incitement appears both in section 16(2)*(b)* and 16(2)*(c)* of the Constitution, yet no meaning has been elicited. Furthermore, it is unclear whether incitement should have the same meaning in both provisions. Having discussed the incitement to imminent violence test in detail above, it is evident that 'incitement' here, in the context of South African 'incitement to cause harm', cannot easily be compared. The more applicable context in which to apply the US approach to incitement would be under section 16(2)(b) of the Constitution.

4.4. Germany

4.4.1. Introduction

The Basic Law for the Federal Republic of Germany ("German Constitution") was adopted on 22 May 1949 largely in response to the gross violation of rights perpetrated during the Second World War and its history of Nazi rule. Many of the values adopted by the German Constitution are the direct result of Germany's history of censorship and discrimination under Nazi rule. This can be seen as a deliberate commitment to break away from the past, particularly in Germany's attempt to deal with its history of antisemitism. Article 1 of the German Constitution expressly protects human dignity.

4.4.2. Approach to Freedom of Expression

The German Constitution guarantees the right to Freedom of Communication[149] under Article 5. Article 5 of the German Constitution provides that:

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of

[148]Supra note 133.
[149]Freedom of communication and freedom of expression are used interchangeably.

the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

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

Article 5(1) guarantees the right to freedom of expression with respect to an individual right to freedom of expression, freedom of the press, and freedom of reporting and broadcasting. Subsection (2) provides a list of the limitations to subsection (1). Subsection (3) provides a list of specific communication rights which are not subject to any general limitations clause.

Although held in high regard and seen as a fundamental part of the German constitutional system, the right must be balanced against other rights and values. In terms of the balancing exercise, the Federal Constitutional Court ruled that human dignity cannot be balanced against other rights.[150]Thus, when a balancing exercise occurs involving freedom of expression, human dignity trumps freedom of expression.[151] In determining whether a right has been violated, the Courts engage in a balancing exercise. The first question asked is "whether the matter is subject to the definitional coverage, second whether there is a possible limit posed by the regulation or prohibition and last, whether the limitation is proportional.[152]

The landmark case which set down a precedent for the balancing approach was *Luth*. In *Luth*, former senator had attempted to boycott a film directed by a person who had supported the Nazis. The Hamburg Regional Court held that he must refrain from attempting boycott the film.[153] Thereafter the Federal Constitutional Court dismissed the appeal and ruled that the former senator had exercised his right to freedom of expression.[154] The Federal Constitutional Court also held that the right to free expression can be limited if there is a competing interest that has a higher rank or value.[155] Whether the interest outweighs freedom of expression depends on the circumstances of the case.[156] Other cases involving Article 5, seem to support this approach.

[150]Luth, BverfGE 7, 198 (1958).
[151]Ibid.
[152]Op cit note 129 at pg. 321 and Brugger Winfried 'The Treatment of Hate Speech in German Constitutional Law' Vol. 04 No. 01 at pg's 9-10.
[153]Ibid.
[154]Ibid.
[155]Ibid.
[156]Ibid.

In *Schmid-Spiegel*, the Court noted that freedoms related to communication under Article 5 ought to be protected:

"Only a free public discussion over all matters of general significance guarantees the free building of public opinion that is necessary to a free democratic state. This dialogue necessarily occurs pluralistically involving contrasting views arising from contrasting motives, freely disseminated. Above all, it consists of speech versus counterspeech. Every citizen is guaranteed the right through Article 5 to take part in this public discussion."[157]

This approach is very similar to South Africa's approach to freedom of expression which holds that freedom of expression is to be interpreted as part of a "web of mutually supporting rights".[158] In *Mephisto*, the Court while acknowledging the protection afforded to Articles 5(1) and (3) recognised that Article 5 can be limited by interests such as the protection of personality and human dignity.[159]

There are several limitations to Article 5 of the German Constitution. First, as stipulated in Article 5(2), freedom of expression can be limited in the provision of the general laws, for the protection of young persons and in furtherance of the protection of the right to personal honour.[160] Secondly, it can be limited under specific circumstances such as for those serving in military or alternative services.[161] Thirdly, under Article18 which provides that anyone who abuses the right to freedom of expression may forfeit the protection of the right.[162]

Article19 provides that any limitation to a law must be based on a lex generalis (a law of general application).[163] Marais contends that Article 18 is comparable to section 16(2)(c) of the Constitution as it shows that anti-democratic speech often in the form of hate speech is has no place in a free and democratic society.[164]This view is reflected in Germany's approach to hate speech with respect to its decision to criminalise hate speech.

[157]Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] January 25, 1961, 12 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 113, 125 (F.R.G); translated in Eberle, 8
[158]*Case v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996* (3) SA 617 (CC) para 27.
[159] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 24, 1971, 9 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173 (F.R.G) at 836-837.
[160]Article5(2) of the Basic Law of the Federal Republic of Germany, 1949.
[161]Article17(a) of the Basic Law of the Federal Republic of Germany, 1949.
[162]Article18 of the Basic Law of the Federal Republic of Germany, 1949.
[163]Article19 of the Basic Law of the Federal Republic of Germany, 1949.
[164]Op cit note 61 at pg. 460.

4.4.3. Approach to Hate Speech

Germany primarily regulates hate speech through its criminal code. These provisions were enacted to ensure that Germany complies with their international obligations in prohibiting hate speech.[165] Section 130 in particular provides that:

"(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning an aforementioined group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years.

(2) Whosoever with respect to written materials (section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them,

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services shall be liable to imprisonment not exceeding three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply mutatis mutandis."

As stated above, someone convicted for disturbing the public peace or inciting hatred can be sentenced to imprisonment. Furthermore, subsection 2 prohibits these forms of speech in the media while subsections 3 and 4 target the glorification of the acts of the Nazis as a special form of hate speech. Subsection 4 demonstrates the extent to which context and history

[165]See Brugger Winfried 'The Treatment of Hate Speech in German Constitutional Law' Vol. 04 No. 01, pg. 17.

influence hate speech regulation. Subsection (4) criminalises the glorification or justification of National Socialist Rule. Brugger notes that these provisions "establish a far-reaching criminalization of hate speech that is directed against individuals and groups and that is further secured by norms protecting public peace and the constitutional order."[166] Furthermore, it is acknowledged that these provisions were enacted to comply with Germany's obligations under the ICERD.[167]

The Federal Constitutional Court in *Wunsiedel* found that section 130(4) of the Criminal Code does not violate freedom of expression under Article 5 as the expression affirming Nazi propaganda was incompatible with the free and democratic society envisaged by the German Constitution.[168]Significantly, Marais contends that the incitement of hatred requirement under section 130(1) which must take place in "a manner capable of breaching the public peace" is similar to interpretation of incitement which refers to a risk a likelihood or risk of ensuing harm. [169] In addition to section 130, sections 185 to 200 of the German Federal Penal Code regulate punishment for individual or collective defamation or insult.[170]

Most cases involving hate speech deal with Holocaust denialism. In this regard, Brugger notes that a distinction ought to be made between a simple Holocaust lie and a qualified one.[171] A simple Holocaust lie refers to a situation where there is an insistence that the genocide did not take place at all or that it was exaggerated.[172] A simple lie becomes a qualified one if it is accompanied by a normative conclusion or action based on this lie.[173]

In the Holocaust denial case, the Federal Constitutional Court found Holocaust denialism not protected under the Article 5 (1).[174] This case revolved around a demonstration held by the National Democratic Party ("NDP"). The NDP invited a speaker who was a holocaust revisionist. The speaker alleged that the Jews were not persecuted by the Third Reich. The Federal Constitutional Court held that Article 5 (1) was not violated as the assertion was

[166]Ibid.
[167]Ibid at pg. 11.
[168] Wunsiedel decision BVerfG 1, BvR 2150/08 (4 November 2009)
[169]Op cit note 61 at pg. 469.
[170]See Op cit note 162.
[171]Ibid at pg. 32.
[172]Ibid
[173]Ibid.
[174]See the BverfGE 90 Decision of 13 April 1994, Auschwitz Lie Case (Holocaust Denial Case).

deemed untrue.[175] Thus, the Court noted that this assertion did not disclose a violation of Article 5 (1).[176]

The Court further held that Sections 130 and 185 of the Criminal Code which were cited by the Munich authorities in refusing the NPD a demonstration were constitutional.[177] The Court held that the assertion caused significant harm to Jewish people with respect to their reputation and dignity.[178]The emphasis of human dignity is an important aspect of the German Constitution as discussed above. Further, although harm is not explicitly considered, the understanding that hate speech violates the dignity of an individual based on group membership is relevant to the regulation of hate speech in South Africa.

4.4.4 Application

The German approach to freedom of expression recognises both its significance and instances where it ought to be restricted. Article 18 of the German Constitution allows for anyone who abuses the right to freedom of expression to be forfeited. As will be argued in Chapter 5, this provision can be compared to the categorical exclusion in section 16(2) of the Constitution. The German approach to hate speech is historically and contextually driven with respect to its criminalisation of hate speech. Particularly with reference to section 130(4) which criminalises support of National Socialism. Of particular relevance is the conception of incitement in section 130(1) which closely accords with the understanding of incitement in Article20 (2) of the ICPPR. Additionally, although harm is not explicitly considered, the understanding that hate speech in particular violates the dignity of an individual based on group membership is relevant to the regulation of hate speech in South Africa.

4.5. Canada

4.5.1. Introduction

The Canadian Charter of Rights and Freedoms (the Charter) was adopted in 1982 which entrenches a Bill of Rights in the Canadian Constitution. The Charter contains and protects a number of rights and freedoms, including freedom of expression. Significantly, section 1 of the Charter, guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This section

[175]Ibid.
[176]Ibid.
[177]Ibid.
[178]Ibid.

is used when the Courts engage in a balancing exercise to determine whether a right has been justifiably limited.

4.5.2. Approach to Freedom of Expression

Section 2 of the Canadian Charter provides that everyone has the following freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.[179]

Despite the Supreme Court of Canada's insistence that rights are not absolute, freedom of expression is described as a 'fundamental freedom'.[180] As the Canadian Supreme Court stressed in *Irwin*, "this is because in a free pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."[181]

Owing to the broad scope of the right to freedom of expression, the Canadian Courts have allowed for an extensive amount of activity or conduct to be protected. This is because the general approach of the Canadian Supreme Court to section 2(b) focuses on the protection of activity that conveys or attempts to convey meaning.[182] The wide ambit of expression or activity that could convey or attempt to covey meaning has a broad scope for different kinds of expression to be protected. In this regard, the Courts have ruled the following activity to be protected: defamation, pornography, and advertising.[183]

Despite being described as an important right, the right to freedom of expression can be limited. For example, if a "pressing and substantial concern" justifies the limitation of freedom of expression, then it can be limited.[184] Thus, a value or interest could limit the exercise of freedom of expression. Secondly, because rights are not absolute in Canada, rights can be limited if the restriction can be justified by section 1 of the Charter. Lastly, violent acts are excluded.[185]

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[179]Section 2 of the Canadian Charter of Rights and Freedoms.
[180]See Op cit note 17.
[181]See *Irwin Toy Ltd. v Quebec (Attorney General)* [1989] 1 SCR 927
[182]*Taylor*, 3 S.C.R. at 913-14
[183]See *Rocket v Royal Coll. of Dental Surgeons of Ont*., [1990] 2 S.C.R. 232, 244 (Can.) for advertising; see *Hill v Church of Scientology*, [1995] 2 S.C.R. 1130, 1188 (Can.) for defamation; and see *R. v Butler*, [1992] 1 S.C.R. 452, 488 (Can.) for pornography.
[184]*R. v Oakes*, [1986] 1 S.C.R. 103.
[185]See *Montréal v 2952-1366 Québec Inc[2005] 3 S.C.R. 141.*

4.5.3. Approach to Hate Speech

Hate speech in Canada is primarily regulated through the Criminal Code. Section 318 of the Canadian Criminal Code prohibits genocide. Section 319(1) prohibits incitement to hatred where such incitement is likely to lead to a breach of the public peace and subsection (2) prohibits the wilful promotion of hatred against an identifiable group. If convicted of either could result in imprisonment. At a federal level, hate speech is prohibited both in criminal and civil legislation. As noted by Marais, section 319(1), requires incitement to be likely to lead to a breach of the public peace.[186]This conception of incitement which requires some form of imminent or a triggering act is similar to both incitement in Article 20(2) of the ICCPR and section 130(1) of the German Criminal Code.[187]

Although, *R v Keegstra* will be discussed in more detail below, the development of section 319 was emphasised in the judgment. Its development was set in motion due to an upsurge in Neo-Nazi activity. Consequently, the Minister of Justice at the time established the Cohen Committee to provide a study on hate propaganda.[188] To this end, section 318 and section 319 were all added as offences. Furthermore, it was acknowledged that these provisions were enacted to give effect to Canada's international obligations.[189]

In *R v Keegstra,* James Keegstra a high school teacher, was charged with contravening section 319(2) of the criminal code. Mr Keegstra taught his students that Jews were evil and that the aim of the Jewish race was to control the world. He further claimed that the Holocaust was created by the Jews so that people would be sympathetic to them. To this end, students were punished if they did not agree with Mr Keegstra's teachings.[190]

The issue that the Court had to consider what whether section 319 (2) unjustifiably limited the right to freedom of expression provided for under section 2(b) of the charter. In order to determine whether the limitation was justifiable, the Court had to engage in a balancing exercise under section 1 of the charter. The majority in determining whether hate speech constitutes expression noted that hate speech conveys meaning and therefore constitutes a form of expression within the scope of section 2(b). The majority further held that the provision infringed freedom of expression, but that it was a justifiable infringement.

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[186]Op cit note 61 at pg. 469
[187]Ibid.
[188]R. v. Keegstra. (1990) SCR 697 para 62.
[189]Ibid.
[190]Ibid para 3.

In discussing the objective of the criminal code, the Court noted that its purpose was to protect minorities from hate propaganda. The majority further linked this to the harms caused by hate speech. In this regard, the harm caused by hate speech manifests itself in two ways. First, in relation to the harm suffered by members of the target group which is primarily psychological and emotional.[191] Second, its influence on society which might make people "believe anything" and thus be susceptible to its influence.[192] On this point, the Court noted that; "It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society."[193] As will be demonstrated in Chapter 5, this conception of harm is particularly useful for the regulation of hate speech in South Africa.

Additionally, the Court noted that; "The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society. With these dangers in mind, the Cohen Committee made clear in its conclusions that the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada."[194] As is noted in the German section, the violation of dignity was recognised as a central component to hate speech regulation.

In dealing with the rational connection requirement, the majority held that the restriction was justified under section 1.[195] It was held that the limitation was justifiable because the provision advanced the aim of the legislation which was to supress the spread of hate propaganda against minority groups.[196] In this regard, the majority noted the following;

"Section 319(2) of the *Code* constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda

[191]Ibid para 60.
[192]Ibid
[193]Ibid
[194]Ibid
[195]Ibid.
[196]Ibid.

and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the *Charter* strongly buttress the importance of this objective."[197]

During the proportionality enquiry, it was found that hate speech did not contribute to any of the values underlying freedom of expression and in particular did not help foster participation in a democracy.[198] When considering whether there was a rational connection between the purpose of the legislation and the infringement, the Court found that the prohibition in section 319 was a proportional response to its objective.[199] Its objective in this regard was to protect vulnerable minorities from hate propaganda with the end goal of developing a multi-cultural society.[200]

The majority stressed that the enactment of a criminal prohibition for hate propaganda outweighed the limiting effects of the provision.[201] Significantly, the Court noted that criminal prohibitions cannot eradicate hate propaganda but can mitigate its spread through criminal prosecutions [202]

The minority agreed with the majority with respect to the issue of whether hate speech constitutes expression. It further acknowledged that the purpose of the legislation was the objective of the provision was to justify a limitation to free expression.[203] The point of divergence between the majority and minority judgments was with respect to the rational connection and minimal component of the proportionality exercise. The minority stated that it was unlikely that the provision would achieve its purpose in reducing the spread of hate propaganda in Canada.[204] They further held that it did not constitute a minimal impairment and that it would unjustifiably limit freedom of expression.[205]

As noted above, despite Canada's commitment to a multicultural society, the minority clearly disagreed with the approach of majority which tended to favour an approach similar to the US Supreme Court with respect to its presumption in favour of the First Amendment.

The meaning of hatred as mentioned in *Keegstra* has been affirmed in subsequent Courts in *Taylor* and *Whacott*. The Canadian supreme Court in Taylor, described hate speech as the ardent

[197]Ibid.
[198]Ibid para 86.
[199] Ibid.
[200]Ibid para 80.
[201]Ibid para 136.
[202]Ibid.
[203]Ibid.
[204]Ibid
[205] Ibid.

"emotion of detestation, calumny and vilification."[206] In addition, in Whacott, the Court confirmed this view of hatred, the Court had stated that hatred must be restricted to "extreme manifestations of the emotion described by the words "detestation" and "vilification".[207] Other cases involving hate speech include *R v Whacott*, where the Canadian Supreme Court had to determine whether section 14(1)(b) of the Saskatchewan Human Rights Code was constitutional. In this case the meaning of hatred was central to dispute as mentioned above. The Court found that the section was constitutional in that the prohibition on hatred was found to be reasonable.[208]

4.5.4. Application

The Canadian regulation of freedom of expression bears similarity to Germany in that although it holds a significant value, it can be limited. In this regard hate speech has been criminalised under section 319 of the Criminal Code due to the threat that hate propaganda poses to its society envisaged by its Chater which supports a multi-cultural and harmonious society. The conception of incitement under section 319 of the Criminal Code reflects a similar approach with to both Article 20 (2) of the ICCPR and section 130 of the German Criminal Code. Lastly, the conception of harm which includes psychological and emotional harm and specifically relates to dignity is similar to the German approach.

4.6. Conclusion

Section 39(1)(c) permits the optional consideration of foreign law when interpreting the Bill of Rights. The US approach to Freedom of Expression recognises its paramount value and accordingly, there is a presumption in favour of the First Amendment. Although there is recognition of the possibility of regulating hate speech if there is compliance with the First Amendment, it is unhelpful for the purposes of determining incitement to cause harm. The German approach to freedom of expression diverges from the US as it recognises that it is not absolute and can be limited. With respect to its position on hate speech, Germany has opted to criminalise hate speech in attempt to commit to a society premised on Human dignity. In this regard, the conception of incitement in section 130 of the Criminal Code is relevant as it can be compared to Article20(2) of the ICCPR which closely resembles incitement under section 16(2)(c). With respect to Canada, the conception of incitement under section 319 of the Criminal

[206] Canada (Human Rights Commission) v. Taylor [1990] 3 SCR 892
[207]Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11, [2013] 1 SCR 467 para. 35,
[208]Ibid

Code reflects a similar imminence type approach to both Article20 (2) of the ICCPR and section 130 of the German Criminal Code. Lastly, the conception of harm which includes psychological and emotional harm that specifically relates to the dignity is similar to the German approach and will be useful when addressing interpreting the meaning of incitement to cause harm in Chapter 5.

Chapter 5: Hate Speech in the South African Constitution

5.1. Apartheid

The apartheid era in South Africa has been characterized as a divided society where gross human rights violations were rife.[209] During apartheid, South Africa adopted parliamentary sovereignty which gave parliament almost absolute power to pass any law it desired. The apartheid government in turn banned speech which advocated national or racial hatred.[210] Whilst this seemed race-neutral, it was used as a ploy to ban anti-apartheid expressions or speech.[211] For example, section 1(d) of the Suppression of Communism Act defined communism as including "aims at the encouragement of feelings of hostility between the European and non-European races.[212] Thus, the apartheid government banned speech that advocated hatred in order to disrupt anti-apartheid activities.[213] In contrast to the apartheid government, the African National Congress (ANC) supported the regulation and restriction of hate speech through various legal instruments. For example, the 1955 Freedom Charter recognized the "right to speak" but also provided that "preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime."[214]

5.2. Interim Constitution

The Interim Constitution (IC) was drafted in 1993 by the Multi-Party Negotiating Process (MPNP) which replaced the Convention for a Democratic South Africa (CODESA) who were

[209]Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 5-10.
[210]Johannessen Lene 'A Critical View of the Constitutional Hate Speech Provision' (1997) 135 *AfrJon Hum Rts* 137 at 137.

[211]Ibid.
[212]Section 1 of the Suppression of Communism Act 44 of 1950.
[213]For a comprehensive summary of hate speech laws in South Africa during apartheid see Marcus Gilbert 'Racial Hostility: The South African Experience' in Coliver, Boyle and D'souza (eds) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*" (1992).
[214]African National Congress's Freedom Charter, available at: http://www.anc.org.za/show. See op cit note 36 at pg. 78-79 for a comprehensive summary on the African National Congress's position on hate speech during apartheid.

originally tasked with drafting the Constitution. The IC was crucial to transforming South African society. It entrenched a constitutional supremacy clause and included a chapter on fundamental rights applicable to all. The entrenchment of a chapter on fundamental rights described as a "historic bridge" in the epilogue signalled what Mureinik terms a shift from a culture of authority to one of justification,[215] where the reasons behind a decision matter more than the authority of the decision maker.[216] There was no provision regulating hate speech in the IC as it was not considered necessary by the Technical Committee during the drafting of the IC.[217] Johannsen contends that the relevant stakeholders during the negotiations were content with the primacy of the equality clause over expressional rights.[218]

5.3. Final Constitution

The Constitution of the Republic of South Africa was adopted in 1996. It is premised on a commitment to transforming the inequalities of the past and thus considered to be a transformative document.[219] Broadly speaking, it has the aim of healing the divisions of the past in order to establish a society based on democratic values, social justice, and fundamental human rights as enunciated in the preamble. Therefore, the document responds to a particular political, economic, and social history.[220] It endeavours to realise a set of foundational values which include that the state is to be declared sovereign and democratic based on human dignity, the achievement of equality, and the advancement of freedoms.[221] Human dignity, the achievement of equality, and the advancement of freedoms are the values closely linked to hate speech regulation in South Africa.

In terms of the structure of the Constitution, parliamentary sovereignty was replaced with a system of constitutional supremacy. The system of constitutional supremacy means that the Constitution is the supreme law and any law or conduct inconsistent with it is invalid. Furthermore, the rule of law is entrenched as a foundational value and a rule in terms of section 2. Another significant feature of the Constitution is the separation of powers. Constitutional principle VI in the interim Constitution provides that "there shall be a separation of powers

[215]Mureinik Etienne 'A Bridge to Where' (1994) 10 *SAJHR* 31 at 32.
[216]Ibid.
[217]Op cit note 66 at pg. 137.
[218]Ibid.
[219]See Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.
[220]See Davis Dennis *Democracy and Deliberation* (1999).
[221]Section 1 of the Constitution of the Republic of South Africa, 1996.

between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."[222]

The separation of powers doctrine divides powers, functions, and personnel between the three branches of government.[223] Checks and balances in this particular context mean that each branch of government must hold the other branches to account.[224] The Constitution also contains a general limitations clause under section 36. Under the general limitations clause, rights can be justifiably limited provided that the limitation is rational and proportional.[225] As illustrated in Chapter 3, both Germany and Canada also have limitation clause which is reflective of their balancing approaches. An important consequence of the limitations clause is that no rights are absolute.

Klare's argument is that the Constitution is a transformative document which commits to transforming the social, political, and economic relations in society.[226] While it is beyond the scope of this thesis to consider Klare's argument in full, I will describe some of the transformative features of the Constitution. First, the Constitution contains a Bill of Rights which is defined as the cornerstone of democracy in South Africa under section 7 of the Constitution, enshrines civil, political, and socio-economic rights. The justiciability of socio-economic rights is seen as an important indicator of its transformative nature.[227] Secondly, section 7 of the Constitution prescribes positive and negative duties on the state to fulfil, protect, promote, and respect the Bill of Rights. Therefore, the Constitution places affirmative duties on the state to protect, respect, promote, and fulfil the bill of rights.[228]

Thus, in certain instances may the state may be required to enact legislative or other measures in complying with an obligation. Section 8 the Constitution has both vertical and horizontal application, meaning that the Bill of Rights applies to private parties as well. Thirdly, section 39(1) of the Constitution provides that when interpreting a right in the Bill of Rights, one must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. What this suggests is that rights must be interpreted to give effect to the

[222]Constitutional Principal IV in Interim Constitution of the Republic of South Africa Act 200 of 1993.
[223]See Friedman Warren and De Vos Pierre (eds) 'The Separation of Powers and the Three Branches of government' in *South African Constitutional Law in Context* (2014).
[224]Ibid.
[225]Section 36 of the Constitution of the Republic of South Africa, 1996.
[226]Ibid.
[227]See *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004).
[228]See *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

values of the Constitution. These transformative aspects of the Constitution are significant for hate speech regulation in South Africa. The fulfilment of a duty or obligation might require the state to enact legislative or other measures under section 7. This might entail legislation criminalising the extreme and anti-democratic speech under section 16(2)(c) of the Constitution as discussed in Chapter 2.

5.4. Interpretation of Rights

Section 39(1) provides that when interpreting the Bill of Rights, a Court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

In order to give effect to section 39, the CC has determined various interpretive techniques when interpreting a right in the Bill of Rights. The starting point of this exercise is assessing the text of the provision in the Bill of Rights.[229] When assessing the text of a particular right in the Constitution, it cannot be interpreted in isolation from the other rights in the Constitution.[230]The preamble must be considered in this regard. The Court in *Makwanyane* adopted the following approach to the interpretation of the Bill of Rights in which it provided that

"whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution."[231]

The above quotation has been interpreted to mean that a provision that is literally interpreted will only be given that meaning if it has the same meaning as if one were to have a generous and purposive interpretation.[232] Two further points are significant in this regard. First, that when interpretating a provision, a Court cannot give the provision a meaning that it is not reasonably capable of bearing.[233] Additionally, an interpretation of a provision or text cannot be unduly strained.[234]A purposive approach to a constitutional provision means that one must determine the meaning of the right by considering the interests it protects.[235] This exercise entails a

[229]Currie Iain and De Waal Johan 'Constitutional Interpretation' *The Bill of Rights Handbook* (2013) at pg.135.
[230]*Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006) para 36 and *Johannesburg Municipality v Gauteng Development Tribunal* (2010) (2) SA 554 (SCA) para 39.
[231]*S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 9.
[232]Currie Iain and De Waal Johan 'Constitutional Interpretation' *The Bill of Rights Handbook* (2013) at pg.136.
[233]*South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* (123 of 2010) [2011] ZASCA 1 (11 January 2011) para 29.
[234]*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (pty) Ltd para 24.
[235]*S v Zuma 1995* (2) SA 642 (CC) para 9.

consideration of the values that underpin the rights in an open and democratic society based on human dignity, equality, and freedom.[236] An interpretation which affirms and protects these values must be supported over any other interpretation.[237] A purposive interpretation entails a value judgment.[238] A generous interpretation means that the Courts must favour an interpretation which allows a broad interpretation of the ambit or scope of the right. The Court in *Zuma* stated the following in this regard:

"[A supreme constitution requires] a generous interpretation … suitable to give to individuals the full measure of fundamental rights and freedoms referred to…"[239]

Moreover, a right in the Bill of Rights must be interpreted contextually in order to determine the purpose of the right. In order to interpret a right contextually we first need to consider its political history.[240] In addition, the drafting history of a constitutional provision may indicate the reason for its inclusion.[241] The background information or travaux préparatoires as well as the reports of various technical committees are relevant to the interpretative exercise as well.

A Court will also look at other rights to determine the context for the interpretation of the right in question. For example, because hate speech implicates not only the right to freedom of expression but also the rights to equality and dignity, all three rights need to be interpreted when interpreting section 16(2)*(c)*.

5.5. Right to Equality

Section 9 of the Constitution provides:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

[236]Currie and De Waal at pg. 137.
[237]Currie and De Waal at pg. 136.
[238]Currie and De Waal at pg. 137.
[239]Supra note 89 at para 14.
[240]*Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC) para 26.
[241]Currie and De Waal at pg. 140.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Equality is both a self-standing right in terms of section 9 and a foundational value in terms of section 1. Equality has a central role in the new constitutional dispensation as it is key to transformation. As the CC provided in Van Heerden:

"The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus, the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."[242]

South Africa's equality jurisprudence adopts a substantive approach to equality as opposed to a formal one. Substantive equality effectively means that there are structural reasons for why some people have better opportunities than others.[243] It therefore prioritises various economic, social, and political conditions of people as well as practices which reproduce inequality.[244] Another important feature of our equality jurisprudence is intersectionality. The CC in *Mahlangu* provides the following about intersectionality:

"There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination."[245]

[242]*Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004) para 72.
[243]See Friedman Warren and De Vos Pierre (eds) 'The Separation of Powers and the Three Branches of government' in *South African Constitutional Law in Context* (2014).
[244]See Friedman Warren and De Vos Pierre (eds) 'Equality, Human Dignity and Privacy Rights' in *South African Constitutional Law in Context*' (2014).
[245]*Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) at para 76.

Lastly, recognising the potential destruction that unfair discrimination can cause, section 9(3) of the Constitution provides that the state cannot unfairly discriminate on the basis of grounds such as race, gender and religion. Furthermore, section 9(4) of the Constitution provides that legislative measures must be made to protect categories of persons disadvantaged by unfair discrimination. As noted in Chapter 2, PEPUDA is the legislation enacted to combat unfair discrimination. The prohibition of unfair discrimination is crucial to the constitutional project in that it provides protection against conduct with impairs human dignity.[246] Equality is thus inextricably linked to dignity despite both being independent and enforceable rights.[247] As noted above, hate speech threatens the equal treatment of people in society and therefore infringes the right.

5.6 Right to Dignity

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. It is a foundational value in terms of section 1 of the Constitution and a justiciable and enforceable right in terms of section 10. The value of dignity permeates many of the features of the Constitution. For example, it is involved in the interpretation, application, and limitation of rights in the bill of rights, as O'Regan provided in *Dawood*:

"The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis."[248]

While dignity is a broad term, the Court in *Ferreira* held that dignity aims to create an opportunity for every individual to reach his or her potential and to experience complete

[246] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300; 1997 (11) BCLR 1489 (CC) at para 50.

[247] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

[248] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 35.

freedom.[249] In addition, the constitutional protection of dignity provides that people have value and worth and that they ought not to be treated as an end to a means. The right implies an expectation to be protected from conditions or treatment which offends a person's sense of their worth in society. At the heart of dignity is the assumption that each human has worth and should be treated accordingly, regardless of circumstances. Furthermore, it can be perceived as a personal right associated with a person's identity, autonomy and moral agency. Importantly, dignity is considered the cornerstone of South Africa's democracy.[250]

According to Teichner, a person's sense of belonging to a community or group is related to the respect accorded to that group.[251] In this regard, an individual's self-worth is diminished by hate speech. Woolman further argues that hate speech may cause an individual to refrain from participating in society as whole.[252] The consequence of such refrainment is that it adversely impacts the Constitution's efforts to build a society premised on human dignity. This view accords with the reasons for why hate speech is prohibited in *Malema*[253] – that hate speech causes discord in communities that are excluded from participating in democracy.

5.7. The Right to Freedom of Expression

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;

(c) Freedom of artistic creativity; and

(d) Academic freedom and freedom of scientific research

(2) The right in subsection (1) does not extend to

(a) Propaganda for war;

(b) Incitement of imminent violence; or

[249] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) para 49.
[250] Supra note 11 at para 328.
[251] Shaun Teichner 'The Hate provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad, the Ugly' at pg. 350.
[252] Stu Woolman (ed) 'Dignity's relationship to the substantive bill of rights' in *The Constitutional Law of South Africa* (2013).
[253] Supra note 20 para 21.

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

Section 16(1) of the Constitution guarantees the right to freedom of expression. Expression that infringes on the protected categories in subsection (1) must satisfy the limitations clause in section 36 of the Constiution. Freedom of expression has been described in various ways in the South African Courts. Emphasising its importance, the Court in *SANDF v Minister of Defence* described freedom of expression as being a "guarantor of democracy."[254] Other cases have described it as the "utmost importance in the kind of open and democratic society"[255] as well as an "indispensable facilitator of a vigorous and necessary exchange of ideas and accountability."[256] Despite, its importance, the CC in *S v Mamabolo* also recognised that it is of no paramount value.[257] This approach is reflective of the approach to freedom of expression in both Germany and Canada.

Additionally, an important part of the right to freedom of expression is the toleration of diverse views, regardless of how unpopular or offensive they are. As noted in *Islamic Unity*:

"The dictates of pluralism, tolerance and open-mindedness require that our democracy fosters an environment that allows a free and open exchange of ideas, free form censorship no matter how offensive, shocking or disturbing these ideas may be."[258]

As noted above, rights cannot be interpreted in isolation from one another. Therefore, when interpreting the right to freedom of expression under section 16, it must be interpreted alongside other rights. Thus, as the Court stated in *Case v Minister of Safety and Security,* freedom of expression must be interpreted as part of a web of mutually supporting rights.[259]

It is important to recognize that South Africa's history of censorship during apartheid plays a role in the way we understand freedom of expression.[260] Censorship also contributed to violations of other rights in South Africa during apartheid.[261] When freedom of expression is

[254]*South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 7.
[255]*S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 37
[256]*Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* (CCT201/19) [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021 (2) SA 1 (CC); 2021 (1) SACR 387 (CC) (27 November 2020) para 1.
[257]*S v Mamabalo (E-tv Intervening)* 2001 (3) SA 409 (CC) para 41.
[258]Supra note 9 at para 29.
[259]*Case v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996* (3) SA 617 (CC) para 27.
[260]*Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25 paras 2 and Daniels *v Scribante and Another* 2017 ZACC 13 at paras 23-24.
[261]Supra note 11 at para 27.

balanced, the one side of the balancing exercise is concerned with the protection of "the pluralism and broad mindedness which is crucial to any democracy" whereas the other side is concerned with being "undermined by speech which seriously threatens democratic pluralism itself."[262]

5.8. Section 16(2)

Section 16(2) of the Constitution is definitional in that it details the forms of expression that are not included as part of the scope of the right.[263] This is known as an internal modifier because it defines the scope of a right.[264] While there is a debate regarding whether section 16(2) is an internal modifier or internal limitation, academic consensus indicates that section 16(2) is an internal modifier.[265] The categories of expression provided in the provision have been identified by the drafters as not being deserving of constitutional protection.[266] This is because these forms of expression have the potential to adversely impinge on the dignity of others and cause harm.[267] However, this does not mean that the categories of expression present in section 16(2) are prohibited. Despite not being constitutionally protected, the state still has an interest in regulating these categories of expression.[268] There is nothing preventing legislation from regulating and consequently prohibiting these areas of expression. It is only if the state develops and passes legislation which encroaches on the terrain of protected expression will it be subject to section 36.

It is important to note that the meaning given to the phrases must be interpreted narrowly as "the constitutional interpretative exercise of restricting the ambit of constitutionally excluded expression thus also limits the ambit of the legislative prohibition."[269] This view is supported by Botha, who notes that section 16(2) must be narrowly interpreted as the exclusionary categories are strictly tailored,[270] as well as by the dicta from *Freedom Front* which provided

[262]Ibid at para 29.
[263]See op cit note 109.
[264]Op cit note 109 at pg. 350.
[265]Ibid and see Friedman and De Vos 'The limitation of rights' in *South African Constitutional Law in Context* 1 ed (2014).
[266]Supra note 9 para 32.
[267]Ibid.
[268]Ibid para 33.
[269]Milo, Penfold and Stein 42.8 "Excluded Expressions Analysis" in 'Freedom of Expression' in Woolman and Bishop (eds) *The Constitutional Law of South Africa* (2013).
[270]Joanna Botha & Avinash Govindjee 'The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2016) 32 *SAJHR* 2 at 297.

that any test for determining whether expression amounts to hate speech must recognise that the protection of freedom of expression is the norm and section 16(2)*(c)* as a limitation.[271]

As noted above, hate speech under section 16(2)*(c)* is categorically excluded from protection under section 16(1).[272]Marais contends that this is an insufficient reason for why the categorical exclusion exists, seeing as the Courts could resort to the use of section 36 in determining whether infringements to section 16(1) are justifiable. Marais contends that the categorical exclusion was included because the expression under section 16 (2) is irreconcilable with the type of society envisaged by Constitution which is based on equality, dignity and freedom. [273] In justifying her argument, Marais compares section 16(2) with Article18 of the German Constitution and the criminal code prohibiting hate speech in Canada to illustrate how the history of these various societies influences their conception of hate speech. Ultimately, Marais contends that the international context with respect to the adoption of the ICCPR and ICERD in conjunction with various developments in hate speech prohibitions influenced the drafter's decision to categorically exclude the categories of expression enumerated in section 16(2) from protection.[274]

The implication raised by Marais, is whether or not the state as per section 7 of the Constitution is obliged to criminalise the expression enumerated in section 16(2). Although, this issue will be dealt with the comparative analysis of section 10 of PEPUDA and section 16(2)(c), it is worth noting at this point that the expression under section 16(2)(c) is clearly different to the expression prohibited under section 10 of PEPUDA. Section 16(2)(c) clearly contemplates expression of anti-democratic nature which is more akin to the hate speech prohibitions in the various Criminal Codes discussed in Chapter 4. As noted in *Islamic Unity*, the CC held that the state will have a further interest in regulating the forms of expression under section 16(2).[275]Additionally, the obligations raised under Article 4 of the ICERD permit as the enactment of legislative measures to combat and criminalise hate speech. It is therefore submitted that section 16(2)(c) obligates the enactment of legislative measures to criminalise hate speech.

[271]*Freedom Front* at para 1297.
[272]Islamic Unity at para 33.
[273]Op cite note 61 at pg. 247.
[274]Ibid.
[275]Supra note 9 at para 33.

5.9. Section 16(2)(a) Propaganda for War

This exclusion mirrors Article20(1) of the ICCPR. Article20(1) of the ICCPR provides that "any propaganda for war must be prohibited by law." This exclusion has not been interpreted by the South African Courts nor has it received much attention from academia. However, Milo, Penfold, and Stein argue that this exclusion should be interpreted restrictively as it is phrased.[276] This thesis supports the interpretation proposed above.

5.10. 16(2)(b) – Incitement of imminent violence

Similarly to the first exclusion in section 16(2), this exclusion has not been tested in the South African Courts. This exclusion is largely borrowed from the "imminent lawless action" test in *Brandenburg v Ohio*. According to the test in *Brandenburg*, the "advocacy of the use of force or of a violation of a law may be prohibited where advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[277] The word 'incitement' will be considered in substantial detail when discussing the meaning of 'incitement to cause harm' in sections below. However, the meaning of 'incitement' will be considered in this particular context as it will inform the understanding of incitement in the context of 'incitement to cause harm'.

Milo, Penfold and Stein argue that incitement refers to the act of encouraging, calling for, or pressuring others to involve themselves in acts of violence where there is an imminent threat of violence.[278] Therefore, incitement means calling for or pressuring others.[279] Furthermore, Milo, Penfold, and Stein also contend that section 16(2)*(b)* comprises of a subjective and objective element.[280] Here, the subjective aspect of the test refers to where the speaker subjectively intends to incite imminent violence and the objective aspect refers to the expression resulting in violence.[281] This thesis endorses this approach advocated by Milo, Penfold and Stein.

[276]Ibid.
[277]Supra note 57.
[278]Op cit note 19
[279]Ibid.
[280]Ibid.
[281]Ibid.

5.11. 16(2)(c) – Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm

The constitutional standard of hate speech comprises two elements which both have to be met. First, the expression must amount to an advocacy of hatred based on race, ethnicity, gender, or religion.[282] Thereafter it must constitute incitement to cause harm.[283] I will first discuss the advocacy requirement before proceeding to the main focus of this thesis. It is important to recognize two points before proceeding further. First, as acknowledged in *Freedom Front*, any test used in the determination of hate speech must recognize the "seriousness of such a classification."[284] Secondly, in accordance with the approach to limitations in international law, the constitutional restrictions must to freedom of expression must be interpreted narrowly.[285] This view accords with the view in *Freedom Front,* that any test for hate speech must treat section 16(2)*(c)* as an exception to the norm in section 16(1).[286] Any interpretation of section 16(2)*(c)* should acknowledge the difficulty in balancing the harm caused by hate speech and South Africa's history of censorship.[287] This view is proposed by Milo Penfold and Stein and finds shape in *Islamic Unity* where the Court stated that a balance should be found be South Africa's history of censorship on the one hand and, on the other, commitments to a pluralistic, broadminded, and tolerant society which acknowledges that certain forms of expression can cause harm.[288]

5.11.1. Advocacy of Hatred

Milo, Penfold and Stein argue that advocacy of hatred means that the speaker must "actively" advocate hatred by promoting hatred or attempting to instil hatred in others.[289] They concur with Currie and De Waal's suggestion that to "advocate hatred is to propose or call for it, to make a case for it."[290] When determining the meaning of hatred, the Courts in South Africa have endorsed the interpretation set out by Cory JA in *R v Andrews*, where the Court stated that "hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity,

[282]*Freedom Front v South African Human Rights Commission and another* 2003 (11) BCLR 1283 (SAHRC) at pg. 1284.
[283]Ibid.
[284]Ibid.
[285]Joanna Botha & Avinash Govindjee 'The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2016) 32 *SAJHR* 2 at 297.
[286]Supra note 134.
[287]Op cit note 127.
[288]Supra note 11 at para 29.
[289]Op cite note 19.
[290]Ibid.

ill will, and malevolence in another. Clearly an expression must go a long way before it qualifies."[291]

Section 16(2)*(c)* of the Constitution specifies four grounds upon which hate speech can be based. Scholars suggest that the grounds listed are a numerus clausus and that the grounds contained within cannot be expanded to include other grounds.[292] This approach is supported by international law, where restrictions to freedom of expression must be narrowly interpreted.[293] The reasons for the selection of these particular grounds were discussed in *Freedom Front.* The Court noted that race, gender, ethnicity and religion were the lines by which society during apartheid was most vulnerable.[294] The inclusion of these grounds sought to heal these divisions. [295]

5.11.2 Incitement to Cause Harm

In *Freedom Front*, the SAHRC had to determine whether the slogan "kill the Farmer, kill the Boer" amounted to hate speech in terms of section 16(2)*(c)* of the Constitution. The slogan was chanted at an ANC Youth League meeting and thereafter at funeral. When determining the meaning of 'incitement to cause harm', the SAHRC held that the test is objective and that the "focus must be on whether the expression itself causes or is likely to cause harm and not on the subjective intention of the person articulating it".[296] It added that what must be determined is whether a reasonable person assessing the advocacy of hatred on a stipulated ground within its context would objectively conclude that there was a real likelihood that the expression could cause harm.[297] It concluded that the effect of the speech is crucial and that "the closer the proximity or causal link between the advocacy of hatred on the stipulated grounds and the harm, the more likely it is that the expression would be deemed to be hate speech".[298] Harm was interpreted to include psychological and emotional harm and it was emphasised that the harm caused or likely to be caused had to be serious and significant.[299]

Several cases from the BCT in particular have dealt with the requirement of incitement to cause harm. In *Van Loggerenberg*, the Minority held that a joke which contained a sexual innuendo

[291]Supra note 3 at para 81 and R v Andrews [1990] 3 SCR 870,
[292]See Currie & De Waal at pg. 89 and Milo, Penfold & Stein at pg 122.
[293]Ibid.
[294] Freedom Front at pg. 1292.
[295] Ibid.
[296] Ibid at pg. 1297.
[297] Ibid at pg. 1285.
[298]Ibid.
[299] Ibid at pg. 1295.

directed at the miraculous birth of Jesus Christ amounted to incitement to cause harm.[300] The Minority in this regard, discussed the emotional harm caused by the joke but did not go into significant detail regarding incitement.[301]Another case from the BCCSA found that a broadcast which compared the Hamas government to the Nazi's was found to propagate hatred against Palestinian people and constituted incitement to cause harm.[302]The BCCSA understood incitement in the following manner;

"not whether the incitement was necessarily effective, but whether the commentator … sought to influence the minds of the listeners towards hating the inhabitants of Gaza"[303]

Currie and De Waal posit that incitement, means 'directed at' or 'intended'.[304]Thus incitement to cause harm requires that the speaker must intend to cause harm.[305]Thus, the speech itself causes harm which can be psychological or emotional.[306]

Milo, Penfold and Stein apply a textual approach in which they argue that incitement refers to the "active encouragement or pressuring of others to commit harm".[307] This approach is also supported by Marais.[308]The authors also support the inclusion of an intention requirement in that the speaker must subjectively intend to incite harm.[309] They further argue that the impact of the speech on the audience is paramount. With respect to harm, they argue that harm should extend beyond physical harm and can be emotional or psychological. Furthermore, they state that the harm must be "concrete" in that it must be capable of being incited.[310] Examples they provide include "hateful statements at a neighbourhood meeting that call for the lynching of blacks, for harassing phone calls to be made to black neighbours, or for the conclusion of agreements not to sell houses in the neighbourhood to black persons."[311]

Botha submits that the "incitement to cause harm" component of the threshold test for hate speech, as read with the requirement that the speaker must advocate hatred, requires:

a) that the hatemonger intends to advocate hatred against the target group;

[300]Van Loggerenberg v 94.7 Highveld Stereo 2004 (4) BCLR 561 (BCT) at pg. 9
[301]Ibid.
[302]Hamid v Chaifm 2015 JOL 3343 (BCCSA) para 7.
[303]Ibid at para 89.
[304]Currie & De Waal at pg. 359.
[305]Ibid.
[306]Ibid.
[307] Op cite note 19 at 42-82-3.
[308]Op cit note 61 at pg. 469.
[309] Op cit note 19 at 42-83-3
[310]Ibid.
[311]Ibid.

b) that he or she also intends to incite the audience to cause harm to the target group; and

c) that objectively speaking the likely effect of the words in the context in which they are spoken is that they will cause serious harm to the target group or to the broader societal good.[312]

5.12. Promotion of Equality and Prevention of Unfair Discrimination Act

The CC in *Qwelane* made a significant observation regarding the purpose and function of the PEPUDA;

"The preamble to the Equality Act explicates that its overarching goal is to steer our journey to an equal and democratic society by, amongst other things, eradicating inequality, transforming our society and embracing our diversity. It is thus clear that the Equality Act aspires to heal the wounds of the past and guide us to a better future. This commitment was fulfilled by Parliament, pursuant to section 9(2) of the Constitution. One of the ways in which the Equality Act realises this commitment is through prohibiting hate speech in section 10. The Legislature was alive to the reality that unfair discrimination can be perpetuated by both conduct and the dissemination of words (or more broadly, through expression). Through this prism, section 10 is located at the confluence of three fundamental rights: equality, dignity and freedom of expression, and we ought to navigate an interpretation of that section within this terrain."[313]

This quote aligns with two objects provided in section 2 of the PEPUDA which is to prevent unfair discrimination and protect human dignity and prohibit the advocacy of hatred based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act. Of relevance to hate speech are sections 10 and 12 as provided below.

"10. Prohibition of hate speech

i. 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 be harmful or to incite harm and to promote or propagate hatred.

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

12. Prohibition of dissemination and publication of information that unfairly discriminates

[312]Op cit note 135 at pg. 282.
[313]Supra note 3 para 49.

No person may— (a) (b) disseminate or broadcast any information; publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

The CC held that section 10(1) can be described "as a statutory delict that offers specific remedies concerting the right to equality".[314] With respect to the interpretation of section 10(1), the CC in Qwelane noted that "words" must be interpretated to encompass verbal and non-verbal expression.[315] With respect to the terms "advocate" and "propagate", the CC held it is indicative of ideas rather than words.[316] The CC further held that this interpretation is necessary in order to give effect to Article 4 of the ICERD and section 16(2)(c) of the Constitution.[317] With respect to communicate, it was held that it assumes the conveyance of ideas.[318]It was added that communicate means to" transit words to a third party and that one can communicate publicly and privately.[319] With respect to "against any person", the Court reasoned that its inclusion relates to the fact that hate speech can impact individuals and groups.[320] With respect to "that could reasonably be construed to demonstrate a clear intention", the CC noted that it is an objective test.[321] Lastly, incite harm does not require causal link between the expression and actual harm committed.[322]

5.13. Comparative Analysis between section 10(1) and section 16(2)

An important consequence of *Qwelane* is that the CC noted that section 10(1) is the primary mechanism to prevent or prohibit unfair discrimination.[323] Therefore section 16(2), although relevant is not the primary framework by which to interpret the hate speech prohibition in section 10(1).Marais contends that "the unfair discrimination framework in no manner, negates the right to freedom of expression, the Court described its central task in *Qwelane* as a delicate

[314]Ibid para 95.
[315]Ibid para 113.
[316]Ibid para 114
[317]Ibid para 115.
[318]Ibid
[319]Ibid para 116.
[320]Ibid para 122.
[321]Ibid para 96.
[322]Ibid.
[323]Ibid para 50 and Marais ME "Hate Speech in the Equality Act Following the Constitutional Court Judgment in Qwelane v SAHRC" PER / PELJ 2023(26) at pg.4 and Marais ME and Pretorius JL "A Contextual Analysis of the hate speech provisions of the Equality Act PER / PELJ 2015(18) 4

balancing exercise between the fundamental rights to freedom of expression, dignity and equality."[324]

Section 16(2)(c) and section 10(1) are evidently linked as both provisions are concerned with regulating hate speech. However, they have different scopes and aims. Section 10(1) as discussed above is concerned with prohibiting expression that is harmful or incites harm and propagates hatred. It clearly exceeds the ambit of section 16(2)(c) which is narrowly confined to an advocacy based on hatred on a stipulated ground which constitutes incitement to cause harm. Furthermore, section 10(1) was enacted with the obligation under sections 9(3) and (4) to prevent and prohibit unfair discrimination. Added to this, Marais notes that "The object of the prohibition is to protect target groups from the direct and ensuing harmful impact and effects of exposure to the malicious communication of disrespect, scorn, or hatred related to group characteristics."[325]

As has been reiterated above, the categorical exclusion under section 16(2) warrants legislative and other measures which could include criminalisation to regulate the extreme form of expression enumerated under section 16(2)(c). Despite the broader ambit of section 10(1) it was still enacted to give effect to section 16(2)(c). Therefore, the understanding of incite harm is crucial in this regard as it closely resembles, "incitement to cause harm".

Significantly, *Qwelane* raises the questions of whether the threshold of incited harm is higher in section 16(2)(c) of the Constitution than in section 10(1) of PEPUDA. It is submitted that the threshold for incited harm in section 16(2)(c) of the Constitution is higher than section 10(1) as, section 16(2)(c) refers to expression which warrants criminalisation. It refers to a more extreme form of speech incompatible with the values of the Constitution and therefore the threshold for harm needs to be greater.

5.14. Application

Section 39(1)(a) of the Constitution requires a wide ranging, textual, generous, purposive and contextual interpretation of the right. As noted above, the starting point is assessing the text of the right. The significance of the categorical nature of section 16(2) has been discussed throughout the dissertation. As section 16(2) closely resembles Article 20 (2) of the ICCPR it stands to reason that the drafters of the Constitution were heavily influenced by international

[324]Op cit note 276 at pg 7.
[325] See Marais ME and Pretorius JL "The Constitutionality of the Prohibition of Hate Speech in terms of Section 10(1) of the Equality Act: A Reply to Botha and Govindjee" PER / PELJ 2019(22) at pg.7.

law and in particular the international stance on hate speech regulation which permits its criminalisation in certain instances. This accords with the view held in *Freedom Front* which recognises that any test used to determine hate speech must recognise the seriousness of such a classification. Additionally, it must be noted that when determining the meaning of incitement to cause harm, the international conventions which South Africa are signatory to must be taken into account.

Next, when assessing a text, it must be interpreted alongside other rights. Section 16(2)(c) in this regard, implicates both the rights to equality and dignity. Therefore, an interpretation of incitement to cause harm must be linked to the protections afforded by sections 10 and 9 of the Constitution with respect to preventing unfair discrimination and protecting dignity.

With respect to a purposive approach which requires one to determine the meaning of the right by considering the interests it protects. This exercise entails a consideration of the values that underpin the rights in an open and democratic society based on human dignity, equality and freedom. Hate speech in this particular context is regarded as incompatible with the foundational values of the Constitution.[326]The CC has noted that hate speech subverts the dignity of people and marginalises them based on group membership. [327]

A contextual interpretation is crucial in order to determine the purpose of the right. In order to interpret a right contextually we first need to consider its political history. As noted above, the reason for the inclusion of the categorical exclusion was due to the drafters of the Constitution deeming the expression to be underserving of constitutional protection. Section 16(2)(c) in particular bears close resemblance to Article 20 (2) of the ICCPR. Furthermore, the purpose of hate speech prohibitions is "to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination.[328] This purpose accords with purpose of the hate propaganda prohibitions in Canadian and German law. Having reviewed the case law and scholarship on the interpretation of incitement to cause harm, it is clear that there is no consensus. The test in *Freedom Front*

[326]Supra note 9
[327]Supra note 3 at para 1.
[328]Ibid at para 193.

has been heavily criticised by scholars due to its conflation of the advocacy and the incitement requirements. Therefore, the definition used in this case is not applicable.

It is submitted that definition of incitement should correlate to that of Article 20(2) of the ICCPR which defines it as "statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."[329] What Marais terms "more than just a likelihood that a risk of ensuing harm" with respect to incitement correlates to this approach.[330] Although reference is made to discrimination, hostility or violence in Article 20(2), Article 20(2) permits that states adapt its requirements to their own norms. The approach by Marais and Article 20(2) in relation to imminent risk/likelihood that a risk of ensuing harm is supported by interpretations of Section 130 of the German Criminal Code and Section 319 of the Canadian Criminal Code.[331] In particular section 130 of the German Criminal Code provides that "incitement to hatred" must be "in a manner capable of disturbing the peace" whereas section 319 of the Canadian Criminal Code also reflects this notion of incitement as it requires incitement to be likely to lead to a breach of the peace.[332] It is submitted that incitement be interpreted in the way Milo, Penfold, and Stein define the word, meaning to instigate or persuade others to cause harm. This view, is endorsed by Marais who compares it to incitement in section 16(2)(c) which refers to incitement that is "born out of hatred towards a target group that instils a desire to harm members of that group".[333]

The suggestion by Currie and De Waal is too broad, while the suggestion by Botha and Govindjee is far too comprehensive for one part of the test. Therefore, incitement should mean to instigate or persuade others to cause harm. It is further submitted that hate speech be interpreted as including the proviso that the speaker must firstly intend to advocate hatred and thereafter incite others to cause harm. This interpretation is supported by the incitement is understood in the ICCPR, as well as with reference to the Canadian and German Criminal Code's. Therefore, the speaker must first intend to advocate hatred and thereafter incite others to cause harm. 'Cause harm' should be interpreted to mean that harm must occur or there must be a likelihood of harm occurring. The understanding of incite harm as stipulated in *Qwelane*

[329]Camden Principles: Principle 12
[330]Op cit note 61 at pg. 469.
[331]Op cit note 61 at pg. 469.
[332]Ibid.
[333]Ibid.

does not require a causal link between the expression and actual harm committed.[334] This interpretation should be added to cause harm.

Secondly, 'harm' must extend to both psychological and emotional harm. This definition of 'harm' is compatible with the constitutional values of dignity and equality. Furthermore, the ambit of 'cause harm' is not wide, meaning that the interpretation is narrow enough so that the interpretation is compliant with international law standards. Thus, the constitutional meaning of 'incitement to cause harm' is that 'incitement' means to instigate or persuade, while 'cause harm' means that harm must occur or there must be a likelihood of harm. Harm can be both psychological and emotional as well as physical. That harm can be both psychological and physical is endorsed by both Germany and Canada with respect to their regulation of hate speech as demonstrated in Chapter 4. The suggestion made by Milo, Penfold, and Stein also accords with the understanding of 'incite harm' in PEPUDA, which does not require a causal link between the expression and actual harm committed. [335]

5.15 Conclusion

In conclusion, the regulation of hate speech has fundamentally changed since the adoption of the Constitution. While there was no mention of a hate speech provision in the IC, the final Constitution expressly excluded hate speech from constitutional protection. In interpreting the hate speech exclusion due regard must be paid to the structure of the Constitution, the right to dignity and equality, and the overall interpretative scheme in section 39. This thesis submits that the interpretation favored by Milo, Penfold, and Stein should be the correct approach for determining the phrase 'incitement to cause harm', in that the constitutional meaning thereof is that 'incitement' means to instigate or persuade, while 'cause harm' means that harm must occur or there must be a likelihood of harm. Harm can be both psychological and emotional as well as physical. The suggestion made by Milo, Penfold, and Stein also accords with the understanding of 'incite harm' in PEPUDA, which does not require a causal link between the expression and actual harm committed. This interpretation is sufficiently narrow to comply with the international standards as well as both the international and foreign conceptions of incitement and harm discussed in Chapters 3 and 4.

[334]Supra note 3 para 107.
[335]Ibid para 117.

Chapter 6: The Criminalisation of Hate Speech in South Africa

6.1. Introduction

Section 16(2) of the Constitution categorically excludes expression which undermines the values of the Constitution. This chapter is concerned with the role of criminal law in regulating the extreme form of expression enumerated under section 16(2)(c). First, I examine the context of the obligation which involves a brief discussion on section 16(2)(c) and section 10(2) of PEPUDA. Second, I discuss the meaning of incitement in domestic criminal law to ascertain whether it is useful in interpreting incitement in the context of hate speech as well as whether crimen inuria could possibly regulate criminalised hate speech. Third, I evaluate relevant provisions of the Film and Broadcasting Act and the Hate Crimes Act. The focus on the Hate Crimes Act will assess whether it complies with the requirements of section 16(2)(c) and can thus aid in the interpretation of incitement to cause harm. Ultimately, it is found that the current criminal law framework does not assist in the determination of incitement to cause harm. It is concluded that the approach of Milo, Penfield and Stein to interpreting incitement to cause harm is the most suitable read with conception of harm endorsed by the *Qwelane* judgment.

6.2. The relationship between section 16(2)(c) and section 10(2)

As noted in Chapter 5, the expression contemplated by section 16(2) has been categorically excluded from constitutional protection because it impairs the mandate of the Constitution. As has been argued throughout this dissertation, this section warrants legislative measures to regulate the expression. Section 10(2) of PEPUDA authorises the Director of Public Prosecution to institute criminal proceedings in cases involving hate speech. Thus section 16(2)(c) read with section 10(2) of PEPUDA and Article 4 of the ICERD permit the criminalisation of hate speech in South Africa.

6.3. Incitement

The crime of incitement in South Africa is regulated by statute and the common law. In terms of the common law, the crime of incitement is defined as "the unlawful communication by an inciter to an incitee with the intent to move, influence, encourage or prompt the incite to commit a crime."[336] In this regard, the Court in *S v Nkosinyana* defined an inciter in the following manner.

[336] See S v Nlhovo 1921 AD 485.

"[A]n inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime."[337]

In terms of statute, the Riotous Assemblies Act criminalised incitement. Specifically, Section 18 (2) which provides that "[A]ny person who ... incites, instigates, commands or procures any other person to commit any offence ... shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable".[338] It is important to note that this section has been declared unconstitutional to the extent that it criminalises incitement of another to commit any offence.[339]

Whilst this provision criminalises incitement, it does not apply to hate speech in the context of incitement. Scholars argue that this Act was intended to impede opponents of apartheid.[340] Therefore, incitement as it stands is not suitable for the purposes of interpreting incitement in the context of criminal law.

6.4. Crimen Iniuria

Crimen iniuria has been defined as the unlawful, intentional and serious violation of the dignity or privacy of another."[341] A significant aspect of Crimen Iniuria relates to an infringement of the dignity or privacy of another person.[342] Crimen Injuria is similar to hate speech in South African jurisprudence in that both are concerned with harm. Crime Injuria can manifest itself in various ways. Most notably, in the form of racial insults or epithets. However, it is submitted that the harm caused by hate speech is far more complex in that it affects both individuals and groups. Harm for Crimen Iniuria only affects individuals. Therefore, Crimen iniuria is not suitable for the regulation of hate speech from the perspective of criminal law.

6.5. Film and Publications Act

Section 2 of the Film and Publications Act provides that,

[337] S v Nkosinyana (1966 (4) SA 655 (A) at 658, 659)
[338] Section 18 (2) of the Riotous Assemblies Act no 17 of 1956.
[339] Supra note 118.
[340] Op cite note 61 at pg.479 and Currie and De Waal 356
[341] CR Snyman Criminal Law 5 ed (2008) at 469.
[342] Ibid.

2. Objects of Act.—The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to— (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care; (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and (c) make use of children in and the exposure of children to pornography punishable.[343]

The Film and Publications Act criminalises hate speech. Specifically, Section 16(4)(a)(ii) read with section 18(3)(a)(ii) provide a classification scheme that labels publications, games or films which contain "an advocacy of hatred based on an identifiable group characteristic and that constitutes incitement to cause harm" as a refused publication.[344] Additionally, a film or game in terms of section 18(3)(a) can be classified as a refused publication if it contains (i) child pornography, propaganda for war or incitement of imminent violence; or (ii) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm. The implication of these sections is that under section 24A (2), a person who continues to publish or distribute a refused classification knowingly will be guilty of an offence and liable for a penalty should they be convicted.[345] The same penalty can be invoked where someone knowingly publishes or distributes a publication that constitutes hate speech was not submitted for classification in terms of section 16(1). [346]

Although, the Film and Publications Act provides for the criminalisation of hate speech in the context of the publications, films and games and resorts to the use of incitement to cause harm, the phrase has not been interpreted definitively by the BCCSA. Therefore, although it has value in providing an example of criminalising hate speech as per the obligation imposed by section 16(2)(c), it is unhelpful in the interpretation of incitement to cause harm.

6.6. Analysis of the Hate Crimes Act.

On Thursday 9 May 2024, President Cyril Ramaphosa, assented to the Preventing and Combating of Hate Crimes and Hate Speech Act (Hate Crimes Act) which provides for the criminal offence of hate speech and hate crimes. Both offences in this regard can be subject to prosecutions.

[343]Section 2 of the Films and Publications Act 65 of 1996.
[344]Op cit note 61 at pg. 478.
[345]Section 42A (2) of the Films and Publications Act 65 of 1996.
[346]Op cit note 61 at pg. 478.

The Hate Crimes Act, according to its preamble aims to give effect to Article 4(a) of the ICERD. In this regard, its aim is to "to declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin."[347] The Bill also recognises the obligation placed on the state in terms of section 7(2) of the Constitution in terms of the obligation to fulfil, protect, respect and promote the Bill of Rights.

Of particular importance for our purposes, is section 3 and 4 which refer to Hate Crimes and Hate Speech respectively. Section 3 provides that,

"3. (1) A hate crime is—

(a) an offence recognised under any law (hereinafter referred to as an ''underlying offence''), excluding the common law offence of crimen injuria or an offence referred to in section 4(1); and

(b) committed by a person who is motivated by their prejudice or intolerance—

(i) towards the victim, the victim's family member or the victim's association with or support for a person with one or more characteristics or a group of persons who share one or more of the characteristics; and

(ii) which was based on one or more of the actual or perceived characteristics.

(2) (a) Any person who commits an offence referred to in subsection (1), is guilty of the underlying offence as a hate crime and liable on conviction to a sentence as contemplated in section 6(1).

(b) The criminal record of a person who has been convicted of an offence referred to in paragraph (a) must explicitly record the underlying offence as a hate crime.

(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by the Director

[347]Preamble of Prevention and combating of Hate Crimes and Hate speech Act 16 of 2023

concerned.[348]

Section 3 creates an offence for hate crimes. Notably subsection (a) excludes crimen injuria and section 4 offences. Additionally, someone found guilty of a hate crime will have it on their criminal record.

Section 4 provides for the offence of hate speech as provided below;

"4. (1) (a) Any person who intentionally publishes, propagates, advocates, makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

(i) be harmful or to incite harm; and

(ii) promote or propagate hatred,

based on one or more of the grounds, is guilty of the offence of hate speech.

(b) Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is—

(i) accessible by any member of the public; or

(ii) accessible by, or directed at, a specific person who can be considered to be a victim of hate speech,

is guilty of an offence.

(2) The provisions of subsection (1) do not apply in respect of anything done as contemplated in subsection (1) if it is done in good faith in the course of engagement in any bona fide—

(a) artistic creativity, performance or expression;

(b) academic or scientific inquiry;

(c) fair and accurate reporting in the public interest or the publication of any

[348]Section 3 of the of Prevention and combating of Hate Crimes and Hate speech Act 16 of 2023

information, commentary, advertisement or notice; or

(d) interpretation and proselytising or espousing of any religious conviction,

tenet, belief, teaching, doctrine or writings,

that does not advocate hatred that constitutes incitement to cause harm, based on one or

more of the grounds.

(3) Any prosecution in terms of this section must be authorised by the Director of

Public Prosecutions having jurisdiction or a person delegated thereto by the Director

concerned."[349]

The offence of hate speech makes marked improvements from its predecessors as intention is now required under the offence.[350] There is a close resemblance between section 4(1) and section 10(1) of PEPUDA. The major difference is that the crime of hate speech requires intention. The offence not only refers to incidents that incite harm and propagate hatred but also to the distribution of electronic communication. Subsection (2) mirrors the proviso in Section 12 of the PEPUDA. Subsection (3) empowers the Director of Public prosecution or a person delegated by the Director to authorise a public prosecution.

Additionally, Section 5 regulates Victim Impact Statements, Section 6 refers to Penalties which include imprisonment, Section 7 provides for National Instructions which empowers the National Commissioner of the South African Police Service in conjunction with the Director General to issue national instructions regarding the investigation of hate crimes, Section 8, refers to the Reporting powers of the relevant Cabinet Minister in Implementing the Act and Chapter 9 empowers the State and various other bodies to promote awareness of hate speech prohibitions.

It is notable that incitement to cause harm is absent from the definition. It is argued that although the Hate Crimes Act was enacted in mind to comply in particular with section 4 of the ICERD, an additional measure will most likely need to regulate the extreme form of hate speech under section 16(2)(c).

[349]Section 4 of the of Prevention and combating of Hate Crimes and Hate speech Act 16 of 2023
[350] See Op cit note 61 at pg. 480-482.

6.6. What is the meaning of Incitement to cause Harm

The aim of this dissertation was to establish the meaning of 'incitement to cause harm'. In this regard, the most persuasive definition comes from Milo, Penfold, and Stein. Therefore, incitement should mean to instigate or persuade others to cause harm. It is further submitted that hate speech be interpreted as including the proviso that the speaker must firstly intend to advocate hatred and thereafter incite others to cause harm. This interpretation is supported by the conception of incitement understood in Article 20(2) of the ICCPR, as well as with reference to the Section 319 of the Canadian Criminal Code and Section 130 of the German Criminal Code's. The speaker must first intend to advocate hatred and thereafter incite others to cause harm. 'Cause harm' should be interpreted to mean that harm must occur or there must be a likelihood of harm occurring. The understanding of incite harm as stipulated in *Qwelane* does not require a causal link between the expression and actual harm committed.[351] This interpretation should be added to cause harm. Additionally, harm can be both physical and psychological.

6.7 Conclusion

In conclusion, the aim of this chapter was to assess the framework for the criminalisation of hate speech in South Africa as obligated by section 16(2)(c). Secondly, whether conceptions of incitement and crimen iniuria can regulate hate speech in the context of criminal law. It was found that the current framework for the criminalisation of hate speech is not useful in the interpretation of incitement harm. With respect to the relationship between the Hate Crime Act and section 16(2)(c), it is found that the Act was enacted to comply with Article 4(a) of ICERD. There is very little resemblance between section 16(2)(c) and the Hate Crimes Act, as the offence of hate speech largely resembles section 10(1) of PEPUDA. Section 16(2)(c) will thus require additional measures tailored to its requirements.

[351]Supra note 3 para 107.

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