



SOUTH AFRICA THE MODEL? A COMPARATIVE ANALYSIS OF HATE
SPEECH JURISPRUDENCE OF SOUTH AFRICA AND THE EUROPEAN COURT
OF HUMAN RIGHTS

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We compare the handling of hate speech by the European Court of Human Rights and the highest courts of South Africa: The latter, it turns out, adopts a more robust and well-articulated approach to the issues of hate speech than the former, falling more in line with the thresholds set out by documents such as the UN’s Rabat Plan of Action. We argue that South Africa can be a good template for other countries, organizations, and social media platforms seeking a human-rights-based approach to handling hate speech.

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INTRODUCTION

For several decades the pros and cons of laws against “hate speech” have been hotly debated among academics and activists in liberal democracies. In general, both those in favour of and those opposed to hate speech laws share a broad commitment to liberal democratic values including individual freedom, tolerance, and equality. However, they tend to differ sharply as to whether laws against hate speech are likely to further or endanger these values.¹

The question of whether—or to what degree—hate speech should be tolerated has only been heightened by the growth of centralized social media platforms on which hate speech and extremism, which would previously be limited to a small, closed-circuit ecosystem, can now be amplified and given global reach. At worst this has fatal consequences. In October 2016, Myanmar’s military took to Facebook to incite large scale violence against the Rohingya Muslim minority, whilst Facebook overlooked several warnings and let the campaign continue before belatedly taking action.² On the other hand, hate speech norms can also be used to justify repression of dissent and criticism in countries where social media provides the only alternative to heavy handed official censorship and propaganda. For

¹ Examples of books assessing such discussions include: CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); ERIC HEINZE, *HATE SPEECH AND DEMOCRATIC CITIZENSHIP* (2016); *EXTREME SPEECH AND DEMOCRACY* (Ivan Hare & James Weinstein eds., 2009); *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* (Michael Herz & Peter Molna eds., 2012).

² Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://perma.cc/GC7X-CLYA>.

example, Venezuela's 2017 "Law against Hatred"³ has become a central mechanism through which President Maduro silences dissent, particularly online. In a 2020 review of more than 40 arrests that took place under this law, Reuters found that each case involved persons who had criticized the president, his party, or his allies.⁴

Many democracies have opted to stem the tide of online hatred with legal initiatives. In 2017, Germany adopted the controversial Network Enforcement Act,⁵ which obliges social media platforms to remove manifestly illegal content—including incitement to hatred—within 24 hours or risk huge fines. On a European Union (EU) level, a political agreement was reached on the Digital Services Act in April of this year. The DSA implements a strict liability regime, including enhanced EU monitoring and fines on social media platforms which fail to removal "illegal content." Further, at the end of 2021, the European Commission put forth a proposal which aims to add hate crimes and hate speech to the current list of what are referred to as "EU Crimes."⁶

There are compelling reasons as to why open and democratic societies, committed to the values of freedom, dignity, and equality, should wish to counter incitement to hatred. Research shows that hate speech can cause harm to individuals and communities such as psychological trauma and self-censorship,⁷ while a link between online hate speech and real-world violence has been

³ The Constitutional Law against Hatred, for Peaceful Coexistence and Tolerance, Gaceta Oficial de la República Bolivariana de Venezuela, No. 41,274 (Nov. 8, 2017).

⁴ Angus Berwick & Sarah Kinoshian, *Venezuela Wields a Powerful Hate Law to Silence Maduro's Remaining Foes*, REUTERS (Dec. 14, 2020), <https://perma.cc/4T3J-7T3E>.

⁵ Network Enforcement Act (Netzdurchsetzungsgesetz, NetzDG) (Oct. 1, 2017), <https://perma.cc/NW47-ZQUQ>.

⁶ Eur. Comm'n, *Communication from the Commission to the European Parliament and the Council—A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime* (Sept. 12, 2021), <https://perma.cc/MV62-G76L>.

⁷ See, e.g., Alexandra A. Siegel, *Online Hate Speech*, in SOCIAL MEDIA AND DEMOCRACY—THE STATE OF THE FIELD, PROSPECTS FOR REFORM 56 (Nathaniel Persily & Joshua A. Tucker eds., 2020); PHYLLIS B. GERSTENFELD, *HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES* (4th ed. 2017); Billy Henson, Bradford W. Reynolds & Bonnie S. Fisher, *Fear of Crime Online? Examining the Effect of Risk, Previous Victimization, and Exposure on Fear of Online Interpersonal Victimization* 29, J. CONTEMP. CRIM. JUST. 475 (2013); Karsten Muller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime* (2020), 19 J. EUR. ECON. ASSOC. 2131 (2021).

discerned.⁸ It does not necessarily follow that banning hate speech is an effective remedy, which can be implemented without a serious risk to freedom of expression or other negative unintended consequences. Nevertheless, the vast majority of states have chosen anti-hate-speech restrictions as a tool and so have social media platforms. This raises the question of whether it is possible to identify specific paradigms that more convincingly manage to square the circle between respecting freedom of expression and restricting hate speech in a clear, transparent, and robust manner.

Many national and regional courts have sought to apply principles of domestic and International Human Rights Law (IHRL) to strike the balance between preventing hate speech and ensuring the freedom of expression without unjustifiable limitations. Numerous studies and discussions have looked at the treatment of hate speech by the European Court of Human Rights (ECtHR)⁹ and compared the jurisprudential realities and differences between the United States and European states/the ECtHR.¹⁰ The South African legal framework on hate speech has been looked at by some authors¹¹ and there are a few comparative

⁸ See generally Karsten Muller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* (July 24, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149103.

⁹ See, e.g., Jacob Mchangama & Natalie Alkiviadou, *Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?*, 21 HUM. RTS. L. REV. 1008 (2021); Paola Lobba, *Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 EUR. J. INT'L L. 237 (2015); Antoine Buyse, *Dangerous Expressions: The ECHR, Violence and Free Speech*, 63 INT'L & COMP. L. Q. 491 (2014); Mario Oetheimer, *Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law*, 17 CARDOZO J. INT'L & COMP. L. 427 (2009); David Keane, *Attacking Hate Speech Under Article 17 of the European Convention on Human Rights*, 25 NETH. Q. HUM. RTS. 641 (2007); Stefan Sottiaux, *Bad Tendencies in the ECtHR's Hate Speech Jurisprudence*, 7 EUR. CONST. L. REV. 40 (2011).

¹⁰ See, e.g., Roger Kiska, *Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence*, 25 REGENT U. L. REV. 107 (2012); Erik Bleich, *Freedom of Expression Versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe*, 40 J. ETHNIC & MIGRATION STUD. 2 (2013); Claudia E. Haupt, *Regulating Hate Speech—Damned If You Do and Damned If You Don't: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT'L L.J. 2, 313 (2005).

¹¹ See generally Joanna Botha & Avinash Govindjee, *Regulating Cases of "Extreme Hate Speech" in South Africa: A Suggested Framework for a Legislated Criminal Sanction*, 27 S. AFR. J. CRIM. JUST. 117 (2014).

studies which assess South Africa and Kenya,¹² Canada,¹³ and the U.S.,¹⁴ with one study analysing the merits of introducing criminal sanctions in South Africa and the legal position in international law, the EU, the U.S., and Canada.¹⁵ However, there is no study to date which compares in depth the approach of South Africa and the ECtHR, a gap which this paper seeks to fill.

This paper will provide a short discussion of hate speech as a concept. It will then give an overview of some cases from the ECtHR, followed by a more detailed analysis of hate speech cases decided by South African courts. The paper argues that in general, South Africa's highest courts have adopted a convincing and speech protective approach which may, in fact, work as a suitable compromise between the free speech "absolutism" of the U.S. on the one hand and the arguably over-restrictive and incoherent European approach on the other. This is predominantly because the Constitutional Court of South Africa (CCSA) and the Supreme Court of Appeal (SCA) have acknowledged the need to regulate some forms of extreme speech, while simultaneously insisting on robust free speech protection by conducting, with intense scrutiny, an examination of the speech in question, its context, and the justifications for any such restrictions. Moreover, unlike the ECtHR, South African case-law acknowledges that censorship and free speech restrictions are integral to systemic oppression, such as its own history of apartheid. Accordingly, South Africa's highest courts have recognized that such restrictions endanger democracy and freedom unless they are narrowly defined and judiciously enforced. Although this pattern was partly altered by the July 2021 judgment by the

¹² See Judith Geldenhuys & Michelle Kelly-Louw, *Hate Speech and Racist Slurs in the South African Context: Where to Start?*, 23 POTCHEFSTROOM ELEC. L.J., July 27, 2020, at 1; Karabo Rajuili & Nomagugu Nyathi, *South Africa and Kenya's Legislative Measures to Prevent Hate Speech*, 2 CONFLICT TRENDS, Sept. 1, 2017, at 41; Lene Johannessen, *A Critical View of the Constitutional Hate Speech Provision*, 13 S. AFR. J. ON HUM. RTS. 135 (19917); Eric Neisser, *Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence*, 5 SETON HALL CONST. L.J. 103 (1994).

¹³ See Karmini Pillay & Josha Azriel, *Banning Hate Speech from Public Discourse in Canada and South Africa: A Legal Analysis of the Roles of Both Countries' Constitutional Courts and Human Rights Institutions*, 27 S. AFR. PUB. L. 259, 261 (2012).

¹⁴ See Alexander Traum, *Contextualising the Hate Speech Debate: The United States and South Africa*, 47 COMP. & INT'L L.J. S. AFR. 1, 65 (2014); G.N. Barrie, *The Divergent Constitutional Approach to Hate Speech in South Africa and the United States*, 47 J. S. AFR. L. 64 (2013).

¹⁵ See Botha & Govindjee, *supra* note 11, at 117.

country's CCSA in *Qwelane v. South African Human Rights Commission* which, as discussed below, was not as speech-protective as the SCA's ruling on the same matter, the authors argue that South Africa remains a source of inspiration for stakeholders seeking to adopt (more) coherent models to handling hate speech which limit the risk of abuse and arbitrariness.

I. WHAT IS HATE SPEECH AND AT WHAT POINT, IF ANY, SHOULD IT BE LEGALLY REGULATED, EVEN CRIMINALIZED?

The regulation of various forms of hatred has old roots. A papal decree from 1231 specified that heretics were to pay the "debt of hatred," which for obstinate heretics meant being sent to the secular authorities for execution.¹⁶ The incitement of hatred against the state, government, or public officials has also been punished through various laws against sedition, malicious gossip, and enmity in polities as different as late 18th century America, 19th century Britain, 20th century India, and Nazi Germany, to mention but a few.¹⁷ However, after World War II and specifically with the advancement of human rights concepts, laws against hate speech have primarily focused on protecting particular groups of people (typically ethnic, racial, national, or religious minorities) against incitement to hatred that might lead to discrimination, persecution, or even genocide.¹⁸

Alexander Traum notes that there are two sides of the hate speech regulation debate, with one focusing on the harms of hate speech and the other on the harm in restricting freedom of expression. He adds that hate speech laws are vulnerable to state abuse and that their implementation is "impossible to implement without stifling legitimate discourse."¹⁹ Jeremy Waldron, however, argues that hate speech regulation is a necessary prerequisite for ensuring dignity for those vulnerable to the corrosive effects of words that wound and stigmatize.²⁰ Such approaches can be linked, *inter alia*, to the doctrine of militant democracy, which was articulated by the German émigré political scientist Karl Loewenstein in 1937 as a strategy against

¹⁶ See Susan Wise Bauer, *The Debt of Hatred, in THE HISTORY OF THE RENAISSANCE WORLD: FROM THE REDISCOVERY OF ARISTOTLE TO THE CONQUEST OF CONSTANTINOPLE* 318 (2013).

¹⁷ See JACOB MCHANGAMA, *FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA* (2022).

¹⁸ *Id.*

¹⁹ Traum, *supra* note 14, at 65.

²⁰ See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 7 (2009).

the ascendancy of fascism.²¹ Lowenstein argued that “democracy and democratic tolerance have been used for their own destruction”²² and proposed militant democracy on the basis that European democracies faced by fascist movements had “gravely sinned by their leniency, or by too legalistic concepts of the freedom of public opinion.”²³

Since Loewenstein’s writings, several scholars²⁴ have sought to analyse and further define militant democracy, with Macklem’s positioning being particularly relevant to our paper. He argued that militant democracy is “a form of constitutional democracy authorised to protect civil and political freedom by pre-emptively restricting the exercise of such freedoms.”²⁵

There is no universally accepted definition of hate speech, with most States and institutions adopting their own standards, often without comprehensive definitions.²⁶ The 2020 UN Strategy and Plan of Action on Hate Speech²⁷ recognises three levels of lawful and unlawful expression. The most serious level encompasses advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence, and so mirrors article 20(2) of the International Covenant on Civil and Political Rights (ICCPR). The intermediate level encapsulates other forms of hate speech which may only be prohibited if the ban is in accordance with law, pursues a legitimate aim, and is necessary and proportionate. At the

²¹ Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417 (1937).

²² *Id.* at 423.

²³ Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 417, 638, 653 (1937).

²⁴ See, e.g., Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, 29 EUR. L. REV. 407 (2004); Otto Pfersmann, *Shaping Militant Democracy: Legal Limits to Democratic Stability*, in MILITANT DEMOCRACY 47 (Andras Sajó ed. 2004); Andras Sajó, *Militant Democracy and Transition Towards Democracy*, in MILITANT DEMOCRACY 209 (Andras Sajó ed. 2004).

²⁵ Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT’L J. CONST. L. 488, 491 (2006).

²⁶ See Natalie Alkiviadou, *Regulating Hate Speech in the EU*, in ONLINE HATE SPEECH IN THE EU: A DISCOURSE ANALYTICAL PERSPECTIVE 6, 7 (Stavros Assimakopoulos, Fabienne H. Baider & Sharon Millar eds., 2017).

²⁷ U.N., UNITED NATIONS STRATEGY AND PLAN OF ACTION ON HATE SPEECH: DETAILED GUIDANCE ON IMPLEMENTATION FOR UNITED NATIONS FIELD PRESENCES (2020), <https://perma.cc/3BQ3-YQ3L>.

bottom level is speech that is offensive, shocking, or disturbing, but which should not be legally restricted.²⁸

One of the few documents which has sought to provide a definition is Recommendation No. R. (97) 20 of the Council of Europe's Committee of Ministers, which defines hate speech as:

covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.²⁹

By including vague terms such as "promotion" and "justification" as well as "intolerant expression" and "ethnocentrism," with no explicit requirement of incitement to specific harms, the above document, albeit non-binding, adopts a significantly lower threshold for hate speech than does the 2020 UN Strategy.

In 2009, the Agency for Fundamental Rights (FRA) of the European Union defined hate speech as "incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic."³⁰ The reference to "characteristic" is open-ended and wide, with a plethora of potential characteristics falling thereunder.

The UN's Rabat Plan of Action (RPA) is central to any discussion on hate speech since it seeks to delineate the threshold for illegal hate speech. It notes that restrictions on the freedom of expression must be clearly defined and not be overly wide, must respond to a pressing social need, must be the least intrusive measures available, and must be proportional to their goal.³¹ The RPA³² and General Recommendation 15 of the European Commission on Racism and Intolerance³³

²⁸ *Id.* at 12–16.

²⁹ Council of Eur. Committee of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (Oct. 30, 1997), <https://perma.cc/FS8Z-5MXU>.

³⁰ EUR. UNION AGENCY FOR FUNDAMENTAL RTS., HATE SPEECH AND HATE CRIMES AGAINST LGBT PERSONS (2009), <https://perma.cc/7CMR-TURC>.

³¹ GAOR, Annual Report of the United Nations High Commissioner for Human Rights: Appendix: Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence, U.N. Doc. A/HRC/22/17/Add. 44 ¶ 18 (Jan. 11, 2013), <https://perma.cc/RDQ9-TZAX>.

³² *Id.* at ¶ 34.

³³ Eur. Comm. Against Racism & Intolerance, General Policy Recommendation No. 15 on

stress that criminal sanctions should only be used as a last resort.³⁴ Here, it is noteworthy that the RPA was adopted after Resolution 16/18³⁵ of the Human Rights Committee which, itself, was an explicit attempt to narrow the permissible limits on freedom of expression, after attempts by states of the OIC (Organization of Islamic Cooperation) to interpret article 20(2) as encompassing attacks on religion.

II. THE EUROPEAN COURT OF HUMAN RIGHTS

A. *Brief Contextual Backdrop*

No other international or regional human rights court has developed as extensive a body of human rights case law as the ECtHR, which has also delivered dozens of cases regarding hate speech. Yet, an analysis of 60 hate speech cases before the ECtHR and the European Commission of Human Rights between 1979–2020, conducted by the Danish think tank Justitia,³⁶ determined that speech restrictions have been found to violate the right to freedom of expression in just over one out of three hate speech cases. The position of the ECtHR is marked by the historical experiences of totalitarianism, in particular Nazism, on the continent and the lessons the court believes should be drawn from that history. The court has paid particular attention to the fanatical agitation and popular support that helped fascist movements gain power in Italy and Germany in the 1920s and 30s, with disastrous consequences for Europe. An instructive example is Judge Yudkivska's concurring opinion (joined by Judge Villiger) in the ECtHR case of *Vejdeland v. Sweden*, where she noted that the U.S. approach "where hate speech is protected until it threatens to give rise to imminent violence . . . is a very high threshold, and for many well-known political and historical reasons, today's Europe cannot afford the luxury of such a vision of the paramount value of free speech."³⁷

However, the ECtHR's historical justification for severely restrictive hate speech bans is a selective one. It does not discuss the fact that during the Weimar

Combating Hate Speech 58 (Mar. 21, 2016), <https://perma.cc/38X2-4YXD>.

³⁴ See generally HEINI Í SKORINI, *FREE SPEECH, RELIGION AND THE UNITED NATIONS—THE POLITICAL STRUGGLE TO DEFINE INTERNATIONAL FREE SPEECH NORMS* (2021).

³⁵ GAOR, Resolution Adopted by the Human Rights Council 16/18, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011), <https://perma.cc/EX9M-D5SV>.

³⁶ Justitia, <https://futurefreespeech.com/hate-speech-case-database/>.

³⁷ *Vejdeland v. Sweden*, App. No. 1813/07, 58 Eur. H.R. Rep. 479, 495 (2014) (Yudkivska, J., joined by Villiger, J., concurring).

Republic, increasingly restrictive measures were used to combat extremism and included censorship of the radio, the administrative banning of Nazi and communist newspapers, convictions of leading Nazi editors for defamation and incitement to hatred, and bans both against the Nazi party and against Hitler speaking in public.³⁸ The ECtHR's analysis also omits the fact that, once in power, the Nazis used the emergency laws of the Weimar Republic to strangle the very democracy and freedoms these laws were supposed to protect.³⁹ Nor does the ECtHR's historical justification grapple with the fact that during negotiations over the Universal Declaration of Human Rights as well as the ICCPR, the Soviet Bloc used almost the exact same justification as the ECtHR does today to argue for an obligation to prohibit hate speech under IHRL. In fact, as early as 1936 the Soviet constitution under Stalin declared "any advocacy of racial or national exclusiveness or hatred and contempt punishable by law" and sought to include a similar injunction—copied almost verbatim—against hate speech in the Universal Declaration of Human Rights.⁴⁰

Such prohibitions subsequently helped the communist states legitimize extensive crackdown on dissidents using a plethora of speech crimes, including various prohibitions against "incitement to hatred."⁴¹ Many Western democracies warned against hate speech provisions which, in the words of a Norwegian diplomat, were "so easy to misconstrue that those whom the provision was supposedly designed to protect might very well find themselves its victims."⁴² No member of the Council of Europe voted in favour of the adoption of article 20(2). The selective historical background for the ECtHR's embrace of hate speech laws is thus built on a skewed balancing between the potential harms and benefits of hate speech bans *vis-à-vis* the protection of freedom of expression, which has arguably contributed to the

³⁸ JACOB MCHANGAMA, *FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA* (2022).

³⁹ *Id.*

⁴⁰ USSR CONST. art. 123 (adopted December 1936); U.N. ESCOR, Comm'n on Hum. Rts., Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. doc. E/CN.4/Sub.2/21 (Nov. 26, 1947); *see also* Johannes Morsink, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 70 (2000); *THE FREE SPEECH CENTURY* 218–19 (Lee C. Bollinger & Geoffrey R. Stone eds., 2018).

⁴¹ *THE FREE SPEECH CENTURY*, *supra* note 40, at 219.

⁴² U.N. GAOR, 16th Sess., 3d Comm., 1084th mtg., U.N. doc. A/C.3/SR.1084 at 121 (Oct. 26, 1961).

ECtHR's acceptance of broad restrictions on freedom of expression as outlined below.

B. Limiting the Freedom of Expression: Article 10 and 17

Article 10 of the European Convention on Human Rights (ECHR) provides for the freedom of expression (with certain limitations such as for the protection of the rights and reputation of others). Uniquely for ECHR rights, Article 10 also notes that this right comes with "special duties and responsibilities," reflecting the drafters' concern about the potential for abuse. This was also included in article 19 of the ICCPR. The ECtHR has noted, repeatedly, that the freedom of expression "constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."⁴³ In the landmark case of *Handyside v. The United Kingdom*, the court found that this freedom:

is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.⁴⁴

The Court has developed a test based on Article 10(2). The key question this test seeks to answer is whether a particular interference is in line with the Convention. The Court looks at whether (i) the interference is necessary in a democratic society, (ii) there is a "pressing social need" for the interference, (iii) the interference was proportionate to the legitimate aim pursued, and (iv) the reasons for the interference are relevant and sufficient in light of the aims listed in Article 10(2). Moreover, the interference must be "prescribed by law," which means it must have a basis in domestic law which is sufficiently accessible and foreseeable.

The doctrine of proportionality is significant in considering restrictions to Article 10. As established in *Handyside*, "every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued."⁴⁵ In *Lehideux v. France*, the ECtHR noted that the choice of criminal proceedings rather than other means of intervention through the civil pathway was

⁴³ *Handyside v. United Kingdom*, App. No. 5493/72, 1 EUR. H.R. REP. 737, 754 (1976).

⁴⁴ *Id.*

⁴⁵ *Id.*

“disproportionate and, as such, unnecessary in a democratic society.”⁴⁶ Within the same framework, in *Féret v. Belgium*, the ECtHR considered the proportionality of the restriction which was of a non-criminal nature, and thereby reflected the Contracting Party’s restraint when resorting to criminal proceedings, particularly where other means are available.

Article 17, the ECHR’s “prohibition of abuse of rights” clause, provides that:

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

In cases where the Court determines that the speech in questions qualifies as abuse of convention rights under Article 17, no proportionality test is required to justify the restriction of such speech, which is deemed to fall entirely outside the scope of the Convention’s protection. As such, the use of Article 17 to prohibit hate speech must not be taken lightly. “Article 17 was originally included in the Convention in order to prevent the misappropriation of ECHR rights by those with totalitarian aims.”⁴⁷ Article 17 is intended to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention.”⁴⁸ As noted by the Court in *Ždanoka v. Latvia*, the possibility exists that persons or groups may use the rights and freedoms emanating from the Convention in order to conduct themselves in such a manner as to destroy the rights or freedoms protected therein.⁴⁹ As a result, the Court concluded that “no one should be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society.”⁵⁰ In *Lehideux v. France*, the concurring opinion of Judge Jambrek attempted to set out the conditions for the application of Article 17, opining that, for this article to be applicable,

the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are

⁴⁶ *Lehideux & Isorni v. France*, App. No. 24662/94, 30 EUR. H.R. REP. 665, 667 (1998).

⁴⁷ LAW COMMISSION, HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES App. A at 8 (2013).

⁴⁸ *Witzsch v. Germany*, App. No. 7485/03, ¶ 3 (ECHR Dec. 13, 2005).

⁴⁹ *Ždanoka v. Latvia*, 2006-IV EUR. CT. H.R. 29, 65–66.

⁵⁰ *Id.* at 66.

racist or likely to destroy the rights and freedoms of others.⁵¹

Considering the wide-ranging consequences of speech being subsumed under Article 17, it is remarkable how broad Judge Jambrek's definition of speech likely to fall under this article is. After all, what types of speech amount to "undemocratic methods," "undermine[]" a nation's "democratic and pluralist political system," are "racist," or are "likely to destroy the rights and freedoms of others" may depend on subjective factors such as the judge's temperament and outlook. As a result, there are strong reasons why such speech should, at the very least, be assessed by the ECtHR rather than being excluded by Article 17, which would properly be more narrowly construed "to prevent totalitarian or extremist groups from exploiting in their own interests the principles enunciated by the Convention."⁵² Moreover, under Article 10 of the ECHR, the protection of the rights and freedoms of others is a ground for limitation that is to be appraised within the framework of necessity, legality, and proportionality.

In terms of what the ECtHR understands to be hate speech, it was only in the recent case of *Lilliendahl v. Iceland* (2020), involving homophobic and transphobic speech, that the court attempted to provide a more well-articulated approach to its hate speech jurisprudence, by developing a two-tiered hierarchal overview of what hate speech is. The first category includes the "gravest forms of hate speech"⁵³ that are excluded from any protection on the basis of Article 17. The second is the "less grave forms of hate speech"⁵⁴ which do not fall outside Article 10 but which the court "has considered permissible for the Contracting States to restrict."⁵⁵ Here, the court incorporated not only calls for violence or other criminal acts but also insults, ridicule, and slander, which constitute "prejudicial speech within the context of permitted restrictions on freedom of expression."⁵⁶ Nevertheless, the court's opinion provides no normative or practical analysis of the meaning of the above categories or how to define them.

⁵¹ *Lehideux v. France*, App. No. 24662/94, 30 EUR. H.R. REP. 665, 707 (1998) (Jambrek, J., concurring).

⁵² See, e.g., *Paksas v. Lithuania*, App. No. 34932/04, 59 EUR. H.R. REP. 1025, 1048 (2014); *Ayoub v. France*, App. No. 77400/14, ¶ 92 (ECHR Jan. 1, 2021).

⁵³ *Lilliendahl v. Iceland*, App. No. 29297/18, ¶ 34 (ECHR May 12, 2020).

⁵⁴ *Id.* at ¶ 35.

⁵⁵ *Id.*

⁵⁶ *Id.* at ¶ 36.

C. *Speech Targeting Minorities (Racial, Religious, and Sexual)*

In *Féret v. Belgium* (2009), a member of the Belgian House of Representatives and editor-in-chief of the far-right Front National's publications had been criminally charged for the circulation of leaflets during the party's campaign. The leaflets called for the repatriation of immigrants and included statements such as "save our people from the risk posed by Islam the conqueror." After conducting a somewhat superficial overview of what it considered to be hate speech, its harm and the necessity for its restriction, the ECtHR found no violation of Article 10 and explained that:

incitement to hatred did not necessarily call for specific acts of violence or other offences. Insults, ridicule or defamation aimed at specific population groups or incitation to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety.⁵⁷

Here, the court adopts a particularly low threshold for hate speech to include insulting, ridiculing, or defaming speech. This line of reasoning was followed in *Vejdeland v. Sweden* (2012), which involved the distribution of homophobic leaflets in school lockers with statements such as "tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold," and "tell them that homosexual lobby organisations are also trying to play down (avdramatisera) paedophilia, and ask if this sexual deviation (sexuella avart) should be legalised." In finding no violation of Article 10, the court held that "although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations."⁵⁸

In *Norwood v. The United Kingdom* (2004), a regional organiser for the far-right British National Party displayed a large poster in his window with a photograph of the Twin Towers in flames, the words "Islam out of Britain—Protect the British People" and a symbol of a crescent and star in a prohibition sign. The applicant faced criminal proceedings. Here, the court took a worrying turn by applying Article 17 rather than conducting the test under Article 10. The court held that:

the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious

⁵⁷ *Féret v. Belgium*, App. No. 15615/07, ¶ 73 (ECHR July 7, 2009).

⁵⁸ *Vejdeland v. Sweden*, App. No. 1813/07, 58 EUR. H.R. REP. 479, 481 (2014).

group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of articles 10 or 14.⁵⁹

As a result of the court's assessment of the impugned expression, the application was found to be incompatible *ratione materiae* with the convention. As such, there was no analysis of the limitation grounds found in Article 10 and conditions attached to restricting speech, placing the impugned expression in a particularly dangerous position *vis-à-vis* the assessment of the prohibition's legality and legitimacy.

In sum, the three cases demonstrate (i) the low threshold that the court applies when deciding which speech it considers legitimate to restrict, despite its strong support for freedom of expression in its *Handyside* judgment; and (ii) the haphazard use of Article 17 in *Norwood*, which meant that no assessment under Article 10 took place (since the case was "kicked out" on Article 17 grounds). As such, there seems to be little nuance or substance in the court's analysis of the facts or inclusion of considerations militating in favour of the applicants' speech rights, including an assessment of the impact of silencing speakers.

In addition to providing weak protection for freedom of expression, the ECtHR's jurisprudence is often inconsistent and contradictory.⁶⁰ This is evident in the court's position regarding insults. Consider *Ibragimov v. Russia* (2018),⁶¹ which involved the banning of several books written by Muslim scholar Said Nursi, on the grounds that they constituted extremist literature. Here, the ECtHR held that, since the books depicted a moderate, non-violent understanding of Islam, the restriction on speech was not legitimate. To this end, the ECtHR referred to the decision of the country's District Court which relied on a "specialists' report" on the books' content to highlight that in "The Tenth Word: The Resurrection and the Hereafter," Muslims were described positively as "the faithful" and "the just" while everyone else was described negatively as "the dissolute," "the philosophers," "the

⁵⁹ *Norwood v. United Kingdom*, App. No. 23131/03, at 4 (ECHR Nov. 16, 2004).

⁶⁰ For a detailed discussion on this point, see Jacob Mchangama & Natalie Alkiviadou, *Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?*, 21 HUMAN RIGHTS L. REV. 4 (2021).

idle talkers,” and “little men.” On this ground, the District Court concluded that the book treated non-Muslims as inferior to Muslims, inciting “religious discord and containing propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their attitude to religion.” In disagreeing with the national court, the ECtHR stated that::

merely because a remark may be perceived as offensive or insulting by particular individuals or groups does not mean that it constitutes “hate speech.” Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression.

On the other hand, in *Atamanchuk v. Russia* (2020),⁶² which involved an application submitted by a journalist/politician after he was convicted of referring to non-Russians as criminals (without making any calls for violence), the court held that insults without violence can be legitimately prohibited. It stated that:

inciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner.

Thus, in the first case, mere insult was not sufficient to prohibit speech, whereas in the second, insults were incorporated in the framework of inciting hatred, without the nexus between insult and hatred being defined by the court.

D. Protection of Democracy and Democratic Institutions

Article 17 was incorporated into the Convention in order to safeguard the rights provided therein by allowing for the free operation of democratic institutions.⁶³ In the field of expression, the prohibition of revisionist/negationist speech has been linked with the preservation of democracy. *Lehideux v. France* involved a publication in *Le Monde* that defended the memory of Marshal Pétain, a French General who holds a contradictory role in French history.

The ECtHR relied on Article 17, holding that “justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.”⁶⁴ In *Garaudy v. France*, the ECtHR dealt with the publication of a book, “The Founding Myths

⁶² *Atamanchuk v. Russia*, App. No. 4493/11, ¶¶ 22, 64 (ECHR Feb. 11, 2020).

⁶³ *German Communist Party v. Germany*, App. No. 250/57, ¶¶ 12–13 (ECHR July 20, 1957).

⁶⁴ *Lehideux v. France*, App. No. 24662/94, 30 EUR. H.R. REP. 665, 697, 703–04 (ECHR 1998).

of Israeli Politics,” which included statements such as “the myth of six million exterminated Jews that has become a dogma justifying and lending sanctity (as indicated by the very word Holocaust) to every act of violence.” In this case, the Court explained why revisionist speech is to be considered hateful and harmful speech by holding that:

Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.⁶⁵

The court thus systematically finds negationist or revisionist speech in relation to the Holocaust⁶⁶ to constitute hate speech, sometimes ousted through the application of Article 17. However, in a case involving the denial of the Armenian genocide, it ruled that this fell within the framework of protected speech.⁶⁷ This is another illustration of the inconsistency in the ECtHR’s approach.

The treatment of totalitarian symbols, which although dealt with through Article 10, are still relevant to democracy-preserving actions, is yet another indication of the contradictions in the court’s approach to alleged hate speech. In *Fáber v. Hungary* (2012),⁶⁸ the court found that Article 10 protected an applicant who held a striped Árpád flag⁶⁹ less than 100 metres away from a demonstration against racism and hatred. In *Vajnai v. Hungary* (2008),⁷⁰ during a demonstration, the applicant wore a red communist star and was convicted of the offence of using a totalitarian symbol; the ECtHR found this conviction to be a violation of the applicant’s freedom of expression. However, in the recent case of *Nix v. Germany*

⁶⁵ *Id.* at 397.

⁶⁶ See, e.g., *Williamson v. Germany*, App. No. 64496/17, 68 EUR. H.R. REP. SUPP. 157, 162, 164 (2019); *Pastörs v. Germany*, App. No. 55225/14, ¶ 48 (ECHR Jan. 3, 2020); *Garaudy v. France*, App. No. 64496/17, 2003-IX Eur. Ct. H.R. at 396, 398.

⁶⁷ *Perinçek v. Switzerland*, App. No. 27510/08, 63 EUR. H.R. REP. 193, 298 (ECHR Oct. 15, 2015).

⁶⁸ *Fáber v. Hungary*, App. No. 40721/08, ¶¶ 6, 59 (ECHR Oct. 24, 2012).

⁶⁹ Used by the Hungarian Fascist Arrow Cross party, responsible for crimes against Jews during World War II.

⁷⁰ *Vajnai v. Hungary*, App. No. 33629/06, 50 EUR. H.R. REP. 1086, 1101–02 (2010).

(2018), which involved a German blogger who posted a picture of Heinrich Himmler wearing a swastika armband and likened him to the officers of an employment office which he alleged discriminated against his mixed-race daughter, the court came to a different conclusion. Despite the fact that the applicant neither advocated nor defended Nazism but instead sought to demonstrate the problems with a state employment office, the court found the claim of free speech protection to be manifestly ill-founded, noting that:

In the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis. The court considers that the legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace (also taking into account the perception of foreign observers), and to prevent the revival of Nazism must be seen against this background.⁷¹

E. The European Court of Human Rights: Concluding Comments

The ECtHR has, in practice, exempted many controversial expressions from the protection of Article 10, by adopting a broad understanding of impermissible hate speech, as the non-exhaustive examples above have shown. It has also resorted to the use of Article 17, which seriously restricts speech as cases are excluded from the court's consideration without a legal analysis of Article 10. Differences between the treatment of the two Russian insult cases, differences between the treatment of the Holocaust and the Armenian genocide, and the haphazard use of Article 17 in cases such as *Norwood* also reflect the unpredictability and contradiction that comes with this court's jurisprudence. Moreover, the ECtHR is liable to err on the side of restrictiveness.

III. SOUTH AFRICA

A. Brief Contextual Backdrop

South Africa's apartheid regime was a deeply racist system where white supremacy was embedded in its very constitutional and legal structure. Under apartheid, the State prohibited speech which promoted racial hostility.⁷² Under its "race-neutral" guise, such law was used by the government almost "exclusively to

⁷¹ *Nix v. Germany*, App. No. 35285/16, ¶ 47 (ECHR Mar. 13, 2018).

⁷² Article 19: The Prohibition of Incitement to Hatred in Africa: Comparative Review and Proposal for a Threshold 4 (2011), <https://perma.cc/C2QU-FVMS>.

restrict anti-Apartheid views and expressions.”⁷³ As argued by author Nadine Gordimer, “[n]o social system in which a tiny minority must govern without consent over a vast majority can afford to submit any part of control of communication to the hazard of a court decision.”⁷⁴ A central element of the regime’s censorship arsenal was the Publications Act of 1974.⁷⁵ The act banned “undesirable” publications, films, records, and other material if they were obscene or offensive to public morals; blasphemous or offensive to religion; harmed the safety of the state, the general welfare, peace, or good order; disclosed illegal judicial proceedings; harmed the relations between groups; or brought any section of the community into contempt or ridicule. In effect, this operated partly as an apartheid version of a hate speech ban.⁷⁶ As Kobus van Rooyen, the Chairman of the Publications Control Board from 1980 to 1990, noted:

The Appeal Board has emphasized that the South African community in no way wants to suppress criticism against whites or the government, but writers should realize that they are on delicate ground and that they have to make sure that what they publish does not assume the character of a hateful attack on the white man.⁷⁷

For example, Gordimer’s *Burger’s Daughter* was initially banned because it “contain[ed] various anti-white sentiments,”⁷⁸ and *Roots*, the U.S. mini-series on slavery, was banned in 1984 on the grounds that “a substantial number of likely viewers would identify with the cause of the oppressed American slaves.”⁷⁹ However, the end of apartheid “marked a turning point in South Africa’s history.”⁸⁰ Shortly before winning the 1994 presidential election, Nelson Mandela gave a

⁷³ Johannessen, *supra* note 12, at 137.

⁷⁴ Nadine Gordimer, *Apartheid and ‘The Primary Homeland’*, INDEX ON CENSORSHIP 25, 26 (1972).

⁷⁵ Publications Act 42 of 1974 (S. Afr.).

⁷⁶ Publications and Entertainment Act 26 of 1963 (S. Afr.).

⁷⁷ MARGAREET DE LANGE, THE MUZZLED MUSE: LITERATURE AND CENSORSHIP IN SOUTH AFRICA 23 (1997) (quoting Kobus van Rooyen).

⁷⁸ J.M. Coetzee, *Censorship in South Africa*, 17 ENGLISH IN AFRICA 12 (1990) (quoting J.C.W. VAN ROOYEN, CENSORSHIP IN SOUTH AFRICA: BEING A COMMENTARY ON THE APPLICATION OF THE PUBLICATIONS ACT 100 (1987)).

⁷⁹ *Id.* (quoting VAN ROOYEN, *supra* note 78, at 103).

⁸⁰ Alexander Traum, *Contextualising the Hate Speech Debate: The United States and South Africa*, 47 COMP. & INT’L L.J. S. AFR. 64, 78 (2014).

speech to the International Press Institute's Congress in which he asserted that:

The removal from South Africa's Statute books of the scores of laws, ordinances, regulations and administrative measures that have empowered government to abridge the rights of South African citizens to know the truth, or which repress the freedom of the media to publish, or which limit citizens' rights to express themselves are, in our view, essential for a democratic political climate. Freedom of expression, of which press freedom is a crucial aspect, is among the core values of democracy that we have striven for.⁸¹

As noted by Alexander Traum, South Africa's constitutional jurisprudential approach was born in the "wake of centuries of official and unofficial racial subjugation by a white minority of a black majority."⁸²

The position that regulating racist speech would contribute to a functional society was supported by the soon to be dominant African National Congress (ANC) whose 1955 Freedom Charter⁸³ had underlined both the freedom of expression but also the protection against racial and national insults. Specifically, the Charter provided that "the law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship, and to educate their children," demonstrating the right to free speech. It also included a limitation to that right, which must be read in light of the particularly dire historical context of the country during that time, namely that "all national groups shall be protected by law against insults to their race and national pride."

As to the hate speech clause in the constitution, the right-wing Freedom Front and the socially conservative African Christian Democratic Party later endorsed the position of the ANC. The liberal Democratic Party was opposed.⁸⁴ The result was the limitation clause in section 16 on freedom of expression, not extending it to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. On a first reading, this section does not automatically make the

⁸¹ Nelson Mandela, Address to the International Press Institute Congress (Feb. 14, 1994), https://web.archive.org/web/20210718094903/http://www.mandela.gov.za/mandela_speeches/1994/940214_press.htm.

⁸² Alexandra Traum, *Contextualizing the Hate Speech Debate: The United States and South Africa*, 47 COMP. & INT'L L. J. S. AFR. 64, 66 (2014).

⁸³ The Freedom Charter 1955, <https://perma.cc/CQ9J-UJ3K>.

⁸⁴ Johannessen, *supra* note 12.

advocacy of hatred illegal but rather denotes that this category of speech can be legitimately restricted. However, a positive obligation to tackle hate speech can be found in the country's Equality Act,⁸⁵ which was passed in 2000. Section 10(1) therein prohibits hurtful, hateful and harmful speech. The Equality Act has been enforced in several hate speech cases, yet in *Qwelane*, discussed further down, the SCA found section 10(1) of the Act unconstitutional. This was partly reversed by the CCSA, as discussed below, which also moved towards a "positive obligation" approach by noting that that "our Constitution requires that we not only be reactive to incidences or systems of unfair discrimination, but also pre-emptive. We need to act after the damage has occurred where so required, but, importantly, we are also required to act to ensure that it does not occur."⁸⁶ The CCSA did not expand on how this can be achieved.

In addition, the "Prevention and Combating of Hate Crimes and Hate Speech" Bill⁸⁷ is currently pending and, if passed, will more generally make hate speech a criminally punishable offence in South Africa. Below we offer an assessment of South African hate speech jurisprudence. Given that *Qwelane*, involving homophobic speech, is the most recent case to be decided by the CCSA (July 2021) and given the partial reversal of the SCA's position on the constitutionality of section 10 of the Equality Act, this case will be dealt with in a section of its own.

A short note on constitutional review of hate speech cases and its differences from the ECtHR: The process differs in South Africa in that Section 16(2) of the Constitution specifically prohibits the advocacy of hatred that is based on race, ethnicity, gender, or religion that constitutes incitement to cause harm. Thus, the hate speech cases discussed in this paper are assessed within this provision and the broader right to free speech provided for in Section 16(1) with references also to Article 36. Article 36 of the Constitution generally limits all the provisions set out in the Bill of Rights. The limitation grounds in Article 36 include a proportionality review ("less restrictive means to achieve the purpose") which is common to both jurisdictions (the Council of Europe and South Africa) and has proved significant

⁸⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁸⁶ *Qwelane v. S. Afr. Hum. Rts. Comm'n* (CCT 12/20) [2021] ZACC (20 July 2021) ¶ 110.

⁸⁷ Prevention and Combating of Hate Crimes and Hate Speech Bill, <https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf>.

in hate speech cases. As discussed below, in *Qwelane*, the doctrine of proportionality played a pivotal role in finding the term “hurtful” to be unconstitutional. Further, in South Africa, there is no equivalent to ECHR’s Article 17. The end result means that all cases undergo review through the lens of Section 16.

Besides the provision of free speech and the incorporation of a hate speech clause in the drafting and adoption of South Africa’s 1996 constitution, we also refer to the fundamentality of the doctrine of dignity to the South African constitution in general and cases involving hate speech in particular. Chapter 1 of the constitution refers to its founding principles with human dignity named as the first. Chapter 2, the Bill of Rights, affirms the values of dignity, equality, and freedom. Section 10 specifically stipulates that “everyone has inherent dignity and the right to have their dignity respected and protected.” In the table of non-derogable rights, it is affirmed that dignity is protected entirely. Section 39 of the Bill of Rights notes that, when interpreting the Bill, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on, once again, the trinity of dignity, equality, and freedom. As will be demonstrated, despite the fundamental nature of dignity as it has the status of being one of the “founding values”⁸⁸ of the constitution that forms part of the “trinity”⁸⁹ against which courts must interpret other rights, both the SCA and the CCSA place particular emphasis on the centrality of free speech in an open democracy.

Dignity is central for any open society which values the inherent essence of human existence. Its significance must also be placed in the historical context that “apartheid was a denial of a common dignity. Black people were refused respect and dignity The new constitution rejects this past and affirms the equal worth of all South Africans This right [to dignity] therefore is the foundation of many of the other rights that are specifically entrenched.”⁹⁰ As noted in *Prinsloo v. Van der Linde* (1997), “we are emerging from a period in our history during which the humanity of the majority of the inhabitants of this country was denied They were denied recognition of their inherent dignity.”⁹¹ Grappling with the doctrine

⁸⁸ Nazeem MI Goolam, *Human Dignity—Our Supreme Constitutional Value*, 4 POTCHEF-STROOM ELEC. L.J. 1, at 4 (2001).

⁸⁹ *Id.* at 1.

⁹⁰ *State v. Makwanyane* (1995) 3 SA 391 (CC) ¶ 329.

⁹¹ *Prinsloo v. Van der Linde* (1997) 3 SA 1012 (CC) ¶ 32.

of dignity has not been an easy task for South African courts with the CCSA noting that dignity is “a notoriously elusive concept”⁹² but one that at the very least requires the court “to acknowledge the value and worth of all individuals”⁹³ and to treat all with “equal respect and concern.”⁹⁴

Whilst the significant role and positioning of dignity in the South African legal order is evident, balancing dignity with other rights, such as that of expression, is “contested terrain.”⁹⁵ In *S. v. Mamabolo* (2001), the CCSA discussed the relationship between dignity and expression:

With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.⁹⁶

In *Democratic Alliance v. African National Congress* (2015), the CCSA underlined that the freedom of expression is one of a “web of mutually supporting rights” that has an “intense connection” to other rights including that of dignity.⁹⁷

All hate speech cases discussed below looked at the issue of dignity but, as will be shown below, only the CCSA’s decision in *Qwelane* found the speech in question to violate the doctrine of dignity, though it also concluded that the prohibition of “hurtful” speech was not proportional to the preservation of dignity.

B. The Constitutional Court of South Africa’s Jurisprudence (minus Qwelane)

In *Islamic Unity Convention v. Independent Broadcasting Authority* (2002), the CCSA (South Africa’s highest ranking court) decided a case where a community radio station had broadcast a programme in which a historian and author denied the legitimacy of Israel and asserted that Jewish people were not gassed in

⁹² Harksen v. Lane (1998) 1 SA 300 (CC) ¶ 50 (citation omitted).

⁹³ Nat’l Coal. for Gay & Lesbian Equality v. Minister of Justice (1999) 1 SA 6 (CC) ¶ 28.

⁹⁴ *Id.* ¶ 134.

⁹⁵ Avinash Govindjee & Lynn Biggs, Global Human Dignity Project—South Africa, *Human Dignity Principles* 6 (n.d.), <https://perma.cc/6K8C-Y45A>.

⁹⁶ *S. v. Mamabolo*, 2001 (3) SA 409 (CC) ¶ 41.

⁹⁷ *Democratic Alliance v. African Nat’l Congress* (CCT 76/14) [2015] ZACC 1, ¶ 124 (cleaned up).

concentration camps during World War II. The South African Jewish Board of Deputies claimed that the broadcast contravened the Code of Conduct for Broadcasting Services since it was “likely to prejudice relations between sections of the population, i.e., Jews and other communities.” In its judgment, the court pointed out that freedom of expression

lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters⁹⁸

The court also noted the particular importance of protecting speech given the country’s restrictive history:

[W]e have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in south Africa. Those restrictions would be incompatible with South Africa’s present commitment to a society based on a “constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours.”⁹⁹

In light of the above, the court found that section 2(1) of the code of conduct was broader than constitutionally permissible under section 16 of the constitution, as it referred to a “section of the population” rather than specific groups. Further, the court held that the lower threshold of “prejudice” was not sufficient to meet the requirements of hatred that leads to harm as set out in the constitution. It is important to highlight that the CCSA was only concerned with whether the provision was consistent with Section 16 of the constitution and that “the contents of the particular statement in respect of which the Board complains are not relevant to the enquiry.”¹⁰⁰

The CCSA’s interpretation of the notion of incitement is also noteworthy. In November 2020, the CCSA held that a provision criminalising incitement to “any

⁹⁸ *Islamic Unity Convention v. Independent Broadcasting Authority*, 2002 (4) SA 294 (CC) ¶¶ 1, 2, 26 (citation omitted).

⁹⁹ *Id.* ¶ 27 (citation omitted).

¹⁰⁰ *Id.* ¶¶ 21, 35, 36.

offence” was overly broad and thus violated section 16 of the constitution. In this case, Julius Malema, the President of the political party Economic Freedom Fighters was charged under the apartheid-era Riotous Assemblies Act, with incitement to occupy land after he made various statements including, “I can’t occupy all the pieces of land in South Africa alone. I cannot be everywhere You must be part of the occupation of land everywhere else in South Africa,” and “[if] you see a piece of land, don’t apologise, and you like it, go and occupy that land. The land belongs to us.”

The court underlined the significance of free speech, noting that it is the “lifeblood of a genuine constitutional democracy” and that “[w]hen citizens are very angry or frustrated, it serves as the virtual exhaust pipe through which even the most venomous of toxicities within may be let out to help them calm down, heal, focus and move on.”¹⁰¹ As with other cases mentioned in this paper, the court referred to the apartheid history of the country, noting that the right to freedom of expression had been violated during the “highly intolerant and suppressive past,”¹⁰² and emphasised that it “thus has to be treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation of what it represents.”¹⁰³ Although the court also emphasised that the right is not absolute and is not more important than other rights, it stressed that limitations can only occur in specific circumstances, such as when national interest, dignity, physical integrity, or democracy are threatened. The court noted that this complied with the country’s international obligations in respect of limitations to free expression and made a specific reference to article 19 of the ICCPR.¹⁰⁴ The court proceeded with examining the history of incitement in the country and underlined that the historical context of the Act could serve to indicate its unconstitutionality.¹⁰⁵

C. Supreme Court of Appeal Cases: *The Build Up to Qwelane*

The SCA has cultivated a particularly high threshold *vis-à-vis* hate speech restrictions as demonstrated in three cases—*Moyo*, *Masuku*, and *Qwelane*, with the

¹⁰¹ Economic Freedom Fighters, Julios Selo Malema v. Minister of Justice & Const. Dev., 2021 (2) SA 1 (CC) ¶¶ 1, 7, 8, 56, 65.

¹⁰² *Id.* ¶ 2.

¹⁰³ *Id.*

¹⁰⁴ *Id.* ¶¶ 46, 47 n.51.

¹⁰⁵ *Id.* ¶ 4.

latter being the culmination of the development of the court's thinking in the previous two.

Moyo v. Minister of Justice and Constitutional Development and *Sonti v. Minister of Justice and Correctional Services* (2017) involved two appeals heard together which both included the use of allegedly threatening and violent language (the former towards officers at a police department and the latter towards a private individual). In June 2018, the SCA found that:

unless hate speech, incitement to imminent violence or propaganda for war as proscribed in . . . the Constitution are involved, no one is entitled to be insulated from opinions and ideas that they do not like even if those ideas are expressed in ways that place them in fear. Indeed, in present day South Africa many will be afraid of the political and social possibilities that are advocated for daily in high stakes debates that characterise a transforming society with a violent, racist past. Obviously, this may place many South Africans in a condition of subjective or 'reasonable' fear. But that does not entitle them to expect the state to lock up those whose chosen forms of expression placed them in a subjective state of fear or might reasonably but not in fact have placed them in fear.¹⁰⁶

Six months later, in December 2018, the SCA confirmed this narrow approach to hate speech in *Masuku v. South African Human Rights Commission obo South African Jewish Board of Deputies* (2018).¹⁰⁷ The case involved statements made by Masuku, the Secretary of the International Relations Arm of the Congress of South African Trade Unions (COSATU), about the conflict between Israel and Palestine, particularly a military operation against Hamas in the Gaza Strip which resulted in the death of more than seven hundred people. The events sparked worldwide reaction. COSATU directly opposed the Israeli actions.¹⁰⁸

On a blog entitled "It's Almost Supernatural" the following comments were posted:

Even when all the monkeys in Cosatu have died of Aids (even those who were cured by raping babies), I still won't return [to SA]. Jews should be in Israel supporting Israel—Friends—make Aliya! Do it!¹⁰⁹

¹⁰⁶ *Moyo v. Minister of Justice & Const. Dev.; Sonti v. Minister of Justice & Correctional Servs.*, 2018 (3) All SA 342 (SCA) ¶¶ 18, 31, 55.

¹⁰⁷ Case 1062/2017 [2018] ZASCA 180.

¹⁰⁸ *Id.* ¶¶ 1–2, 4.

¹⁰⁹ *Id.* ¶ 5.

A further comment posted read:

Let us bombard the COSATU offices with phone calls to let them know our anger. It is hard[er] to ignore phone calls than email. Maybe we should start a policy that Israel-loyal Jews refuse to employ COSATU members in retaliation to COSATU's evil actions.¹¹⁰

On the same day, Masuku posted the following statement on the blog:

Hi guys, Bongani says hi to you all as we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity. Every Palestinian who suffers is a direct attack on all of us.¹¹¹

The South African Human Rights Commission, on behalf of the Jewish Board of Deputies, approached the High Court sitting as an Equality Court, seeking a declaration that Masuku's statement amounted to hate speech. The Equality Court granted an order that "[t]he impugned statements are declared to be hurtful, harmful, incite harm and propagate hatred and amount to hate speech as envisaged in s.10 of the Equality Act No.4 of 2000." Masuku appealed the decision to the SCA which found that "a hostile statement is not necessarily hateful in the sense envisaged under s 16(2)(c) of the constitution."¹¹² It also reiterated the findings of *Islamic Unity* in relation to the:

severely restrictive past where expression, especially political and artistic expression was extensively circumscribed by various legislative enactments The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systematic violations of other fundamental human rights in South Africa.¹¹³

The SCA thus found that "[t]he fact that particular expression may be hurtful of people's feelings or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection."¹¹⁴ The court added that the "the

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶ 6.

¹¹² *Id.* ¶¶ 1, 6, 11, 19 (internal quotation marks omitted).

¹¹³ *Id.* ¶ 30 (internal quotation marks omitted).

¹¹⁴ *Id.* ¶ 31.

bounds of constitutional protection are only overstepped” when the specific circumstances in section 16(2) are met.¹¹⁵ The court ruled that “[n]othing Masuku wrote or said transgressed those constitutional boundaries.” In reaching this decision it provided a historically empirical and theoretically and practically nuanced position *vis-à-vis* hate speech and when the law should step in.

D. Qwelane at the Supreme Court of Appeal and the Constitutional Court of South Africa

In *Qwelane v. South African Human Rights Commission* (2019),¹¹⁶ the SCA dealt with a 2008 publication by Jon Qwelane, a well-known anti-apartheid activist and journalist, in the Sunday Sun. The article was titled “Call me names—but gay is not okay” and used homophobic language and was accompanied by a cartoon comparing homosexuality to bestiality. The article stated:

The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their “lifestyle” and “sexual preferences.” There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those . . . I do pray that someday a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the constitution of this country, to excise those sections which give license to men “marrying” other men and ditto women. Otherwise, at this rate, how soon before some idiot demands to “marry” an animal and argues that this constitution “allows” it?¹¹⁷

The publication led to a public outcry and the South African Human Rights Commission received around 350 complaints regarding the article and the cartoon. In 2017, the Johannesburg High Court (sitting as an Equality Court) decided that certain statements were “hurtful[,] harmful, incite[d] harm and propagate[d] hatred” and thus contravened section 10(1) of the Equality Act. Qwelane then appealed the case to the SCA, arguing that the Equality Act’s definition of “hate speech” was unconstitutional, because it prohibited more speech than permitted by section 16(2) of the constitution.¹¹⁸

¹¹⁵ *Id.*

¹¹⁶ (686/2018) [2019] ZASCA 167.

¹¹⁷ *Id.* ¶¶ 4, 6.

¹¹⁸ *Id.* ¶¶ 34, 36.

The judgment of the SCA commences with a Laurell K. Hamilton quote that “hatred makes us all ugly.”¹¹⁹ The court recognized that hatred goes against the country’s constitution and acknowledged South Africa’s “painful past”¹²⁰ and the need “to heal the divisions of our past and establish a society based on democratic values, social justice and fundamental rights.”¹²¹ Immediately after this, the court referred to the freedom of expression as the “lifeblood” of “a democratic society,” citing George Orwell’s essential rationale that “if liberty means anything at all, it means the right to tell people what they do not want to hear.”¹²² Therefore here, as in other judgments discussed in this paper, the historical past of South Africa was acknowledged and an emphasis was also placed on the significance of freedom of expression.

The SCA substantively discussed the “tension between hate speech and freedom of expression”¹²³ and particularly the constitutionality of section 10(1) of the Equality Act. The court underlined that the constitutional standard set out in section 16(2) is an objective test, namely whether the expression constituted advocacy of hatred based on one of the prohibited grounds and then whether that advocacy was an incitement to cause harm.¹²⁴ The court concluded that section 10 of the Equality Act did, in fact, go beyond what was constitutionally permissible under section 16(2) and warned that “one must be careful not to stifle the views of those who speak out of genuine conviction.”¹²⁵ Whilst recognising the importance of dignity, the court also underlined that “given our history . . . freedom of expression must also be prized.”¹²⁶ In light of the above, the court upheld the appeal, declaring section 10 of the Equality Act in contravention of section 16 of the constitution and thus unconstitutional and invalid. Parliament was given 18 months commencing 29 November 2019 to remedy this. In the meanwhile, the court held that section 10 shall read as follows:

¹¹⁹ *Id.* ¶ 1 (quoting LAURELL K. HAMILTON, *BURNT OFFERINGS* 90 (2002)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* ¶ 2.

¹²³ *Id.* ¶ 3.

¹²⁴ *Id.* ¶ 62.

¹²⁵ *Id.* ¶ 70.

¹²⁶ *Id.* ¶ 85.

10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.

10(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religions or sexual orientation and that constitutes incitement to cause harm, 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.

The SCA based its analysis on the historical framework, recognizing the country's divisive past but, as opposed to other, apartheid-related speech cases, underlined that a high threshold should be reached when restricting expression. Moreover, unlike the ECtHR the SCA does not apply a one-sided reading of history in which hate speech is solely seen as a threat to towards the new democratic and egalitarian constitutional order, to be purged, but acknowledges that restricting freedom of expression, even with the best of intentions, poses inherent risk to such a constitutional order and formed an integral part of the oppressive arsenal of apartheid rule. Substantiated and objective tests are necessary to ensure that prohibited hate speech is *actually* inciting hatred.¹²⁷

The South African Human Rights Commission appealed the SCA's decision to the CCSA, arguing that section 10(1) is constitutional. The matter was heard in September 2020 and judgment was passed in July 2021. The CCSA found that section 10 of the Equality Act was in fact constitutional, apart from its reference to "hurtful." In relation to the term "hurtful" as incorporated in the Equality Act, the CCSA noted that "if speech that is merely hurtful is considered hate speech, this sets the bar rather low."¹²⁸

Accordingly, while the CCSA narrowed the speech protection demonstrating that, despite the reversal of the other aspects of the SCA decision on section 10, the issue of threshold continued to be important for the CCSA when faced with speech restrictions. The assessment of dignity also played a role in its decision on the term "hurtful." The CCSA underlined that the central issue was balancing free speech with dignity and equality.¹²⁹ Interestingly, it noted that "it is not only the right to equality and dignity that our Constitution seeks to protect. The right to free speech

¹²⁷ *Id.* ¶¶ 62, 85, 88, 96.

¹²⁸ *Qwelane v. S. Afr. Hum. Rts. Comm'n* (6) SA 579, ¶ 139 (CC).

¹²⁹ *Id.* ¶ 2.

is equally protected.”¹³⁰ It further noted that “the prohibition of hurtful speech would certainly serve to protect the rights to dignity and equality of hate speech victims. However, hurtful speech does not necessarily seek to spread hatred against a person because of their membership of a particular group Therefore, the relationship between the limitation and its purposes is not proportionate.”¹³¹

As well as the issues of threshold and dignity is also that of transparency. The court underlined that “it is difficult for ordinary citizens to know whether their conduct will be ‘hurtful’ or ‘harmful’ and thus whether it meets the threshold requires by section 10.” For the reasons discussed above, the court therefore found the term “hurtful” to be vague and a breach of the rule of law.¹³²

In relation to the incitement of harm, the CCSA noted that “there is no requirement of an established causal link between the expression and actual harm committed.”¹³³ It referred to foreign courts, including the ECtHR case of *Vejdeland v. Sweden* in which the court held that inciting hatred does not necessarily entail a call for violence or other criminal acts.¹³⁴ As noted above, this is one of the cases illustrating the low threshold attached by the ECtHR to what is permissible speech. Further, the CCSA underlined that the constitution requires that “we not only be reactive to incidence or systems of unfair discrimination but also pre-emptive.”¹³⁵ As such, it held that the SCA was wrong in concluding that there was no evidence to demonstrate a link between the article in question and subsequent attacks on the LGBT+ community.¹³⁶ It also assessed the likelihood of harm through the dignity lens, noting that:

The likelihood of the infliction of harm and the propagation of hatred is beyond doubt. It is difficult to conceive of a more egregious assault on the dignity of LGBT+ persons. Their dignity as human beings, deserving of equal treatment, was catastrophically denigrated by a respected journalist in a widely read article.¹³⁷

¹³⁰ *Id.* ¶ 67.

¹³¹ *Id.* ¶ 139.

¹³² *Id.* ¶ 156.

¹³³ *Id.* ¶ 107.

¹³⁴ *Id.* ¶ 108.

¹³⁵ *Id.* ¶ 110.

¹³⁶ *Id.*

¹³⁷ *Id.* ¶ 181.

In brief, the CCSA's judgment meant that the reference to "harmful" or incitement to such harm as well as promotion of hatred as incorporated in the Equality Act were constitutional. We argue that the free speech problem lies with the element of "harmful." This was considered by the SCA not to meet the threshold of section 16(2) of the constitution, which limits itself (for purposes of the current discussion) to the restriction of speech insofar as it constitutes an incitement of imminent violence or advocacy of hatred. The element of "harm" or "harmful" is not incorporated in the constitution nor is it found in the UN counterpart, namely article 20(2) of the ICCPR, which prohibits the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence.

Whilst the significance of dignity in the South African constitutional order is indisputable, we do argue that the CCSA did not adequately support the link it made between the dignity of the LGBT community on the one hand and the banning of "harmful" speech on the other. Although it stated that their dignity as human beings was "catastrophically denigrated" by the article, given the high threshold and importance granted to freedom of expression in this jurisdiction (not that it trumps dignity), the causal link between dignity and the alleged "catastrophe" should have been more manifest. As such the CCSA decision in *Qwelane* is vulnerable to some of the same criticisms as the hate speech jurisprudence of the ECtHR when it comes to the applicable threshold as well as foreseeability and arbitrariness. Nevertheless, despite the less stringent approach to freedom of expression when compared to the position of the SCA, *Qwelane* continues to include some findings that can be useful for limiting hate speech regulation, by explicitly exempting mere "hurtful" expressions from the limitation clause in Article 16(2).

E. Equality/High Courts

Some lower court judgments provide a comparator highlighting the rigour of the CCSA and the SCA in hate speech cases.

In *AfriForum v. Malema* (2011), the Equality Court found that the words of an apartheid-era struggle song directed against Afrikaners constituted hate speech under section 10 of the Equality Act. Malema, then the president of the ANC Youth League sang the lyrics: "shoot the Boer/farmer," and "shoot the Boers/farmers they are rapists/robbers."¹³⁸ This song had been originally sung by anti-apartheid activists challenging the apartheid regime. The court found that such songs sought

¹³⁸ 2011 (6) SA 240 (EqC) ¶ 109.

to dehumanise the enemy and bond soldiers together to act as a unit¹³⁹ and had no place in the post-apartheid era. The court stated that under the new era “the enemy has become the friend, the brother.”¹⁴⁰ Under such a framework, the court found that the song could reasonably be considered intentionally “hurtful to incite harm and promote hatred”¹⁴¹ but did not substantiate this finding, apart from reference to the use of the song during the apartheid and reconstruction of the South African society. The court ordered that Malema and the second respondent were to be restrained from signing the song in any public or private meeting, that persons should refrain from using the words and signing the song, and that Malema pay some of the trial costs.

Nelson Mandela Foundation Trust v. Afriforum NPC (2019) involved 2017 nationwide demonstrations, which were held to protest violent attacks on white farmers using the title “Black Monday.”¹⁴² It was widely reported by eyewitness accounts and images on social media that the old, apartheid-era South African flag was displayed at some of the Black Monday demonstrations.¹⁴³ The old flag is viewed within South Africa and beyond as “licensing racial segregation and endorsing white supremacy.”¹⁴⁴ The Nelson Mandela Foundation Trust sought an order declaring that any gratuitous display of the old flag constitutes hate speech, unfair discrimination, and harassment against black people under the Equality Act. The court found in favour of the Nelson Mandela Foundation, holding that the display of the old flag was a symbol of apartheid and white supremacy and was in contravention of the Equality Act.¹⁴⁵

What makes this judgment particularly interesting is that it was delivered only three months before the SCA passed judgment in *Qwelane*. As has been argued, *Qwelane* (before the SCA) was in “stark contradiction to the lower court’s decision

¹³⁹ *Id.* ¶¶ 59, 63.

¹⁴⁰ *Id.* ¶ 108.

¹⁴¹ *Id.*

¹⁴² (EQ2/2018) [2019] ZAGPJHC 324 ¶ 22.

¹⁴³ *Id.* ¶ 23.

¹⁴⁴ Lisa Draga, *Hate Speech Symbols: Court Imposed Restrictions on Flying the Apartheid-Era Flag*, MEDIA LAWS (Jan. 16, 2020), <https://perma.cc/Y4QT-RGP5>.

¹⁴⁵ (EQ2/2018) [2019] ZAGPJHC 324 ¶¶ 4, 187.

in *Nelson Mandela Foundation Trust*.¹⁴⁶ We can extend this discrepancy more generally, noting that the cases at the High Court/Equality Court level have given a lower protection than the SCA has to the freedom of expression in hate speech cases.

It could be tempting to argue that the lower court cases were decided in the way that they were due to their content being directly related to the apartheid. However, this argument crumbles when turning to the 2006 Prophet Muhammed cartoon case heard before the Johannesburg High Court. A local Islamic organization wanted to prevent several major media companies in the country from printing the cartoon depicted in a Danish newspaper.¹⁴⁷ Relying on section 16 of the constitution, the court found in favor of the plaintiff, barring media companies from publishing any cartoons, caricatures, or drawings of the Prophet Mohammed. The court explained that the freedom of expression must be developed within the framework of, *inter alia*, dignity and that the cartoons in question insult and ridicule Muslims and “demean the dignity of an individual whom the Muslim community hold in highest regard.”¹⁴⁸

The court noted that freedom of expression may be limited if content promotes hatred or stereotypes of a religious minority, which could prevent the fostering of national unity.¹⁴⁹ It also noted that such cartoons “in some cases constituted unacceptable provocation” and would “perpetuate patterns of discrimination and inequality.”¹⁵⁰ It did not expand on how the cartoons constituted unacceptable provocation, nor did it make a link between the cartoons and inequality. Its unsubstantiated and generalised narrative is reminiscent of the ECtHR’s approach in, amongst others, *Féret v. Belgium* and *Vejdeland v. Sweden*,¹⁵¹ with its notions that insults (with a low threshold for what constitute insults) fall within the ambit of hate speech.

¹⁴⁶ Draga, *supra* note 144.

¹⁴⁷ *Jamiat–UL–Ulama of Transvaal v. Johncom Media Inv. Ltd.* (1127/06) [2006] ZAGPHC 12.

¹⁴⁸ *Id.* at 2, 9.

¹⁴⁹ *Id.* at 8.

¹⁵⁰ *Id.*

¹⁵¹ App. No. 15615/07, ¶ 73 (ECHR July 7, 2009); *Vejdeland v. Sweden*, App. No. 1813/07, 58 EUR. H.R. REP. 479, 481 (2014).

F. South African Jurisprudence: Conclusion

A key element of both the CCSA's and the SCA's decisions in several of their cases has been the acknowledgement of the evils of the apartheid era as a caution rather than as an invitation to limit freedom of expression, given the centrality of censorship and brutal repression of dissent during this period. While the sparse number of South African cases treated in this article should caution against categorical conclusions, it nonetheless appears that South African lower courts tend to attach higher weight to dignity and equality than freedom of expression, when these values are seen to clash. The jurisprudence of the SCA also seems to attach decisive weight to freedom of expression requiring compelling justifications and narrowly tailored laws subject to rigorous scrutiny for restricting this constitutional right. Accordingly, that court has given due regard to the values of freedom of expression and equality/dignity as mutually reinforcing rather than mutually exclusive, in all but very narrow circumstances where hate speech can be demonstrated to create a real risk of harm to the protected groups under section 16(2).

The above characterisations were applicable to the CCSA up until *Qwelane*, a case which did rock the boat, as it extended the spectrum of prohibited speech to include harmful speech (though such an extension is not mentioned in the text of the constitution's limitations on expression). Had the CCSA upheld the SCA's decision, the path forward for hate speech bans, including the pending South African Bill on Hate Crimes and Hate Speech, would have been a very narrow one indeed. By partially reversing the SCA's decision, the CCSA has allowed a lower threshold for speech prohibition.

Nevertheless, even with this decision, the South African position on hate speech is more robust and nuanced than its ECtHR equivalent. The former looks, for example, at history and empirical evidence, substantiation that is missing from the latter's approach. The low free speech protection adopted by the ECtHR can be reflected in the fact that it has incorporated even merely offensive and prejudiced speech in the hate speech spectrum. Noteworthy here is the fact that in *Qwelane*, the CCSA underlined that "the expression of unpopular or even offensive beliefs does not constitute hate speech."¹⁵²

CONCLUSION

For more than a decade, freedom of expression has been in global decline,

¹⁵² *Qwelane v. S. Afr. Hum. Rts. Comm'n*, 2021 (6) SA 579 (CC) ¶ 79.

including in many democracies. Given the intimate relationship between freedom of expression and democracy, this development is deeply worrying.

While hate speech bans have often been adopted for purposes of protecting democratic values of tolerance, equality, and dignity, such laws have also contributed to the current free speech recession, affecting ever broader categories of speech to the detriment of robust public debate on controversial issues. This has taken place with little resistance on the part of essential independent institutions like the ECtHR, which has set a very low bar for European democracies to criminalize and otherwise restrict freedom of expression under the often-nebulous definition of hate speech.

On the other hand, South Africa is a jurisdiction for stakeholders such as social media platforms and other States to turn to when seeking a good recipe to tackle hate speech. This is because many of the cases before the SCA and the CCSA map a more coherent way forward by seeking to fuse the essential values of freedom of expression and equality/dignity and to recognize the very real harms and dangerous consequences of restricting freedom of expression, even when the intentions are good. These courts also give clarity and transparency to what is to be prohibited and what is not.

In this respect, we argue that the South African approach comes closer than its ECtHR counterpart to article 19 of the ICCPR and the thresholds attached to the “hate speech clause” found in article 20(2) therein. As such, South African law may be particularly well suited to serve as an interpretational guide to ICCPR articles 19 and 20(2), given the lack of legally binding case law and the relatively few decisions by the United Nation’s Human Rights Committee. By implication, it may also serve as an interpretational guide for social media platforms, which should seek to adopt a human rights-based approach to content moderation, as recommended by the UN Special Rapporteur on Freedom of Expression and Opinion.¹⁵³

¹⁵³ David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/74/486 (Oct. 9, 2019).