



PROGRAMME : LLB
MODULE : HUMAN RIGHTS/BILL OF RIGHTS
CODE : HRT41B0/HRE0021
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DURATION : 120 MINUTES
TOTAL MARKS : 80 (50% of semester mark)

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MODERATOR : Dr E Fourie
EXTERNAL MODERATOR : Prof M Pieterse (University of the Witwatersrand)
NUMBER OF PAGES : Pages

INSTRUCTIONS:

1. PLEASE HAND IN THE QUESTION PAPER AFTER THE EXAM.
 2. ANSWER BOTH SECTION A AND SECTION B.
 3. READ THE QUESTIONS CAREFULLY.
 4. ONLY ANSWER WHAT IS ASKED.
 5. WRITE NEATLY. GOOD LUCK!
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SECTION A:
QUESTION 1:

The questions below are based on the following set of facts.

The national government has recently proposed the introduction of the Prevention and Combating of Hate Crimes and Hate Speech Bill, B9-2018, in order to prevent and combat crimes with an element of hatred, as well as incidences of hate speech. This legislation, among other things, criminalises hate crimes and hate speech. Suppose that this Bill has now been successfully adopted by both houses of Parliament and has commenced.

The hate speech provision of the Hate Speech Act provides as follows:

“Offence of hate speech

4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates 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; or

(ii) promote or propagate hatred,

based on one or more of the following grounds:

(aa) age;

(bb) albinism;

(cc) birth;

(dd) colour;

(ee) culture;

(ff) disability;

(gg) ethnic or social origin;

(hh) gender or gender identity;

(ii) HIV status;

(jj) language;

(kk) nationality, migrant or refugee status;

(ll) race;

(mm) religion;

(nn) sex, which includes intersex; or

(oo) sexual orientation,

is guilty of an 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.

(c) Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which that person knows constitutes hate speech as contemplated in paragraph (a), which is 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—

- (a) any bona fide artistic creativity, performance or other form of expression, to the extent that such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a);
 - (b) any academic or scientific inquiry;
 - (c) fair and accurate reporting or commentary in the public interest or in the publication of any information, commentary, advertisement or notice, in accordance with section 16(1) of the Constitution of the Republic of South Africa, 1996; or
 - (d) the bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a).
- (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 him or her."

The political party, the Freedom Movement, has been using the old South African flag during its rallies. It also frequently displays the flag at party meetings and conferences. Party members use the flag on social media and display it at their homes and businesses. Members of the public and the civil rights organisation, Free Expression Institute, have however lodged complaints of hate speech against the Freedom Movement for the use of the old South African flag. In terms of the new Hate Speech Act, a successful complaint could lead to criminal prosecution and prison sentences of up to 15 years. Assume that the Freedom Movement have approached the High Court for an order stating that the provisions of the Hate Speech Act are unconstitutional as it infringes on the right to freedom of expression.

The respondents in the case, Department of Justice and Constitutional Development, as well as the Free Expression Institute, argue that the old South African flag symbolises the system of Apartheid for many South Africans and reminds them of our painful, discriminatory and deeply troubling past. The display of the old South African flag therefore infringes on other South African's rights to human dignity and equality. The Free Expression Institute therefore feels that the Freedom Movement should be precluded from displaying the old South African flag, as this is an instance of hate speech and that those who display the flag should face criminal prosecution. The Freedom Movement, however, argue that the old South African flag may also be seen as a symbol of overcoming oppression (in this case the historical oppression of the South African Union under British rule and South Africa's emergence as an independent Republic). They therefore argue that it does not fall within the definition of hate speech and is still a protected type of expression in terms of section 16 of the Constitution. The Freedom Movement's main argument however, is that the new hate speech provisions in the Hate Speech Act, and the criminalisation of hate speech, unjustifiably infringe the right to freedom of expression and are therefore overbroad and unconstitutional. Assume that you are the judge in the High Court and that you are responsible for delivering the court's judgment.

Answer the following questions:

1.1) Which **steps** should the court follow when the Bill of Rights is applied to these facts? Indicate your answer in table form and apply the steps to these facts.

For purposes of this question you only have to consider the Freedom Movement's right to freedom of expression, which does not include instances of hate speech, protected by section 16 of the Constitution. (8)

1.2) In terms of section 36(1) any limitation of rights must be "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality". Indicate how the court should apply the five factors of the limitation clause in section 36 to these facts, in order to determine whether the limitation is reasonable and justifiable. **(PLEASE NOTE: You must name and explain the factors and physically apply them to these facts. For purposes of this question you have to consider the Freedom Movement's right to freedom of expression, which does not include instances of hate speech, protected by section 16 of the Constitution.)** (10)

1.3) In terms of section 38 of the Constitution, "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief...". As the judge in this matter, indicate what "appropriate relief" you would have granted with regard to this set of facts. (2)

1.4) Suppose the court in this set of facts declared the provisions of the Act unconstitutional. What constitutional remedies could the court use to minimize the effect of the declaration of invalidity? (4)

TOTAL SECTION A: [24]
