



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 201/19

In the matter between:

ECONOMIC FREEDOM FIGHTERS

First Applicant

JULIUS SELLO MALEMA

Second Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA

First Amicus Curiae

SAKELIGA NPC

Second Amicus Curiae

Neutral citation: *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Mogoeng CJ (majority): [1] to [78]
Majiedt J (dissenting): [79] to [157]

Heard on: 18 February 2020

Decided on: 27 November 2020

Summary: Riotous Assemblies Act 17 of 1956 — incitement — sentencing — liable — freedom of expression — justification analysis — overbreadth — less restrictive means

Trespass Act 6 of 1959 — interpretation of trespass — Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 — constitutional challenge

ORDER

On a matter from the High Court of South Africa, Gauteng Division, Pretoria the following order is made:

1. The order of the Gauteng Division of the High Court, Pretoria declaring section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 unconstitutional and invalid to the limited extent dealing with sentence, is set aside.
2. Leave to appeal directly to this Court is granted.
3. Section 18(2)(b) of the Riotous Assemblies Act is declared to be inconsistent with section 16(1) of the Constitution and invalid to the extent that it criminalises the incitement of another to commit “any offence”.
4. The operation of paragraph 3 is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defect.
5. During the period of suspension of the order of invalidity, section 18(2)(b) of the Riotous Assemblies Act should be read as follows:

“(2) Any person who—

...

(b) incites, instigates, commands, or procures any other person to commit,

any [serious] offence, whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

6. The reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.
7. Should Parliament fail to cure the defect within 24 months from the date of this judgment or within an extended period of suspension, the reading-in will become final.
8. Mr Julius Sello Malema and the Economic Freedom Fighters’ prayer for an order declaring that the Trespass Act 6 of 1959 does not apply to unlawful occupiers under the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, is refused.
9. There will be no order for costs.

JUDGMENT

MOGOENG CJ (Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, and Victor AJ concurring):

Introduction

[1] It is no exaggeration to characterise the right to freedom of expression as the lifeblood of a genuine constitutional democracy that keeps it fairly vibrant, stable and peaceful. When 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. More importantly, free expression is an

indispensable facilitator of a vigorous and necessary exchange of ideas and accountability.

[2] Expression of thought or belief and own worldview or ideology was for many years extensively and severely circumscribed in this country. It was visited, institutionally and otherwise, with the worst conceivable punishment or dehumanising consequences. The tragic and untimely death of Steve Biko as a result of his bold decision to talk frankly and write as he liked, about the unjust system and its laws, underscores the point. This right thus has to be treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation of what it represents in a genuine constitutional democracy, considering our highly intolerant and suppressive past.

[3] That said, no constitutional right is absolute or ranks higher than all others in this country. In our enjoyment of these rights, a greater sense of responsibility is demanded particularly of those who are thought-leaders whose utterances could be acted upon without much reflection, by reason of the esteem in which they are held and the influence they command. After all, leaders from all walks of life ought to bear heavier responsibilities than all others, to help preserve our ubuntu, justice and equality-based heritage and actualise our shared aspirations.

[4] The historical significance and constitutional fate of the crime of incitement within the context of the Riotous Assemblies Act,¹ require the reflection and guidance of this Court. The stated objective of this legislation of apartheid extraction was, and still is, to “consolidate the laws relating to riotous assemblies and the prohibition of the engendering of feelings of hostility between the European and non-European inhabitants of the Republic and matters incidental thereto, and the laws relating to certain offences”.² We have to answer the question whether its dark past and this

¹ 17 of 1956.

² Preamble of the Riotous Assemblies Act.

constitutionally-suspect salutation necessarily point to its unconstitutionality in our non-racist, just and ubuntu-inspired order. We have also been called upon to decide whether there exists a real possibility of a harmonious coexistence between the Trespass Act,³ of the same pedigree as the Riotous Assemblies Act, and the constitutionally-birthed Prevention of Illegal Evictions from and Unlawful Occupation of Land Act⁴ (PIE).

[5] In sum, these applications are essentially about the possible confirmation of the declaration of the unconstitutionality of a sanction imposable on an inciter, and whether the criminal offence of incitement to commit “any offence” is constitutionally invalid to the extent of its alleged impermissible limitation of the fundamental right of free expression. The additional enquiry is whether the offence of trespass is reconcilable with the subsequent constitutional dispensation that appears to absolve an unlawful occupier of sanctionability in terms of a criminal law process.

Background

[6] Criminal charges have been preferred by the National Prosecuting Authority against Mr Julius Sello Malema, the President of a political party known as the Economic Freedom Fighters (EFF). They are based on certain statements he allegedly made.

[7] On 16 December 2014 at the elective conference of the EFF he reportedly said:

“I can’t occupy all the pieces of land in South Africa alone. I cannot be everywhere. I am not [the] Holy Spirit. So you must be part of the occupation of land everywhere else in South Africa.”

[8] On 26 June 2016, in Madadeni, Newcastle, Kwa-Zulu Natal, he allegedly said:

³ 6 of 1959.

⁴ 19 of 1998.

“If you see a piece of land, don’t apologise, and you like it, go and occupy that land. That land belongs to us.”

[9] And on 7 November 2016, after his court appearance in connection with the statement of 26 June 2016, he is quoted as having said:

“Occupy the land, because [the State has] failed to give you the land. If it means going to prison for telling you to take the land, so be it. I am not scared of prison because of the land question. We will take our land, it doesn’t matter how. It’s becoming unavoidable, it’s becoming inevitable – the land will be taken by whatever means necessary.”

[10] The thrust of the charges, based on section 18(2)(b) of the Riotous Assemblies Act, is that Mr Malema incited EFF members and other persons to commit an offence of occupying land registered in the names of others without lawful permission or lawful reason. The offence others have allegedly been incited to commit is said to be trespass in terms of section 1(1) of the Trespass Act.

[11] After being notified of the charges, both Mr Malema and the EFF set out to challenge the constitutionality of the Riotous Assemblies Act and the applicability of the Trespass Act. They also sought to review and have the decision of the National Prosecuting Authority to charge him, set aside. To achieve that, they approached the Gauteng Division of the High Court, Pretoria.

[12] The High Court concluded that the Riotous Assemblies Act actively criminalises conduct that is otherwise protected by section 16(1) of the Constitution and thus limits the right to freedom of expression. It however held that the limitation

is reasonable and justifiable in terms of section 36 of the Constitution. The basis was that the purpose of section 18(2)(b) is crime prevention.⁵

[13] Of its own accord, the High Court turned to one aspect of section 18(2)(b). That part relates to sentence and provides that an inciter “shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable”. It held that this part is not rationally connected to the purpose of crime prevention.⁶

[14] The Court further held that section 18(2)(b) of the Riotous Assemblies Act is unconstitutional and invalid. This, it said was so, because it is unreasonable and unjustifiable to the extent that the inciter is compulsorily liable to the same punishment as a person who actually committed the crime.

[15] With regard to section 1(1) of the Trespass Act, which criminalises entry and occupation of land or any landed property without lawful permission or lawful reason, the applicants sought declaratory relief to the effect that the Trespass Act does not apply where PIE applies. They argued that the Trespass Act is to be read subject to PIE, the Extension of Security of Tenure Act⁷ (ESTA) and section 39(2) of the Constitution. And that the meaning that ought to flow from that interpretation is that someone who is an “unlawful occupier” under PIE may not be prosecuted and found guilty of unlawful occupation under the Trespass Act.⁸ For this reason, they went so far as to ask the Court to quash criminal charges preferred against Mr Malema.

⁵ *Economic Freedom Fighters v Minister of Justice and Constitutional Development* 2019 (2) SACR 297 (GP) (High Court judgment) at paras 35-62.

⁶ *Id* at paras 60-2.

⁷ 62 of 1997.

⁸ High Court judgment above n 5 at para 65.

[16] The Court held that there is no immediate conflict between the Trespass Act and PIE which could justify the declaratory order prayed for. Citing *Zwane*,⁹ it concluded that the provisions of PIE and the Trespass Act were not really in conflict, but were complementary to each other.¹⁰

[17] Aggrieved by the outcome, the EFF and Mr Malema approached this Court. The first application relates to the confirmation of the order of constitutional invalidity. The second relates to declaring the offence of inciting others to commit “any offence” unconstitutional and to decide whether, on a proper interpretation of the Trespass Act, an unlawful occupier who is protected by PIE or ESTA may nevertheless be guilty of trespass.

Jurisdiction

[18] Undoubtedly, that part of this matter that relates to confirmation of the order of constitutional invalidity engages the jurisdiction of this Court. We have no choice but to entertain it, for we are constitutionally so enjoined.¹¹

[19] The balance of the applicants’ case relates to the constitutionality of section 18(2)(b) of the Riotous Assemblies Act to the extent that it criminalises the “incitement” of another person to commit “any offence”. The contention is that the crime it creates, offends against the constitutional right to freedom of expression. And section 1(1) of the Trespass Act is in effect sought to be interpreted with due regard to

⁹ *Zwane v S*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No A635/2016 (28 November 2018) which held at para 17 that:

“[B]oth the Trespass Act and the PIE Act apply to the same class of persons, i.e. ‘unlawful occupiers’ where in both instances the ‘occupation’ is without permission or other lawful right to occupy. . . . [T]he effect of the two acts contradicts each other. The Trespass Act criminalises unlawful occupation of property and provides for summary ejection, whereas on the other hand, the PIE Act decriminalises unlawful occupation and limits the eviction only where it would be just and equitable in the circumstances.”

¹⁰ High Court judgment above n 5 at para 76.

¹¹ Section 167(5) read with section 172(2)(a) of the Constitution.

the provisions of section 26(3) of the Constitution although the applicants only mention section 39(2) of the Constitution and PIE.

[20] It is trite that the interpretation of legislation that seems to limit a fundamental right implicates the Constitution.¹² This is so because there cannot be a proper interpretation of that legislation without the guidance of section 39(2) which insists on the promotion of the Bill of Rights.¹³ Both these challenges raise a constitutional issue and thus engage the jurisdiction of this Court. Additionally, the matter raises a legal point of general public importance. Landlessness and homelessness are issues of such great moment that the general public would probably want to know what this Court has to say about legal questions relating to them.¹⁴

Leave

[21] No leave is required for the confirmation application. It is however, necessary for the other aspects of this matter.

[22] The Supreme Court of Appeal has jurisdiction to entertain an appeal from the High Court on the constitutionality of incitement to commit any offence and the

¹² *Competition Commission of South Africa v Standard Bank of South Africa Limited* [2020] ZACC 2; 2020 JDR 0685 (CC); 2020 (4) BCLR 429 (CC) at para 39; *Jordaan v Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) at para 77; *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) at para 21; and *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 83.

¹³ *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] ZACC 7; 2018 (39) ILJ 1213 (CC); 2018 (5) BCLR 527 (CC) at para 33; *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 27; *Jordaan* id at para 77; and *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* [2015] ZACC 25; 2015 (6) SA 32 (CC); 2015 (10) BCLR 1139 (CC) at para 34.

¹⁴ Section 167(3)(b)(ii) of the Constitution provides:

- “(3) The Constitutional Court—
- (b) may decide—
- (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

interpretation of the Trespass Act.¹⁵ It would thus have to be shown that it is in the interests of justice to bypass the Supreme Court of Appeal and approach this Court on direct appeal.¹⁶ To do so requires that compelling reasons be advanced for us to exercise our discretion in favour of direct appeal. It would thus take “sufficient urgency or public importance, and proof of prejudice to the public interests or the ends of justice and good government, to justify such a procedure”.¹⁷

[23] Delays in the finalisation of cases in virtually all our courts bear testimony to the scarcity of judicial resources. The aspects of this matter that should ordinarily be appealed to the Supreme Court of Appeal are intertwined with the confirmation application that must of necessity come directly to this Court. Allowing them to take their ordinary course would mean that the same parties would have to argue the confirmation application here, and also approach the Supreme Court of Appeal for the possible invalidation of the “any offence” part of section 18(2)(b) of the Riotous Assemblies Act and for a consideration of the applicants’ preferred interpretation of section 1(1) of the Trespass Act. Not only would that constitute insensitivity to the critical need for prudence and frugality in the deployment of court time and its other resources, but it would also result in huge expenses to the applicants and a dent to the already overstretched public purse that could have been sensibly avoided by entertaining all these interrelated applications in one forum. Sight should never be lost of the ever-rising cost of litigation in this country, and that many people are acutely under-resourced. Where all relevant circumstances are dead against avoidable wastage, that should be embraced and acted upon.

¹⁵ Section 168(3)(a) of the Constitution.

¹⁶ Section 167(6)(b) of the Constitution.

¹⁷ *Mazibuko N.O. v Sisulu N.N.O.* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 35:

“For the existence of exceptional circumstances there must, in addition to other factors, be sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure. An additional consideration is whether there are any issues, and evidence relating to those issues, that would be better isolated and clarified through the multi-stage judicial process.”

[24] The applicants have reasonable prospects of success in respect of the constitutionality challenge. And it is in the interests of justice that the applications for confirmation of the declaration of constitutional invalidity of the penal aspect of section 18(2)(b) and for direct appeal relating to incitement and trespass be heard and disposed of together. They are essentially one application. All of the above, put together, constitute compelling reasons or exceptional circumstances that justify the grant of leave for direct appeal. Leave to appeal from the High Court directly to this Court will thus be granted, for it is in the interests of justice to do so.

Confirmation

[25] The High Court declared that part of section 18(2)(b) of the Riotous Assemblies Act that deals with sanction constitutionally invalid. This was on the basis that it compels a court to impose the same sentence on the person inciting others to commit a crime, as on the person who actually committed the crime.¹⁸

[26] Section 172(2)(a) of the Constitution provides that “an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court”. We thus have to reflect on the constitutional correctness of the High Court order sought to be confirmed. The impugned section provides:

“(2) Any person who—

...

(b) incites, instigates, commands, or procures any other person to commit,

any offence whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”¹⁹

¹⁸ High Court judgment above n 5 at paras 61-2.

¹⁹ Section 18(2)(b) of the Riotous Assemblies Act.

[27] The word “liable” does not connote inescapability, compulsion or absence of judicial discretion. Its ordinary meaning is that the inciter is susceptible to the same punishment or might have the same punishment visited upon him or her as the actual perpetrator. This in effect is the meaning given to it in *Toms*:

“[T]he words ‘liable to’ in a provision . . . would normally denote a susceptibility to a burden of punishment and not that the burden in question is mandatory or compulsory; the actual incidence and extent must still be determined.”²⁰

[28] It is with this understanding that Snyman observed:

“Normally the inciter gets a lighter punishment than the actual perpetrator, just as someone who only attempts to commit the crime or only conspires to do so, gets a lighter punishment than the actual perpetrator. . . . However there may be cases in which a court may decide that the inciter deserves a heavy punishment, such as where the evidence reveals that she was the [mastermind] behind a whole criminal scheme.”²¹

[29] And it follows that the declaration of unconstitutionality was premised on an incorrect interpretation of section 18(2)(b). The High Court order will thus not be confirmed.

Is section 18(2)(b) invalid on another ground?

[30] The applicants contend that section 18(2)(b) is unconstitutional by reason of its overbreadth. This is grounded on its criminalisation of incitement of others to commit “any offence”. They assail the constitutionality of this section on the basis that it

²⁰ *S v Toms; S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (A) at 813B-C.

²¹ Snyman *Criminal Law* 6 ed (LexisNexis, Durban 2014) at 296. See also *S v P and J* 1963 (4) SA 935 (N) at 940E where the Court said—

“[a]lthough persons conspiring to commit an offence are liable to be punished as if they had actually committed the offence, it appears to me that, in a case of this kind, the conspiracy to commit the offence should ordinarily not be dealt with as severely as the actual or attempted commission of it.”

infringes Mr Malema’s right to freedom of expression. This right is provided for in section 16 of the Constitution, which lists incidents of expression that fall within and outside protected bounds. It does so as follows:

“Freedom of Expression

- (1) Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitute incitement to cause harm.”

[31] This Court explained the purpose of section 16(2) in these terms:

“[S]ection 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. . . . Implicit in its provisions is an acknowledgement that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.

There is accordingly no bar to the enactment of legislation that prohibits such expression. Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right to section 16.

Where the State extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only

if such regulation meets the justification criteria in section 36(1) of the Constitution.”²²

[32] What the Constitution gives an unrestrained leeway to proscribe, is expression or words meant to cause “war”, “imminent violence” and specified forms of “harm”. Incitement to cause war or commit imminent violence would, if criminalised, thus not constitute a limitation of the right to freedom of expression. The thrust of section 16(2)(c) is to disallow practices, tendencies and laws of our ugly and unjust past any space to find expression or application. When one incites others, under the guise of freedom of expression, to cause race- or gender-based harm, the inciter may not look to section 16(1) for exoneration.

[33] Section 16(2) does not therefore constitute a limitation of free expression and it cannot have any role to play in determining what constitutes a reasonable and justifiable limitation of free expression. That said, although legislation would clearly be on safer territory if it conforms to the dictates of section 16(2), it may also be permissible to venture across the boundary lines of protected expression. But, that would be conditional upon the existence of reasonable grounds to justify that encroachment. Like all other open and democratic societies based on constitutional values of universal application, we ought to “permit reasonable proscription of activities and expressions”,²³ if they “pose a real and substantial threat to such values and to the constitutional order itself”.²⁴

[34] Section 18(2)(b) of the Riotous Assemblies Act criminalises incitement to commit “any offence”. And that kind of incitement is undoubtedly a form of expression that is ordinarily protected by section 16(1) of the Constitution. It therefore constitutes a limitation of protected expression. Whether that limitation is

²² *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 5 BCLR 433 (CC) (*Islamic Unity*) at paras 32-4.

²³ *Id* at para 29.

²⁴ *Id*.

reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom, is the question we must now wrestle with.²⁵

Justification analysis

The approach to limitation

[35] It is necessary to give proper context to a section 36 proportionality-based justification analysis. Whenever a fundamental right has been limited by a law of general application, it is required of the State or any party seeking to uphold the limitation to give good reason for a court to excuse that interference with a right so important.²⁶ It is indeed correct that “although section 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation”.²⁷ For, the rights in the Bill of Rights are an embodiment of the very character or cornerstone of our constitutional democracy.²⁸ Both the nature and importance of the right must necessarily be taken into account.²⁹ And the State has no inherent “right” to limit these rights. But it is constitutionally obliged to respect, protect, promote and fulfil them.³⁰ It may only be permitted to limit them if the limitation is reasonable and justifiable in a value-based constitutional democracy.³¹

[36] The values and principles that are essential to a free and democratic society must guide our courts. They are, after all, foundational to our democracy and the high and ultimate standard by which a limitation of guaranteed rights may be reasonably

²⁵ A justification analysis is to be done in terms of section 36(1) of the Constitution.

²⁶ *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at paras 32 and 37.

²⁷ *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 34.

²⁸ Section 7(1) of the Constitution.

²⁹ *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 66.

³⁰ Section 7(2) of the Constitution.

³¹ For example, our constitutional democracy is based or founded on the values set out in section 1 of the Constitution.

justified. Only where the exercise of these rights “would be inimical to the realisation of collective goals of fundamental importance” would their limitation be reasonable and justifiable in a free and democratic society.³² The explicit but inexhaustive justificatory criteria set out in section 36(1) also have a crucial role to play in the weighing up of competing values “to reach an assessment founded on proportionality”.³³

[37] In this regard O’Regan J and Cameron AJ said:

“The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringement provision, taking into account the availability of less restrictive means available to achieve that purpose. The limitation analysis that follows will therefore first consider the extent of the limitation of the right caused by section [18(2)(b)], and will then turn to the purpose, importance and effect of section [18(2)(b)]. These are the two issues whose relative weight determines the outcome of the limitation analysis. That analysis therefore concludes by comparing the relative weight.”³⁴

[38] Responding to these reflections Madala J, Sachs J and Yacoob J said:

“We agree . . . that there is a pressing social need for legislation to address the evil [O’Regan J and Cameron AJ] identify. Section 36, however does not permit a sledgehammer to be used to crack a nut. . . . The duty of a court is to decide whether

³² *R v Oakes* [1986] 1 SCR 103 at 136g-h and section 36(1) of our Constitution.

³³ *Manamela* above n 29 at para 33. As this Court correctly observed:

“The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors in the overall determination whether or not the limitation of a right is justifiable.”

³⁴ *Id* at para 66. I inserted section 18(2)(b) in the quotation to make it easier for the reader to appreciate the relevance of the principle to this case.

or not the legislature has overreached itself in responding, as it must, to matters of great social concern.”³⁵

[39] That exercise entails a reflection on the historical origins of the concept or right entrenched and the cardinal values it embodies.³⁶ The analysis must thus be premised on the ever-abiding consciousness that the impugned limitation violates rights and freedoms which are guaranteed by the supreme law of the Republic. And courts must approach this exercise alive to the constitutional obligation to uphold the rights in the Bill of Rights.³⁷ The contextualisation of the interpretive exercise with reference to a free and democratic society as part of the standard for justifying the limitation of rights speaks to “the very purpose for which the [Bill of Rights] was originally entrenched in the Constitution”.³⁸

[40] An approach to the justification analysis that seems to move from the premise that a legitimate governmental objective for the limitation automatically renders the limitation reasonable and justifiable or somehow shifts the burden to citizens to explain what is wrong with the limitation or why their constitutional rights deserve protection, would be misplaced. The purpose for the limitation, however legitimate and laudable, must still earn its juxtaposition to the right it inhibits. The burden to prove that it passes constitutional muster rests primarily on the State.³⁹ And that is so because the obligation to give these rights the space to flourish rests on the same State that may limit them, in a constitutionally permissible manner.⁴⁰

[41] Despite its unjust foundations, section 18(2)(b) of the Riotous Assemblies Act is, broadly speaking, one of many instruments suited to the achievement of the goal of

³⁵ Id at para 34.

³⁶ *Oakes* above n 32 at 119e-f.

³⁷ Id at 135i-6a.

³⁸ Id at 136b-c.

³⁹ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 184.

⁴⁰ Section 7(2) and (3) of the Constitution.

crime prevention. The question to be addressed is whether its limitation of free expression, admittedly meant to serve and advance a legitimate and important societal and governmental purpose, is proportionate to this obviously noble objective. In other words, does it restrict free expression as little as possible or minimally? Or did Parliament “overreach itself in responding to [this] matter of great social concern” – crime prevention.⁴¹ If the answer is no and yes respectively, then “any offence” would be way out of proportion with the objective of crime prevention which could still be majorly realised without an overly invasive provision that gives no recognition to free expression. The availability of less restrictive means would have to be explored. If it is available, then that would necessitate the invalidation of “any offence”.

The nature and importance of free expression

[42] A reminder of where we were just over 26 years ago is necessary for context. Then, expression was so extensively and severely circumscribed that a person could be arrested, banned, banished or even killed by the apartheid regime for labelling as unjust, what everyone now accepts is unjust. Inciting people to protest against apartheid – a crime against humanity – or to break its unjust laws, was not only criminalised but could also attract untold consequences. Thought control or enforced conformity was virtually institutionalised. Free expression is thus a right or freedom so dear to us and critical to our democracy and healing the divisions of our past,⁴² that it ought not to be interfered with lightly – especially where no risk of serious harm or danger exists.⁴³

⁴¹ *Manamela* above n 29 at para 34

⁴² See the Preamble to our Constitution.

⁴³ In *Islamic Unity* above n 22 at para 27, Langa DCJ explains why free expression came to, and should continue to, enjoy a special place in the constitutional nerve centre of South Africa:

“Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we 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

[43] This important observation finds reinforcement in Kriegler J’s instructive historical and comparative context in *Mamabolo* where he said:

“Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, *is of the utmost importance* in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and *enforced conformity* to governmental theories, freedom of expression — the free and open exchange of ideas — *is no less important than it is in the United States of America*. It could actually be contended with much force that the public interest in the open market-place of ideas *is all the more important to us in this country* because our democracy is not yet firmly established and must feel its way.”⁴⁴

[44] The right to freedom of expression is thus so precious and utmostly essential to our democratic well-being that this Court correctly observed that it “is no less important than it is in the United States of America” and that there ought to be more sympathy for the view that it is even more important here to help break the severe constraints of our past. This approach is meant to ensure that free expression is never again to be treated lightly and limited at the slightest irritation or provocation. For, as O’Regan J said, freedom of expression—

“lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the

‘constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours’.”

As pointed out by Kriegler J in *S v Mamabolo (E TV Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 28:

“[F]reedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights.”

⁴⁴ *Mamabolo* id at para 37.

search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”⁴⁵

[45] All people ought to enjoy the freedom to express themselves robustly and fully on issues they consider important for the advancement of the project of rebuilding our nation or the broader cause of justice. This absolute necessity for fearlessness and unquestionable freedom to express oneself is what the European Court of Human Rights (ECtHR) had in mind in *Handyside*.⁴⁶ There it underscored the character of this right as one of the essential foundations of democracy and a basic condition for the progress and development of each member of a democratic society. It said that that approach is—

“applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb Such are the demands of such pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁴⁷

The nature, extent and purpose of the limitation

[46] Utmost essential as the right to free expression is, it bears emphasis that like all other constitutional rights, it is neither absolute nor does it rank higher than others.⁴⁸ It is thus susceptible to an appropriate limitation by a law of general application.⁴⁹ That said, our Constitution would not easily countenance “incitement” or “advocacy” to commit “any offence” as a limitation of the right to freedom of expression. It cannot therefore be correct to criminalise the incitement of any offence

⁴⁵ *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7.

⁴⁶ *Handyside v The United of Kingdom*, no 5493/72, ECtHR 1976.

⁴⁷ *Id* at para 49.

⁴⁸ *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67.

⁴⁹ See section 36(1) of the Constitution.

that does not even pose danger or serious harm to anything or anybody. Broadly speaking, it is when, for example, national interests, our democracy, the dignity or physical integrity of people or property could be imperilled, that free speech may ordinarily be limited.

[47] This is buttressed by these apt observations by Langa DCJ in *Islamic Unity*:

“The pluralism and broadmindedness that is central to an open and democratic society can . . . be undermined by *speech which seriously threatens* democratic pluralism itself. . . . [O]pen and democratic societies permit *reasonable proscription* of activities and expressions that *pose a real and substantial threat* to such values and to the constitutional order itself.”⁵⁰

It follows that for a limitation of free expression to be permissible, it must be reasonable. And legislation that seeks to limit free speech must thus be demonstrably meant to curb incitement of offences that seriously threaten the public interest, national security, the dignity or physical integrity of individuals – our democratic values. This accords with our international obligations in relation to the extent to which we may limit free expression.⁵¹

⁵⁰ *Islamic Unity* above n 22 at para 29.

⁵¹ Article 19 of the International Covenant on Civil and Political Rights, 16 December 1966 provides:

- “1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

[48] Even the common law criminalises incitement that could lead to the “high risk of a *dangerous* situation developing”.⁵² Punishing that kind of incitement is meant to achieve “the deterrence of future crime [and] restraint of the *dangerous* offender”.⁵³ The risk must be fairly high and the situation sought to be created, *dangerous*. The offence thus exists to deter not just any offender, but a dangerous one, who poses a serious threat.⁵⁴

[49] Section 18(2)(b) is sought to be saved from invalidation merely because, like all other criminal legislation, it serves the common or ordinary purpose of crime prevention. What is however required is that the purpose of criminal legislation, like the Riotous Assemblies Act, be much more than the ordinary need to protect society from potential “harm”, to pass constitutional muster. Additional to being legitimate, the purpose must still be specific, pressing and substantial for that legislation to be regarded as reasonable and justifiable in its limitation of free expression.

[50] There can be no doubt that we need the criminalisation of certain categories of incitement. What also matters is that the nature, extent or effect of what others are being incited to do must be serious to save legislation from invalidation. The prohibition of incitement is thus to be countenanced in circumstances where it seeks to prevent the commission of a serious offence. The limitation must demonstrably be in the interests of the public and appropriately tailored so as not to deny citizens their fundamental rights where this could have been avoided.

[51] And it bears repetition that there should be no debate about the need for or benefits of the inchoate crime of incitement. Its usefulness is mundane. But, what is inescapable is that legislation that limits free expression may not do so by proscribing the incitement of just “any offence”. The limitation must not extend to minor offences

⁵² Burchell *Principles of Criminal Law* 5 ed (Juta & Co Ltd, Cape Town 2016) at 528.

⁵³ *Id* at 529.

⁵⁴ *Id*.

or offences that threaten no serious harm or danger either to individuals, society or public order, property or the economy. And by minor, as opposed to serious, offences I have in mind those that may not necessarily fall in the category of the *de minimis* rule⁵⁵ or be covered by the defence of necessity, but all offences that cannot correctly be described as “serious” offences.

Overbreadth and less restrictive means

[52] Citizens ought to enjoy the liberty to express themselves in support of or opposition to anything or any law, obviously within the confines of the overall thrust of section 16(1) of the Constitution. Speaking out or advocacy against laws or offences believed to be unjust ought not to be easily proscribed by statute. And so is encouraging, not forcing, others to defy them. Allowing that expression would then leave it open to individuals to make up their own minds – to follow or reject the incitement – in line with their constitutional right to freedom of “thought” and “opinion”.⁵⁶ The exercise of that freedom would then inform their own response to what they are being incited to say or do.

[53] In an attempt to ameliorate the highly negative effect of the impugned free expression-limiting provision, several factors were raised. They are: the significance of intention as an element of the crime of incitement; the State’s burden to prove the guilt of a person accused of incitement beyond a reasonable doubt; the relevance of the *de minimis* rule; defences open to an accused person; and the possibility of lenient or appropriate sentences being imposed. First, almost all crimes have intention, as opposed to negligence, as one of the elements. That this is also a requirement for establishing guilt in respect of incitement to commit “any offence” cannot help save this overly intrusive legislative provision. Second, guilt in virtually all crimes must be

⁵⁵ *De minimis non curat lex*, meaning the law does not concern itself with trivialities.

⁵⁶ Section 15(1) of the Constitution.

established by the State beyond a reasonable doubt.⁵⁷ And that is in line with an accused person's presumption of innocence and right to remain silent – an integral part of the constitutional right to a fair trial.⁵⁸ This is not a requirement that is unique to incitement or a few other offences. Third, the *de minimis* rule does not apply to all, but only some, of the minor offences. It therefore does not help the retentionist approach much, if at all. Fourth, most of the citizens of South Africa are not only laypersons, but they are also woefully under-resourced. They often have no money for basic necessities, talk less of fees for a legal representative to raise defences known to lawyers, when charged for only trying to exercise their fundamental rights. And even if represented, grave injustices do happen and justice is sometimes only done after a long and economically, reputationally and emotionally taxing or ruinous judicial process. Why not avoid this? As for the appropriateness of sentence, that is an elementary feature of our criminal justice system.

[54] Properly contextualised, the following remarks are as relevant to section 18(2)(b) as they were to the impugned provision in *Manamela*, of which the Court said:

“[I]ts sweep is too great. The risk of people being erroneously convicted and unjustly sent to jail is too high. We acknowledge that ours is an open and democratic society facing many challenges with limited means, and that it is in this setting that the question of proportionality must be determined. Yet, the very circumstances that have made the challenge so great and left us with means so stretched, place those least capable of defending their rights in the greatest jeopardy of being victims of miscarriages of justice. We, therefore, cannot agree with the view expressed in the minority judgment that the limitation on the presumption of innocence is sufficiently focused to be justifiable.”⁵⁹

⁵⁷ The State is sometimes aided by presumptions to establish the guilt of an accused person. Under those circumstances it would not itself have proven guilt beyond a reasonable doubt.

⁵⁸ Section 35(3)(h) of the Constitution.

⁵⁹ *Manamela* above n 29 at para 50.

[55] Inevitably, the failure by the State to provide reasonable grounds to justify the sweeping nature of this provision, that takes away free expression in relation to incitement to commit any offence, must result in a failure by section 18(2)(b) of the Riotous Assemblies Act to meet the section 36(1) test.

[56] On the basis of section 18(2)(b), inciting another to commit any offence must, barring *de minimis* and necessity, inexorably result in a prosecution or conviction in the name of crime prevention. No legislative differentiation between serious and lesser, yet not trivial, offences is thus thought to be necessary. Although the inciter might well escape the legally-ordained consequences of “any offence”, it could be after some unpleasant exposure or process. Citizens must not have their fundamental right to free expression unnecessarily and severely limited and thus exposed to the risk of arrest or even prosecution. They ought not to be left to take solace in the likelihood of eventually being exonerated on the basis of *de minimis* or necessity. The risk of being left vulnerable to arrest for exercising free expression or to an injustice and the impecuniosity that could imperil many’s prospects of appeal to remedy any possible injustice, ought to be enough to trigger the need for certainty and protection, considering the importance and nature of this right. Section 18(2)(b) not only exposes citizens to the risk of arrest and prosecution for minor offences committed in the course of free expression, but it also has the potential to inhibit many from freely expressing themselves to avoid falling prey to the vast or sweeping net of “any offence”. This provision does not promote but prevents all free expression in the form of “incitement” or “advocacy”.

[57] We are yet to be told why, apart from the generalities proffered by the State, it is necessary or constitutionally defensible to limit free expression on the basis of “any offence”. No sound reason or justification was given for having to criminalise incitement of “any offence” and why it is necessary to do so at the expense of free expression. Nor has it been explained what prejudice the invalidation of “any offence” and its replacement with “any serious offence” would occasion to crime prevention in general and the incitement regime in particular. All we are told is that it

is an inchoate crime necessary for crime prevention and that “serious” is too difficult a concept to grapple with. That cannot be a good enough reason for taking away citizens’ fundamental rights. We should always lean in favour of respecting, protecting and promoting these rights rather than settle for the easy and more deleterious option of taking them away.

[58] Why not recalibrate the limitation in a way that still respects free expression? Why wait for a possible characterisation of an offence as one that falls within the necessity or *de minimis* rule protective cover? Additionally, the retention of “any offence” does not leave citizens with any degree of clarity. They are left uncertain as to how far they may go in the enjoyment of this right without exposing themselves to the risk of criminal prosecution.

[59] And courts cannot abdicate their responsibility to curb unnecessary yet vast invasions of the free expression space to the police and prosecuting authority, by reason only of the competence and professionalism expected of them.⁶⁰ And this accords with our jurisprudence. For, we have previously said that “the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions”.⁶¹ When presented with opportunities to define the bounds of permissible legislative encroachment, courts must be keen to do so as a way of promoting the spirit, purport and objects of the Bill of Rights.⁶² The uncertainty about the extent to which the State may limit free expression in relation to incitement must therefore end now.

[60] A right in the Bill of Rights must be promoted, protected, respected and fulfilled. It may only be limited when doing so is in line with our foundational values. Where there is a less restrictive means to avoid the gross invasion of a guaranteed right, then a limitation that needlessly strays beyond protected bounds must be

⁶⁰ See sections 179, 195, 205 and 237 of the Constitution.

⁶¹ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 76.

⁶² Section 39(2) of the Constitution.

arrested. It would be remiss of any court to shirk that responsibility, counting on the police and prosecutors to do what Parliament should have done but failed to, and what a court should be doing but chooses to pass the buck to the police and the prosecuting authority. For, it is crucial even as we interpret section 18(2)(b) never to lose sight of the all-important obligation imposed on us by section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights – in this instance, free expression.

[61] Again I say, the criminalisation of “incitement” of “any offence” by section 18(2)(b) is a limitation so “widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted”.⁶³ “Any offence” is therefore unquestionably overbroad and its inhibition of free expression is markedly disproportionate to its conceivable benefit to society.⁶⁴ And there is no need for this. Not only would confining the proscription of incitement to serious offences promote or be respectful of free expression, but it would also enhance crime prevention in a more meaningful way. That would constitute a less restrictive means. It would also avert the dangers of a prohibition which makes very substantial inroads into the free expression domain and carries a criminal sanction with all its chilling consequences.

[62] The offensification of incitement of any offence is such an egregious encroachment into the free expression terrain that good reason or stronger justification would be required to save it from invalidation. And that justification would have to go way beyond citing the common or incontestable necessity for the existence of the

⁶³ *Islamic Unity* above n 22 at para 44.

⁶⁴ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 63:

“One need not go so far as to accept the notion of a preference for free expression over other rights, to appreciate the danger of overbroad statutory prescriptions. It is incumbent upon the Legislature to devise precise guidelines if it wishes to regulate sexually explicit material. Especially in the light of the painfully fresh memory of the executive branch of government ruthlessly wielding its ill-checked powers to suppress political, cultural, and, indeed, sexual expression, there is a need to jealously guard the values of free expression embodied in the Constitution of our fledgling democracy.”

inchoate offence of incitement – “nipping crime in the bud”. I again draw from our jurisprudence which obviously applies subject to appropriate modulation:

“In assessing whether the section 37(1) limitation of the right to be presumed innocent is reasonable and justifiable, the State in this case has established the importance of the objectives sought to be attained by the impugned provision. Nonetheless, considering that the grounds of justification must be more persuasive where the infringement of the rights in question is extensive, the State has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose.”⁶⁵

[63] It must be emphasised that a less restrictive means for proscribing constitutionally objectionable incitement is the exclusion from its range, of those offences that are minor but not necessarily *de minimis* in character. As stated, that could be achieved by criminalising the incitement of only those offences that are potentially serious. Perpetrators of “any offence” would still be prosecuted and punished. Accomplices would still face the wrath of the common law. The exclusion of inciters of minor or lesser offences and targeting inciters of serious offences cannot undermine the important objective of crime prevention as feared by the State. The value of circumscribing this limitation is that the right to free expression would be protected, respected, promoted and fulfilled as the Constitution demands of the State, and serious crime would still be effectively combatted.

[64] We see the limitation of the scope of the crime of incitement as a less restrictive means of achieving the overarching purpose of crime prevention. This is so because incitement of non-serious crimes does not cause as much public harm as incitement of serious crimes. The all-encompassing purpose of the crime of incitement can thus be met even with this more limited scope of section 18(2)(b). In

⁶⁵ *Manamela* above n 29 at para 49.

sum, if the offensification of incitement of crime goes too far out in seeking to achieve its purpose, it becomes acceptable to limit its scope to give recognition to the undeniably important right of freedom of expression.

[65] All of the above leave us with no choice but to invalidate section 18(2)(b) to the extent of the disproportionality of its societal benefit to its vast invasion of free expression and consequential inconsistency with section 16(1) of the Constitution. It is not reasonable and justifiable to limit free expression on the basis of crime prevention in circumstances where the criminalisation of incitement of only serious offences would constitute a less restrictive means and help achieve the same objective.

Remedy

[66] Crime prevention is an absolute necessity. Legislation that seeks to achieve that objective must ordinarily be preserved and enabled to avoid the guillotine of unconstitutionality. Section 18(2)(b) is part of that kind of legislation.

[67] In crafting a remedy, we must therefore remind ourselves that ours is an interim relief – a short term solution – whose lifespan is at the mercy of Parliament’s prompt and more enduring intervention. The long term solution is best left to Parliament whose primary responsibility it is to grapple with and settle conceivable definitional challenges. While waiting for it to exercise its legislative authority in relation to the content of the provision, we have to ensure that the lacuna created by our invalidation of section 18(2)(b) is filled. And that would be achieved by reading-in a word into this provision. Like every reading-in exercise, this too must be done in a manner that is sensitive to separation of powers.⁶⁶

[68] The criminalisation of incitement to commit “any offence” overshoots the mark of crime prevention that is free expression sensitive. To ensure that section 18(2)(b)

⁶⁶ *Abahlali Basemjondolo Movement South Africa v Premier of the Province of KwaZulu Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) at para 123 where Moseneke DCJ, writing for the majority said that reading in too many qualifications into a provision offends the rule of law.

shoots within the confines of a constitutionally-permissible range, and thus constitutes a less restrictive means of limiting free expression, “serious” is the word that must be inserted between “any” and “offence”. And the insertion of “serious” would serve the purpose of constraining the overbreadth in the interim.

[69] “Any serious offence” is admittedly not without practical challenges. For, what is serious to some may not necessarily be serious to others. There is, therefore, an element of fluidity in relation to which offences are then to be understood as envisaged by “any serious offence”. This raises the question: what is the meaning of “serious” and how is “serious” to be measured or determined? Murder, rape, armed robbery, fraud, human trafficking and corruption are examples of offences that self evidently fall within the realm or meaning of serious offences. Many more fit the description. These crimes are deemed *mala in se*, that is, evil by their very nature.⁶⁷ We are unable, though pressed, to define or develop a somewhat clearer standard by which “seriousness” may be assessed, owing to time and resource constraints. We say this without playing down the need for clarity and for the resultant predictability of the operation of the law which are central facets of the rule of law.⁶⁸

[70] That said, “serious” is an expression or concept that courts are all too familiar with. Not infrequently, especially in the context of considering an appropriate sentence, courts refer to the seriousness of the offence concerned. They should thus find it relatively easy to deal with on a case by case basis, duly aided by existing jurisprudence.

⁶⁷ See the judgment of Froneman J in *S v Jacobs* [2018] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC) at paras 109-11.

⁶⁸ As Woolman neatly summarised it in “The Amazing Vanishing Bill of Rights” (2007) 124 *SALJ* 762 at 763:

“An approach to constitutional adjudication that makes it difficult for lower court Judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied . . . equally, constitutes a paradigmatic violation of the rule of law.”

[71] Existing legislation provides some fairly useful guidelines in this regard. For example, Schedules 1, 2 (Parts II and III) and 5–8 to the Criminal Procedure Act⁶⁹ list offences that seem to qualify as “serious offences”. Arguably, this appears to find some support from, inter alia, the fact that these Schedules already render incitement for any of the offences listed within them subject to sanction. It must be said, that although the Schedules to the Criminal Procedure Act include a number of statutory offences, they do not contain all statutory offences that could reasonably be said to constitute “serious offences”.

[72] In conclusion, it is necessary to afford Parliament the opportunity to remedy this constitutional defect. To avoid applications for extension that are now becoming a fairly regular feature of litigation before this Court, we will give Parliament 24 months within which to do the needful.

The interpretation of the Trespass Act

[73] The applicants contend that a proper interpretation of the Trespass Act in conjunction with PIE ought to yield a meaning that effectively renders it impermissible for one to face criminal charges and a possible conviction flowing from an alleged violation of section 1(1) of the Trespass Act where PIE applies or offers protection. It is also argued that PIE has implicitly repealed the Trespass Act.

[74] Since PIE owes its breath to section 26(3) of the Constitution, it is not unreasonable or inappropriate to read a reference to PIE as a pointer to the inescapability of the role of section 26(3) as the cardinal reference point in addressing this issue. The way the issue was raised renders it unavoidable that the constitutionality of section 1(1) of the Trespass Act be effectively pronounced upon, even if it might not be expressly referred to as such. Truth be told, this is another way of seeking to have us declare this section unconstitutional. This we will not do.

⁶⁹ 51 of 1977.

[75] This approach, foisted upon us by the applicants, is very difficult if not impossible to manage to its intended end. They ought to have launched a frontal challenge to the constitutionality of section 1(1). Nothing stopped them from doing so. But, they chose not to. Instead, they opted for this intractable interpretive route. They would therefore have to fall by their free choice.

[76] The applicants could, if so advised, still go back to the High Court to launch a fresh challenge to section 1(1) of the Trespass Act. This leg of their application will thus be dismissed.

Costs

[77] Each party has recorded a measure of success. During the hearing, the applicants renounced a somewhat favourable High Court order. But they have successfully caused a portion of section 18(2)(b) of the Riotous Assemblies Act to be declared unconstitutional to the extent of its inconsistency with section 16(1) of the Constitution. The respondents, namely the Minister of Justice and Correctional Services and the National Prosecuting Authority, have also been able to ward off the current attack against the applicability of the Trespass Act. Each party is therefore to pay its own costs.

Order

[78] In the result the following order is made:

1. The order of the Gauteng Division of the High Court, Pretoria declaring section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 unconstitutional and invalid to the limited extent dealing with sentence, is set aside.
2. Leave to appeal directly to this Court is granted.
3. Section 18(2)(b) of the Riotous Assemblies Act is declared to be inconsistent with section 16(1) of the Constitution and invalid to the

extent that it criminalises the incitement of another to commit “any offence”.

4. The operation of paragraph 3 is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defect.
5. During the period of suspension of the order of invalidity, section 18(2)(b) of the Riotous Assemblies Act should be read as follows:

“(2) Any person who—

...

(b) incites, instigates, commands, or procures any other person to commit,

any [serious] offence, whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

6. The reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.
7. Should Parliament fail to cure the defect within 24 months from the date of this judgment or within an extended period of suspension, the reading-in will become final.
8. Mr Julius Sello Malema and the Economic Freedom Fighters’ prayer for an order declaring that the Trespass Act 6 of 1959 does not apply to unlawful occupiers under the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, is refused.
9. There will be no order for costs.

MAJIEDT J (Jafta J and Tshiqi J concurring):

Introduction

[79] I have read the well-reasoned judgment penned by the Chief Justice. I agree with all aspects addressed in it, save for the unconstitutionality of section 18(2)(b) of the Riotous Assemblies Act, as far as the offence of incitement is concerned. I agree with the conclusion in the main judgment regarding section 1(1) of the Trespass Act that, absent a direct frontal challenge to the constitutionality of the section, this Court should not express any view on the matter.

[80] With regard to the constitutionality of section 18(2)(b) of the Riotous Assemblies Act, I am of the view that the section's limitation of the right to freedom of expression in section 16(1) of the Constitution is reasonable and justifiable as envisaged by section 36(1) of the Constitution. My disagreement on this aspect stems from two conclusions made in the main judgment. First, the main judgment's outlook on the crime of incitement and how it should be treated in a robust, democratic Republic like ours and, second, its approach to the justification analysis of the limitation of freedom of expression.

[81] At the outset, it is necessary to pause and to make preliminary observations regarding the preamble of the Riotous Assemblies Act. The preamble is vile, symbolic of the iniquitous apartheid regime and utterly indefensible in our constitutional dispensation. Its retention in the Riotous Assemblies Act, despite numerous repeals, is inexplicable and most unfortunate. However, that does not, in and of itself, taint the constitutionality or utility of section 18(2)(b) of the Riotous Assemblies Act (the impugned provision).

[82] The crime of incitement is a vital cog in our fight against the pervasive crime wave in our country. That much appears to be common ground in this case. In her

dissent in *Shelby County*, in discussing why the regional protections of the Voting Rights Act remained necessary, Justice Ginsburg of the Supreme Court of the United States said:

“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁷⁰

[83] We must take great care not to discard the “umbrella” of incitement in the impugned provision while we are in the relentless downpour of rampant crime. It would be remiss of us to ignore the utility of this section because it was previously used as a means to suppress political speech, when it undoubtedly serves to protect the rule of law and the rights of others in our constitutional democracy.

Incitement as an inchoate crime

[84] The main judgment, correctly so, acknowledges a need for the retention of the offence of incitement for the purposes of crime prevention.⁷¹ It is well-established that, like all inchoate crimes, the reason for the existence of the crime of incitement is the need to deter future crime – to “nip crime in the bud” as it were. Thus, a coordinated planning of crime is deterred. To this end, Clarkson points out that, in a way, the crime of incitement is needed “to protect the person incited from corruption”.⁷² But the criminalisation of incitement also has retributive value. In *Zeelie*, the Appellate Division underscored retribution as another justification for the criminalisation of inchoate crimes such as incitement.⁷³ Thus, while incitement may

⁷⁰ *Shelby County v Holder* 570 US 529 (2013) at 33.

⁷¹ Main judgment at [41] and [49].

⁷² Clarkson *Understanding Criminal Law* 4 ed (Sweet & Maxwell, London 2005) at 27. See further *R v Zeelie* 1952 (1) SA 400 (A) at 405D.

⁷³ *Zeelie* id at 405E-G.

not demonstrate immediate visible harm, there is undoubtedly indirect harm to society.⁷⁴

[85] Equally well-established is that the completion or non-completion of the incited crime is irrelevant to a finding of guilt for incitement.⁷⁵ Duff contends that, if a person has made a moral conclusion to intentionally commit an inchoate crime or cause it to occur, and has taken tangible steps towards the realisation of that crime, the mere fact that the substantive crime may not actually take place is outweighed by, amongst others, the need to protect victims from a risk of the crime being completed.⁷⁶ He further contends that, should the law tolerate all forms of inchoate crimes until they result in the final commission of a crime, society would remain at constant risk of criminal activity. Thus, the criminalisation of incitement remains necessary to curb group criminality and to ensure social order.

[86] In recognising the common law crime of incitement, our courts have followed a similar line of reasoning. Thus, in *Nlhovo*, the Appellate Division held:

“[W]e should definitely lay down that it is an offence to incite a person to commit a crime even though nothing has been done by him in furtherance of its commission. And I come to that conclusion for two reasons. The first is that it is to my mind repugnant to one’s common sense that the mere fact that a person has failed to induce another to commit a crime should be regarded as a sufficient reason for treating him as if he were entirely guiltless of any offence.”⁷⁷

⁷⁴ Burchell above n 52 at 528 points out that this indirect harm consists of “the high risk of a dangerous situation developing”. See further Alexander and Ferzan “Risk and Inchoate Crimes: Retribution or Prevention?” in Sullivan and Dennis (eds) *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart Publishing, Oxford 2012) at 103-20.

⁷⁵ *Zeelie* above n 72 at 405E.

⁷⁶ Duff “Risks, Culpability and Criminal Liability” in Sullivan and Dennis above n 74.

⁷⁷ *R v Nlhovo* 1921 AD 485 at 493.

[87] That approach accords with earlier decisions.⁷⁸ For instance, in *Ungwaja*, Gallwey CJ commented that:

“Can it be a question in a civilised country that the inciting of another to commit a crime shall not be considered an offence? The question is, had the defendant a wicked intention when he employed another person to commit the crime of murder? That the attempt failed, and that no murder took place is not in my opinion material, and on this point, the Roman authorities are conclusive. I think that it is sound law that where the offence of solicitation has been proved, the offender should be punished, even though no crime has actually followed.”⁷⁹

[88] The common law crimes of incitement and conspiracy were codified in the Riotous Assemblies Act. The current Act was preceded by the Riotous Assemblies and Criminal Law Amendment Act.⁸⁰ In interpreting the Riotous Assemblies Act, the Appellate Division defined an inciter as “one who reaches and seeks to influence the mind of another to the commission of a crime”.⁸¹ It is within this context that one must be cognisant that incitement is an independent crime and that its prosecution is not dependent on whether the incitee actually acts upon the inciter’s instruction.

[89] With these general remarks as a backdrop, I now turn to an analysis of the impugned provision and consider whether it limits free speech and whether it is a reasonable and justifiable limitation.

⁷⁸ *R v Fortuin* 1915 CPD 757 and *R v Ungwaja* 1891 12 NLR 284. See further Kemp et al *Criminal Law in South Africa* (OUP, Cape Town 2012) at 261.

⁷⁹ *Ungwaja* id at 286.

⁸⁰ 27 of 1914.

⁸¹ *S v Nkosiyana* 1966 (4) SA 655 (A) at 658H.

The impugned provision justifiably and reasonably limits the right to freedom of expression

[90] The right to freedom of expression, entrenched in the Bill of Rights, looms large in the determination of the central issue. I unhesitatingly accept that the impugned provision, which is a law of general application, does infringe the section 16(1) right to freedom of expression. I will therefore confine this judgment to a discussion of the second phase of the enquiry, namely whether the limitation of that right is reasonable and justifiable.

The justification analysis

[91] Section 36(1) of the Constitution reads:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

All relevant factors must be taken into account to measure what is reasonable and justifiable, and the factors listed in section 36(1)(a)-(e) are not exhaustive.⁸² What is required is for a court to “engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list”.⁸³

⁸² *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) at para 60.

⁸³ *Manamela* above n 29 at paras 32-3. See further De Vos et al *South African Constitutional Law in Context* (OUP, Cape Town 2014) at 350-2; Woolman and Botha “Limitations” in Woolman et al (eds) *Constitutional*

In *Makwanyane*, Chaskalson P clearly articulated that this balancing exercise “involves the weighing up of competing values, and ultimately an assessment based on proportionality”.⁸⁴

Nature of the right to freedom of expression

[92] It is axiomatic that in order to determine the extent of the encroachment on a right in considering whether that encroachment passes constitutional muster, one must first ascertain the nature and content of the right encroached upon.

[93] The main judgment rightly emphasises the importance of the right to freedom of expression in our constitutional landscape. The reference to the dictum of O’Regan J in *South African National Defence Union* is apposite.⁸⁵ Similarly, in *Khumalo* this Court said:

“[W]ithout [freedom of expression], the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.”⁸⁶

[94] As the main judgment points out, this right is valued just as highly in other jurisdictions. In addition to *Handyside* mentioned in the main judgment in a European context,⁸⁷ there are other examples.⁸⁸

Law of South Africa 2 ed (Juta & Co Ltd, Cape Town 2014) at 93; and Rautenbach “Proportionality and the Limitation Clauses of the South African Bill of Rights” (2014) 17 *PER* 2229.

⁸⁴ *Makwanyane* above n 39 at para 104. See further *Johncom Media Investments Ltd v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at paras 24-5 and *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at paras 17-8.

⁸⁵ Main judgment at [44], citing *South African National Defence Union* above n 45 at para 7.

⁸⁶ *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21.

⁸⁷ Main judgment at [45].

⁸⁸ In the Indian context, the landmark Supreme Court judgments are *Sakal Papers (P) Ltd v Union of India* 1962 SCR (3) 842 and *Khushboo v Kanniammal* (2010) 5 SCC 600. In Canada, there is the Supreme Court judgment of *R v Guignard* 2002 SCC 14; [2002] 1 SCR 472 and *R v Keegstra* 1990 SCC 24; [1990] 3 SCR 697.

[95] The right to freedom of expression lies at the heart of our constitutional democracy, not only because it is an “essential and ‘constitutive’ feature”⁸⁹ of our open democratic society, but also for its transformative potential. But axiomatically, the right to freedom of expression is, as is the case in virtually all other jurisdictions, not an unfettered or an unqualified right. Further, it does not rank higher than other rights in our Bill of Rights, because our Constitution does not have a hierarchy of rights. In *United Democratic Movement* this Court said “[o]ur entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected”.⁹⁰

[96] This right is limited in two ways. First, it is internally limited by section 16(2), which expressly lists forms of expression that are excluded from the protection of that right. Second, like any other right in the Bill of Rights, it may be limited by section 36(1) of the Constitution.

[97] In *Phillips*, this Court explicated the limited ambit of section 16(1):

“The right to freedom of expression (as is the case with all rights in the Bill of Rights) is not and should not be regarded as absolute. The section 16(1) right may be limited by a law of general application that complies with section 36 of the Constitution. In other words, the Constitution expressly allows the limitation of expression that is ‘repulsive, degrading, offensive or unacceptable’ to the extent that the limitation is justifiable in ‘an open and democratic society based on human dignity, equality and freedom’.”⁹¹

⁸⁹ Dworkin’s assessment in *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge 1996) at 200.

⁹⁰ *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 31.

⁹¹ *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 17.

[98] In addition to freedom of expression, other rights which are implicated in this case are the rights to freedom and security of the person,⁹² property⁹³ and access to adequate housing.⁹⁴ The applicants have not contended otherwise. Absent a hierarchy of rights, conflicting rights must be assessed according to the constitutional standard of proportionality set out in section 36(1).

[99] In *Islamic Unity*, the lodestar on how section 16 is to be interpreted and applied, this Court expounded:

“Where the State extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.”⁹⁵

Islamic Unity is directly applicable to this case. This Court carefully analysed section 16 and said:

“Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.

...

Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve

⁹² Section 12 of the Constitution.

⁹³ Section 25 of the Constitution.

⁹⁴ Section 26 of the Constitution.

⁹⁵ *Islamic Unity* above n 22 at para 34.

constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm.”⁹⁶

[100] It went on to say that, where the limitation of the right extended beyond the categories of expression listed in section 16(2), as was clearly the case with clause 2(a) of the Code of Conduct for Broadcasting Services, the question was “whether the clause, in prohibiting that which is not excluded from the protection of section 16(1), does so in a manner which is constitutionally impermissible”.⁹⁷ It then undertook a justification analysis in terms of section 36(1).

[101] Thus, properly construed in accordance with the approach outlined in *Islamic Unity*, legislation that infringes upon the right to freedom of speech beyond the varieties outlined in section 16(2), limits protected expression. It must be reasonable and justifiable as envisaged in section 36(1), in order to pass constitutional muster.

[102] While the Constitution in section 16(2)(b) expressly limits “incitement of imminent violence”, it merely stipulates the minimum bounds of the available limitations to the right. It does not amend the statutory crime of incitement, but merely provides that the right to freedom of expression does not extend to incitement of imminent violence.

[103] It is necessary to consider some of the observations made in the main judgment in respect of *Islamic Unity*. First, it must be clearly understood that section 16(2) speech is constitutionally unprotected expression. Thus, as *Islamic Unity* unequivocally tells us, “[a]ny regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16”⁹⁸ and

⁹⁶ Id at paras 31-2. This was affirmed in *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 48.

⁹⁷ *Islamic Unity* above n 22 at para 36.

⁹⁸ Id at para 33.

“[s]ubsection (2) deals with expression that is specifically excluded from the protection of the right”.⁹⁹ The limitation of the right in section 16(1) must therefore not be confused with section 16(2) – any limitation of the right in section 16(1) must be tested against section 36(1). Under section 16(2), on the other hand, there can be no question of a limitation of a right, because freedom of expression does not extend to the expression enumerated in that subsection. As I read the main judgment, this distinction is not drawn clearly. Thus, I respectfully disagree with the observation that “our Constitution would not easily countenance ‘incitement’ or ‘advocacy’ to commit ‘any offence’ as a limitation of the right to freedom of expression”.¹⁰⁰ Furthermore, I take issue with the observation that it cannot be correct “to criminalise the incitement of any offence that does not even pose danger or serious harm to anything or anybody”.¹⁰¹ Quite apart from the fact that the concept “serious offence” does not appear in section 16(2), it is not correct to characterise the section in this fashion. It bears emphasis that section 16(2) deals with constitutionally unprotected speech and has nothing to do at all with any limitation of the right to free speech.

[104] Second, invoking a passage from *Islamic Unity*, the main judgment holds that “for a limitation of free expression to be permissible, it must be reasonable. And legislation that seeks to limit free speech must thus be demonstrably meant to curb incitement of offences that seriously threaten the public interest, national security, or the dignity or physical integrity of individuals – our democratic values”.¹⁰² But, it is of crucial importance to cite the additional part of that passage, which states that:

“Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.”¹⁰³

⁹⁹ Id at para 31.

¹⁰⁰ Main judgment at [46].

¹⁰¹ Id.

¹⁰² Id at [47].

¹⁰³ *Islamic Unity* above n 22 at para 29.

It is clear from this passage that this Court acknowledged the variety of valid limitations available to the Legislature in limiting speech. Included in that list was the limiting of speech surrounding fair trials (perhaps referring to scandalising of courts),¹⁰⁴ offensive or inflammatory language, and political communication to ensure free and fair elections. Adding the prevention of crime to that list fits in as a justifiable limitation with a genuine purpose.

[105] In interpreting that right, section 39(1)(c) of the Constitution permits us to consider foreign law. I am mindful that while comparative analyses are useful, they should not supplant our Constitution and the nuances of our jurisprudence.¹⁰⁵

Comparative foreign law perspectives

[106] Foreign jurisprudence provides useful guidance on the nature and content of the universal right to freedom of expression and how other democratic jurisdictions regulate the crime of incitement. The applicants in their argument in this Court, refer to only one jurisdiction, namely the United States of America, to advance the view that freedom of expression has a special place in our constitutional dispensation and, as such, only the incitement to commit serious offences or imminent violence should be criminalised.¹⁰⁶ But, unlike our Constitution, the Constitution of the United States

¹⁰⁴ As was protected in *Mamabolo* above n 43.

¹⁰⁵ In *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 35, O'Regan J eloquently stated that:

“It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems’ grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.”

¹⁰⁶ The applicants cited, amongst others, *Brandenburg v Ohio* 395 US (1969) 444 at 447.

of America elevates the right to free speech in its First Amendment above all other rights.¹⁰⁷ As this Court cautioned in *Mamabolo*:

“The fundamental reason why the test evolved under the First Amendment cannot lock on to our crime of scandalising the court is because our Constitution ranks the right to freedom of expression differently. With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment; section 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content. . . . What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.”¹⁰⁸

[107] It bears repetition that the right to freedom of expression is neither absolute, nor more important than other countervailing rights like, for present purposes, the rights to security of the person, property and housing. To this end, in *Khumalo*, O’Regan J, writing for a unanimous Court, remarked that “although freedom of expression is fundamental to our democratic society, it is not a paramount value”.¹⁰⁹ The applicants’ heavy reliance on jurisprudence from the United States of America in respect of the right to freedom of expression is therefore misplaced, as the right to freedom of expression is treated differently in our law.

¹⁰⁷ The First Amendment states that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

¹⁰⁸ *Mamabolo* above n 43 at para 41. See also *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 47.

¹⁰⁹ *Khumalo* above n 86 at para 25. In addition, Milo et al in “Freedom of Expression” in Woolman et al above n 83 observe at 9:

“The single most significant aspect of the growing South African jurisprudence on freedom of expression is a rejection of the dominant approach in the United States that freedom of expression is a pre-eminent right or value, in favour of an approach of balancing.”

See further Currie and de Waal *Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2018) at 338, which states that “one should be cautious about drawing lessons from the First Amendment jurisprudence of the United States, which is ‘extraordinarily’ protective of freedom of expression”.

[108] Casting a wider net, there are many jurisdictions which criminalise the exercise of freedom of expression in order to incite others to commit criminal conduct. Moreover, and importantly, imminent violence or seriousness and harmfulness are not prerequisites for criminal liability in those jurisdictions. In a wide-ranging study, Eser concludes that public incitement is a crime in “practically every legal system”, albeit in some instances limited to certain underlying offences.¹¹⁰

[109] Article 10 of the European Convention on Human Rights (Convention) entrenches the right to free expression.¹¹¹ The ECtHR has consistently upheld convictions of incitement where the particular speech did not entail an alleged threat of imminent violence. For instance, in *Palusinski*,¹¹² the applicant’s conviction for incitement in respect of the use of drugs was upheld because the Court found that, although the legislation implicated the applicant’s right to freedom of expression, the limitation was necessary in a democratic society. The ECtHR held that the applicant’s conviction of incitement was a lawful interference with his right to freedom of expression, as it was aimed at the protection of the health and morals of the general public. Again, it bears repetition that there was no requirement for seriousness.

[110] Likewise, the European Commission of Human Rights (ECHR) upheld an incitement conviction in *Arrowsmith*,¹¹³ where the applicant, a pacifist, had disseminated leaflets in which she urged English soldiers not to serve in Northern Ireland. She had been convicted of offences under sections 1 and 2 of the Incitement to Disaffection Act of 1934. In upholding the applicant’s conviction under

¹¹⁰ Eser “The Law of incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective” in Kretzmer and Hazan (eds) *Freedom of Speech and Incitement Against Democracy* (Kluwer Law International, The Hague 2000) at 130. Eser notes the exceptions are England, Chile and Costa Rica.

¹¹¹ Article 10(1) of the Convention provides:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

¹¹² *Palusinski v Poland*, no 62414/00, ECtHR 2006.

¹¹³ *Arrowsmith v United Kingdom*, no 7050/75, ECHR 1978.

the Act, the ECHR found that the words in her leaflets could be reasonably understood by soldiers (her target readership) as an encouragement or incitement to disaffection. With reference to Article 10(2) of the Convention,¹¹⁴ the ECHR held that the impairment of the applicant's right to freedom of expression was justifiable as she had gone beyond merely expressing an opinion in the leaflets.

[111] Section 44(1) of the United Kingdom Serious Crime Act 2007 provides:

“A person commits an offence if—

- (a) he does an act capable of encouraging or assisting the commission of an offence; and
- (b) he intends to encourage or assist its commission.”

Thus, a vendor who sold a device allowing motorists to detect radar speed traps, was convicted of incitement, notwithstanding the fact that the court did not reject an argument that the accused's direct intent was to generate profit and not to induce drivers to exceed speed limits.¹¹⁵ There is no requirement for seriousness in the United Kingdom.

[112] Furthermore, the penal codes of a number of jurisdictions criminalise incitement. For instance, the German Criminal Code (the StGB) provides in section 30(1) that an attempt to incite another to commit a felony is penalised.¹¹⁶ Eser

¹¹⁴ Article 10(2) of the Convention provides for the justifiable restriction of free speech insofar as it may be “necessary in a democratic society”.

¹¹⁵ *Invicta Plastics Ltd v Clare* [1976] RTR 251.

¹¹⁶ Section 30 of the Criminal Code “Attempted participation”, reads:

- “(1) Whoever attempts to induce or incite another to commit a serious criminal offence incurs a penalty under the terms of the provisions governing attempted serious criminal offences. The penalty must, however, be mitigated pursuant to section 49(1). Section 23(3) applies accordingly.
- (2) Whoever declares their willingness or accepts the offer of another or agrees with another to commit or incite to the commission of a serious criminal offence incurs the same penalty.”

explains that section 111 of the StGB, “[p]ublic incitement to commit offences”, deems the public incitement of criminal acts to be particularly dangerous because of the “dangerousness associated with the incitement of an indeterminate group of people”.¹¹⁷ Furthermore, German Criminal Code draws a distinction between abetting¹¹⁸ and incitement of the masses.¹¹⁹

[113] In Australia, incitement as a crime has been held to be consistent with the freedom of speech (referred to in Australia as “the freedom of political communication”) implicit in the Australian Constitution.¹²⁰ In Canada, section 464(a) of the Canadian Criminal Code creates the offence of “counselling”,¹²¹ which is akin to incitement. Under this law, the accused in *Hamilton*¹²² had advertised software to generate credit card numbers and was convicted of counselling (that is, inciting) credit card fraud. Though not a case involving a constitutional challenge, in the Supreme Court of Canada, the majority upheld the appeal against the Court of Appeal’s decision to confirm the trial court’s acquittal of the accused. The majority held that the *actus reus* (overt act) for counselling was a deliberate encouragement or active inducement of the commission of a crime. The *mens rea* (intent) consisted of

¹¹⁷ Eser above n 110 at 124.

¹¹⁸ Section 26 of the Criminal Code, “Abetting”, reads:

“Whoever intentionally induces another to intentionally commit an unlawful act (abettor) incurs the same penalty as an offender.”

¹¹⁹ See section 130 of the Criminal Code, “Incitement of masses”. There are various decisions emanating from the German Federal Constitutional Court that deal with the tension between convictions for incitement of masses and the right to freedom of expression. See further: 1 BvR 2150/08; 1 BvR 2083/15; 1 BvR 673/18; and 1 BvR 479/20.

¹²⁰ See *Nationwide News Pty Ltd v Wills* [1992] HCA 46 and *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 1.

¹²¹ Section 464 of the Criminal Code provides:

“Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) everyone who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and
- (b) everyone who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.”

¹²² *R v Hamilton* 2005 SCC 47; [2005] 2 SCR 432.

an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in counselling.

[114] Looking at jurisdictions closer to home, section 96(c) of the Penal Code of Botswana renders any person who utters, prints or publishes any words, which indicate that it might be desirable to do anything which is calculated to defeat by “unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law” guilty of an offence and liable to punishment. Section 391 of the Penal Code of Kenya provides that any person who incites another to do any act “of such a nature that, if the act were done . . . an offence would thereby be committed”, is guilty of an offence and liable to punishment. Similarly, section 157(1)(a) of the Penal Code of Cameroon criminalises conduct that “by any means whatever incites to the obstruction of the execution of any law, regulation, or lawful order of the public authority”.

[115] There are many other examples further afield. On 16 July 2020, this Court, as it has on previous occasions, submitted a request to the World Conference on Constitutional Justice (Venice Commission) regarding other jurisdictions’ position on the crime of incitement and its requirements. This elicited a number of further useful comparable instances, which largely reflect the general position that: (i) many jurisdictions criminalise the exercise of freedom of expression when used to incite others to commit criminal conduct and (ii) seriousness is not a requirement for the crime of incitement or similar offences.¹²³ For instance, incitement similarly

¹²³ See, for example, Mexico (Article 208 of the Criminal Federal Code of Mexico) and Croatia (Article 37 of the Criminal Code of Croatia). Article 39 of the Constitution of the Republic of Croatia contains a prohibition similar to the one in our section 16(2): “Any call for or incitement to war or use of violence, to national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable by law.” Article 38 of the Croatian Constitution also protects freedom of expression. Incitement is also a crime, without any further requirement of seriousness in the Czech Republic, the Slovak Republic, Bulgaria, Azerbaijan and Kosovo, albeit that certain jurisdictions impose a further requirement that the crime incited must actually be committed.

characterised as a crime can also be found in the penal codes of Sweden¹²⁴ and Bosnia and Herzegovina.¹²⁵ Incitement is also punishable in the Netherlands.¹²⁶

[116] This excursus of foreign jurisprudence demonstrates that there are many countries that criminalise incitement to commit a crime. It is necessary to emphasise that all of the foreign jurisdictions mention the need to protect human dignity, liberty, freedom and equality, either through their constitutions or through robust legislation.¹²⁷ In these respects, therefore, these jurisdictions are apposite comparisons.¹²⁸

¹²⁴ Section 4 of Chapter 23 of the Swedish Criminal Code, titled “On attempts, preparation, conspiracy and complicity”.

¹²⁵ Article 30(1) of the Criminal Code of Bosnia and Herzegovina, titled “Incitement”.

¹²⁶ *Prosecutor v Imane*, District Court of The Hague (10 December 2015).

¹²⁷ Australia, by way of further example, protects certain freedoms such as the right to vote and the right of freedom of religion through sections 41 and 116 of its Constitution, respectively. The protection of human rights is ensured largely by legislation, particularly the Australian Human Rights Commission Act 1986 which gives effect to Australia’s international human rights obligations. In the United Kingdom, rights are largely protected by the Human Rights Act 1998. As for those jurisdictions which do have constitutions, the following features are notable—

- (a) the Preamble of the Constitution of Bosnia and Herzegovina begins with the line: “Based on respect for human dignity, liberty and equality”;
- (b) the Constitution of Sweden includes numerous references to “freedom”;
- (c) the Constitution of Kenya contains a list of rights and fundamental freedoms;
- (d) the first Article of the Constitution of Cameroon provides that it shall “recognise and protect traditional values that conform to democratic principles, human rights and the law. It shall ensure the equality of all citizens before the law”;
- (e) the Constitution of Botswana recognises various fundamental rights and freedoms of the individual, including the right to life and personal liberty, and freedom of expression;
- (f) the first Article of the Basic Law of the Federal Republic of Germany requires that “[h]uman dignity shall be inviolable”, before listing other basic rights such as equality and freedom of expression, arts and science;
- (g) the Constitution of the Republic of Poland recognises the need to “respect . . . the inherent dignity of the person, [and] his or her right to freedom” in its Preamble;
- (h) the Preamble to the Constitution of India recognises justice, liberty, equality, and fraternity;
- (i) the Constitution of the Kingdom of the Netherlands dedicates its first chapter to codifying “fundamental rights”, including “the right to inviolability” of person, the right to equality, and various freedoms including the right to profess religion freely;
- (j) under Chapter I of the Constitution of Mexico concepts such as human dignity, liberty and equality are protected;

[117] The singular exception in respect of incitement as a crime, is the United States of America. There, speech is punishable only where it is directed to inciting or producing imminent lawless action. The seriousness or harmfulness of speech are not prerequisites in other foreign jurisdictions, as demonstrated in the preceding discussion. In the United States of America, free speech is acknowledged as the cornerstone of democracy. The First Amendment thus provides, amongst other things, that Congress shall not pass any law that curtails the freedom of speech or of the press.¹²⁹ As an outlier, the exceptional situation in the United States of America is therefore readily understood by the high premium it places on this First Amendment right of free speech.¹³⁰

[118] As stated, there exists no equivalent premium placed on freedom of expression in our Constitution. As elaborated upon above, our Constitution has no hierarchy of

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- (k) the Constitution of the Republic of Croatia upholds and protects human dignity, liberty and equality;
 - (l) in the Czech Republic, human dignity, liberty and equality are protected under the Charter of Fundamental Rights and Freedoms;
 - (m) the Constitution of Bulgaria protects freedom of expression as well as human dignity, liberty and equality;
 - (n) the Constitution of Kosovo protects human dignity, equality and freedom of expression;
 - (o) the Constitution of the Slovak Republic protects human dignity, liberty and equality as well as freedom of expression; and
 - (p) liberty and equality are guaranteed by the Constitution of the Republic of Azerbaijan.

¹²⁸ See, for example, where this Court has considered comparative foreign law analyses in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 69 and *National Coalition for Gay and Lesbian Equality* above n 27 at para 39.

¹²⁹ See First Amendment above n 107.

¹³⁰ As Justice Brandeis put it in *Whitney v California* 274 US 357 (1927) at 376:

“It is the function of speech to free [people] from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.”

See also Webb “Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System” (2011) 50 *Washburn Law Journal* 445.

rights, and this Court has never set out to establish one. We should not venture to do so now, even implicitly.

The importance of the purpose of the limitation

[119] This factor requires a consideration that the limitation on freedom of expression must at least serve an important purpose that contributes to an open and democratic society based on the advancement of freedom, equality and dignity. It bears repetition that the crime of incitement is a vital cog in the fight against the rampant crime in our country.

[120] It is necessary to say something about the abhorrent history of the Riotous Assemblies Act and to place section 18(2)(b) in its proper context. The Riotous Assemblies Act was, as the applicants trenchantly contend before us, the apartheid regime's backlash against the momentous adoption of the Freedom Charter at Kliptown in 1955. That adoption came at the height of the Defiance Campaign which commenced in 1952. As indicated, the Riotous Assemblies Act was the re-enactment of an earlier statute. In its original form, the Riotous Assemblies Act empowered the Minister of Justice or a Magistrate to ban gatherings considered to be a danger to public peace. But, after a series of repeals, all that remains of the Riotous Assemblies Act are the preamble and sections 16, 17 and 18. The fact that the Riotous Assemblies Act is a relic of apartheid and presently has a preamble that is vile does not in itself subvert its function and utility as a legislative tool to combat crimes under our democratic dispensation. Thus, conspiracy under the Riotous Assemblies Act has been the subject of a number of judgments in our courts, including two in this Court.¹³¹ Sections 16, 17 and 18 in the Riotous Assemblies Act were clearly intended to retain vital tools in the fight against crime. Whatever the original intention of the Legislature was in enacting the Riotous Assemblies Act, is of no concern to us insofar

¹³¹ *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) and *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

as the present enquiry is concerned – we must simply consider the constitutionality of the impugned provision.¹³²

[121] It is apt to note that in our transformative legal arena “South Africa is undergoing a metamorphosis” and “[i]f the racist and authoritarian intentions of past legislators were to be taken as paramount and invariable in determining the validity of legislation today, many statutes would not have survived the advent of constitutional democracy”.¹³³ Section 18(2)(b) of the Riotous Assemblies Act serves a legitimate government purpose today.

[122] The main judgment accepts that “section 18(2)(b) is, broadly speaking, one of many instruments suited to the achievement of the goal of crime prevention”.¹³⁴ However, later on, the main judgment slightly changes tack and opines that the reliance on crime prevention as a justification for the limitation in the impugned provision is too general and not sufficiently specific.¹³⁵

[123] It is clear that crime prevention constitutes a pressing and substantial concern, especially in the South African context. In any event, “[t]here are no hard-and-fast rules for determining whether the purpose will be considered constitutionally legitimate”.¹³⁶ This can be evinced from our jurisprudence that has accepted wide-ranging objectives as legitimate government purposes.¹³⁷ It is also critical not to

¹³² In terms of section 241 of the Constitution, read with item 2 of Schedule 6, pre-1994 legislation, if consistent with the Constitution, remains in force subject to amendment or repeal.

¹³³ The minority judgment penned by O’Regan J and Sachs J in *Jordan* above n 131 at paras 111-2.

¹³⁴ Main judgment at [41].

¹³⁵ *Id* at [49].

¹³⁶ De Vos et al above n 83 at 369 which also states that “[b]roadly speaking, the constitutional values of openness, democracy, freedom, equality and dignity will play a role in determining what a legitimate purpose is”.

¹³⁷ For example, in *S v Singo* [2002] ZACC 10; 2002 (4) SA 858 (CC); 2002 (8) BCLR 793 (CC) this Court accepted the smooth running of the administration of justice at para 35 and in *Larbi-Odam v Member of the Executive Council for Education (North West Province)* [1997] ZACC 16; 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC) this Court accepted reduction of unemployment at para 30. Furthermore, on numerous occasions this Court has accepted the importance of taking effective action against crime. See for instance *Ex Parte Minister of Safety and Security: In Re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7)

conflate the important considerations of section 36(1). The overbreadth of the legitimate government purpose must not be muddled with the less restrictive means enquiry (the overbreadth of the impugned term “any offence”). Therefore, the objective of crime prevention, especially given the severe impact of crime on our society, is an important purpose animating our constitutional values.

Nature and extent of the limitation

[124] The nature and extent of the limitation is such that the impugned provision does little to curtail free expression. This Court emphasised in *De Reuck* that one must carefully distinguish between limitations concerning the core and those concerning the periphery of the right to freedom of expression.¹³⁸ It said:

“[T]he limitation of the right caused by section 27(1) does not implicate the core values of the right. Expression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of the freedom of expression in many democratic societies.”¹³⁹

[125] I agree with the Full Court that the right most likely implicated by the impugned provision is that listed in section 16(1)(b), the “freedom to receive or impart information or ideas”.¹⁴⁰ The limitation in the impugned provision extends only to a prohibition against exhorting others to commit a crime. It is a relatively minor curtailment of free speech, and merely constitutes a prohibition on the intentional influencing of the minds of others to commit a specified unlawful act that is considered by the State to be a crime.

BCLR 663 (CC) (*Walters*) at para 44; and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 53.

¹³⁸ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

¹³⁹ *Id* at para 59. See also *Case* above n 64 at para 77.

¹⁴⁰ High Court judgment above n 5 at para 55.

[126] This is not to say that robust political debate must be stifled, particularly regarding the current highly emotive topic of land reform. Far from it – as is well-known, public debate in our country has always been very robust. This was so even under apartheid’s narrowly delineated bounds of racially demarcated public life. Thus, in *McBride*,¹⁴¹ this Court referred to *Pienaar* where, regarding political debate in this country, the court said that “[s]trong epithets are used and accusations come readily to the tongue”.¹⁴² The Court also said that some leeway was warranted, “because the subject is a political one, which had aroused strong emotions and bitterness”, of which readers were aware and that they “would not be carried away by the violence of the language alone”.¹⁴³ As Cameron J pointed out in *McBride*, public debates have “if anything become more heated and intense since the advent of democracy”.¹⁴⁴ In *Democratic Alliance*, this Court emphasised the “importance, both for a democracy and the individuals who comprise it, of being able to form and express opinions – particularly controversial or unpopular views, or those that inconvenience the powerful”.¹⁴⁵

[127] Land reform is now arguably the most heated topic under discussion. While landlessness evokes deep emotions of deprivation and despair and engenders feelings of hopelessness, frustration and justifiable apoplexy, it cannot justify incitement to commit crime. Vigorous public debate and heated political discourse on this burning issue must continue unfettered, as long as it does not become incitement to commit crime. In *Land Access Movement* this Court endorsed the statement that:

¹⁴¹ *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*McBride*) at para 99.

¹⁴² *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C.

¹⁴³ *Id* at 318F-G.

¹⁴⁴ *McBride* above n 141 at para 100.

¹⁴⁵ *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 125.

“There can be no freedom, without land. There can also be no peace until the emotional issue of land is settled.”¹⁴⁶

[128] This was affirmed in *Mwelase*, where this Court explicated:

“South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department’s failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform.”¹⁴⁷

[129] This Court has recognised that the mass invasion of land threatens social stability and public peace.¹⁴⁸ In *Grootboom*, this Court warned:

“People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country’s housing shortage.”¹⁴⁹

[130] Given the volatility of the current debate – its understandably highly emotive nature – and bearing in mind the caution expressed by this Court in *Modderklip* and in *Grootboom*, the limitation of what is at the periphery of the right is warranted.

¹⁴⁶ *Speaker, National Assembly v Land Access Movement of South Africa* [2019] ZACC 10; 2019 (6) SA 568 (CC); 2019 (5) BCLR 619 (CC) (*Land Access Movement*) at para 1 quoting “Open Letter to the Multiparty Negotiations at the World Trade Centre, 18 August 1993” *AFRA News: Newsletter of the Association for Rural Development* (August/September 1993).

¹⁴⁷ *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at para 41.

¹⁴⁸ In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (*Modderklip*) this Court stated at para 45:

“Land invasions of this scale are a matter that threatens far more than private rights of a single property owner. Because of their capacity to be socially inflammatory, they have the potential to have serious implications for stability and public peace.”

¹⁴⁹ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*) at para 2.

The relation between the limitation and its purpose

[131] This factor requires a rational connection between the objectives of crime prevention and the means chosen to achieve that objective.¹⁵⁰ To my mind, there is a causal connection and the impugned provision is proportionate with its objectives.

[132] Section 16(2) enumerates the minimum, not the maximum, limitations on the right. It bears repetition that this Court said in *Islamic Unity* that any purported legislative limitation beyond those outlined in section 16(2), must pass the section 36(1) justification test.¹⁵¹ It is of some significance that the impugned provision has been in operation since the advent of our democracy and in my view, its application in a plethora of cases has been uncontroversial. Based on a reading of the law reports, which are replete with incitement cases, there is to my knowledge, not a single instance in our democratic era where the impugned provision in the context of incitement has been abused in practice, applied inconsistently or resulted in harsh or unfair consequences. In my view, its operation has been uncontroversial.

[133] It must be borne in mind that our Republic is one based on respect for the rule of law. A legitimate government purpose is served by deterring people from intentionally influencing and procuring other people to commit a crime, regardless of whether the crime is serious, harmful or includes imminent violence. Interestingly, this is not novel since many other countries criminalise incitement without a prerequisite of imminent violence, seriousness or harmfulness.¹⁵²

¹⁵⁰ The limitations analysis is not concerned with the “correct measure”, but rather whether the limiting measure, as determined by the Legislature, pursues a constitutionally legitimate purpose. This, in turn, ushers in the rational connection requirement – whether the means chosen achieves its accepted purpose. The concern is about the rationality of the limitation, not about whether it is optimum or ideal. Compare this approach to the limitations analysis of the main judgment, which does not fully consider the rational connection requirement.

¹⁵¹ *Islamic Unity* above n 22 at para 34.

¹⁵² See discussion on comparative foreign law jurisdictions at [106] to [118].

Less restrictive means

[134] In *Prince* this Court explicated that “[a] challenge to the constitutionality of legislation on the grounds that it is overbroad is in essence a challenge based on the contention that the legitimate government purpose served by the legislation could be achieved by less restrictive means”.¹⁵³ Therefore, it is important to consider the issue of the widely phrased term “any offence” in the context of the less restrictive means enquiry. This leg requires its own proportionality enquiry in the form of what can conveniently be termed a “costs-benefits analysis” (the limitation must achieve benefits proportional to the costs of the limitation).

[135] The main judgment regards the criminalisation of “any offence” by the impugned section as overbroad. For this reason, it finds the section unconstitutional in its present form. As stated above, it is well established that the central enquiry in respect of the challenge of overbreadth is whether there are less restrictive means available to achieve the purpose of the limitation. Generally speaking, the main judgment does not take issue with the notion that criminalising incitement serves a legitimate government purpose, namely the prevention of crime.¹⁵⁴

[136] In *Case*, this Court explicated:

“To determine whether a law is overbroad, a court must consider the means used (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad.”¹⁵⁵

¹⁵³ *Prince v President, Cape Law Society* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 114.

¹⁵⁴ Main judgment at [41].

¹⁵⁵ *Case* above n 64 at para 49 and *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* [1996] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at paras 12-3.

[137] In *Case* an analogy was drawn with the approach our courts took in the pre-democratic era in respect of a determination whether subordinate legislation was *ultra vires* (an act that is not authorised by law). It said that “[s]ubordinate legislation was invalidated on the basis that the means used exceeded the limits implied by the underlying objectives of the empowering statute”.¹⁵⁶ As I will expound more fully, the less restrictive means proposed in the main judgment is in fact no solution at all.

Countervailing factors against overbreadth

[138] The current formulation of incitement in the impugned provision contains numerous countervailing factors to guard against its misuse. First, there is the requirement of *mens rea* for a conviction. In *Nkosiyana*, the Appellate Division emphasised the requisite intent on the part of the inciter:

“[I]t is the conduct and intention of the inciter which is vitally in issue . . . the purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes.”¹⁵⁷

[139] The State must prove intent beyond reasonable doubt, that is, that there was no equivocation in the exhortation directed by the inciter to his or her listeners.¹⁵⁸ Thus, in *Nathie*, where the appellant had, in a report tabled at a meeting, called upon the Indian community to defy the Group Areas Amendment Act,¹⁵⁹ the Appellate Division held:

“It thus appears that the evidential material upon which the State relies for a conviction does not establish with the requisite degree of proof that the appellant, in addressing the persons attending the meeting, intended his words to be understood as

¹⁵⁶ *Case id* at para 51, citing as an example *United Democratic Front v State President* 1987 (3) SA 296 (N).

¹⁵⁷ *Nkosiyana* above n 81 at 659A.

¹⁵⁸ *S v Nathie* 1964 (3) SA 588 (A) at 595A-B.

¹⁵⁹ 77 of 1957.

an exhortation to them (and [Indian people] in general) to embark on a campaign involving contraventions of the Group Areas Act.”¹⁶⁰

[140] Later it said:

“[N]otwithstanding the strongly worded exhortation to the persons gathered at the meeting not to remain silent but to unite in registering their protest by giving voice to their opposition to the Act, the passage in question, fairly construed in its context, cannot be said clearly to constitute an incitement to those persons to commit contraventions of the Act so as to register their protest against the implementation of the policy embodied therein.”¹⁶¹

[141] Incitement cannot be committed negligently; intent (direct or indirect) must be proved beyond reasonable doubt.¹⁶² And the *actus reus* requires a positive act – in our law, incitement through an omission is not possible.¹⁶³ There must, by definition, be communication between the inciter which actually reaches the mind of the incitee and influences the mind of the latter to commit an offence.¹⁶⁴ Absent any communication, there can be no evidence of influence. Thus, what is important is not whether the incitee commits the crime incited or not, but whether the inciter had in fact communicated to the incitee with the intention of influencing them to commit a crime.

¹⁶⁰ *Nathie* above n 158 at 596F-G.

¹⁶¹ *Id* at 597A-B.

¹⁶² Burchell above n 52 observes at 534:

“[A]ctual intention is not required, *dolus eventualis* will suffice. Thus, it must be shown that the accused must have foreseen, and hence by inference did foresee, at least the possibility that his or her communication would influence the incitee’s mind and result in that person doing an act which amounted to a crime.”

¹⁶³ *Id* at 531-2. For instance, in *Nkosiyana* above n 81, Holmes AJ noted that the communication can take place in many forms at 658H: “The machinations of criminal ingenuity being legion, the approach to the other’s mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive.”

¹⁶⁴ Burchell *id*.

[142] It is therefore plain that the bar is set very high for a conviction of incitement, particularly as far as the intent requirement is concerned. The State must prove beyond reasonable doubt the act of incitement as well as the requisite intent. These are cogent counterbalancing factors. There is also the *de minimis* rule which bears consideration. The law enforcement agencies, in particular the prosecutorial authority, already overburdened with the investigation and prosecution of crime, can reasonably be expected not to pursue trivial matters. Prosecutorial discretion, in particular, would act as another strong counterbalance against the misuse of incitement in trivial matters. I am of the view that leaving it to the authorities to exercise their discretion in deciding whether to charge or prosecute instances of incitement, when it is coupled with the other various safeguards, militates against abuse and assuages the overbreadth of the impugned provision.

[143] Furthermore, the common law defences of, amongst others, necessity and insanity would conceivably be available on a charge of incitement. Lastly, there is the penalty part of the impugned provision which prevents “over-punishment”. As the main judgment holds, sentencing officers may, in the exercise of their discretion impose the same sentence to that which a person convicted of actually committing that offence would be liable for. But the impugned provision does not countenance a sentence in excess of that. This, too, is another significant counterbalancing factor to consider. These checks and balances strongly counter the assessment of the impugned provision being “overbroad” or an “egregious” and an unjustifiable limitation on the right to freedom of speech as the main judgment finds.

[144] As I see the matter, the impugned provision serves the legitimate purpose of crime prevention, and does so in a proportional manner guaranteed by its sliding punishment regime. The premise for this view is the common cause acceptance that crime prevention is a legitimate aim, and our common understanding that the legislation (and the common law) has set punishment regimes that are appropriate for punishing offences. Thus, to punish someone proportionally for inciting those offences (in other words, *no more than* the maximum sentence available for the

primary offence), is a reasonable and justifiable regime for such punishment. This is especially so, because, as pointed out in the main judgment, the punishment regime sets the *maximum*, not the *mandatory* limit for punishing incitement.¹⁶⁵

[145] I respectfully differ with the dismissive observations in the main judgment with regard to these countervailing factors. They must indubitably be placed on the scales of proportionality in this justification analysis. In the premises, I am of the view that the impugned provision passes constitutional muster.

[146] While less restrictive means is where most limitations analyses may “stand or fall”¹⁶⁶, one must not conflate this leg for the broader balancing proportionality enquiry as envisaged by section 36(1). It is helpful to consider the scholarly remarks by De Vos et al:

“Means that are less restrictive will always be possible to identify but might not – on balance – be proportionate when considering all the factors at play In this sense, a means may not be less restrictive, but may still be proportional.”¹⁶⁷

[147] This approach is consistent with the jurisprudence of this Court. In *Mamabolo* it was stated that:

“Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And, in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant.”¹⁶⁸

¹⁶⁵ Main judgment at [27] to [29].

¹⁶⁶ Currie and de Waal above n 109 at 171.

¹⁶⁷ De Vos et al above n 83 at 372. Contrast this overall global proportionality approach to the main judgment at [41].

¹⁶⁸ *Mamabolo* above n 43 at para 49.

[148] Therefore, one is still required to conduct an overall proportional balancing exercise. Before turning to this, it is important to explicate some difficulties with the main judgment’s proposed remedy as a form of less restrictive means.

Problems with the proposed remedy

[149] Although this judgment comes to a contrary conclusion on the unconstitutionality of the impugned provision, it is necessary to say something brief about the remedy proposed in the main judgment. In my respectful view, the remedy would lead to considerable uncertainty and may well cause some injustice. The solution proposed is to include the element of seriousness in the offence of incitement. Only instances of incitement of serious offences would thus attract criminal sanction. The main judgment proposes the interim insertion of the word “serious” between the words “any” and “offence”.¹⁶⁹ In addition, the main judgment notes that while “any *serious* offence” cannot be clearly defined, guidance can be ascertained from Schedules 1, 2 (Part II and III) and 5 – 8 to the Criminal Procedure Act, which list offences regarded as serious.¹⁷⁰

[150] The reading-in provided for in the main judgment, while seeking to prune the overbreadth of the impugned provision, ushers in the real risk of vagueness. In *Affordable Medicines*, this Court accepted that:

“The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not

¹⁶⁹ Main judgment at [68].

¹⁷⁰ Id at [71].

require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”¹⁷¹

[151] It seems to me that the concept “any offence”, while broad, is not vague. Rather, this notion of “serious offences” may be less broad, but it is vague – it does not indicate with “reasonable certainty” those who are bound by it and what is required of them in order to regulate their affairs. This is particularly alarming when criminal sanction is at stake. The main judgment rightly acknowledges the pitfalls of introducing the element of “seriousness” in order to narrow the ambit of the restriction.¹⁷² It is doubtful that the average citizen would be cognisant of what is “serious”. This is a relative concept, undefined in this particular statute and open to varied definitions.¹⁷³

[152] The introduction of “seriousness” as the resultant reading-in appears to be a usurpation of the law-making function of the Legislature. A reading-in of this nature, where there is a range of polycentric choices for the Legislature to choose from, may go too far and rub against the separation of powers principle.¹⁷⁴ Put differently, narrowing the scope of the impugned provision in a way that was not properly pleaded

¹⁷¹ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 108.

¹⁷² Main judgment at [69].

¹⁷³ The nature of this reading-in is contrary to what this Court said in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 75:

“In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution.”

¹⁷⁴ As this Court warned in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 64:

“Where, as in the present case, a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature.”

by the parties, as a form of less restrictive means, may unduly narrow the range of policy choices available to the Legislature.¹⁷⁵

[153] In *Case*, this Court, with reference to Tribe, cautioned against “the perilous dialectic between the Scylla of overbreadth and the Charybdis of vagueness”¹⁷⁶ and explained that, there is a real danger that a court may “simply substitute for the vice of overbreadth the equally fatal infirmity of vagueness”.¹⁷⁷ The potential ambiguity, uncertainty and possible unjust results are manifest when one considers the remedy proposed in the main judgment.

Proportionality proper

[154] Our jurisprudence plainly sets the standard for a global proportional assessment.¹⁷⁸ Having considered and weighed all the factors in section 36(1), guided by the standards of reasonableness and justifiability in an open and democratic society, I am of the view that, given the legitimate and important purpose underscoring the impugned provision, coupled with the existence of a rational connection between the means and ends, the limitation strikes at the penumbra of a constitutionally cherished right, and ultimately the overbreadth of the impugned provision can be cured by existing countervailing factors. In my view, all of these coalesced considerations evince a proportionate effect on the right and thus tip the

¹⁷⁵ In *Manamela* above n 29 at para 95 this Court warned that:

“The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area. . . . When a court seeks to attribute weight to the factor of ‘less restrictive means’ it should take care to avoid a result that annihilates the range of choice available to the Legislature.”

¹⁷⁶ *Case* above n 64 at fn 117 citing Tribe *American Constitutional Law* 2 ed (Foundation Press, 1988 New York) at 1030.

¹⁷⁷ *Case* id at para 79.

¹⁷⁸ See *Makwanyane* above 39 at para 104 and *Walters* above n 137 at para 27 that states:

“In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved.”

scales towards a reasonable and justifiable limitation of the right in section 16(1) of the Constitution.

Conclusion

[155] The devastation wreaked by the repressive colonial and apartheid regimes' deprivation of land undeniably requires proper redress. Land deprivation occurred right from the time the Dutch settlers first set foot on the southern tip of our country and encountered its first peoples, the Khoisan. It continued unabated in brutal fashion and was formalised in the abominable Native Land Act.¹⁷⁹ The forced removals and evictions that followed left an indelible scar. Land deprivation goes to the very heart of penury and the loss of human dignity, equality and justice. Malcolm X famously said that "land is the basis of all independence. Land is the basis of freedom, justice and equality."¹⁸⁰ Robust public debate, heated political discourse and even fiery rhetoric about the land question must be afforded its deserved space in our vibrant, nascent democracy. Society must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced.¹⁸¹

[156] We must heed the exhortation that:

"Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen."¹⁸²

The extensive political process currently underway must take its course. Orderly land reform must occur within the bounds of our Constitution as this Court has said in

¹⁷⁹ 27 of 1913.

¹⁸⁰ Malcolm X "Message to the Grass Roots" (Northern Negro Grassroots Leadership Conference, 9-10 November, 1963) as quoted in Breitman *Malcolm X Speaks: Selected Speeches and Statements* (Grove Press, New York 1965) at 9.

¹⁸¹ *South African National Defence Union* above n 45 at para 7.

¹⁸² *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at para 43.

Port Elizabeth Municipality.¹⁸³ None of these are incompatible with the crime of incitement as it is presently formulated in section 18(2)(b) of the Riotous Assemblies Act. We need the “umbrella” of the crime of incitement in the storm of rampant crime in our country. There are adequate checks and balances to guard against its misuse. And in my view, it passes constitutional muster as it satisfies the stringent test set in section 36(1).

[157] For these reasons, I would decline to confirm the invalidity of the sentencing part of the impugned provision, grant leave to appeal and dismiss the appeal. Applying the principles in *Biowatch*,¹⁸⁴ I would make no order as to costs.

¹⁸³ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 20.

¹⁸⁴ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 23.

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