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BOSHEGO NGWANATHABA ANGELINAH.

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DECLARATION BY STUDENT.

I, the undersigned, **NGWANATHABA ANGELINAH BOSHEGO** do hereby declare that this Mini-Dissertation submitted to the University of Pretoria, for the degree Masters of Laws in Constitutional and Administrative Law, has not been previously submitted by me for a degree at this or any other university or similar institution, that it is my own work in design and in execution and that all material contained herein has been duly acknowledged.

…… ……

NGWANATHABA ANGELINAH BOSHEGO **Date**

DECLARATION BY SUPERVISOR.

I, the undersigned, **Prof Anton Kok** do hereby declare that this Mini-Dissertation by **NGWANATHABA ANGELINAH BOSHEGO** for the degree, Masters of Laws in Constitutional and Administrative law (LLM) be accepted for examination.

…….. ……

PROFESSOR ANTON KOK **Date**

DEDICATIONS.

This mini-dissertation is dedicated to the lives and times of my late uncle, Ramagohu Dalson Boshego, (1946-2002), who was very close to my heart but passed on after a long mental illness. May his soul rest in eternal peace and rise in glory.

I would also like to dedicate this mini-dissertation to my mother Joyce Boshego, who raised me up to more than I can be, and to my father Joe Matebane, whom history will judge very harshly for the choices he has made about me.

This mini-dissertation is also dedicated to the lives and times of my cousin, who played the role of a brother to me and raised me up, Kgaogelo Lawrence Phala, (1985-2016), may his soul rest in eternal peace and rise in glory.

Last but not least, I would like to dedicate this mini-dissertation to the lives and times of my late kinder gardens mother, Salome Makota, who raised me up and took great care of me when my mother was at work, may your soul rest in eternal peace and rise in glory.

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Thank you so much for your continued support and guidance throughout my academic career, for it is your encouragement and support which made it possible for me to soldier on and complete this work, God bless you.

Most of all I thank God almighty, who gives without limits and nurtures endlessly.

LIST OF INTERNATIONAL INSTRUMENTS.

1. The Universal Declaration of Human Rights (1948) (UDHR).
2. The International Covenant on Civil and Political Rights (ICCPR).
3. The European Convention on Human Rights (ECHR).
4. The African Charter on Human and People's Rights (ACPHR).
5. American Convention on Human Rights (ACHR).

LIST OF ABBREVIATIONS.

Butterworths Constitutional Law Reports (BCLR)

Bachelor of Laws (LLB)

Chief Justice (CJ)

Constitutional Court (CC)

Company (Co)

European Union (EU)

Equality Court (EqC)

Justice (J)

South African Public Law (SAPL)

South African Journal on Human Rights (SAJHR)

Supreme Court of Appeal (SCA)

United States of America (USA)

United Nations (UN)

Witwatersrand Local Division (W)

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

TABLE OF CASES.

Table of International cases.

Chapter 1: Introduction.

1. Research title.

Balancing the right to freedom of expression with the right to privacy for public figures.

2. Research problem.

In this dissertation, I will analyse the right to freedom of expression and the right to privacy and consider how these two rights relate to one another. In particular I will consider how the right to freedom of expression should be balanced with the right to privacy for public figures, taking public policy considerations into account.

3. Research questions.

The questions which lie at the heart of this research are:

a) Under what circumstances can a public figure's right to privacy be limited in favour of public policy? What role does section 36 play in this regard?
b) How do the German, Canadian and the American legal systems balance the rights to privacy and freedom of expression for public figures and what lessons may South Africa take from these jurisdictions?

4. Motivation for study.

4.1 Background to study.

The right to freedom of expression finds its basis in section 16 of the Constitution.[1] In terms of this section in the Constitution, everyone has the right to freedom of expression which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.[2]

This right however, does not include propaganda for war, incitement of imminent violence, advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm.[3]

[1] The Constitution of the Republic of South Africa 1996 (hereafter "the Constitution").
[2] S 16 (1) (a) to (d) of the Constitution.
[3] S 16(2) of the Constitution.

The right to privacy on the other hand has its confirmation in section 14 of the Constitution. In terms of section 14, everyone has the right to privacy which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed.

Neethling,[4] explains the content of the privacy right as follows:

> Privacy is an individual condition of life, characterised by seclusion from the public and publicity, thus this condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they will be kept private.[5] Privacy relates only to personal facts, immaterial property is excluded.[6]

At common law, the breach of a person's privacy constitutes an *iniuria*.[7] This occurs when there is an unlawful intrusion on someone's personal privacy or an unlawful disclosure of private facts about a person.[8] The common law recognises the right to privacy as an independent personality right that the courts consider to be part of the concept of *dignitas*.[9]

The unlawfulness of an actual infringement of privacy is judged in the light of the contemporary *boni mores* and the general sense of justice of the community as perceived by the court.[10]

In *Shabalala Msimang v Sunday Times and others,*[11] the court held that the medical records of an individual are private and confidential in terms of the National Health Act.[12] In this case, Shabalala Msimang was a minister and Member of Parliament in the country. She had been admitted at a Sandton private hospital for a liver transplant.

It was alleged that she needed to undergo a liver transplant because she had been drinking too much alcohol. After she was admitted in hospital, the Sunday Times

[4] Neethling 2001: 30.
[5] Neethling 2001: 30.
[6] Neethling 2001: 30.
[7] Currie and de Waal 2005: 316.
[8] *Financial Mail v Sage Holdings* 1993 2 SA 451 (A); Currie and de Waal 2005: 24.
[9] *Universiteit van Pretoria v Tommie Meyer Films Bpk* 1979 1 SA 441 (A).
[10] *Financial Mail v Sage Holdings* 1993 2 SA 451 (A) ; Currie and de Waal 2005: 24
[11] *Shabalala Msimang v Sunday Times* 2008 3 BCLR 338 (W) at par 26.
[12] Act 61 of 2003.

newspaper obtained her hospital records by unlawful means and had published an article titled *'Manto's hospital booze binge'* in which they were potraying the minister as an alcoholic.[13]

Shabalala Msimang then applied to court for an interdict to stop the newspaper from commenting and publishing further on her hospital stay and her health status, and also that the health records which were obtained by unlawful means be brought back.[14]

The newspaper contended that the publication of the article was protected by the Constitution.[15] It was strenuously contended on behalf of the respondents that there is a great public interest in publication of the allegations in the respondents' article of 12 August 2007 and this public interest overrides any entitlement, that the applicants may otherwise have had, to the relief sought.[16]

Thus the implication of this judgement is that when it is in the public interest, then sometimes the right to confidentiality of an individual can be superseded by the right to freedom of expression, especially for public figures.

This case was in the public interest because the person whose rights have been infringed was a cabinet member who was responsible for the portfolio of National Health and in terms of the Constitution,[17] she made an oath to obey, respect and uphold the Constitution and all other laws of the Republic of South Africa and hold her office as a Minister with honour and dignity in terms of Schedule 2 of the Constitution.

Public figures should thus ensure that they exercise their powers within allowable limits. Because she was a public figure, arguably many people were interested in her personal and public life. The question then arises as to when will public policy considerations allow a public figure's right to privacy to be overridden, and in terms of which allowable limits?

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[13] *'Manto's hospital booze binge' Sunday Times* 12 August 2007: 2.
[14] *Shabalala Msimang v Sunday Times* at par 4.
[15] S 16(1) (a) and (b) of the Constitution provides that everyone has the right to freedom of expression which includes freedom of the press and other media, freedom to receive and impart information or ideas.
[16] *Shabalala Msimang v Sunday Times* at par 11.
[17] S 95 of the Constitution.

The aim of this research is to provide a clear position on the right of public figures to their privacy as well as educating the society that everyone ought to be afforded the opportunity to enjoy all the rights contained in the Bill of Rights, including the right to privacy when it comes to public figures.

The public ought to be educated that when they exercise their right to freedom of expression. They must keep in mind to respect and value the right to privacy of public figures as far as possible. Only when it is in the interests of justice and is in the interests of the society can we over-ride and limit the right to privacy for public figures.

4.2 Literature review.

The right to freedom of expression finds its basis in section 16 of the Constitution.

The importance of the right to freedom of expression is to ensure openness, transparency and in some cases, accountability.[18] Freedom of expression is in my view one of the most fundamental and valuable rights in our Bill of Rights. Its recognition contributes immensely to the moral agency of individuals and facilitates the search for hidden truths by individuals and the society generally[19]. Its existence may also produce good results for the community.[20]

4.2.1 The importance of the right to privacy and why this right is protected.

The right to privacy on the other hand also has its confirmation in section 14 of the Constitution. The importance of the right to privacy is in my view, to give everybody a sense of individuality about themselves and their things. In *Bernstein and Others v Bester NO and others,*[21] the court held that privacy is an elusive concept that has been the subject of much debate by scholars.[22] The court in this case defined the scope of privacy as closely related to the concept of identity and that such a right is not based on the notion of an unencumbered self, but on the notion of what is necessary to have one's own autonomous identity.[23]

[18] Currie and de Waal 2005: 360.
[19] Currie and de Waal 2005: 360.
[20] Currie and de Waal 2005: 360.
[21] 1996 4 BCLR 449 (CC).
[22] *Bernstein and Others v Bester NO and Others* 1996 4 BCLR 449 (CC) at par 65.
[23] *Bernstein and Others v Bester NO and Others* at par 65.

The right to privacy in my view is important because it contributes to a person's realisation of his or her right to psychological and bodily integrity.[24] Some people, value their private life so much, and would like for such private life to be kept private because disclosure of some of it might result in extreme trauma as well as pain and suffering.

However, if it is in the public interest such private life, may not be kept from the public. People want to know how their representatives conduct themselves, so that they can make informed decisions.

In *NM and others v Charlene Smith and others*,[25] the court demonstrated the value of privacy and held that the importance of privacy is asserted because of our constitutional understanding of what it means to be a human being. An aspect of privacy entails the right to choose what personal information of ours is released into the public domain.[26] The more important the information is in fostering privacy, the more it affords a person of his or her right to privacy. It should be left to an individual to make the primary decision whether to release private information or not.[27]

The courts protect the right to privacy, but they also at the same time acknowledge that this right is not absolute; it may be limited in certain circumstances.[28] The unlawfulness of a factual infringement of privacy is judged in light of contemporary *bonis mores* and the general sense of justice of the community.[29]

The courts have explained the right to privacy to include entering a private residence without being authorised to do so, therefore ensuring security of persons within the private building, reading private documents and listening to private conversations.[30]

Publishing a person's photograph without authorisation has also been held to be a grave infringement of privacy.[31]

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[24] S 12 (2) of the Constitution provides that everyone has the right to bodily and psychological integrity.
[25] 2007 7 BCLR 751 (CC).
[26] *NM and others v Charlene Smith and others* at par 132.
[27] *NM and others v Charlene Smith and Others* at par 132.
[28] Currie and de Waal 2005: 318.
[29] Currie and de Waal 2005: 318.
[30] *Bernstein v Bester NO* at par 68.
[31] *O'keeffe v Argus Printing and publishing Co Ltd* 1954 3 SA 244 (A) at P247-249; Currie and de Waal 2005:316.

But then, there is a gap in the protection of privacy rights, especially when it comes to public figures. The gap exists when one tries to balance the right to privacy with the right to freedom of expression, especially for public figures.

In *Shabalala Msimang*, the court held that the public has a right to be informed of current news and events concerning the lives of public persons such as politicians and public officials, the public has to be informed not only on matters which have a direct effect on life, such as legislative enactments, and financial policy.[32] This right may in appropriate circumstances extend to information about public figures.[33]

The gap exists in that at times public figures' right to privacy becomes compromised and thus ends up not being enjoyed, and members of the public use their right to freedom of expression to justify the infringement, which may not be a justifiable infringement.

We need to look at making laws which protect the right to privacy of public figures to close this gap whilst at the same time, not compromising our right to freedom of expression. It should be noted that public figures, despite the fact that they are out there in the limelight they also are entitled to an equal enjoyment of all rights, the right to privacy included.

The courts currently in balancing these two rights, firstly, recognise the importance of having these two rights as contained in the Bill of Rights and secondly, weigh the right and the interests protected by such a right and looks at which one weigh more under the circumstances.[34] In my view the courts resort to employing this approach because our Constitution does not have a hierarchy of rights.

In *Shabalala Msimang*,[35] the court stated that the defence of public interest raised by the respondents entails a recognition of the constitutional importance of the rights to freedom of expression and to receive and impart information and ideas, entrenched in section 16 of the Constitution.[36]

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[32] *Shabalala Msimang and Others v Sunday Times* 2008 6 SA 102 (W) at par 38.
[33] *Shabalala Msimang and Others v Sunday Times* at par 38.
[34] This conclusion is drawn from reading these two cases: *Shabalala Msimang* 2008 6 SA 102 (W) and *Khumalo v Holomisa* 2002 5 SA 401 (CC).
[35] *Shabalala Msimang and Others v Sunday Times* at par 22.
[36] *Shabalala Msimang and Others v Sunday Times* at par 22.

The court however went on to say that *Shabalala Msimang* enjoys a constitutional basis for her claim to right to privacy which is protected by section 14 of the Constitution and must be afforded the opportunity to enjoy it.[37] The courts strive by all means to afford people their rights while at the same time not infringing the rights of others unreasonably.

The question then arises as to where should the emphasis be when these two rights are at loggerheads with each other? In most cases, it depends on the circumstances of each case. For example, in *Shabalala Msimang*, the court held that where a person seeks publicity and consents to it by nature of the position occupied by such an individual, this individual cannot object when his or her actions are publicised.[38]

The court went on further to say this principle applies equally in appropriate cases where the information sought to be published has been unlawfully acquired. However, any such interference must be both reasonable and necessary. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements.[39]

The Constitution provides for a situation wherein a person's rights may be limited in some circumstances, depending on each case. This process is called the limitation of rights and section 36 of the Constitution sets out how this limitation must be undertaken.

According to section 36, 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 extent and nature of the limitation

[37] *Shabalala Msimang and Others v Sunday Times* at par 30.
[38] *Shabalala Msimang and Others v Sunday Times* at par 40.
[39] *Shabalala Msimang and Others v Sunday Times* at par 40.

d. The relation between the limitation and its purpose

e. Less restrictive to achieve the purpose

The law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose. To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law, (infringement of the fundamental right) and the benefits it is designed to achieve, (purpose of the law) or rather the purpose of the limitation.[40] Arbitrary limitations cannot be allowed and the limitation must be acceptable in an open society.[41]

Case law, has shown also, that when it comes to the right to privacy and the right to freedom of expression, in arriving at the question of whether or not there must be more protection for the privacy rights for public figures, the court must have due regard to the right to dignity and privacy of an individual and then weigh the circumstances between the harm created and the nature of the right protected for a said individual.[42]

Currie argues that when limiting the right to privacy of an individual, the limitation must be reasonable.[43] Reasonableness depends on the set of values to which one links the standard of reasonableness.[44] A person's privacy shrinks the more the person has communal relations.[45] This means that the more a person enters public domain, the more their right to privacy diminishes.

The reason the courts protect our right to privacy is because privacy, contributes immensely to the notion of self -worth and dignity, to be able to afford people of their right to self-identification.[46]

5. Research approach and methodology.

[40] Currie and de Waal 2005: 178.
[41] Currie and de Waal 2005: 178.
[42] *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) at par 43.
[43] Currie and de Waal 2005: 178.
[44] Currie and de Waal 2005: 178.
[45] Currie and de Waal 2005: 319.
[46] Statement made by Koketso Boshego, third year Medical Sciences student at the University of Pretoria.

My approach for this research will be a legal analytical one, in that it will consist of reading case law, journal articles and legal textbooks to try and find out where the balance lies between the right to privacy, the right to dignity and the right to freedom of expression.

I will undertake a legal comparison with the applicable provisions in Canadian American and German laws relating to the right to privacy as well as the right to freedom of expression. The aim of this comparative study will be to draw lessons from these countries.

To this end therefore, the study seeks to make a modest contribution to the ongoing debate about the profound issues and challenges being faced by public figures especially when it comes to balancing their right to privacy with public policy considerations.

6. Chapter overview.

This mini-dissertation will consist of five chapters.

Chapter one is the introduction and background chapter laying down the foundation.

In chapter two, I will focus on the legal framework of the right to freedom of expression and privacy as well as under which circumstances may a person's right to freedom of expression be limited in favour of public interest.

In chapter three, I will deal with the limitation clause as contained in section 36 of the Constitution.

In chapter four, a comparative study with the German, Canadian and the American Constitutions will be made as well as lessons to be learnt from other jurisdictions.

Chapter five will be a summary of the conclusions drawn from the whole study, insights and make some recommendations.

Chapter 2: Under what circumstances may a person's right to privacy be limited in favour of public interest?

2.1 Introduction.

At the heart of the right to privacy, lies a person's dignity and stature. Yet at the heart of democracy, lies the right to freedom of expression. In this chapter, I will discuss the legal frameworks of these two rights in answering the question: under what circumstances may a person's right to privacy be limited in favour of the public's interest?

I will discuss the content of the right to freedom of expression, as well as outline why the right to freedom of expression is important and necessary. I will also discuss the content of the right to privacy and the legitimate expectations of what privacy entails. I will also discuss the doctrine of balancing of rights as well as reasonableness. I will then look at the cases of *Khumalo v Holomisa* [47] and *National Media Ltd v Bogoshi*,[48] to try and answer the question posed above. I will then end with a conclusion which will be made from the study conducted in this chapter.

2.2 The legal framework of the right to freedom of expression.

2.2.1 Freedom of expression.

Freedom of expression finds its basis in section 16 of the Constitution.[49] Freedom of expression is important because it contributes to the Constitution's project of overturning an authoritarian past and establishing democracy in its place.[50]

In the pre-Constitutional era, the right to freedom of expression was not enjoyed as much as it is in the current constitutional dispensation.[51] The Suppression of Communism Act[52] authorised the banning of individuals and organisations.[53] The banned person would be a political nonentity, would be confined to his or her home, and would not be allowed to meet with more than one person at a time except a family member.[54]

Banned people were also not allowed to hold any office in any organisation, speaking publicly or writing any publication and neither could they be quoted in any publication.[55] Policies were introduced to enable the executive to stop the publication of newspapers, magazines and books.[56] Only government controlled radio stations

[47] 2002 8 BCLR 771 (CC).
[48] 1998 4 SA 1196 (SCA).
[49] The Constitution.
[50] *S v Mamabolo* 2001 3 SA 409 (CC) at par 41.
[51] http://www.sahistory.org.za/archive?field_media_library_type_tid=All&combine= accessed on 27 June 2016.
[52] Act 44 of 1950, which was later renamed the Internal Security Act in 1976. The Act was repealed in 1982.
[53] S 3 of the Suppression of Communism Act, 44 of 1950 (hereafter referred to as 'the Suppression of Communism Act').
[54] S 9 of the Suppression of Communism Act.
[55] S 6 of the Suppression of Communism Act.
[56] http://www.wan-ifra.org/sites/default/files/field_article_file/Bizos.pdf accessed on 16 June 2016.

were allowed to operate.[57] Television was prohibited for a number of years, some newspapers closed down and some journalists were prohibited from working for the news media.[58] This is how bad freedom expression was suppressed during the apartheid era.

This came to an end in 1996 when the new Constitution was adopted and it included the right to freedom of expression.[59] Freedom of expression is in my view important and should be valorised and upheld at all times because it is part of what it means to be a human being and alive, it entails the protection of things which please other people but do not stay well with you as an individual and it also entails tolerance and respect. It encourages citizens in a country to be active and involved in what happens around them.

2.2.2 Why freedom of expression?

According to Dworkin,[60] freedom of expression is valuable because expression is an important part of what it means to be human.[61] He explained the value of expression as follows:

> Freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and constitutive of a feature of a just political society that government treat all its adult members as responsible moral agents. That requirement has two dimensions firstly, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies them of their moral responsibility, when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one no official and no majority has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it.[62]

Based on what Dworkin has said, it is safe to conclude that freedom of expression lies at the heart of a fair and accountable government. Freedom of expression is important because it also contributes to the Constitution's project of overturning an

[57] http://www.wan-ifra.org/sites/default/files/field_article_file/Bizos.pdf accessed 16 June 2016.
[58] http://www.wan-ifra.org/sites/default/files/field_article_file/Bizos.pdf accessed 16 June 2016.
[59] http://www.sahistory.org.za/archive?field_media_library_type_tid=All&combine accessed on 27 June 2016.
[60] Dworkin 1996: 200.
[61] Dworkin 1996: 200.
[62] Dworkin 1996: 200.

authoritarian polity and establishing a democracy in its place.[63] It also helps a society to make informed decisions regarding choosing the people it wants or wishes to elect into power.[64]

Emerson, an American jurist who wrote about the First Amendment to the United States Constitution (the provision protecting the right to free speech), argues that there exist four principal reasons for the protection of this right in a democratic society:[65]

1. It allows for self-actualisation as citizens voice their opinion on the matters concerning themselves and the state, and in so doing affirms their inherent dignity;

2. It aids the quest for truth which is essential to the creation of an open, transparent and accountable government which when stifled, hinders social debate;

3. It allows for meaningful social commentary and engagement with the state and is essential to participatory democracies; and

4. It promotes social cohesion and fosters a nation that is able to rationally engage in conversations despite differing opinions and thus allowing for the creation of consensus and tolerance.[66]

Basically freedom of expression lies at the heart of humanity. It gives society the dignity it deserves and lies at the heart of an accountable and open government. It is my view that a government would steal so much from its citizens if it takes away its rights to speak freely.

2.2.2 The content of the right to freedom of expression.

The right to free expression in South Africa is not narrowly defined[67] and may include the displaying of posters, and also painting and sculpting.[68] Artists are often responsible for radical criticisms of the functioning of society.[69] Their work has often

[63] *S v Mamabolo* 2001 3 SA 409 (CC) at par 41.
[64] *S v Mamabolo* at par 41.
[65] Vadachalam (2014) 6 SALJ 15.
[66] Emerson 1970: 6-7; available at http://chicagounbound.uchicago.edu/journal_articles accessed on 23 July 2016.
[67] *De Reuck v Director of Public Prosecutions* (*Witswatersrand Local Division*) 2003 3 SA 345 (CC) at par 48.
[68] *De Reuck v Director of Public Prosecutions* at par 48.
[69] Currie and de Waal 2005: 370.

been sought to be controlled by governments, lest the artwork upset sensitive people.[70] Freedom of expression entails artistic creativity, freedom of the press and other media, freedom to receive and impart information or ideas and academic freedom as well as freedom of scientific research.[71] Each of these freedoms will be discussed briefly below.

2.2.2.1 Freedom of artistic creativity.

Artists sometimes are responsible for radical criticism of the way the society functions.[72] At times though, their work upsets sensitive people. This is one of the reasons why governments have been tempted to control the production and exhibition of art.[73]

Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another,[74] dealt with the alleged infringement of the Carling Black Label trademark (owned by the respondents) by the appellants who used the trademark in a parodying T-shirt in order to make a social comment. The court dismissed the claim that the trademark was infringed, as the likelihood of economic prejudice had not been established.[75]

Importantly, Sachs J held that:

> Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of bodies such as Laugh it Off to advance subversive humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts.[76]

Sachs J further went on to state that there was a risk to societies taking offence to irreverence as being detrimental to their existence. Instead, he holds that humour is one of the 'great solvents of democracy' that 'enables a multitude of discontents to

[70] Currie and de Waal 2005: 370.
[71] S 16 (1) (a) to (d) of the Constitution.
[72] Currie and de Waal 2005: 370.
[73] Currie and de Waal 2005: 370.
[74] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 1 SA 144 (CC) at par 66.
[75] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* at par 66.
[76] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* at par 108.

be expressed in a myriad of spontaneous ways'.[77] It is an elixir of constitutional health.[78]

2.2.2.2 Freedom of the press and other media.

The rationale behind the constitutional protection of the media and press is the important contribution made by the press to one of the goals of maintaining and establishing an open and democratic society.[79] Thus, the press is protected by the right to freedom of expression and has duties to promote freedom of expression on behalf of society.[80] Society will make informed decisions through the information it receives from the media. Thus the media are bearers of constitutional rights and constitutional obligations.[81] The press is free to report and broadcast anything which is of public interest and may benefit society.

Media freedom is very critical to freedom of expression. The media is an important role player because it brings matters of national importance and interest closer to the society. It is what makes the people different from animals, that they can read, comprehend and make informed decisions through what they have read in the media. By censoring the media, one steals so much from a society.

2.2.2.3 Freedom to receive and impart information and ideas.

The right to receive and impart information and ideas removes any doubt whether the right to freedom of expression aims to protect only speakers or both speakers and listeners.[82]

In *Case v Minister of Safety and Security*,[83] Mokgoro J held that the right to freedom of expression embraced the right to receive, hold and consume expressions

[77] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* at par 109.
[78] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* at par 109.
[79] Currie and de Waal 2013: 368.
[80] Currie and de Waal 2013: 368.
[81] Currie and de Waal 2013: 295.
[82] S 16 (1) (b) of the Constitution is strictly for purposes of receiving and imparting information and not a right to receive information. The right to information is contained in section 32 of the Constitution; Currie and de Waal 2013: 369.
[83] 1996 3 SA 617 (CC).

transmitted by others.[84] Thus this right protects both the carriers, transmitters and the recipients of information.

2.2.2.4 Academic freedom and freedom of scientific research.

At the core of the right to academic freedom is the right of an individual to do research, to publish and to disseminate learning through teaching, without government interference.[85] The right to academic freedom vests in an individual and not a university.[86] A university's decision making body may be prone to infringing academic freedom.[87] However academic freedom would be a hollow idea without institutions such as universities.[88]

One of the reasons for the establishment of universities is academic freedom.[89] If the state could prescribe to universities that no research critical of the government may be funded by the university, or that no researchers critical of government may be appointed, academic freedom would be stranded.[90]

Academic freedom is relevant in discussing freedom of expression because it is part of what freedom of expression contains. Academic freedom is what inspires people to venture into different careers of their choice, to conduct an independent research and to come with solutions to real life problems.

Having discussed the right to freedom of expression in this section, it is safe to conclude that freedom of expression is an important component in a democratic society and plays a major role in bringing the whole concept of democracy alive. Without freedom of expression, democracy has no meaning and the society will be unable to make informed and important decisions. Freedom of expression also comes and is manifested in many forms as I discussed earlier.

2.3 The legal framework of the right to privacy.[91]

[84] *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) at par 25.
[85] Currie and de Waal 2013: 370-371.
[86] Currie and de Waal 2013: 370-371.
[87] Currie and de Waal 2013: 371.
[88] Currie and de Waal 2013: 371.
[89] Currie and de Waal 2013: 371.
[90] Currie and de Waal 2013: 371.
[91] S 14 of the Constitution provides as follows:

Privacy is a valuable and advanced aspect of personality.[92] Sociologists and psychologists agree that a person has a fundamental need to privacy.[93] In *National Coalition for Gay and Lesbian Equality v Minister of Justice,*[94] the court emphasised that we all need a right to privacy because privacy recognises that we all have a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interferences from the outside community.[95] Privacy is thus in my own view, important and very prudent for self-worth and dignity. It contributes immensely to a person's dignity and personal stature in the community.

The right to privacy as contained in section 14 of the Constitution, has two parts. The first part contains a general right to privacy, while the second part protects against specific enumerated infringements of privacy.[96] These enumerated infringements include searches and seizures of someone's person, property or possessions and the infringement of the privacy of communications.[97]

In most cases, when someone's person, home or property is searched, or when their possessions are seized or communications intercepted, the right to privacy is infringed.[98] However, because the right against searches and seizures is a subordinate element of the right to privacy, constitutional protection is triggered only when an applicant shows that a search, seizure or interception of communication has infringed the general right to privacy.[99] This is clear from the wording contained in section 14 of the Constitution. The right against searches and seizures is placed within the parameters of the general right to privacy.[100]

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14. Everyone has the right to privacy, which shall include the right not to have-
    a) Their person or home searched
    b) Their property searched
    c) Their possessions seized or
    d) The privacy of their communications infringed.

[92] Neethling 2001 : 29.
[93] Neethling 2001: 29.
[94] 1999 1 SA 6 (CC).
[95] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA (CC) at par 23.
[96] Currie and de Waal 2013:294.
[97] Currie and de Waal 2013: 294; S 14 of the Constitution.
[98] *Director of Public Prosecutions*: *Cape of Good Hope v Bathgate* 2000 2 SA 535 (CC) at par 82.
[99] Currie and de Waal 2013: 295.
[100] Currie and Johan de Waal 2013: 295.

The interests underlying the entrenchment of a right to privacy in the Bill of Rights, have long been recognised by the common law as important reasons for protecting privacy. The common law, recognises the right to privacy as an independent personality right that the courts consider to be part of the concept of *dignitas*.[101]

The right to privacy has some form of a degree of occurrence based on the presumed probability that people will respect the privacy of others. This presumed degree of occurrence exists where the defendant has manifested an expectation of privacy that society recognises as reasonable.[102] The test is whether the defendant exhibited an expectation of privacy in a place or item searched, and whether society generally recognises the defendant's expectation of privacy as reasonable.[103]

A legitimate expectation of privacy has two components: (a) the subjective expectation of privacy and (b) what society has recognised as objectively reasonable.[104] The subjective expectation component entails that privacy is what feels to be private.

This subjective expectation of privacy does more than say privacy is what feels private.[105] One can have no expectation of privacy if one has consented explicitly or implicitly to having one's privacy invaded; this is the second leg which entails an objective component.[106]

One's subjective privacy expectation must be reasonable to qualify for the protection of the right.[107] What is reasonable however depends on the circumstances of each case.

2.3.1 The content of the right to privacy.

Privacy is what can reasonably be considered to be private.[108] In *Mistry v Interim National Medical and Dental Council of South Africa*, the court said the following about the continuum of privacy: [109]

[101] *Bernstein v Bester NO* 1996 2 SA 751 (CC) at par 68.
[102] http://definitions.uslegal.com/l/legitimate-expectation accessed 18 June 2016.
[103] http://definitions.uslegal.com/l/legitimate-expectation accessed 18 June 2016.
[104] Neethling 2001: 252.
[105] Currie and de Waal 2013: 298.
[106] Currie and de Waal 2013: 298.
[107] Currie and de Waal 2013: 318.

> The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. This would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction the scope of personal space shrinks accordingly.

This is not a new test for privacy, which may be thought of substituting the legitimate expectation test for privacy, but rather it is an application of the latter test.[110] 'In the truly personal realm', an expectation of privacy is more likely to be considered reasonable than a privacy expectation in the context of 'communal relations and activities'.[111]

2.4 Right to privacy and freedom of expression: Where should the emphasis be?

With the right to freedom of expression and the right to privacy having been entrenched in the Bill of Rights,[112] there is no doubt that these two rights may be in conflict with each other, particularly in cases involving public figures and the media. The notion of privacy has, been partially protected within several common law doctrines, including trespass, nuisance, breach of confidence and defamation.[113]

The media is governed and protected by the code of ethics and conduct for South African print and online media (also known as the press council),[114] which came into

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[108] *Bernstein v Bester NO* at par 67; Currie and de Waal 2013: 318.

[109] *Mistry v Interim National Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC) at par 27; *Bernstein v Bester NO* at par 67.

[110] Currie and de Waal 2013: 318.

[111] Currie and de Waal 2013: 318.

[112] The Bill of Rights is contained in chapter 2 of the Constitution.

[113] Currie and de Waal 2013: 295.

[114] It is popularly known as the press council or the Press Ombudsman, which seeks and aims to safeguard responsible reporting and that media subjects are confined within the correct parameters of the law without infringing on the rights of anyone, http://www.presscouncil.org.za/ accessed on 13 July 2016.

effect on 1 January 2016.[115] The press council exists to protect the media and to also ensure responsible and ethical reporting by the media.[116]

The primary purpose of this press council is to serve society and to give practicality to section 16 of the Constitution.[117] In its preamble, it reads that the media exists to serve the society, their freedom provides for independent scrutiny for the forces that shape society, and is essential to realising the promise of democracy.[118] It enables citizens to make informed judgements on the issues of the day, a role whose centrality is recognised in the Constitution.[119]

The media strives to hold the rights contained in section 16 of the Constitution in trust for the country's citizens, and the media is subject to the same rights and duties as an ordinary individual.[120] Everyone has a duty to defend and further their rights, in recognition of the struggles that created them, the media, the public and the government who all make up the democratic state.[121]

The media's work is guided at all times by the public interest, understood to describe information of legitimate interest or importance to citizens.[122] Journalists are thus expected to commit themselves to the highest standard in order to maintain credibility and to keep the trust of the public.[123] This denotes that journalists must strive for the truth, avoid unnecessary harm, reflect a multiplicity of voices in their coverage of events, show a special concern for children and other vulnerable groups, exhibit sensitivity to cultural customs of their readers and the subjects of their reportage and act independently.[124]

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[115] The code of ethics, also known as the press Ombudsman, was adopted by parliament in November 2015, it binds all media stakeholders and all journalists, it is however an independent organisation which seeks to promote responsible reporting, it is enforced by members of its council and was drafted by parliament in 2015.
[116] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[117] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[118] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[119] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[120] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[121] This is found in the second paragraph of the preamble of the Code of Ethics and conduct for South African print and online media, which code was adopted in November 2015 by the South African parliament, http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[122] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[123] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.
[124] http://www.presscouncil.org.za/contentPage?code=presscode accessed 25 March 2016.

It is not inevitable that privacy and free speech rights conflict, but where a conflict exists, how to resolve the competing values encompassed in these rights becomes an essential and unavoidable question. There is a need for workable and consistent criteria to assist the courts in undertaking this task in my view.

For example, should the courts adopt a hierarchal approach to rights with freedom of expression weighing heavier as it does in some jurisdictions? Or should the starting point be that these two rights are of equal status?[125] Is it a balancing exercise for the courts or does it involve a more complex or stringent process? This is where the chapter for lessons to be learnt from other jurisdictions will be of great importance.

The Promotion of Equality and Prevention of Unfair Discrimination Act[126] gives content to the rights of freedom of expression and dignity, and is the tool through which those constitutional rights must be accessed and enforced.[127] Sections 10 and 12 of PEPUDA relate to freedom of expression and provide for the circumstances in which the right can be justifiably limited.[128] Thus one of the Acts which one may rely on when bringing an action against the restriction of the right to freedom of expression is PEPUDA.

Although there is no hierarchy of rights in our Bill of Rights, freedom of expression should be the rule to which private life is an exception.[129] This means that in order to succeed with a violation of a right to privacy complaint, it is necessary to show that the interference would be an unbearable breach of private life or breach of intimate private life before a limitation may be placed on freedom of expression.[130]

The courts must adopt a balancing exercise wherein they must take particular factors in account when limiting rights.[131] "The factors to be weighed include amongst others, the significance in the particular case of the values underlying the Bill of Rights, the importance of the intrusion on a protected right in public interest terms, the limits that will be placed on the common law in the particular case and the

[125] Currie and de Waal 2013: 295.
[126] Act 4 of 2000 'PEPUDA'.
[127] Currie and de Waal 2013: 163-185.
[128] Currie and de Waal 2013: 163-185.
[129] *Tshabalala-Msimang v Makhanya* at par 26.
[130] Currie and de Waal 2013: 163-185.
[131] Currie and de Waal 2013: 163-185.

effectiveness of the intrusion in protecting the interests that are put forward to justify the limiting of another right".[132]

The courts must evaluate first the nature of the information and the situation of those concerned.[133] Thus, a right can only be limited in allowable and justifiable circumstances. The courts must not favour one right at the expense of the other, they should instead limit one right in favour of the other one, but the said limitation must be qualified in that it should be proportional and reasonable. It should also be open and justifiable. In the next chapter, I will discuss limitation of rights in greater detail and also discuss how rights must be limited.

In the next section of this chapter I will discuss two court cases which dealt with the rights to freedom of expression and the right to privacy for public figures. I will be making reference to this two cases because they explain and make us understand that when it is in the public interest, freedom of expression override the right to privacy. These two cases will also help us understand the criteria which the courts use to limit the right to privacy of public figures, in favour of the right to freedom of expression.

2.5 The approach of the courts in *Khumalo v Holomisa* [134] and *Bogoshi*.[135]

In *Khumalo v Holomisa* the respondent was well-known South African politician and the leader of a political party[136] who sued the applicants whom we may assume are responsible for the publication of a newspaper called the Sunday World for defamation arising out of the publication of an article in their newspaper.[137] In the article it was stated amongst other things that the respondent was involved in a gang of bank robbers and that he was under police investigation for this involvement.[138]

The applicants excepted to the respondent's particulars of claim.[139] They averred that given that the contents of the statement were matters in the public interest, the

[132] Currie and de Waal 2013: 163-185.
[133] Currie and de Waal 2013: 185.
[134] *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).
[135] *National Media Limited v Bogoshi* 1998 4 SA 1196 (SCA).
[136] Bantubonke Harrington Holomisa, a leader of a political party called United Democratic Movement.
[137] *Khumalo v Holomisa* at Par 1.
[138] *Khumalo v Holomisa* at Par 1.
[139] *Khumalo v Holomisa* at par 1.

failure by the respondent to allege in his particulars of claim that the statement was false rendered the claim excipiable in that it failed to disclose a cause of action.[140]

They based their exception on two separate grounds: the direct application of section 16 of the Constitution which protects the right to freedom of expression and alternatively on the common law, asserting that it should be developed to promote the spirit, purport and objects of the Bill of Rights as contemplated by section 39(2) of the Constitution.[141]

The exception also stipulated that the obligation imposed upon a plaintiff to establish the falsity of a defamatory statement did not apply to all plaintiffs in all defamation actions but only in certain actions.[142] The exception in this regard was based on two alternative formulations as the following excerpt indicates: [143]

> It is inconsistent with s 16 of the Constitution to permit a plaintiff to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to the fitness of a public official for public office, alternatively to the fitness of a politician for public office, in circumstances where that plaintiff does not allege and prove the falsity of the statement in question. It is inconsistent with s 16 of the Constitution to permit a politician, alternatively a public official, to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to his fitness for public office, in circumstances where he does not allege and prove the falsity of the statement in question.[144]

The court made an order that the applicants had not shown that the common law of defamation is inconsistent with the provisions of the Constitution. The appeal was dismissed with costs.[145] Thus, this meant that in order for the applicants to succeed, they had to show that the common law was in breach of the Constitution.

This judgment demonstrates that when it comes to public figures, freedom of expression may at times override their right to privacy. The court in this case stated

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[140] *Khumalo v Holomisa* at Par 2.
[141] S 39(2) of the Constitution provides that: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[142] *Khumalo v Holomisa* at Par 3.
[143] *Khumalo v Holomisa* at Par 3.
[144] *Khumalo v Holomisa* at Par 3.
[145] *Khumalo v Holomisa* at Par 35.

that it will be inconsistent with the right to freedom of expression to permit a public figure to claim damages for publication of information where such information relate to matters which are of public importance. [146]

The court might have adopted this approach to demonstrate to the public that public figures have a diminished right to privacy. I make reference to this case because it demonstrates that when it is in the public interest and of public benefit, the court may order that the right to privacy be superceded by the right to freedom of expression. This may be done to ensure that people make informed decisions about the people they choose to positions of power and to expose flaws within different systems.

In *National Media Ltd v Bogoshi,*[147] the Supreme Court of Appeal held that besides being able to establish that the contents of a defamatory statement were true and their publication to the benefit of the public, a publisher could avoid liability for defamation where it could not prove that the statement was true but it could establish that publication was nevertheless reasonable.[148]

The applicants relied on section 16 of the Constitution which entrenches the right to freedom of expression.[149] The Court noted that this is an important right constitutive of democracy and individual freedom.[150] The mass media have a particular role in the protection of freedom of expression to ensure that individual citizens are able to receive and impart information and ideas. They are thus bearers of both constitutional rights and obligations.[151]

A further relevant constitutional issue is that of human dignity which accords value both to the personal sense of self-worth of individuals and to the public's estimation of that worth.[152] The common law therefore needs to strike an appropriate balance between these constitutional interests.[153]

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[146] *Khumalo v Holomisa* at Par 35.
[147] 1998 4 SA 1196 (SCA).
[148] *National Media Ltd & Others v Bogoshi* at P207-208.
[149] *National Media Ltd & Others v Bogoshi* at par 2.
[150] *National Media Ltd & Others v Bogoshi* at P207-208.
[151] *National Media Ltd & Others v Bogoshi* at P207-208.
[152] *Gender Justice Network v Malema* 2010 7 BCLR 729 (EqC) at par 737.
[153] *National Media Ltd & Others v Bogoshi* at P 631-632.

Requiring an injured party to prove a statement to be false means that he or she may not succeed even where the publication of the defamatory statement was not reasonable. Moreover, proving the falsehood of statements may often be difficult. The Supreme Court of Appeal held that the rule the applicants contended for would not strike an appropriate balance between conflicting constitutional interests.[154] However, the court found that the defence of reasonableness developed in *Bogoshi*'s case does establish an appropriate balance.[155]

The Court accordingly held that the applicants had not shown that the common law of defamation is inconsistent with the provisions of the Constitution and therefore dismissed the appeal with costs.[156]

This is yet another judgement which gives an answer as to when can freedom of expression override the right to privacy. The *Bogoshi* judgment tells us that when it is reasonable, freedom of expression may override the right to privacy. I specifically made reference to these two cases because they dealt with instances where a public figure took a newspaper to court, alleging that their right to privacy has been invaded and thus claimed damages. Although it was clear that indeed their privacy was invaded by the media, the court in both cases said it was reasonable and acceptable for such invasion, in that it was for a public benefit.[157]

2.6 Conclusion.

Having discussed the legal framework as well as under what circumstances can a person's right to privacy may be limited in favour of public interest, it is safe to conclude that the *Khumalo and Bogoshi* cases answer the question as to under what circumstances can we limit the right to privacy in favour of the public interest.

The answer to this question is that we may limit the said right if it is in the public interest, it is reasonable and it is necessary, but such limitation must be reasonable and justifiable. A question may now arise as to what is reasonableness and what does it entail? According to Bilchitz,[158] reasonableness is no more than a relational

[154] *National Media Ltd & Others v Bogoshi* 1998 (SCA).
[155] *National Media Ltd & Others v Bogoshi* at P 631-632.
[156] *National Media Ltd & Others v Bogoshi* at P 631-632.
[157] *National Media Ltd & Others v Bogoshi* at P 631-632; *Khumalo v Holomisa* at Par 35.
[158] Biltchitz (2003) 19 SAJHR 424.

status, ends measured against means.[159] This means that the law limiting a right in favour of another must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose.[160]

To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law, (infringement of the fundamental right) and the benefits it is designed to achieve, (purpose of the law) or rather the purpose of the limitation.[161]

Thus, reasonableness just means justifiable and acceptable. A right can only be taken away from a specific individual, in a specific situation if it is widely acceptable and justifiable in the society. This is also important to give effect to the principle of legality and the rule of law, to ensure that those in power and entrusted with authority, do not abuse this doctrine of reasonableness by taking arbitrary decisions. In the end, we all must be subjected to the law.

According to Barendt,[162] in arriving at the answer in question, we have to ask what the value of the speech in the particular case is and compare it with the importance of the privacy, which would be sacrificed if freedom of speech is given priority over it and weighs more.[163]

If such information contributes to important political or social debate and does not intrude greatly on intimate details about an individual's private life, say, it mentions in passing only her dietary preferences or what she wore at a dinner party, freedom of expression should take preference over the right to privacy.[164]

The next chapter of this dissertation will deal with the limitation of rights, where section 36 of the Constitution which deals with limitation of rights clause will be discussed and unpacked in greater details. I will research on concepts such as how should rights be limited and the concept of balancing of rights in more details, such

[159] Biltchitz (2003) 19 SAJHR 424.
[160] Currie and de Waal 2005:176.
[161] Currie and de Waal 2005:176.
[162] Barendt 2003: 86
[163] Barendt 2003 : 86
[164] Barendt 2003: 88

as exploring the criticisms and the ambiguity of balancing. I will also discuss the concepts of rationality and proportionality in the limitation of rights process.

Chapter 3: The limitation clause as contained in section 36 of the Constitution of the Republic of South Africa, 1996.

3.1 Introduction.

In this chapter, I will look at the requirements of how fundamental rights may be limited. I will look at the limitation of rights in the context of the right to freedom of expression and the right to privacy, because these two rights are the focus of this dissertation.

Put at its simplest definition, a limitation is a restriction, prevention from enjoying or doing something. A limitation is a justifiable restriction. A law that limits a right infringes a right. A limitation on a right will however not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom.[165]

This means that not all limitations imposed on rights are unacceptable; they however can only be legal and acceptable if they pass the limitation test contained in section 36 of the Constitution. In order for a limitation to be acceptable, the reasons provided and advanced for such a limitation must best be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This is in accordance with the criteria for limitation encapsulated in section 36 of the Constitution.

Section 36 of the Constitution of the Republic of South Africa contains what I refer to as the limitation of rights clause. This section provides for criteria under which rights in the Bill of Rights may be limited.

In this chapter I will analyse concepts such as how should rights be limited and the concept of balancing of rights. I will also explore the criticisms and the ambiguity of the phrase “balancing rights” and then come up with a conclusion.

3.2 Section 36 of the Constitution.

According to section 36 of the Constitution,[166] 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;

[165] Currie and de Waal 2005: 164.
[166] S 36 of the Constitution.

b) The importance of the purpose of the limitation;
c) The extent and nature of the limitation;
d) The relation between the limitation and its purpose; and
e) Less restrictive means to achieve the purpose;

Each of these requirements will now be discussed in more detail below.

I. The nature of the right

One of the concepts employed by section 36 is the doctrine of proportionality. Proportionality requires that a restriction which is imposed by a corrective measure be linked to the severity of the nature of a prohibited act.[167] In simple terms, it means the punishment should fit the crime. It has also been described as an archetypal universal doctrine of human rights adjudication.[168]

The proportionality enquiry required by section 36 involves weighing up the harm done by a law, which is the infringement of a fundamental right, against the benefits that the law seeks to achieve, the reasons for the law or the purpose of the law.[169] Some rights, such as the right to life, carry more weight than others.

This means that their infringement must be widely acceptable and justifiable than rights which carry less weight, like the right to freedom of association.[170] But in certain circumstances, rights which are equally important, compete with each other and in which instance then the courts will have to weigh both rights which are under discussion and decide which right will weigh more in the specific circumstances.

A court must assess what the importance of a particular right is in the overall constitutional scheme.[171] A right that is of particular importance to the Constitution's ambition to create an open and democratic society based on human dignity, equality

[167] https://en.wikipedia.org/wiki/Proportionality_(law) accessed 02 July 2016.
[168] Rautenbach (2014) 17 PER 219; *S v Zuma* 1995 4 BCLR 401 (CC) at par 36-38.
[169] Currie and de Waal 2013: 164.
[170] Currie and de Waal 2013: 164.
[171] Currie and de Waal 2013: 164.

and freedom will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement.[172]

II. The importance of the purpose of the limitation

Section 36 also requires that a limitation be reasonable. Reasonableness is another doctrine which requires that something be proper, fair or moderate under the circumstances. In most cases, the court will look at the circumstances and not the intention of the actor when assessing if a limitation is reasonable.[173]

The doctrine of reasonableness requires that the limitation of a right must serve a purpose.[174] Justifiability requires that the purpose served be one that is worthwhile and important in a Constitutional democracy.[175] A limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable.[176] The purpose of protecting the personal morality of a sector of society will not qualify as a justification for the limitation of rights.[177]

This is so because people need to be guided by a set of rules and laws which they can consistently rely on rather than relying on set of doctrines which they resort to only when it suits them.[178] What may be moral may not always be legal and what is legal may not always be moral.[179] For example majority of the South African elderly people perceive abortion as something immoral yet it is legal in the country.[180] Again morality is not stagnant in that what may be moral in one community may not be moral in another society.[181] So we need to have a set standard of laws that we need to consistently rely and conform to.

Will protecting the privacy of a public figure be a purpose that deserves protection? The answer to this question is that protecting the privacy of a public figure depends

[172] Currie and de Waal 2013: 164.
[173] https://www.google.co.za/#q=what+does+reasonableness+mean+in+law accessed 02 July 2016.
[174] Currie and de Waal 2013: 166.
[175] Currie and de Waal 2013: 166.
[176] Currie and de Waal 2013: 166.
[177] Currie and de Waal 2013: 166-167.
[178] Telephonic discussion between Angelinah Boshego and Happy Raligilia in December 2015.
[179] Statement made by Mr Kagiso Tladi, Law lecturer at the University of Limpopo.
[180] Telephonic discussion between Angelinah Boshego and Happy Raligilia in December 2015.
[181] Telephonic discussion between Angelinah Boshego and Happy Raligilia in December 2015.

on the nature of the information sought to be protected.[182] If the information sought to be protected is of public benefit, public interest and can assist the society in making informed decisions then that information need not be protected because it is of public benefit.[183]

Such protection must take place in terms of a law of general application and or by an Act of parliament or even the common law. However such protection should be subject to exceptions, for example if the information sought is for public benefit and public interest then it should be made available to the public for their benefit. A public figure's right to privacy can be violated by a law of general application if the information sought to be protected is of public benefit. We have seen in *Khumalo v Holomisa*[184] where the Constitutional Court ruled in favour of the media because the applicant, Mr Holomisa a well-known politician could not prove that the publication of the information that he was involved in a set of bank robberies did not violate his right to privacy.[185]

However if such information will expose the life of a public to an unjustifiable public scrutiny and will not be of public benefit then such information is not useful to the society and cannot thus be worthy of being invaded and published.

III. The nature and extent of the limitation

This factor requires that the court assess the way in which the limitation affects the right concerned.[186] This requirement is an important necessity for the proportionality enquiry because proportionality means that the infringement of rights should not be more extensive than is warranted to by the purpose that the limitation seeks to achieve.[187] A law that limits rights should not use a sledgehammer to crack a nut.[188] To determine whether a limitation does more damage to rights than is reasonable for

[182] Telephonic discussion between Angelinah Boshego and Happy Raligilia in December 2015.
[183] Telephonic discussion between Angelinah Boshego and Happy Raligilia in December 2015.
[184] *Khumalo v Holomisa* at Par 35.
[185] *Khumalo v Holomisa* at Par 35.
[186] Currie and de Waal 2013: 168.
[187] Currie and de Waal 2013: 168.
[188] *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) at par 37; Currie and de Waal 2005:168.

achieving its purpose first needs a determination of how stringent and extensive the limitation is.[189] Thus, arbitrary limitations are prohibited by the law.

IV. The relation between the limitation and its purpose

To serve as a legitimate limitation of a right, a law that infringes a right must be reasonable and justifiable.[190] This means there must be a good reason for the infringement. It also means there must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve.[191] The law must serve the purpose that it is designed to serve.[192]

V. Less restrictive means to achieve the purpose

A limitation of a right must achieve benefits that are in proportion to the cost of the limitation.[193] The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent.[194] If a less restrictive but equally and effective alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.[195]

This means that if there is an alternative to a harshly imposed limitation of a right, the court must first consider that alternative before resorting to the harsh limitation. However there will not always be a less restrictive means as the courts will always look at the circumstances of each case and consider all the factors involved before arriving at a decision. There will not always be an instance wherein a court can think of an alternative to limiting a right. At times the courts will have to limit a right no matter how hard or harsh the results will be. The less restrictive means refer to the alternative methods that will be open to a court which is tasked with the duty to limit a right to consider them before limiting such a right.[196]

[189] Currie and de Waal 2013:168.
[190] Currie and de Waal 2013:169.
[191] Currie and de Waal 2013: 168.
[192] Currie and de Waal 2013: 168.
[193] Currie and de Waal 2013: 170.
[194] Currie and de Waal 2013: 170.
[195] Currie and de Waal 2013: 170.
[196] Currie and de Waal 2005: 178.

The law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose.[197] To satisfy the limitation test then it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (infringement of the fundamental right) and the benefits it is designed to achieve (purpose of the law).[198]

Arbitrary limitations cannot be allowed and the limitation must be acceptable in an open society.[199] The courts in most cases are tasked with the duty to establish if a limitation is acceptable by using the guidelines which are contained in section 36 of the Constitution.

3.3 How should rights be limited?

Before we can come to the issue of how rights should be limited, we need to first understand the rationale behind the limitation of rights. Rights are there so that as people, we do not end up being pushed into unpleasant circumstances and situations, and so that we can enjoy our stay in the country without being victimised, and so that we can live in peace and harmony with each other.

However rights may only be limited in allowable circumstances for example to punish a person if he or she has been found guilty of wrong doing and also, to protect someone's rights. A perfect example in this instance is when a person is found guilty of a crime and is sentenced to a specified period of time in prison, thus interfering and limiting his or her right to freedom of movement.

Rights can never be absolute otherwise a wrong message will be sent to the society that some people are above others and thus more important than others.

The other rationale for the limitation of rights could be to secure a connection between an individual and the society they live in, to deter people from wrong doing and to prevent people from abusing their rights and powers.[200] Rights are limited so

[197] Currie and de Waal 2005: 178.
[198] Currie and de Waal 2005: 178.
[199] Currie and de Waal 2005: 178.
[200] Telephonic conversation between Angelinah Boshego and Maggy Sawa on the 16th of June 2015.

that the principle of legality and the rule of law can be subscribed to.[201] A law can never be effective unless its values and principles are adhered to.[202]

The law of general application criterion contained in section 36 of the Constitution requires however that the law be clear, accessible, precise and that those in authority must respect their rights and obligations.[203] This in my view is so, to ensure that people do not invoke that they broke the law because it was not accessible and thus they did not know what the law stipulate. Rights have boundaries that are also set by important social concerns such as public order, safety, health and democratic values.[204]

Bilchitz explains that there is a two stage analysis that may be employed whenever rights are limited.[205] The first stage involves interpretation of the right, where the court needs to determine the content of the right and its ambit.[206] The second stage is only be triggered once it is found that there is a violation.[207] These stages were confirmed by the court in *S v Makwanyane*,[208] where the court recognised that this two stage approach is important for several reasons.

Firstly it allows courts to provide a broad and generous interpretation of the scope of the right at the first stage of the enquiry.[209] Secondly, the practical result of applying the two stage approach may be different because a one stage analysis involves a broad, overarching enquiry into whether a particular provision is justifiable overall in light of multiple competing factors.[210]

In this two stage approach, the court in the first leg interprets and understands the right and in the second leg, it decides in line with the factors enumerated by section 36, the correct, justifiable and widely acceptable limitation which may be imposed on that right. For example public figures generally have a right to privacy. However, by

[201] Telephonic conversation between Maggy Sawa and Angelinah Boshego on the 16th of June 2015.
[202] Telephonic conversation between Maggy Sawa and Angelinah Boshego on the 16th of June 2015.
[203] Currie and de Waal 2005: 178.
[204] Currie and de Waal 2013: 150.
[205] Biltchitz (2011) 3 TSAR 571.
[206] Biltchitz (2011) 3 TSAR 572.
[207] Biltchitz (2011) 3 TSAR 573.
[208] 1995 6 BCLR 665 (CC).
[209] *S v Makwanyane* at par 100.
[210] *S v Makwanyane* at par 100.

virtue of them being famous, their lives somehow belong to the public.[211] Their private affairs can at times be exposed out into the public eye. In such an instance, should they feel aggrieved and approach a court of law for such a violation, some of the factors which the court will take into consideration when dealing with the violation are the a) nature of the information published, b) the nature and type of the person concerned, c) the degree of the violation of the right d) the public's interest on the published information and e) the importance of the information to the society.[212]

This balancing process will take place in a court of law. Practically a public figure will sue the public and or the media in terms of the principle of *actio iniuriarum* for violation of privacy and then the media or the public will rely on their right to freedom of expression, particularly the right to receive and impart information, the right to freedom of belief and opinion.

Then this action will be taken to a court of law to balance these two rights and rule in favour of the one which will weigh more in the circumstances. The court will then in arriving at its decision after balancing these two rights, use section 36 of the Constitution as a guideline to assist it in ruling in favour of a right. Section 36 will be used as a guideline by the court in order for it to arrive at the correct and justifiable decision.

The law of general application in this instance is that everyone has a right to privacy, public figures included and that everyone has a right to freely express himself or herself, the freedom to freely express and disseminate their opinion, issues and matters of public interest concerned. So a balance ought to always be struck between these two rights whenever public figures approach courts for relief whenever their rights to privacy are invaded.

The two stage analysis requires the question of justifiability to be decided in relation to the specific factors outlined in the limitation clause.[213] The person who claims that a right has been violated bears the overall onus to prove her or his case on a one stage approach and in the two stage approach, this individual or group has to prove

[211] Conversation between Angelinah Boshego and Tebogo Moses in August 2015.
[212] Conclusion drawn from studying the *Khumalo v Holomisa case* as well as the *Bogoshi* case.
[213] Biltchitz (2011) 3 TSAR 575.

that a right has been violated, but the onus shifts to the individual who relies on a defence of a justifiable limitation to prove that the limitation is justifiable.[214]

This means that when a person authorised to enforce the law, takes away your right or even restricts it, there must be some sort of an explanation which is acceptable, reasonable, proportional and adequate for your action for which your right is taken away.

A practical example in this instance is in the right to freedom of expression. If a person spreads propaganda for war in the name of freedom of expression, he will get punished for that either in a form of a fine, imprisonment, or whatever punishment the court may decide on. The crime of *crimen iniuria* may be used to prosecute hate speech in terms of the common law. In that instance his right to freely express himself would have been limited and interfered with, but the person limiting this right, will be justified by the fact that freedom of expression cannot be used to spread propaganda for war.

Another example is when a well-known person is involved in illegal and corrupt things, and then newspapers get hold of such information and then publish and write about it, although it will be done without the consent and endorsement of that famous person, he may decide to take such a matter to court and state that certain information has been released without his or her consent. The court which such a matter is taken to may decide that such a publication was in the public interest and public benefit and thus the invasion of the famous person's privacy was justifiable and necessary.

The court may impose an imprisonment sentence on you, thus confine you to a specified place and in the process interfere with your right to freedom of movement and ultimately, be limited. But in the circumstances, it will be a widely accepted and justifiable limitation. The court will give reasons for limiting your rights which must be justifiable, if not, then the court will be abusing its powers and thus must be taken up on appeal or review by a superior court.

3.4 Constitutional balancing of rights.

[214] Biltchitz (2011) 3 TSAR 578.

The Constitution contains specific internal limitations on the right to freedom of expression. Section 16(2) of the Constitution provides that:

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

(a) propaganda for war;

(b) incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm or;

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

The Constitution is built on the pillars of three conjoined, reciprocal and foundational values: human dignity, equality and freedom.[215] None of the rights provided for in the Bill of Rights are absolute and they are all capable of limitation in terms of section 36 of the Constitution. Thus the right to freedom of expression cannot be said automatically to trump the right to privacy. The right to privacy is at least as worthy of protection as the right to freedom of expression.[216]

The courts have reiterated that there exists no hierarchy of rights – the one taking primacy will depend on the facts of the case at hand.[217] Due to the horizontal application of our Bill of Rights, certain rights entrenched in the Bill can be invoked as between individuals, and not only as against the state.[218] This means that it is possible for private individuals to enforce their constitutional rights against another private individual who has infringed them.[219]

Through the integration of common law principles and rights and the balancing of individual rights, the courts have developed a unique theory in deciding which right takes precedence.[220] In *Midi Television (Pty) Ltd t/a E-TV v Director of Public*

[215] S 1 (a) of the Constitution.
[216] Davis 2011: 11-13.
[217] *S v Mamabolo (E-TV &Others intervening)* 2001 3 SA 409 (CC) at par 41.
[218] Vadachalam (2014) 6 SALJ 15.
[219] Vadachalam (2014) 6 SALJ 18.
[220] Vadachalam (2014) 6 SALJ 18.

Prosecutions (Western Cape)[221] for example, the Supreme Court of Appeal held that the determination of which right takes precedence lay in the limitation clause of the Bill of Rights.[222]

This means that whenever two rights compete against each other, the courts must always go back and fulfil all the requirements which must be fulfilled before deciding to favour a right over another one. All the five factors listed in section 36 of the Constitution are of paramount importance in as far as limiting and deciding on two rights which compete against each other are concerned.

It is clear that these constitutional restrictions on the right to freedom of expression are geared toward the prohibition of hate speech and unfair discrimination.[223] Given South Africa's historical context, the right to dignity is critical.[224] As the right to dignity was a right that was denied to entire groups and generations of people, to argue that it is not as important as the right to freedom of expression would be unacceptable.[225]

All this said however, given that South Africa is a developing country and a relatively young democracy, it is imperative that we hold those who hold power accountable – for the powers we grant them to exercise over us and the nation as a whole.[226] In this way, we are not only engaging meaningfully with the state and our leaders, but affirming our right to dignity as citizens.[227]

By knowing more about our public figures we are not invading their privacy rights, but rather knowing more about them will help us when electing people into power, for us to be able to know the types of people we choose to power. Character is part of what it means to be a person belonging to a particular group, thus we as the public

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[221] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 5 SA 540 (SCA) at par 9.
[222] S 36 of the Constitution.
[223] Vadachalam (2014) 6 SALJ 18.
[224] In *President of Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC) at P728- 729 the court remarked:
The prohibition on unfair discrimination in the interim constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. *At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups'.*
[225] Vadachalam (2014) 6 SALJ 23.
[226] Vadachalam (2014) 6 SALJ 23.
[227] Vadachalam (2014) 6 SALJ 25.

need to know the characters of the people we elect to power and in the process their right to privacy in a way becomes compromised.

3.5 The case for balancing.

According to Ronald Dworkin, law consists of more than just a set of valid legal rules, but constrained into standards that do not function as rules but operate differently as principles, policies and other sorts of standards.[228] Thus, if two principles compete, if one prohibits something and the other one permits it, then one of the principles must be outweighed.[229] Alexy[230] provides that balancing can be broken down into 3 stages, which are;

a. Stage 1: establishing the degree of non-satisfaction, or detriment thereto.

b. Stage 2: assessing the importance of satisfying the competing principle.

c. Stage 3: establishing whether the importance of satisfying the competing principle justifies the detriment to or non-satisfaction of the first.

Balancing in itself, involves the weighing up of options and deciding which one weighs more and thus worthy of protection. In the context of freedom of expression and privacy, the court will have to look at the circumstances of the case and the nature of the case and rights, and then decide based on the circumstances, which right between freedom of expression and an individual's right to privacy weighs more. In the context of public figures, as their right to privacy is diminished, freedom of expression at times weighs more.

This is partially because famous people belong to the public, their lives belong to the public. They are the images and pride of public spaces. In the context of leaders and politicians, people draw inspiration and look for something to always talk about, at times invading the privacy of public figures, becomes a norm.

The press has a right to inform members of the public of matters which are of public interest. As people become more and more exposed to the public domain, they narrow their protection of privacy rights. This is why public figures have a diminished

[228] Dworkin 1977: 192.
[229] Dworkin 1977: 192.
[230] Alexy 2004: 53

right to privacy. Belonging to the public denotes amongst other things, that people will be interested in everything that happens in your life.

3.6 Objections to the principles theory and to balancing.

According to Alexy, the resolution of conflict between principles requires balancing.[231] Thus, balancing is an unavoidable practice of constitutional adjudication.[232] The balancing enquiry does not give preference to rights over competing principles, but, is capable of giving them additional weight.[233]

This in essence means that when balancing rights against principles, in the process, rights weigh more than principles in certain circumstances, but that does not always mean that principles will be overridden - it will depend on the circumstances of each case. For example, when a case is brought before court and it involves a famous person, the general principle and right is that the particular individual has a right to privacy, but at the same time the public has a right to say and express themselves about that famous person.

The public has a right to search for information relating to the life of that particular famous person and then bring that information out for people to read and know about it. But at the same time, they do not have a right to search the home of that person and publish their more private and finer details about his or her life without proper authority; they do not have a right to go through and publish their medical records without that person's consent. That is why in *Shabalala Msimang and Medi-Clinic Ltd v Sunday Times newspaper*, the court ordered that the medical documents which the newspaper has in its possession be returned from where they were accessed illegally in the Medi-Clinic hospital as those records are private and should be kept private.[234]

According to Biltchitz, balancing is a metaphor used to describe the process of legal reasoning in rights cases.[235] It is a phenomenon which entails finding a resolution to

[231] Alexy 2004:55.
[232] Alexy 2004:56
[233] Alexy 2004:58
[234] *Shabalala- Msimang and Medi Clinic Ltd v Makhanya* at par 61.
[235] Biltchitz (2011) 3 TSAR 571.

a problem of competing principles by the ascription of relative weights to the competitors.[236]

This entails that balancing of rights is a process which the courts resort to when faced with two rights which compete against each other. I believe that balancing is a very important exercise, especially in a situation where there is no hierarchy of rights. The courts must balance and weigh rights to ensure that they arrive at a fair and equitable decision. The courts are there to administer justice. This means, they should always justify every decision that they take based on facts, thus in this context, they must always weigh and balance rights against each to make sure that they arrive at just and equitable decisions.

3.7 Criticism of balancing.

According to Currie, balancing has five defects which the courts are always faced with when balancing rights. The courts in most cases resort to legal jurisprudence and textbooks to combat these challenges. These five factors are as follows:

a) Incommensurability. Balancing and weighing suggests that rights and public interests in their limitation are commensurable, measurable by the same metric (scale). Some form of a metric must be able to say what value is better than the other or that they are equal values.[237] This means that the same measure must be employed when balancing and limiting a right in favour of another one, as opposed to when there is incommensurability where there is no common measure of limitation, just an irrational ratio.

b) Subjectivity and arbitrariness. The absence of an objective, external metric for the comparison and ordering of competing values creates the danger of subjectivism that judges will use their own personal metric when balancing. Unchecked judicial discretion of this sort is arbitrary and encourages adjudication either governed by rules or taking place unreflectively according to customary standards and hierarchies.[238]

[236] Biltchitz (2011) 3 TSAR 571.
[237] Currie (2010) 25 SAPL 412.
[238] Currie (2010) 25 SAPL 410.

c) Incrementalism and conservatism. Balancing leads to a cautious, incrementalist approach to constitutionality inspired judicial law making. This means that the balancer is inclined to restrict her finding to the case at hand as the next case ostensibly, requires that a different balance be struck.[239] This means that balancing prohibits the employment of new ideas to enhance the balancing exercise. Instead, it favours tradition in the face of change and is opposed and critical of change. Thus in essence, balancing does not transform our laws.

d) Quasi scienticifity. The process of balancing remains technical; even mechanical. The result is read off the machine; scientific arguments are neither opinions nor arguments that can engage us, but are rather demonstrations.[240]

e) Balancing leads to the possibility that individual rights can be sacrificed at times to collective goals. But then Constitutional rights would lose their firmness, which can only be guaranteed by way of a strict deontological structure, which is having the character of rules.[241]

Balancing as a part of proportionality could be considered ubiquitous in contemporary Constitutional law.[242] This means that balancing is a phenomenon that a court always resorts to whenever faced with a case of competing constitutional rights, because the court will always weigh up as to which right weighs more than the other one, before deciding on a particular case.[243] This means that freedom of expression will not necessarily always weigh more, when competing with the right to privacy for public figures, it will always depend on the circumstances of each case.

Currie is right. As I have stated earlier, South Africa has no hierarchy of rights. One cannot always assume that they can always invade the privacy of public figures and then rely on the right to freedom of expression as a justification. The court will always go into the merits of the case and look at all circumstances.

[239] Currie (2010) 25 SAPL 412.
[240] Currie (2010) 25 SAPL 416.
[241] Currie (2010) 25 SAPL 416.
[242] Currie (2010) 25 SAPL 418.
[243] Currie (2010) 25 SAPL 420.

A perfect demonstration of this was shown in the *Shabalala Msimang* case, where the courts ordered a newspaper to return medical records of a public figure, who was a minister of health to a clinic and also ordered the newspaper to stop publishing information about her. The court weighed the right to freedom of expression against the right to privacy and decided in favour of the right to privacy. Again the court resorted to the concept of balancing of rights.

The court in deciding this case used the same scale to measure the right to privacy against freedom of expression for public figures and thus in the process failed to take the public benefit and public interest concepts into consideration. This is in line with the criticism of balancing which Ian Currie pointed out in his criticisms of balancing that balancing leads to a situation wherein rights are measured by the same metric and scale. The court failed to develop the concept of public figure doctrine in terms of which it could have developed and given a clear position of the right to privacy against the right to freedom of expression for public figures.

This again I find to be in line with Ian Currie's submission that balancing leads to conservatism in terms of which the law is not developed but rather the courts always rely on old concepts rather than developing new ones. There was no distinct or rather new concept which was developed by the court in this case, there was no argument which was also advanced by the court, instead the court relied on existing laws particularly the right to privacy and the fact that the Medical records of an individual are private and confidential in terms of the National Health Act. The court failed again to distinguish between private individuals and public figures whose lives attract the attention and interest of people.

Although balancing has defects as Ian Currie has pointed out. It however seems to be the only concept which can be used by the courts in limiting rights. If the courts do not weigh rights against each other before limiting them, then we might run a risk of having arbitrary limitations by the courts. This on its own might result in people losing confidence and faith in the courts and will thus ultimately take laws into their own hands. I think there is no other avenue for the courts to employ except to balance right against each other whenever a situation to limit one right against another arises.

3.8 Conclusion.

Rights are not absolute; they are all subject to limitations. However such limitations are also subject to the confines of the law. In order for a limitation to be widely acceptable in the country, it must be reasonable, proportional and must be rationally related to the purpose for which it is done.[244]

Public figures have a right to privacy but at times their right to privacy is subject to limitations, and thus may be taken away from them. If members of the public were to refrain from commenting on the lives of public figures as well as matters of national importance, then that may result in the stifling and interference of their right to freedom of expression, freedom of the press and the media, freedom to receive or impart information and ideas, freedom of artistic creativity, academic freedom as well as freedom of scientific research.[245]

This restraint will result in the interference and infringement of political and social debates by the public in general. There should thus be greater tolerance of freedom of expression and critique made by the media relating to public figures, state organs, and public servants. Their lives belong to the public after all, they are our talking points in most instances.[246]

The right to privacy of a public figure is equally and vitally important, but it should at the same time be balanced against the right to freedom of expression, of course with its limitations, as well as the public figure's right to privacy in being able to express thyself and giving opinions. This right must also be balanced against the right to the people of this country to receive and impart information too.

This entails in my view that the right to privacy will be affirmed when people have the power to challenge those in power, to exercise their watchdog powers of ensuring accountability and to recognise their critical mass and begin to question authorities and structures as long as such is done within the confines of the law.

Courts use the concept of balancing two rights against each other and deciding in favour of the right which weighs more under a given set of circumstances. Balancing is therefore a metaphor used to describe the process of legal reasoning in rights

[244] S 36 of the Constitution provides for these requirements in order for an acceptable limitation of a Right to take effect.
[245] Discussion held at Tuks between Angelinah Boshego, Tebogo Moses and Maggy Sawa in September 2015.
[246] Discussion held at Tuks between Angelinah Boshego, Tebogo Moses and Maggy Sawa in September 2015.

cases.[247] It is an apt metaphor to describe a process that entails finding a resolution to a problem of competing principles by the ascription of relative weights to the competitors.[248] Although the concept of balancing has defects, it at the moment seems to be the only avenue which the courts can resort to when limiting rights in favour of another one.

This is a process made inevitable by the particular structure of the South African Bill of Rights; a generous catalogue of rights, each of which is expressly qualified by the possibility of limitation in the service of countervailing considerations.[249] Balancing ought then to be defended and the nature of the process, its 'internal justification' as Alexy terms his deductive scheme, should be made visible in the interests of laying bare the legal reasoning behind decisions in contemporary constitutional rights cases.[250] This still puts an emphasis on the notion that whenever a right is limited, there needs to be a justifiable reason for imposing that limitation.

[247] Currie (2010) 25 SAPL 421.
[248] Currie *(*2010) 25 SAPL 424.
[249] Currie *(*2010) 25 SAPL 424.
[250] Currie (2010) 25 SAPL 424.

Chapter 4: A comparative study of international law; the German, Canadian and American Constitutions and lessons to be learnt from these jurisdictions.

4.1 Introduction.

In the previous three chapters, I analysed freedom of expression and the right to privacy in South Africa and pointed out how South African courts handle a situation where these two rights are competing against each other. In this chapter, I will be doing a study on freedom of expression and the right to privacy for public figures on three foreign countries, which are Germany, Canada and America, and also draw lessons, if any, which South Africa can learn from these countries. I will then outline freedom of expression and privacy in each of these countries and then end with a conclusion for this chapter.

The first country that I will look at is Canada, then Germany and then end with the United States of America.

4.2 Freedom of expression in Canada.

Section 2 (b) of the Canadian Charter of Rights and Freedoms provides as follows:

(2) Everyone has the following fundamental freedoms:

(b) The freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[251]

The Supreme Court of Canada in *Irvin Toy v Quebec*[252] expressed the view that freedom of expression is to be valued because:

"Seeking and attaining the truth is an inherently good activity, participation in social and political decision-making is to be fostered and encouraged; and the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated".[253]

In another case decided by the Supreme court of Canada,[254] it was decided that It is difficult to imagine a guaranteed right which is more important to a democratic

[251] Clayton 2010: 328.
[252] (1989) 1 SCR 927, 976 per Dickson CJ, Larmer and Wilson J; *R v Keegstra* (1990) 3 SCR 697, 762, 763 per Dickson CJ; Clayton 2010: page 328.
[253] (1989) 1 SCR 927, 976 per Dickson CJ, Larmer and Wilson J; *R v Keegstra* (1990) 3 SCR 697, 762, 763 per Dickson CJ; Clayton 2010: 328.

society than freedom of expression". Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies. The vital importance of the concept cannot be over emphasised. No doubt that is the reason why the framers of the Constitution set forth s 2 (b) in absolute terms which distinguishes it, for example, from s 8 of the charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s 2 (b) should only be restricted in the clearest of circumstances.[255]

The Supreme Court of Canada defined expression as an activity which tries to convey a meaning.[256] It therefore includes all forms of art, commercial expression and could even extend to parking a car as part of a protest against parking regulations.[257] Freedom of expression is content neutral so that a statement cannot be deprived of constitutional protection no matter how offensive it is.[258]

Thus freedom of expression in Canada includes communication for the purposes of prostitution, promoting hatred against the Jews or other racial groups, threats of violence and a conviction for the offence of publishing false news by denying the Holocaust.[259] This is in line with the principle that Charter rights should be given a generous interpretation. Expressive activity that takes the forms of violence is not protected by the Charter.[260]

4.2.1 The right to privacy in Canada generally.

Section 8 of the Canadian Charter of Rights and Freedoms protects everyone within the Canadian jurisdiction against unreasonable search and seizure. This section

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[254] *Libman v A-G of Quebec* (1997) 3 SCR 569, 581; Clayton 2010: 329.
[255] *Libman v A-G of Quebec* (1997) 3 SCR 569, 581; Clayton 2010: 329.
[256] *Irwin Toy v Quebec* (1989) 1 SCR 927 968; *re ss* 193 and 195. S 1 of the Criminal Code (Prostitution Reference) (1990) 1 SCR 1123; Clayton 2010: 329.
[257] *Irwin Toy v Quebec* (1989) 1 SCR 927, 968.
[258] Clayton 2010: 328.
[259] Clayton 2010: 328.
[260] Clayton 2010: 328.

basically protects everyone in Canada, not just Canadians against unreasonable state intrusion.[261] Section 8 of the Canadian Charter of Rights provides that:

"[E]veryone has the right to be secure against unreasonable search or seizure".[262]

Section 8 does not apply to every search and or seizure. Rather it protects citizens against searches and seizures on the basis that it violates an individual's right to privacy.[263] However information that tends to reveal intimate details or choices of an individual is subject to a reasonable expectation of privacy.[264] This is why in Canada state records are generally not subject to an expectation of privacy.[265]

4.2.2 The right to privacy for public figures in Canada.

The common law of Canada does not recognise a right to privacy as such. In *Kaye v Robertson*,[266] the Supreme Court of Canada held that parliament should consider whether and in what circumstances statutory provision should be made to protect the privacy of ordinary individuals and public figures.[267] This means that the court made a ruling that parliament should be the one to decide on laws to be implemented and enforced by the courts because courts do not make laws but only interpret and enforce them.

This decision was made after a prominent actor had undergone extensive surgery and was in hospital when he was photographed and interviewed by a tabloid newspaper and the actor was then told that the details of that interview were to be published.[268] He then sought an interdict to prevent the publication of the interview and the case was argued on the infringement of privacy rights for the actor.[269] This is when the court deferred the matter to the parliament for parliament to make the decision through its capacity to legislate to make a law and a finding of in what circumstances a law should be made to protect the privacy of public figures.

[261] S 8 of the Canadian Charter of Human Rights (hereafter referred to as the Canadian Charter).
[262] S 8 of the Canadian Charter.
[263] Clayton 2010: 329.
[264] Clayton 2010: 329.
[265] Clayton 2010: 329.
[266] Clayton 2010: 329.
[267] Clayton 2010: 328.
[268] Clayton 2010: 328.
[269] Clayton 2010: 329.

Although there have been proposals to introduce statutory controls to protect individual privacy rights in relation to the press,[270] these have not been pursued, largely for political reasons, and thus the press continues to be regulated by the Press Regulatory Commission's voluntary code.[271]

4.2.3 Balancing of rights in Canada.

Balancing of rights, as described and discussed in the previous chapter, entails the weighing up of two rights and deciding which one weighs more under the circumstances and then making a decision in favour of the one which weighs more. Balancing however does not mean that one right is more important than the other it rather entails that the court must try to strike a compromise of two competing rights under the circumstances.

Like South Africa, Canada has no hierarchy of rights. Courts always try to strike a balance between competing rights. This means that the defects of balancing which were discussed in the previous chapter are some of the problems which the Canadian courts also deal with.

4.2.4 The limitation of the freedom of expression clause in the Canadian Charter of Rights.

Like South Africa, Canada also has a limitation of rights clause. The limitation clause prescribed by the Canadian Charter of Rights requires that a law must not be excessively vague when a balance is sought between rights. The Supreme Court of Canada developed a balancing test in *R v Oakes*[272] which test dictates that firstly the legislative objective of the limitation must be justifiable on the grounds of pressing and substantial concerns; secondly that the law be rationally connected to the objective[273] and thirdly that the law must impair the right no more is necessary to accomplish the objective and that the specific means adopted to implement the objective are proportionate- the law must not have a disproportionately severe effect

[270] The Calcutt Report 1993: 2135 Press Self-Regulation Review.
[271] The Calcutt Repor 1993: 2135 Press Self-Regulation Review.
[272] (1986) 1 SCR 103.
[273] Clayton 2010: 330.

on the person to whom it applies.[274]It requires much more reasoning to justify a complete limitation of a right than a partial limitation of a right.[275]

An application of the proportionality test to expression is exemplified in *R v Butler*[276] where the criminal prohibition of pornographic material breached section 2 (b) of the Canadian Charter of Human rights by restricting pornography on the basis of its content.[277] The prohibition was however justified under section 1 of the Charter because it was not wider than was necessary to accomplish the goal of preventing harm to the society, it did not prohibit sexually explicit material that was neither violent nor degrading, neither did it attack private possession or viewing of the obscene material or prohibit material that was required by the internal necessities of serious artistic work.[278]

So, the legal position in Canada is comparable to that in South Africa where no right is considered to be more important than the other and whenever rights are limited, a widely acceptable explanation must be given for such a limitation. Arbitrary limitations are not acceptable. The lesson that South Africa can learn from Canada is that in Canada, violation of privacy rights for public figures results in a conviction, for example in *R v Colbourne*[279] the defendant was a hospital employee who published the health records of a public official and was then taken to court.[280] The Canadian Supreme Court convicted the defendant with a criminal conviction and emphasised that unauthorised access to personal information of a public official is unacceptable.[281] I will now look at German and American jurisdictions.

4.3 Freedom of expression in Germany.

The situation with regards to freedom of expression in Germany is largely positive in that freedom of expression is recognised and protected. Freedom of expression is protected by the German Constitution primarily. Article 5 of the German Constitution provides as follows:

[274] Clayton 2010: 330.
[275] Clayton 2010: 330.
[276] (199)2 1 SCR 452; Clayton 2010: 330.
[277] Clayton 2010: 330.
[278] Clayton 2010: 330.
[279] (2014) 1 SCR 227 2014 SCC 13.
[280] *R v Colbourne* (2014) 1 SCR 227 2014 SCC 13.
[281] *R v Colbourne* (2014) 1 SCR 227 2014 SCC.

1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

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

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.[282]

As is the case with the South African Constitution, Germany also has a limitation on their right to freedom of expression.

Germany's biggest limits on freedom of expression are due to its strict hate speech legislation which criminalises incitement to violence or hatred.[283] Germany has particularly strict laws on the promotion or glorification of Nazism, or Holocaust denial with paragraph 130 (3) of the German Criminal Code which stipulates that those who 'publicly or in an assembly approve, deny, or trivialise' the Holocaust,[284] are liable to up to five years in prison or a monetary fine.[285] South Africa can also learn this lesson from Germany of criminalising.

4.3.1 Media freedom in Germany.

Government and political interference in the media sector continues to raise concerns for media independence, with several incidents of interventions by politicians attempting to influence editorial policy in Germany. In 2009 the chief editor of a public service broadcaster ZDF Nikolaus Brender got his contract terminated by

[282] *Germany: Basic Law for the Federal Republic of Germany* 23 May 1949, available at: http://www.refworld.org/docid/4e64d9a02.html accessed 21 July 2016, As amended in June 2008. Published by: German Bundestag – Administration – Public Relations Division Berlin 2008 www.bundestag.de accessed 21 July 2016.

[283] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.

[284] The Holocaust are also known as the Shoah, was a genocide in which Adolf Hitler's Nazi Germany and its collaborators killed about six million Jews.

[285] S 130 (3) of the German criminal code, available at http:// www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm.#wrapper accessed 21 July 2016.

a board featuring several politicians from the ruling Christian Democratic Union.[286] Reporters without Borders labelled it a 'blatant violation of the principle of independence of public broadcasters. In 2011, the editor of *Bild*, the country's biggest newspaper, received a voicemail message from President Christian Wulff, who threatened war on the newspaper which reported on an unusual personal loan which he received.[287]

The legal framework for the media is generally positive with accessible public interest defences for journalists in the law of privacy and defamation in Germany.[288] However Germany has criminal provisions in its defamation law which remain in the penal code.[289] Germany's civil defamation law is medium to low cost in comparison with other jurisdictions such as America and Canada. It places the burden of proof on the claimant (a protection to freedom of expression) and contains a responsible journalism defence although not a broader public interest defence.[290]

4.3.2 Artistic freedom in Germany.

Artists can work relatively freely in Germany. Freedom of expression in arts is protected under the German Constitution and is largely respected especially for satire or comedy.[291] Freedom of expression of artists is chilled through strict hate speech and blasphemy laws.[292]

4.3.3 Privacy rights in Germany.

Privacy rights are also provided and protected to by the German Constitution. Article 19 of the German Constitution provides as follows:

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[286] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.
[287] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.
[288] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.
[289] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.
[290] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.
[291] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.
[292] https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/ accessed on 21 July 2016.

(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.[293]

Much like South Africa, in Germany, public figures have a diminished right to privacy. Germany has a general right to privacy and makes no specification in as far as the life of a public figure is concerned and directs any dispute which arises out of a violation of a privacy right to the German courts or competent forums which are authorised by empowering provisions to deal with privacy issues.[294]

4.4. Freedom of expression in the United States of America.

The United States (hereinafter referred to as the US) safeguards the right to freedom of expression through the First Amendment of its Constitution, which provides as follows:

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.[295]

The US Constitution protects even the most offensive and controversial speech from government suppression and permits regulation of speech only under certain limited and narrow circumstances.[296]

4.4.1 The Foundation of Freedom of Expression in the US.

[293] *Germany: Basic Law for the Federal Republic of Germany* [Germany], 23 May 1949, available at: http://www.refworld.org/docid/4e64d9a02.html accessed 21 July 2016, As amended in June 2008. Published by: German Bundestag – Administration – Public Relations Division Berlin, 2008 www.bundestag.de, accessed 21 July 2016.
[294] Statement by Ntswaki Boshego, made at a debate on 20th of March 2012 Ntswaki was a 3rd year LLB student at the University of Limpopo.
[295] Kalven (1978) 25 UCLA 3.
[296] Kalven (1978) 25 UCLA 3.

The US Constitution's protection of freedom of expression embodies the notion that an individual's ability to express himself freely without fear of government punishment produces the autonomy and liberty that promote better governance.[297] The US Constitution allows its citizens to openly discuss topics of public concern and this results in a more transparent and representative government which is more tolerant of ideas and creates a more stable society.[298]

History has shown that curtailing freedom of expression by banning speech does not advance democracy. The drafters of the US Constitution recognized that when governments forbids their citizens from talking about certain topics, that often forces those citizens to discuss such topics in secret.[299] The US thus allows individuals to express their opinions no matter how much the government and other citizens may disagree with.[300] The First Amendment of the US Constitution promotes transparency and social stability.

This uninhibited public debate also forces ideas into the intellectual marketplace, where they compete with the ideas freely expressed by other individuals.[301] This competition of ideas means that inferior or offensive ideas give way to better ones.[302]

4.4.2 Limitation of freedom of expression in the US.

Freedom of speech is not absolute in the US, just like in Canada, Germany and in South Africa. The government has the discretion to impose content-neutral restrictions than content-based restrictions even on public figures through its laws and policies.[303] This means that firstly, government in its control and limitation of free speech must be viewpoint central on the subject matter about public figures and that secondly, that government cannot regulate free speech which is based on an ideology.[304] The courts and authorized forums in the US have powers to limit the rights of individuals. This means that everyone can limit the rights of public figures as

[297] Yuan yeh (2014) 5 JIMEL 44.
[298] Yuan yeh (2014) 5 JIMEL 46.
[299] Kalven (1978) 25 UCLA 4.
[300] Yuan yeh (2014) 5 JIMEL 46.
[301] *Hustler Magazine Inc. v. Falwell* 485 U.S. 46, 50 (*citing Abrams v. United States*, 250 U.S. 616 630 (1919).
[302] Yuan yeh (2014) 5 JIMEL 48.
[303] Kalven (1978) 25 UCLA 5.
[304] Kalven (1978) 25 UCLA 5.

long as such persons carrying out the limitation are authorized to carry out such limitations and that they follow legal principles.

The government can generally place time, place and the manner of restrictions on the exercise of freedom of expression provided that the restrictions are not based on the content of the speech or the viewpoint of the speaker.[305] These restrictions must 1) be content neutral, 2) be narrowly tailored to serve a significant government interest, and 3) leave open other channels of communication.[306] The restriction can be done by law and then tested in a court of law.

An individual's speech may be restricted in the US under the following circumstances:

1) it is intended to incite or produce lawless action;

2) it is likely to incite such action and;

3) if such action is likely to occur imminently.[307]

This is the standard which the US courts find difficult to meet.[308] General advocacy of violence such as writing on a website that violent revolution is the only cure to society's problems and the US courts have found does not constitute incitement to imminent violence.[309]

US privacy laws provides less protection for public figures regarding their reputation in order to encourage public discussions. And name calling is not actionable in the US as courts do not view the judicial forum as the proper arena for morality.[310]

Under US laws, there are different standards for public officials and private individuals. Speakers are afforded greater protection when they comment about a public official, as opposed to a private citizen.[311] In 1964, the U.S. Supreme Court ruled that public officials could prove defamation only if they could demonstrate

[305] Kalven (1978) 25 UCLA 5.
[306] *Perry Educ. Ass'n v. Perry Educators' Ass'n* 460 U.S. 37 45 (1983).
[307] Yuan yeh (2014) 5 JIMEL 44.
[308] Yuan yeh (2014) 5 JIMEL 46.
[309] Yuan yeh (2014) 5 JIMEL 48.
[310] Yuan yeh (2014) 5 JIMEL 53.
[311] Yuan yeh (2014) 5 JIMEL 53.

"actual malice," that is, that the speaker acted with knowledge that the defamatory statement was false or "with reckless disregard of whether it was false or not."[312]

This decision was later extended to cover "public figures," in addition to public officials.[313] For the private concerns of private individuals, though, the standard for proving defamation remains lower.[314] Defamation of private individuals can be established if the statements were false and damaged the person's reputation without showing actual malice, they must be statements of facts in addition.[315]

4.4.3 Privacy in the U.S.A.

The right to privacy is alluded to in the fourth amendment of the US constitution which states as follows:

"The right of the people to be secure in their persons, houses, papers, and effects,[316] against unreasonable searches and seizures, shall not be violated, but search warrants shall be issued, on probable cause, supported by Oath or affirmation, describing the place to be searched, and the persons or things to be seized".[317]

The US Fourth Amendment does not explicitly explain what privacy is. However some Americans like Westin describe the concept of privacy as follows:

"The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose".[318]

Westin describes four states of privacy which are: solitude, intimacy, anonymity and reserve.[319]

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[312] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).
[313] *Gertz v. Robert Welch Inc. 418 U.S. 323 (1974).*
[314] *Dun & Bradstree Inc v Greenmoss Builders Inc* 472 U.S. 749 (1985)
[315] Yuan yeh (2014) 5 JIMEL 54.
[316]
[317] Yuan yeh (2014) 5 JIMEL 54.
[318] Yuan yeh (2014) 5 JIMEL 56.
[319] Yuan yeh (2014) 5 JIMEL 56.

People are continually engaged in a personal adjustment process in which they balance the desire for privacy with the desire for disclosure and communication of anonymity. They reserve themselves to others in light of the environmental conditions and social norms set by the society in which they live. Under liberal democratic systems, privacy creates a space separate from political life, and allows personal autonomy, while ensuring democratic Freedom of expression.[320]

The US is slightly different when compared to the other countries which are under discussion in this dissertation. In the US, whenever a defamation case is brought before a court of law, the question if a person is a public figure or a private citizen arises. If you are a public figure, you need to prove actual malice and if you are a private citizen you need not prove actual malice.[321] The concept of actual malice means that a person made a false statement with the full knowledge that it is false. So the US courts provide a guideline in terms of what has to be proven by a famous individual and a private citizen in as far as a claim on the right to privacy is concerned.[322]

Public figures attract conversations which in most cases are centered around their lives and in most cases, the more private the story about their lives is, the more it attracts attention and are the centers of debates in most cases. However one needs to bear in mind that becoming a public figure is a career and as such people deserve also privacy protection. The fact that public figures have a diminished right to privacy should not deter people from aspiring to join into the profession. Public figures deserve privacy protection because they may be having lives which belong to the public but at the end of the day they are human beings and they deserve to have their privacy and dignity respected.

4.5 Conclusion.

Freedom of expression is one of the most important rights in the world. People also have a right to privacy. Privacy is part of affirming the dignity of other people. However, when it comes to public figures, when these two rights conflict with each other, their right to privacy becomes compromised.

[320] Yuan yeh (2014) 5 JIMEL 56.
[321] Yuan yeh (2014) 5 JIMEL 56.
[322] Yuan yeh (2014) 5 JIMEL 57.

One also comes to the conclusion that we have as a society failed to develop defence mechanisms for public figures in as far as their right to privacy is concerned. As a society we have failed to recognise the right to privacy for public figures and are continuing to fail them by not recognising their right to privacy. We instead assume that they do not deserve any protection for their private affairs and this is wrong and must be corrected.

Balancing these two rights against each other in instances where public figures are concerned has also become a somehow difficult exercise which the courts and responsible forums for balancing rights are faced with. Courts are at times faced with the challenge of balancing these two rights against each other whenever a case which concerns a public figure arises.

Media attention to celebrities has resulted in complete loss of privacy for public figures. Celebrities as public figures are subject to public scrutiny which is very extensive and robust than an average citizen would receive in any country in this world.[323] The public encourages this intrusion into the lives of celebrities by their obsession with every little bit of gossip that comes their way.[324] Journalists feed this craving by gathering information that the public years to consume and start topics about.[325]

Freedom of expression receives greater protection in the world because freedom of expression speaks lives into all the other rights that one may have. Without freedom of expression, all the other rights technically do not exist because if one cannot firstly express themselves, then all the other rights will be of no use. Freedom of expression encourages us to have healthy and robust conversations with each other, to speak truth to power and to correct government when it is doing wrong.

There should be greater tolerance in as far as freedom of expression and criticism in relation to public figures and state organs is concerned. The right to privacy of public figures is equally important but it should be balanced with the public's right to freedom of expression. It is my conclusion that public figures have a right to privacy, but it is a diminished one. Public figures have fans and followers and they live to

[323] Nodhaus (1999) 10 TRLJ 65.
[324] Nodhaus (1999) 10 TRLJ 66.
[325] Nodhaus (1999) 10 TRLJ 66.

impress. They also live according to certain standards which they set. By virtue of public figures being public figures, they sacrifice and give up some of their right to privacy.

The media and ordinary persons on the ground however should acknowledge and be taught that public figures have a diminished right to privacy by virtue of their status. This however should not warrant to an unreasonable invasion of privacy for public figures. Everyone should at the end of the day, be afforded the opportunity to enjoy all their rights, regardless of who they are.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS.

This is the concluding chapter of this mini-dissertation. This chapter includes only a conclusion and recommendations.

This mini-dissertation is based on conducting a study on the balancing of the right to freedom of expression and the right to privacy for public figures.

Chapter one was the introduction and background chapter laying down the foundation, introducing research questions and chapter overviews.

In chapter two I focused on the legal framework of the right to freedom of expression, the foundation of where this right comes from, the importance of this right in modern democracies, and the right to privacy as well as under which circumstances may a person's right to freedom of expression be limited in favour of public interest and for public benefit.

In chapter three I dealt with the limitation clause as contained in section 36 of the Constitution of the Republic of South Africa, I also dealt with the principle of balancing of rights as well as its criticisms.

In chapter four, I did a comparative study with the German, Canadian, American Constitutions with the South African Constitution and drew lessons which South Africa can to learn from these jurisdictions.

Chapter five is the current chapter and focuses solely on conclusions from the whole study as well as making recommendations. Having conducted a study on the above mentioned topic, I now come to the following conclusion:

Public figures have a diminished right to privacy. The fact that they are in the public limelight makes their lives to belong to the public. They are the sources of public participation, public conversations and public arguments. Public figures are in a way the source of how people exercise their right to freedom of expression. For example, the media constantly probes their lives. Private citizens voice out opinions about the lives of public figures as a form of how they exercise their right to freedom of opinion.

Although our Constitution provides for a right to privacy, it does not distinguish between public figures and private persons. Instead the Constitution only makes mention of a general right to privacy. Although public figures can rely on the invasion of their right to privacy when their private affairs are interfered with, this is in principle only applicable theoretically because in practice public figures receive very little privacy protection. Their affairs receive very little privacy protection. Their status in the society requires that they make sacrifices and one of those sacrifices is that they sacrifice their right to privacy. However this must be changed because they too deserve their private affairs to be protected.

Various underlying reasons exist for affording public figures a diminished right to privacy. Firstly public figures seek and consent to publicity and are recognised worldwide by virtue of their positions. However, a general consent does not justify intrusion into every aspect into an individual's life. The affairs of public figures are viewed as being inherently public and in a way by being celebrities diminish their right to privacy. Celebrities are expected to psychologically be tolerant of press behaviour.

Although freedom of the press is provided for, the extent to which the daily lives of public figures qualify as news should be questioned. The difficulty in maintaining an action for intrusion into private matters is that the spectrum of privacy for celebrities is interpreted narrowly and thereby leaving very little room for a celebrity to successfully argue lack of news worth when the private affairs of a celebrity are invaded. For example when it comes to politicians, they are assumed by public policy rationale that the way an individual handles his personal life is a representation of his character and judgment. This is important to the public in determining the people they elect to power.

RECOMMENDATIONS.

Freedom of expression is the foundation of democracy in most countries, but it must be exercised reasonably especially when it comes to privacy for public figures. There must be policies and workshops which are introduced to the public and the media on

how far they are allowed to go to interfere and intercept the private lives of public figures.

The press ombudsman should develop regulatory mechanisms for the media in terms of which every article or news that the media publishes or intends to publish about a public figure such news or article is made subject to a test in terms of which those articles need to pass. The test should test if whether the news are necessary, in the public interest and if the news are in the public benefit before the final publication. This should be regulated in line with the Constitution and should not be mistaken for censorship.

Moreover, the rights to privacy for public figures should not be interpreted narrowly by the courts and proper forums. Their right to privacy should be interpreted to give effect to their right to dignity and to their right to privacy.

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