**Free speech & academic freedom in SA, examining the UCT & Steven Salaita controversy.**

**By Tyla Dallas**

Section 16 of the Constitution of the Republic of South Africa (“the Constitution”) gives everybody the right to freedom of expression—which includes academic freedom and freedom of scientific research. This right is fundamental to any democracy, as it enables a society to engage in healthy debates on issues of public importance, exchanging ideas and information and promoting tolerance.

Under our constitutional dispensation this right his right is not absolute Section 16(2) provides that some types of speech are not protected, namely: propaganda for war; incitement of imminent violence; or, advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

‘Free speech’ may only be limited if it falls within the narrow bounds of section 16(2), or can be justified under section 36 of the Constitution—which requires the limitation be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” Where an expression advocates hatred, but does not incite imminent violence or an incitement to cause harm, it will still be protected as ‘free speech.’

In *Masuku v South African Human Rights Commission* *obo SAJBD* 2017 (“*Masuku*”), evidence was led on the pattern that genocide follows. It was argued that allowing negative expressions about the same thing to be repeated and go unpunished could “be considered the allowance of [the] first step of genocide against the [group targeted]. The Equality Court (“EQ”) recognised the importance of protecting vulnerable minorities from expressions that advocate hate or prejudice against them, as it is more likely that they would be harmed by it.

In August 2019, the University of Cape Town (“UCT”) held its annual TB David Memorial Lecture on academic freedom, with guest speaker— Dr Steven Salaita. Salaita, an American-Palestinian academic, came under global scrutiny when his position at the University of Illinois was rescinded due to a number of controversial tweets he posted, such as:

“**Zionists: transforming antisemitism from something horrible into something honorable since 1948**”; and, “**the logic of ‘antisemitism’ deployed by Zionists, if applied in principle, would make pretty much everybody [who is] not a sociopath, ‘antisemitic’**.”

Debate in this UCT—Salaita controversy, hovered around freedom of speech with specific emphasis on the academic freedom of Salaita to express these views, and when this ‘free speech’ right could *and should* be suspended.

In *Masuku,* the EQ considered the meaning of the term “Zionism”, finding that the “core of ‘Zionism’ is support for the existence of a Jewish State in the Middle East, and that the term is not synonymous with the word “Jew”. The court went on to say that because “very many Zionists are Jewish and very many Jews may be Zionists, the two concepts may in some circumstances become blurred.”

Salaita had blurred the lines between ‘Zionism’, as a political ideology supporting the existence of a Jewish state, and ‘antisemitism’ which is prejudice towards Jews, in his series of tweets. Many, including the University of Illinois, viewed the tweets as antisemitic, which made UCT’s decision to invite Salaita as a guest speaker even more alarming.

During his UCT address, Salaita saluted UCT’s resolution (which was later rejected by the University’s Council) to ‘not enter into any formal relationship with Israeli institutions operating in the Occupied Palestinian Territories.’ This proposal of an academic boycott- which would have shown extreme prejudice against Israel- and the invitation to Salaita to speak given his controversial tweets, cast a spotlight on UCT’s bias towards a pro-Palestinian agenda.

As stated by then Chairperson of the university’s Academic Freedom Committee, Professor Elelwani Ramugondo:

“Academic freedom as a principle includes the right of people to hold differing views and be able to express them.”

By UCT encouraging one set of views while publicly condemning the others, they marginalised any faculty or students at UCT who didn’t share the institutions views, and stifled any chance of fostering a healthy debate on this issue of public importance, among their students.

It can also be argued that by perpetuating a prejudiced rhetoric, as done by UCT in this case, an institutional-level “rubber stamp” was given to extremist groups that their views are right, and actions justified- violent or not. Failing to intervene merely because the expression doesn’t incite “imminent” violence or harm **now** (as required by section 16(2) of the Constitution), does not mean it will not lead to violence **ever**.

A Federal Court in the US, subsequently found in favour of Salaita who claimed that he was fired due to the University’s disagreement with his “personal speech in a public forum on a matter of public concern.” The Judge commented that when an expression predominantly “involve[s] matters of public concern”, it must flow freely to foster public debate, regardless of one’s own views.

This approach finds international support, with the European Court of Human Rights holding that this right to freedom of expression, applies to all expressions whether they are “favourably received” or “offend, shock [and] disturb.” This approach of elevating freedom of expression above other potentially conflicting right in not consonant with the precepts of South African constitutionalism.

“[P]eople [can] only live at peace if everyone accepted the right to co-existence of other groups of people.” Fostering educational and constructive debate, in the name of academic research, can’t come at the expense of the constitutional imperative that “**South Africa belongs to all who live in it, united in our diversity**.” Protecting the dignity of all individuals, including those whose identity is premised on affiliation to a particular community or ethnic group, is as important as protecting ones’ right to freedom of expression.

In my opinion, section 16(2) of the Constitution should be interpreted broadly so that the requirement of “incitement to cause harm” can cater for those situations where an expression does not immediately incite harm but rather perpetuates a prejudiced rhetoric— that due to its nature and the context in which it was made— may lead to future violence against an ethnic group.

On such a construction UCT would then not have endorsed someone who views antisemitism as “honorable”— by inviting him as guest speaker to their academic freedom lecture, given the context of their existing proposal of an academic boycott against Israel and the rise of antisemitism globally. They would have been forced to remain publicly neutral to the Israeli- Palestinian conflict, and instead encourage healthy debate amongst their student body, giving effect to **all** students’ rights to ‘free speech.’